



House of Commons  
Constitutional Affairs  
Committee

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# **Judicial appointments and a Supreme Court (court of final appeal)**

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**First Report of Session 2003–04**

*Volume I*





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*Volume I*

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## The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

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Dr Alan Whitehead MP (*Labour, Southampton Test*)

The following Member was a member of the Committee during the inquiry:  
Mr Mark Field MP (*Conservative, Cities of London and Westminster*)

### Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

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### Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist) and Julie Storey (Secretary).

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## Summary

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The committee's inquiry follows the Government's announcement of proposals for a new Supreme Court and a new Judicial Appointments Commission and for the abolition of the office of Lord Chancellor.

The proposals involve a considerable number of complex points. The inquiry based its evidence on the responses to the Government's consultation papers on *Constitutional reform: a Supreme Court for the United Kingdom* and *Constitutional Reform: a new way of appointing judges* as well as oral evidence.

A major part of the role of the Lord Chancellor is the protection of the judiciary from political pressure. The way in which these fundamental proposals were announced, as a part of a Cabinet reshuffle and therefore without consultation or advice, has created anxieties amongst the senior members of the judiciary among others, and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them. These are not simple matters on which to legislate.

### The Supreme Court

The present system for appeals works. The arguments for change were about principle and perception.

The Consultation Paper proposes that there be little change in the jurisdiction of the final court of appeal. Complex issues arise relating to Scottish appeals and to cases arising under the devolution Acts.

The Constitutional Reform Bill will need to make clear provision for the arrangements relating to representation of the various parts of the United Kingdom. It will need to set out clearly the principles under which members of the new court are appointed.

The Government put forward three possible models for a special appointing commission for members of the Supreme Court which would recommend candidates to the Prime Minister for nomination as members of this new court. The Government has left vague the staffing arrangements for such a commission. We see no need for a permanent bureaucracy to serve the Commission but there have to be arrangements for continuity of practice and the development of recruitment policy. The Government does not explain how each jurisdiction might have a role to play in recruitment.

The new court will require a completely new set of arrangements for its administration which recognise its absolute need for independence and its United Kingdom role. It is not an English court and the administrative and funding arrangements cannot be part of the English system. The Department of Constitutional Affairs is not the appropriate organization to run the new court: it is too associated with the England and Wales court system and would give the Government control over the administration of the new court.

The new court will need an appropriate setting for its work. Delay in finding suitable accommodation makes it possible that the new court might continue to sit in the House of Lords. However, this would result in the same people doing the same job, in the same place (possibly with the same staff). If more time is needed to establish the court as a distinct

body then the timing of its introduction should be adjusted accordingly.

## Judicial Appointments

The impact of abolition of the office of Lord Chancellor will be crucial for the system of appointing judges to all courts in England and Wales below the final court of appeal. Up to now, the office has had the confidence of the judiciary and has produced judges who are highly regarded internationally and have the utmost integrity.

The balance of democratic accountability for judicial appointments and judicial independence is hard to strike. Witnesses who generally agreed on the need for reform disagreed on the extent to which the Government should have the final say in appointments.

One of the main aims of the Government expressed in its consultation paper is to promote diversity in the appointments to the Bench. This is a laudable aim, but the proposed methods of approaching this are not universally agreed.

To some extent, the Judicial Appointments Commission will be a more expensive way of doing what is done now. It is vital that the new Commission should represent an improvement in the system of appointments, without taking money away from other departmental budgets, such as the Court Service, the Community Legal Service and the Criminal Defence Service.

The Government's view is that the new Commission should be fully independent and should constitute a Non-Departmental Public Body, with its own staff. There is no identifiable strand of generally agreed opinion on the precise balance between lay and judicial or legal members, although the choice of approach between a predominantly lay Commission and one dominated by judges depends on the degree to which the judiciary are seen as potentially appointing members of the profession in their own likeness. The Appointments Commission in Scotland has worked successfully without a majority of judges or even of lawyers. The question of who should chair the new Commission is of key importance: a judge or a lay person? We note the argument in favour of a lay chair of the Commission. Notwithstanding the arguments in favour of a lay Chair, we believe that the Commission should be chaired by a judge.

## Conclusion

The proposed changes consequent on the redistribution of responsibilities and proposed abolition of the office of Lord Chancellor are being bundled together and dealt with over a very short timescale as a single reform. This is unwieldy and, in the case of some of the proposals, precipitate. The proposed changes could be brought in incrementally.

The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political.

The Committee recommends that the Government proceed with the Bill as draft legislation to enable proper scrutiny of these fundamental changes.



# 1 Introduction

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## The inquiry

1. On 12 June 2003 the Government announced that it intended to consult on the establishment of a new “Supreme Court for the United Kingdom” as part of its “continuing drive to modernise the constitution and public services”.<sup>1</sup> The intention was declared as being that the new Court would “put the relationship between the executive, the legislature and the judiciary on a modern footing”, which would take “account of people’s expectations about the independence and transparency of the judicial system.”<sup>2</sup>

2. On the same day, the Government also announced what at first appeared to be the abolition of the position of Lord Chancellor but was clarified as being its intention to do so. Since one of the Lord Chancellor’s primary functions is to make judicial appointments this raised the question of how such appointments should be made in the future. The Government subsequently issued a consultation paper as “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”<sup>3</sup>. The two papers contained lists of questions on specific topics and invited replies. On 26 January 2004 the Government published the summary of responses to the Consultation Papers and the Lord Chancellor made a statement on the more detailed revised proposals relating to Judicial Appointments.<sup>4</sup>

3. The purpose of the inquiry is to examine the Government proposals and responses to the two Consultation Papers and to define the main issues in order to inform the Second Reading debate on the Bill to bring the proposals into law. Most of the submissions in response to the Consultation Papers were written from the point of view that the changes proposed were inevitable (the Consultation Papers did not offer any option other than the proposed reforms). A notable exception to this was the paper from the Law Lords, which included a strong case for maintaining the present system.<sup>5</sup>

4. The Committee recognised the overwhelming significance of the redistribution of responsibilities and proposed abolition of the office of Lord Chancellor. It decided to inquire into the changes immediately. Rather than ask witnesses initially for written papers which would substantially repeat points made in response to the Government’s Consultation Papers, the basis for the written evidence is largely the responses to those consultation papers. We are grateful to the Department for Constitutional Affairs for sending the committee all the responses except those sent in confidence.<sup>6</sup> In addition, the committee took oral evidence from the witnesses listed on page 66.

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1 For a description of the current system see paragraph 16 below

2 Department for Constitutional Affairs (DCA) Consultation Paper CP 11/03, *Constitutional reform: a Supreme Court for the United Kingdom*, para 1, p 10; and see para 101 below

3 Department for Constitutional Affairs (DCA) Consultation Paper CP 10/03, *Constitutional reform: a new way of appointing judges*, Foreword by the Lord Chancellor, p 3

4 HL Deb, 26 January 2004, cols 13-17

5 Law Lords’ response to CP 11/03, [www.parliament.uk/documents/upload/JudicialSCR071103.pdf](http://www.parliament.uk/documents/upload/JudicialSCR071103.pdf)

6 Copies of the responses are available from the DCA website at: [www.dca.gov.uk/consult/confir.htm](http://www.dca.gov.uk/consult/confir.htm)

5. The committee is grateful to all those who assisted it in during the inquiry. In particular, it would like to thank Professor Andrew Le Sueur, Barber Professor of Jurisprudence in the University of Birmingham, and Dr K.E. Maleson, Senior Lecturer in Law, London School of Economics, the specialist advisers to the committee during the inquiry.

## Background

6. The package of changes associated with the ending of the office of Lord Chancellor includes two fundamental constitutional changes: the removal of the jurisdiction of the Appellate Committee of the House of Lords over appeals and reform of the system of appointing judges in England and Wales. These two issues are largely separate although there is a link with the question of how judges of the Supreme Court will be appointed. The planned disappearance of the office of Lord Chancellor, although itself a separate issue, is important to the way in which some people view the reforms. Taken together, these proposals represent the most significant change to the courts systems of England and Wales, Scotland and Northern Ireland for over a century.

7. The two matters are examined separately. The appointment of judges of the final court of appeal is dealt with in the Supreme Court section, as the Supreme Court can be regarded as a separate entity from the rest of the courts systems and it is proposed that there would be a separate mechanism for appointing its members. It would be a UK institution, rather than one based on any of the separate jurisdictions which exist in the United Kingdom.

8. The present position relating to hearing appeals in the House of Lords and to the appointment of judges is intimately connected with the office of the Lord Chancellor. This is an office of long and varied history.<sup>7</sup> Its modern form dates from the end of the nineteenth century, when the Lord Chancellor became the head of a Government Department. Since the Second World War Lord Chancellors have sat less and less frequently in the Appellate Committee of the House of Lords. Since 1971, the Lord Chancellor has had a significant increase in his administrative role as a result of the Courts Act 1971 which made the civil courts system his sole responsibility. Since then, the Lord Chancellor's responsibilities have involved running a department in a similar way to other ministers.

9. By virtue of the office's "great antiquity, much dignity and considerable importance"<sup>8</sup> the holder has special status within Government. He has always in recent times been a lawyer.<sup>9</sup> He has generally in recent times been at one remove—at least in the public eye—from the day to day activity of the Government. Often Lord Chancellors have been promoted from a career outside Parliament, although some have previously served as Attorney General.<sup>10</sup> All have been distinguished within the legal profession, to which they displayed great loyalty.

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7 The Department claims that the first incumbent was Angmendus in 605 AD: see [www.dca.gov.uk/lcfr.htm](http://www.dca.gov.uk/lcfr.htm)

8 See R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, Oxford, Clarendon Press, 1964

9 The last non-lawyer to hold the post was Lord Shaftesbury who resigned in 1673

10 Of the twelve Lord Chancellors appointed since the end of the Second World War, five had never sat in the House of Commons. Two (Simonds and Mackay) were already Lords of Appeal. Since 1945 those who were promoted from being Attorney General were Lords Jowitt, Dilhorne, Kilmuir, Elwyn-Jones and Havers

10. The Lord Chancellor has a complex range of responsibilities which have been acquired over time. These responsibilities arise as much from historical accident as from strategic logic. He is a senior judge, he is a member of the cabinet and he presides over the House of Lords. He is in the strange position of being bound by collective responsibility as a member of the cabinet, yet as a senior judge he sits on the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council (presiding, when he does sit); he is President of the Supreme Court in England and Wales,<sup>11</sup> an *ex officio* judge of the Court of Appeal<sup>12</sup> and President of the Chancery Division of the High Court.<sup>13</sup> His judicial office places on him the duty to be impartial, notwithstanding his active political affiliation. He has many other duties. The present Lord Chancellor has indicated that he will not sit as a judge.

11. The Government proposes to replace the office of Lord Chancellor with a Secretary of State for Constitutional Affairs and to devolve his various duties to other appropriate office holders. The details of these changes were the subject of consultation and were set out in more detail in the Lord Chancellor's statement of the 26 January 2004.<sup>14</sup>

12. Despite the Lord Chancellor's membership of the Cabinet, his office is held in great respect by the judiciary. His status as a member of the Government is regarded not as a political threat but as a means of safeguarding judicial independence. The Law Lords are:

“... very greatly concerned that the important constitutional values which the office of Lord Chancellor protected should continue to be effectively protected. In the past the Lord Chancellor's role was to uphold constitutional propriety and champion judicial independence. The constitution would be gravely weakened if that safeguard were removed and not replaced.”<sup>15</sup>

**13. Whoever carries out the functions of the office of Lord Chancellor will be in charge of the Court Service and will play a central role in the administration of justice. Part of that role is the protection of the judiciary from political pressure in Cabinet and, when necessary, in public. There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with possible advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion.**

14. It is a matter of regret that the proposals were formulated and announced in a way that was hurried and evidently without the knowledge of many of those who would be expected to have been extensively consulted. Lord Hope of Craighead, a Lord of Appeal, said in evidence to the Committee:

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11 Supreme Court Act 1981, s.1

12 *ibid*, s.2

13 *ibid*, s.5(1)(a)

14 DCA Consultation Paper CP 13/03, *Constitutional reform: reforming the office of the Lord Chancellor* and HL Deb, 26 January 2004, cols 13-17

15 Law Lords' response to CP 11/03

“I saw it on the news at Heathrow on my way home to Edinburgh one evening. Certainly I was not consulted, none of us was. There was a Scottish dimension too, which was overlooked initially, I believe, although it has been attended to now. My regret is that some very interesting issues were not and probably now will not be debated.<sup>16</sup>”

**The way in which these fundamental proposals were announced, as a part of a Cabinet reshuffle and without consultation or advice, has created anxieties amongst the most senior members of the judiciary and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them.**

15. These are not simple matters on which to legislate. We set out to examine the proposals and their consequences in more detail, in order to establish whether difficulties could be resolved, and to establish how much time would be needed to resolve them. We became increasingly aware of the complexity of the issues.

## 2 A Supreme Court

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16. Until the Devolution Acts, the highest court in England and Wales, Scotland (apart from in criminal matters) and Northern Ireland was the Appellate Committee of the House of Lords. Since then, case law of the Judicial Committee of the Privy Council on devolution matters (which may include important human rights convention questions) has had binding authority on all other courts including the House of Lords Appellate Committee.<sup>17</sup> Each jurisdiction regards the Appellate Committee as a court in its own jurisdiction, rather than as a United Kingdom court. The Government's proposals in its consultation paper describe its proposals for the establishment of the Supreme Court of the United Kingdom and the consequent reorganisation of the highest levels of the judiciary and the appointments procedure for judges at that level.<sup>18</sup> The primary objective is to separate the highest court of appeal in the United Kingdom from Parliament.<sup>19</sup>

17. There have been a number of calls for such a change in recent years, for example by the Senior Law Lord, Lord Bingham of Cornhill, in his Constitution Unit Lecture in May 2002, in which he said

“Our object is plain enough: to ensure that our supreme court is so structured and equipped as best to fulfil its functions and to command the confidence of the country in the changed world in which we live”.

Mr Matthias Kelly, Q.C., the Chairman of the Bar Council, in an article in *The Times* on 2 April 2003, said

“Judges should have no part of the legislature .... It is very difficult to understand why our Supreme Court (the law lords) should be a committee of the second house of Parliament”.

18. The main argument for the change is that it is felt to be wrong in principle to have judges sitting as members of the legislature. The Consultation paper spells out this argument:

“The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.”<sup>20</sup>

We note that this is a view based on the *appearance* of impartiality rather than the *substance*.

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17 See Scotland Act 1998, s.103(1), Northern Ireland Act 1998, s.82(1), Government of Wales Act 1998, Sched 8, para 32(b)

18 DCA Consultation Paper CP 11/03, p 8

19 *ibid*, para 34

20 *ibid*, para 3

19. To some extent, this problem has been acknowledged and addressed by the Lords of Appeal statement that in view of the Human Rights Act they would refrain from commenting on matters of a partisan nature or which might disbar them from hearing appeals (referred to in paragraph 34 of the Consultative Paper).<sup>21</sup>

20. An argument based on the separation of powers (such as the reference to Article 6) cannot be conclusive in the United Kingdom, where it is a constitutional principle that ministers should be members of one or other House of Parliament. The evidence which we received in the form of responses to the consultation papers and in oral evidence showed a divergence of view among well informed commentators about the principle underlying the change. Although it was clear to most witnesses that it is desirable that judges should be wholly independent of the Government, since it is possible that the Government will be a party to an action before them, the same is not true of independence of the legislature. As Lord Lloyd of Berwick put it:

“Since it is the judges who have to decide whether ministers are breaking the law or exceeding their powers or whatever it may be, it is obviously vital that the judiciary and the executive should be separate and distinct. But there has never been a reason—not one that I can see—why the judges and the legislature should be distinct and separate.”<sup>22</sup>

In other words, freedom of the citizen in the United Kingdom is guaranteed by the Rule of Law, not the separation of powers.<sup>23</sup>

21. Evidence from the judges suggested that it was highly unlikely that any challenge to a decision made by the House of Lords under Article 6 would succeed. Certainly it did not appear to be the cause for changing the present arrangements in the view of Lord Cullen or Sir Robert Carswell.<sup>24</sup>

22. Is it necessary to change anything? Many witnesses commented (as did the Consultative Paper) on the excellence of the present system. The House of Lords is a well established court which is regarded as dispensing justice in an effective and efficient way. The Law Lords themselves commented:

“... it should not be thought that the Law Lords as a body support the proposal to establish a new Supreme Court of the United Kingdom. A number of serving Law Lords<sup>25</sup> believe that, on pragmatic grounds, the proposed change is unnecessary and will be harmful. The present arrangements work well. They believe that the Law Lords’ presence in the House is of benefit to the Law Lords, to the House, and to others including the litigants. Appeals are heard in a unique, suitably prestigious, setting for this country’s court of final appeal. The ‘House of Lords’ as a judicial body is recognised by that name throughout the common law world. Overall, it is believed, it has a fine record and reputation. The Law Lords who do not support the proposed

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21 HL Deb, 22 June 2000, col 419

22 Q 204

23 *ibid*

24 Qq 336ff; Sir Robert Carswell was appointed to the Appellate Committee of the House of Lords since giving evidence to the Committee

25 Lords Nicholls, Hoffmann, Hope, Hutton, Millett, Rodger

change consider these real advantages need not be, and should not be, put in jeopardy. They consider that the cost of the change would be wholly out of proportion to any benefit.”<sup>26</sup>

Other Law Lords<sup>27</sup> disagree about the principle of the change and:

“... regard the functional separation of the judiciary at all levels from the legislature and the executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law. They consider it important, as a matter of constitutional principle, that this functional separation should be reflected in the major institutions of the state, of which the final court of appeal is certainly one.”<sup>28</sup>

**23. Both those in favour of the change and those against were united in emphasising that the present system was one which worked. The arguments for change were about principle and perception.**

## Jurisdiction

24. The Consultation Paper proposes that there be little change in the jurisdiction of the final court of appeal. It dismissed any radical changes such as introducing a US-style Supreme Court as inappropriate for the United Kingdom system—where in any case there is no written constitution or set of constitutional principles that can override statute. Jurisdiction to strike down Acts of Parliament would militate against parliamentary supremacy, which is a cornerstone of the United Kingdom’s constitutional arrangement.<sup>29</sup> Likewise, any proposal that the United Kingdom should have a Supreme Court on the lines of the European Court of Justice, namely where matters of law are referred for a definitive ruling, would go against the principle of United Kingdom courts which decide law on the basis of particular cases before them. An arrangement which required the new Court to consider issues in the abstract “would sit very uneasily with our judicial traditions.”<sup>30</sup>

25. One assumption which the consultation paper makes is that the new court would be a United Kingdom court. This is very different from the present position where the Appellate Committee is the final court in each jurisdiction *separately*. As Lord Hope of Craighead pointed out:

“The problem is, I think, if you describe the court as a supreme court of the United Kingdom, it tends to suggest that there is a body of United Kingdom law. In a court which inevitably is filled with a majority of English judges there may be a temptation to say, “Well, we see differences between Scots law and English law on issues relating to property or other matters, what’s the point of having a difference when we’re sitting as a United Kingdom court?” The Scots may well feel that would introduce a

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26 Law Lords’ response to CP 11/03

27 Lords Bingham, Steyn, Saville, Walker

28 Law Lords’ response to CP 11/03

29 DCA Consultation Paper CP11/03, para 23

30 *ibid*, para 24

drift away from their system of law into an English system, and there are signs in case law, even now, that there is a temptation along that line.”<sup>31</sup>

26. The Lord Chancellor emphasised that there would be no change to the jurisdiction of the court:

“It is not the intention to create some body of a new law called “UK law”. It is still intended for there to be a Court of Final Appeal that deals with legal issues from all parts of the United Kingdom, including Scotland. That means, for example, a decision of the Supreme Court in relation to an English case will not be binding in Scotland, it will only be persuasive authority, which is the current position.”<sup>32</sup>

**27. The legislation establishing the new court will need to make clear the jurisdiction of the court. It will need to establish the extent to which it is a United Kingdom court as opposed to a final court of appeal serving each of the United Kingdom’s three jurisdictions.**

28. There are two further practical matters put forward for consideration: how devolution issues are to be dealt with; and the treatment of appeals from Scotland.

### **Devolution matters**

29. The Government has raised the question of whether to transfer the jurisdiction of the Judicial Committee of the Privy Council over devolution issues to the Supreme Court. The decision to refer devolution cases to the Judicial Committee rather than to the House of Lords was deliberate. The present arrangements are, of course, quite new. According to the Government, they are working well.<sup>33</sup> They have the added practical advantage that the panel of available judges for the Judicial Committee is wider than for the Appellate Committee and therefore that there are more opportunities to have Scottish and Northern Ireland judges sitting on devolution cases.

30. The Government proposes to transfer the jurisdiction on devolution cases from the Judicial Committee to the new Supreme Court with arrangements which enable additional Scottish and Northern Ireland judges to sit in cases raising devolution issues where that is appropriate.<sup>34</sup> The arguments in favour of this are: that there would no longer be any perceived conflict of interest in which the UK Parliament was apparently sitting in judgment over a case relating to its legislative jurisdiction; and that it would provide a single apex to the UK’s judicial systems where all constitutional issues could be considered. It would ensure that there is no longer a danger of conflicting judgments arising, for example on human rights cases which might have come to the Judicial Committee as devolution issues and to the House of Lords as ordinary appeal cases.<sup>35</sup> This point was emphasised by JUSTICE in its policy paper “A Supreme Court for the United Kingdom”<sup>36</sup>

31 Q 296

32 Q 561

33 DCA Consultation Paper CP 11/03, para 19

34 DCA Consultation Paper CP 11/03, para 21

35 *ibid*, para 20

36 Published in November 2002



in which it referred to a case<sup>37</sup> where the same human rights point was raised in separate cases that were simultaneously passing through the Scottish and English & Welsh Courts.

31. However, this apparently simple approach does not find favour with everyone. The Law Lords have said:

“It would in our opinion be consistent with the role of a Supreme Court of the United Kingdom that it should be the final arbiter of devolution issues arising in the devolved jurisdictions. The Scotland Act 1998 and the Northern Ireland Act 1998, however, in giving jurisdiction to resolve devolution issues to the Judicial Committee of the Privy Council, permit such issues to be decided by judges drawn from the devolved jurisdictions who are eligible to sit in the Judicial Committee but are not eligible to sit in the House of Lords and, if our answer to Question 2 is accepted,<sup>38</sup> will not be eligible to sit in the Supreme Court. We would not wish, and we very much doubt if the devolved administrations would wish, to see this feature of the devolution settlement abrogated. If it is to be preserved, the choice lies between leaving matters as they are and making special rules to govern eligibility to sit in the Supreme Court when it is dealing with devolution matters. We do not regard this last possibility as satisfactory and accordingly, although with a measure of reluctance, favour preserving the status quo.”<sup>39</sup>

32. This is clearly a sensitive matter which Parliament should decide on in the light of a clear understanding of the views of the Scottish Parliament and of the Assemblies in Wales and Northern Ireland, though the matter will ultimately be one for the United Kingdom Government and Parliament. The Law Lords have raised a practical point of great significance which the planned Bill will need to address clearly.<sup>40</sup>

### Scottish Appeals

33. Scottish appeals are dealt with in a different way from appeals from England and Wales and from Northern Ireland, partly for historical reasons and partly for practical ones. The Act and Treaty of Union 1707 guarantees the separation of the Scottish judicial system from that of England; the administration of the civil and criminal courts in Scotland is a devolved matter within the competence of the Scottish Parliament and Executive.

34. The basis for the criminal justice system is utterly separate from that in England and Wales. As Lord Hope of Craighead has said:

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37 County Properties Ltd v Scottish Ministers 2000 S.L.T 965 and R (on the application of Holding and Barnes Plc) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 (otherwise known as Re: Alconbury Developments), in which the House of Lords considered the legality of the system whereby the Secretary of State was entitled to call in applications for planning permission for his own determination

38 *i.e.* relating to the composition of the court—see para 40 below

39 Law Lords’ response to CP 11/03

40 Up to 28 January 2004, the Judicial Committee of the Privy Council published judgments in twelve devolution hearings, all of them relating to Scotland: one in 2003; three in 2002; five in 2001; and three in 2000. A judge other than the Lords of Appeal of Ordinary sat in two of these hearings. In December 2000 Lord Kirkwood, a judge of the Second Division of the Inner House, sat in *Stott (Procurator Fiscal) v Brown* [2003] 1 A.C. 681 (on a panel including the two Scottish Law Lords). In July 2002 Lord McKay of Clashfern, the former Lord Chancellor, sat in *Mills v HM Advocate (No.2)* [2002] UKPC D2; [2002] 3 W.L.R. 1597 (on a panel including one of the Scottish Law Lords, the other—Lord Rodger of Earlsferry—being disqualified having sat in the case in the court below prior to his appointment as a Lord of Appeal in Ordinary)

“..although there is now much common ground between England and Scotland in the field of civil law, their systems of criminal law are as distinct from each other as if they were two foreign countries.”<sup>41</sup>

Until devolution in Scotland, there was no further appeal in Scottish criminal cases beyond the High Court of Justiciary. There is now, however, the possibility of appeal under the devolution settlement to the Privy Council in a criminal case if a Convention right is breached by actions by the prosecutor or other member of the Executive or in legislation made by the Scottish Parliament which are outside powers granted by the Scotland Act 1998.

35. Scottish civil appeals do lie to the House of Lords. A particular feature of the Scottish system is that in the great majority of cases there is no requirement to seek leave to appeal to the House of Lords: there is only a requirement for two Counsel to certify the reasonableness of the appeal.<sup>42</sup> Cases from the rest of the United Kingdom do require leave to appeal to the House of Lords. Only a small number of cases reach the House of Lords from Scotland and there is no reason to assume that this would change under the new arrangements.<sup>43</sup>

36. The Government’s view is that:

“There is no evidence that the Scottish criminal appeal system requires change. To the extent that a further appeal may be required after the first tier of appeal has been exhausted, there is the possibility of a reference back at any time to the court of appeal by the Scottish Criminal Cases Review Commission.”<sup>44</sup>

As far as Scottish civil cases area are concerned:

“The Scottish Executive has indicated that it has no plans at present to alter the current arrangements and is in principle content for civil appeals to the new Court to be on the same basis as currently operates in relation to the House of Lords. There are benefits to the Scottish justice system in having important cases reviewed by judges with a different background, and indeed advantages to the larger jurisdiction also in drawing on the resources of a different legal tradition at the highest level.”<sup>45</sup>

These views have some distinguished critics. Professor George Gretton<sup>46</sup> has written that this distinction between Scots criminal and Scots civil law is specious. He suggests that the

41 R. v. Manchester Stipendiary Magistrate, ex parte Granada Television Limited [2000]2W.L.R.1, 5

42 This is based on the 1689 Scottish Claim of Right, by which the right to appeal to the King in Parliament from the judgment of the Court of Session was established

43 The leave requirement was introduced for appeals from courts in England and Wales by the Administration of Justice (Appeals) Act 1934. Looking back at the parliamentary debates in 1934 on the Bill, it seems likely that Scottish civil litigation was excluded from the leave requirement not for any reason of principle, but through oversight or lack of parliamentary time in the House of Commons. Mr Milne, a Scottish MP, said: “. . . I scan the Bill and scan it vain to find any reference whatever to the Court of Session in Scotland. The compelling reasons which constrained the Committee [presided over by the Master of the Rolls] to make their recommendations apply with fourfold force to the case of the Court of Session” (Hansard HC vol 291 cols 1531–1533). The Solicitor-General indicated that the matter would be considered, but it is not clear whether this was done and if so to what effect. See A. Le Sueur, ‘Panning for Gold: Choosing Cases for Top-level Court’, chap 12 in A. Le Sueur, *Building the UK’s New Supreme Court: National and Comparative Perspectives*, OUP, 2004 forthcoming

44 DCA Consultation Paper CP11/03, para 26

45 *ibid*, para 27

46 Lord President Reid Professor of Law, University of Edinburgh

Government's justification for excluding jurisdiction over criminal appeals is weak because it contradicts its justification for retaining jurisdiction over civil appeals. He states that, according to the Consultation Paper:

“criminal cases don't go to London because English and Scots criminal law are so different. But in civil law, it seems, they are much the same, while simultaneously belonging to a 'different legal tradition'.”<sup>47</sup>

37. The Government's view is:

“The disadvantages of changing this are threefold. First, in respect of Scotland, the arrangement whereby Scottish civil cases currently lie to the House of Lords as of right is long established; there is no evidence that change is needed; and there are strong arguments for leaving the position unchanged. The second disadvantage, in all respects, is that it would mean that more of the work of the Court would be absorbed in deciding what cases to hear, rather than hearing them. It would lead, in practice, to fewer cases being heard or to cases taking longer to come before the Court. The third disadvantage is that it would mean that all those seeking the judgment of the Court would have to incur the cost of petitioning for the right to appeal.”<sup>48</sup>

38. The Law Lords agree:

“...subject to what we say in answer to Question 1,<sup>49</sup> we do not propose any change in the jurisdiction of the Appellate Committee on its becoming the Supreme Court. The Appellate Committee has never had jurisdiction to hear criminal appeals from Scotland. It is not a jurisdiction which the Supreme Court (save for its Scottish members) would be well-fitted to discharge. If there is any desire for change in this regard, we would not support it.”<sup>50</sup>

They go on to say in answer to question 21 of the consultation paper (Should the present position in relation to Scottish appeals remain unchanged?):

“There are two views. Some serving Law Lords<sup>51</sup> regard the absence of a leave requirement in relation to Scottish appeals as anomalous and capable, however rarely, of leading to unmeritorious appeals. They would take this opportunity to end this anomaly. Others<sup>52</sup>, while recognising the anomaly, regard the requirement of certification by counsel as an adequate safeguard in all but a very few cases, and would not wish to disturb a long-standing procedure which gives rise to minimal difficulty in practice.”<sup>53</sup>

47 Professor Gretton's response to CP 11/03

48 DCA Consultation paper CP 11/03, para 56

49 *i.e.* in respect of hearing devolution cases—see para 29 above

50 Law Lords' response to the CP 11/03

51 Lords Nicholls, Steyn, Millett, Walker

52 Lords Bingham, Hope, Saville, Rodger

53 Law Lords' response to the CP 11/03

39. **The jurisdiction of the Supreme Court over Scottish appeals and any changes will require legislation or a resolution of the Scottish Parliament. These issues are significant to the maintenance of Scottish law as a distinct entity. They were not addressed when the Government first announced its proposals and the timetable for decisions on the Supreme Court needs to allow for proper resolution and discussion of them in the Scottish Parliament.**

## Judges

### *Composition of the court*

#### *Membership*

40. At the moment there are twelve members of the Appellate Committee of the House of Lords. The first members of the new Supreme Court will be these judges. They hear most of the appeals, although they are able to call on a panel of reserves who are members of the House who are entitled to sit, if they need assistance because of the pressure of work or the need for particular expertise in an area of law. These supplementary judges must be holders of “high judicial office”;<sup>54</sup> in other words: the Lord Chancellor; judges of the High Court; Court of Appeal; and Court of Session who are also members of the House of Lords. Since they must be Members of the House of Lords, obviously there is a limit on the numbers on the panel.

41. The Government’s initial view is that the number of judges forming the core membership of the court “is about right”.<sup>55</sup> It raises the question of how the core membership could be supplemented, as at present, by suitably qualified judges. In their response to Question 2 in the consultation paper, the Law Lords suggested that eligibility to sit on the new supreme court could be extended to the following categories (but should not be extended beyond these categories, unless the Court is to rule on devolution issues):

- Those who have served as a British judge or Advocate-General of the European Court of Justice or
- have sat in the Appellate Committee of the House of Lords as Lord Chancellor or
- hold office as Lord Chief Justice of England and Wales, Lord President of the Court of Session, Lord Chief Justice of Northern Ireland, Master of the Rolls or Lord Justice-Clerk.<sup>56</sup>

42. The composition of the new court will not, in effect, be the same as before. As it functions now, it has a small membership which is able to sit in separately in panels of five or so judges but which still maintains a considerable degree of collegiality. To some extent, this comes from the fact that all the judges are members of the House of Lords. It will not be the same if additional members are co-opted from elsewhere, for example from among

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54 Appellate Jurisdiction Act 1876, s.5

55 DCA Consultation Paper CP 11/03, para 31

56 Law Lords’ response to the CP 11/03

members of the Judicial Committee of the Privy Council, as the Government suggests.<sup>57</sup> Nor will it be the case for other temporary judges who may be selected to sit.

43. At present, there is a convention which ensures that two Scottish judges are appointed to the Appellate Committee.<sup>58</sup> Northern Ireland judges are appointed from time to time, although since they are from a much smaller jurisdiction with a less separate legal tradition this is less of a fixed practice. Necessarily, appointments to the Appellate Committee are rare events. The Law Lords in their response to the consultation paper firmly favoured keeping the convention flexible, on the basis that it was better to have the best candidate than an undeserving candidate who was there to fill a quota. They did not contemplate any reduction in the current level of representation of Scottish and Northern Irish judges and referred to the excellence of part members of the Appellate Committee from those jurisdictions.

44. In respect of the appointment of judges from the various United Kingdom jurisdictions, the Law Society (of England and Wales) did not support the idea of a quota expressed in legislation since it believes that a quota could cut across the overriding principle of merit. It noted that the Supreme Court Appointments Commission could be given an administrative guideline that, all other things being equal, it was desirable to have representation on the Supreme Court from all the jurisdictions in the United Kingdom.<sup>59</sup>

45. However, both the Law Society for Scotland and the Faculty of Advocates have suggested that at least three judges should be drawn from Scotland and the Law Society for Scotland has suggested that this *should* be set in statute as a minimum requirement.<sup>60</sup> The Law Lords commented :

“The only purpose of a statutory rule would be to protect the smaller jurisdictions against the dominant English majority. To suppose that there is a need for such protection is to misunderstand the extent to which the continuing contribution of Scottish and Northern Irish members is valued and the pride which all members of the Court would take in its being a Supreme Court of the United Kingdom.”<sup>61</sup>

The Law Lords went further, by noting that it was better to allow for an increase in the membership of Scottish or Northern Irish judges if the best candidate happened to be from either of those jurisdictions.<sup>62</sup>

46. This question is complicated by the fact that the Welsh part of the system in England and Wales is developing in tandem with devolution of powers to the National Assembly for Wales. As the consultation paper notes:

57 DCA Consultation Paper CP 11/03, para 32

58 The current Scottish members are Lords Hope of Craighead and Rodger of Ealsferry

59 The Law Society response to CP 11/03, *A Supreme Court of Stature and Independence*, p 8

60 The Law Society of Scotland's response to CP 11/03

61 The Law Lords' response to CP 11/03

62 *ibid*

“If the Court is to take on responsibility for devolution issues, some regard should also be had to ensuring that the Welsh dimension of the England and Wales judicial system is respected.”<sup>63</sup>

This is not a fixed situation. The Law Lords noted that:

“It would moreover be wrong to assume that the Welsh legal system will forever be indissolubly linked to the English; the devolution settlement is already leading to a revival of the indigenous legal culture which once existed in Wales.”<sup>64</sup>

**47. There are two aspects which need to be kept in mind when discussing the membership of the new court. The first is the need for special expertise in the laws and understanding of the society in all parts of the United Kingdom—this is particularly true of the distinction between Scottish law and the law in the rest of the United Kingdom. The second is the need for there to be an equal sense of ownership of the new court in all parts of the United Kingdom. The Constitutional Reform Bill will need to make clear provision for the arrangements relating to representation of the various parts of the United Kingdom. It will need to set out clearly the principles under which members of the new court are appointed.**

## *Selection and appointment process*

### *Method of selecting for appointment to the court*

48. The present system of selecting members of the Appellate Committee of the House of Lords is that appointment is by the Queen on the advice of the Prime Minister. (This system is also used for the appointment senior judges such as the Lord Chief Justice of England and Wales and the President of the Court of Session). The Lord Chancellor plays a central role in consulting judges about such appointments, and, as the Government’s Consultation Paper recognises, his special position in the constitution makes this process involving him different from the involvement of a Secretary of State.<sup>65</sup> In the absence of a Lord Chancellor a new method will need to be adopted that allows a reasonable degree of political accountability but that preserves judicial independence.

49. The Government raised the issue of transparency of the method of selection of members of the Supreme Court. Previously, the system has been based on what was commonly referred to as “secret soundings”. In other words, because the group from which likely candidates for the Appellate Committee of the House of Lords has been small, it has been possible for the Lord Chancellor to consult other judges and advise the Prime Minister on the best people to appoint. (All appointments in recent years to the House of Lords Appellate Committee have been from the senior judiciary.) This informal system—which has its critics—has seemed to work well in that it has selected judges of merit and evidently has the confidence of the judges.<sup>66</sup> The Consultation Paper mentions the

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63 DCA Consultation Paper CP 11/03, para 48

64 The Law Lords’ response to CP 11/03

65 DCA Consultation Paper CP 11/03, para 39

66 See e.g. Council of Circuit Judges and Association of District Judges response to CP 11/03 and Q 382 ; see also paragraphs [147 to 153] below

possibility of “open applications” (the meaning of which is unclear: we take this to mean advertised appointments<sup>67</sup>) to the Supreme Court, balancing the argument that this would be off-putting for candidates and of doubtful value given the inevitability that the pool of candidates will be sufficiently well known to allow the Commission or ministers to act without open applications against the requirement for openness and transparency and the prospect that this might contribute to increasing diversity.<sup>68</sup>

50. The Government’s proposal is that there should be “some transparent process which leads to the identification of names, even if the final recommendations are still made by the Prime Minister following consultation with the First Minister or First and Deputy First Ministers as appropriate”.<sup>69</sup> The Government put forward three possible models for the appointments commission which would recommend a limited number of names to the Prime Minister on the basis that the small number of appointments to the Supreme Court and the likely limited field of candidates mean that it would be sufficient for the Commission to present the names of only one or two candidates. The Prime Minister would then consult the First Minister for Scotland and the First Minister and Deputy First Minister in Northern Ireland.<sup>70</sup>

51. The Law Lords said:

“An Appointments Commission, if established, should recommend one appointee to the Secretary of State for Constitutional Affairs. The Secretary of State should be authorised to invite the Commission to reconsider its recommendation, giving reasons. If so invited, the Appointments Commission should reconsider its recommendation and then recommend an appointee (whether the same appointee or another) to the Secretary of State. The Secretary of State would then advise the Prime Minister of that recommendation, and the Prime Minister would advise The Queen accordingly. The Secretary of State would be bound to accept the Commission’s recommendation (either initially or after reconsideration) and the Prime Minister would be bound to advise The Queen in accordance with the Secretary of State’s advice.”<sup>71</sup>

This approach was also advocated by other witnesses.<sup>72</sup>

52. The Bar Council noted that a:

“...limited involvement of the PM provides a degree of political accountability which we regard as desirable...Rejection of a name by the PM would be an extreme step, but it could be taken if s/he thought it the only correct course. The element of political accountability is limited on this model, given the lack of choice, but it exists”.<sup>73</sup>

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67 In evidence Sir Thomas Legg took it to mean “published” applications. Ev 117, para 10

68 DCA Consultation Paper CP 11/03, para 44

69 DCA Consultation Paper CP 11/03, para 40

70 DCA Consultation Paper CP 11/03, para 41

71 Law Lords’ response to CP 11/03, Question 11

72 See e.g. JUSTICE’s response to CP 11/03

73 Bar Council’s response to CP 11/03

It further stated that:

“It is important to recognise that the executive does have an interest in the composition of the [Supreme] Court. Quite apart from anything else, it is important to avoid a situation where the judiciary can be portrayed by a hostile executive as an un-elected body answerable to no-one, should there ever be genuine constitutional conflict. The constitutional arrangements should reflect, in an appropriate way (i.e in a manner consistent with a guarantee of excellence in appointment and judicial independence) the legitimate interest that the Government does have”.<sup>74</sup>

53. A further issue is the extent to which consultation should take place with the First Secretary of the National Assembly for Wales. It was the view of the former Counsel General of the National Assembly that the First Secretary should have equal rights to be consulted with the First Minister in Scotland and the First and Deputy First Minister in Northern Ireland.<sup>75</sup>

54. How is the Commission to be appointed? Clearly, whichever model were adopted, the Commission would have to be a separate body from the judicial appointments commissions in the separate jurisdictions (including any such body for England and Wales). However, as the Court would be the Supreme Court for the whole United Kingdom, it is important that its membership should be selected by those who are representative of all three of the legal jurisdictions within the country.<sup>76</sup> The Government’s proposal is that rather than set up another new body to deal specially with the very small number of appointments, a Commission to advise on appointments to the Supreme Court could be drawn from all three commissions and boards;<sup>77</sup> the Commission would, however, nominate all members, rather than have each Commission nominate members from their respective jurisdictions.<sup>78</sup> There was some support for this from witnesses.<sup>79</sup>

55. The Law Lords thought that there should be an Appointments Commission made up of: the President and the Deputy President, assisted by the senior member of the Court appointed from Scotland, Northern Ireland and the two senior members of the Court appointed from the bench or legal profession of England and Wales (unless any of the latter are President or Deputy President).<sup>80</sup> In addition, there should be two lay members, one or both of whom might be legal academics, appointed (by an independent body) for substantial periods of time. This Commission should be charged with appointing members of the court and its President and Deputy President.<sup>81</sup>

56. There are clearly problems associated with a specially constituted commission which would meet so irregularly. How would the operations of the commission be administered? The Government told the Committee:

74 *ibid*

75 Q 329

76 DCA Consultation Paper CP 11/03, para 43

77 *ibid*

78 DCA Consultation Paper CP 11/03, para 38

79 See e.g. JUSTICE’s response to CP 11/03

80 Law Lords’ response to CP 11/03, Questions 6, 11 and 12

81 *ibid*



“No final decision (on whether the recommending commission would have a permanent secretariat and, if so, where the staff would be situated) has been taken but for so few appointments it may be most practicable for the commission not to be a standing body but convened whenever an impending vacancy needs to be filled in the Supreme Court. It is envisaged that one or more of the commissions in the three jurisdictions will be asked to supply secretarial and other support on an ad hoc basis when a vacancy is to be filled.”<sup>82</sup>

This is an insufficient answer. We see no need for a permanent bureaucracy to serve the Commission but there need to be arrangements for continuity of practice and the development of recruitment policy. Most importantly, the Government does not explain how each jurisdiction will have a role to play in this important activity.

57. Notwithstanding the special circumstances of the new court, the broad principles of appointment of judges will still apply: the process must be transparent; it must have the confidence of the Government, the judiciary, the legal profession and the public—it must be clearly merit-based and the independence of the judges must be assured; it must allow for an increase in diversity, where possible, although the small number of appointments makes this already difficult problem especially hard to resolve (particularly if the current practice of appointing only senior members of the judiciary is maintained); and there must be some level of democratic accountability in the process. It will not be easy for the Government to achieve this set of requirements; we look forward to reading their proposals.

### *Qualifications for appointment*

58. There was some disagreement between the witnesses about the stipulated qualifications for membership of the court. JUSTICE thought that there should be no formal requirement that candidates have previous judicial experience.<sup>83</sup> Professor Stevens indicated in his paper that he believed that many of the more successful appeal judges had been promoted directly from the bar.<sup>84</sup>

59. This touches on what the court of final appeal actually does. Although the Government says that the role of the new court will emphatically not be one of deciding on the constitutionality of laws or acting in a way similar to, for example, the United States Supreme Court, Professor Stevens noted that:

“When you come to the Court of Final Appeal, the new Supreme Court, then I think the new Supreme Court will inevitably be deciding cases which are on the periphery of law and politics and it therefore becomes very important to have judges of experience outside the courts.”<sup>85</sup>

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82 Ev 108 Para 3(b)

83 *ibid*

84 Giving Radcliffe, Reid and Mackay (during his period as a Lord of Appeal) as examples

85 Q 63; and see Q 177 [Lady Justice Hale]

60. The Bar Council has acknowledged that there is a possibility that the appointment of an eminent academic would be an appropriate means of enhancing both the academic standing and the diversity of the court. It states, however, that:

“Such an appointment is likely to be rare, even very rare. The argument that those who are appointed to the Court should have practical experience at the trial level is, in ordinary circumstances, compelling, and we would expect the Appointments Commission to recognise this in the appointments it made”.<sup>86</sup>

The Law Society supported:

“.....removing the requirement for two years holding of high judicial office. If the assessment procedures are sufficiently objective, candidates will have to demonstrate that notwithstanding their lack of judicial experience, they have the requisite skills to be an effective member of the Court in competition against applicants who do have this experience”.<sup>87</sup>

61. Dame Brenda Hale<sup>88</sup> has indicated that:

“The case for members of a first tier, error correcting, appeal court having had experience as a trial judge is much stronger than the case for members of a second tier, points of important principle resolving Supreme Court.”<sup>89</sup>

Her reasons for this are that the Supreme Court justices do not need to have the same knowledge of what it is like at ‘the sharp end’, since by the time the cases come before them, the issues should have been refined into points of purest principle. On that basis, she considers that it might be thought even more important to have a court which reflects the diversity of the legal population, not only in professional and social background, but also in gender and ethnicity, than at its lower levels.<sup>90</sup>

62. The United Kingdom Association of Women Judges stated in its response to the consultation<sup>91</sup> that:

“A second tier appellate court deals with matters of principle. Experience on the bench is generally not necessary for the work with which the Supreme Court will be concerned. The ability to formulate legal policy at high level is not confined to those who have served on the appeal bench. Academics, for example, may bring valuable but different perspectives. The more diverse the membership of the Supreme Court, potentially, the wider will be the debate. It is, therefore, desirable that appointment to the Supreme Court be available to a wider body of candidates than has traditionally

86 Bar Council’s response to CP 11/03

87 The Law Society’s response to CP 11/03

88 When she gave evidence to the Committee Dame Brenda Hale had just been appointed to the Appellate Committee of the House of Lords. Before she was appointed to the High Court she had been an academic lawyer in the University of Manchester for eighteen years

89 Dame Brenda Hale’s response to CP 11/03, *A Supreme Court for the United Kingdom*

90 *ibid*, p 9

91 The United Kingdom Association of Women Judges’ response to CP 11/03, *Constitutional Reform: A Supreme Court for the United Kingdom*, p 1

been the case. People from walks of legal life other than simply the appeal courts should be eligible for appointment.”

**63. The reality of the situation affecting the new court is that the range of possible candidates is always going to be small. Increasing diversity depends on increasing the pool of available talent from which to choose. It is possible to envisage candidates being selected straight from practice or academic life, but we expect that the more productive route towards increasing the diversity of the membership of the new court will be by way of more broadly based appointments to the courts below. Once a person has sat frequently as a judge they will be in the same position as any other candidate.**

**64. Vacancies in the new Court should be publicised and open to application in line with most other public service appointments. It will still be necessary for some element of active searching for candidates to take place.**

### ***President and Deputy President***

65. The Government’s policy in the first instance is that the Presidency of the new court will be held by the serving Senior Law Lord. It has canvassed opinion on whether his successor should be chosen either on the basis of advice from the Prime Minister to the Queen after consultation or on the recommendation of a specially constituted Appointments Commission, whether directly to the Queen or through the Prime Minister.<sup>92</sup>

66. In the absence of the office of Lord Chancellor, there is a gap in the provision for appointments of this kind. Consultations by a Secretary of State will not be the same as a similar exercise carried out by the Lord Chancellor. It is impossible to be transparent about the process, because too few people are candidates. The present system is based on trust, which is a reflection of the esteem in which successive Lord Chancellors have been held in their capacity as defenders of judicial independence.

67. A further option which is not canvassed in the Government’s Consultation Paper is that the members of the new court should elect their own President and Deputy President from among their own number. The President will be the public face of the new court and will have the duty of nominating judges to sit on particular cases.

68. The Law Lords saw a clear merit in having a Deputy President:

“We are of the clear opinion that there should (adopting the terminology of the Consultation Paper) be a Deputy President who will (as now) almost invariably preside over the panel of which he is a member, participate in decisions on the composition of panels and discharge the duties of the President if he is for any reason unable to do so. The importance of these functions in our opinion requires that the office be underpinned by statute.”<sup>93</sup>

69. We note that the Law Lords feel the need to have such an office provided for by statute.

92 DCA Consultation Paper CP 11/03, para 33

93 Law Lords’ response to CP 11/03, Question 5

## Relationship between Supreme Court and Parliament

### *Membership of the House of Lords*

70. The relationship between the Supreme Court and Parliament is a complex question and in many ways goes to the heart of the division of opinion between those who regard the system as needing to be changed and those who think that it should be allowed to remain essentially unchanged. Up to now, the office of Lord Chancellor has provided a formal and informal means of communication between the judiciary, government and Parliament. Membership of the House of Lords in the case of the most senior judges has ensured that on various levels the views of the judiciary have been provided with a forum within Parliament. With the abolition of the office of Lord Chancellor, the separation of the Supreme Court from the House of Lords and a bar on all judges from sitting in the House of Lords there will be no institutional connection between the judges and Parliament.

71. One aspect which makes discussion of this subject difficult is the unresolved issue of reform of the House of Lords. If the House of Lords were to become wholly elected then clearly membership for judges would be inappropriate. As Lord Hope of Craighead said:

“If the House were to become a wholly elected House, plainly it would be anomalous and simply one would have to make some kind of a change. My view is based on the situation as it is at the moment, which, leaving aside the hereditary Peers, is one where the House is appointed, and we take our places as appointed Members of the House for the particular job we are asked to do, so it fits in at the moment.”<sup>94</sup>

72. Various witnesses referred to the work of the Law Lords in the House of Lords, in particular in chairing the Legal Sub-committee of the European Committee.<sup>95</sup> The government acknowledged in the Consultation paper that this had been valuable work, but pointed out that this was work which other eminent lawyers who were members of the House of Lords could carry out.<sup>96</sup>

73. The Law Lords thought that there was no doubt that, in the past, the House of Lords had valued and profited from contributions made, particularly on matters relating to the administration of justice, by holders of high judicial office.<sup>97</sup> Their opinion was divided as to whether there should be a continuing link between the new court and the House of Lords by virtue of some of the Supreme Court judges being members of the House. Some identified particular holders of judicial office as being candidates for membership of the House of Lords in order to give Parliament the benefit of their experience especially in matters relating to the administration of justice.<sup>98</sup> Others prefer to maintain the absolute independence of the two institutions.<sup>99</sup>

94 Q 283

95 See e.g. Q 235; and see Report of the Wakeham Commission: “*A House for the Future*”, January 2000 (Cm 4534)

96 DCA Consultation Paper CP 11/03, para 57

97 Law Lords’ response to the CP 11/03, Question 8

98 Lords Nicholls, Hope, Hutton, Hobhouse, Millett, Scott, Rodger, Walker

99 Lords Bingham, Steyn, Hoffmann, Saville

74. The Government's view is that :

“On balance, [...] it would be better to sever completely any connection between the Court and the House of Lords. It therefore proposes that members of the Court should lose the right to sit and vote in the House while they are members of the Court. Any one who is a member of the House before joining the Court will retain the peerage and title, and will be free to return to the House when he or she ceases to sit on the Court. This will give the House the continued benefit, which it very much values, of the experience of the retired Law Lords.”<sup>100</sup>

75. Future members of the new Court will not necessarily be able to retire as members of the House of Lords. It is the Government's intention to re-examine the:

“present presumption that the holders of certain judicial offices should be granted peerages and thus be made members of the House of Lords.”<sup>101</sup>

Further, it asks the question whether there should be a presumption that all former members of the new court be appointed as members of the House of Lords after they retire.<sup>102</sup> It goes further and questions whether all holders of high judicial office should automatically lose their right to sit and vote in the House of Lords while they sit as judges.<sup>103</sup>

76. Witnesses were split on this issue. For example, JUSTICE thought that members of the new court should cease to be members of the House of Lords and that there should be no presumption that retired members of the new court should be given peerages, although it recognised that the House of Lords might miss the expertise provided by the Law Lords, particularly in some of its committee work, and stated that it would be important that the Upper House retain access to senior and experienced lawyers.

77. The Bar Council has agreed with the consultation paper that the Law Lords make a valuable contribution to the work of select committees, identifying the European Communities Committee as an example, and also acknowledges the value of the judicial contribution to debates. It nonetheless suggests that there are other methods by which the views of the higher judiciary could be made known, and notes that awarding a peerage to a judicial office holder by virtue of that office, when he could neither sit nor vote during the currency of that office would create an anomaly.<sup>104</sup>

78. The Law Society also accept that there should be a bar on all holders of all high judicial office sitting and voting in the House of Lords. It has suggested that:

“..... consideration should be given to a mechanism by which members of the Supreme Court could make their expertise available to the legislative process, but without engaging in the political debate or decision making of the day. This might be a mechanism by which the Government would seek the comments of the members

100 DCA Consultation Paper CP 11/03, para 36

101 DCA Consultation Paper CP 11/03, para 37

102 DCA Consultation Paper CP 11/03, para 36

103 DCA Consultation Paper CP 11/03, para 37

104 Bar Council's response to CP 11/03, paras 20 and 22

of the Supreme Court on white and green papers on issues affecting the exercise of legal rights or the administration of justice in any way. The comment of the Court could be provided collectively and could be made available to Parliamentarians but would not be binding on the Government in any way”.

79. The question of institutional links with Parliament and the Government is extremely important. As Lord Hope emphasised in his evidence to the Committee, the membership of a larger unit (i.e. Parliament) at present given to members of the Appellate Committee meant that he was able to keep in touch with a wider range of people, including Scots Members of Parliament.<sup>105</sup>

**80. From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers.**

### **Accountability to Parliament**

81. In addition to the need to maintain links and understanding between the various parts of the constitutional machinery, it will be necessary for the new court to be accountable to Parliament for the use of the public money given to it and for the *general* discharge of its duties. There needs to be some element of political accountability for the operation of the system as opposed to accountability for decisions. There is a wide range of possibilities for maintaining some institutional link between the new court and Parliament. **As a minimum we would expect the new court to provide an Annual Report to Parliament of the use of the money in its budget and a description of its work over the course of the year. If necessary, Parliament should be ready to hold hearings relating to the financial support required by the new court. The general work of the Judicial Appointments Commission responsible for recommending appointments to the new court will also fall to be examined by this Committee (though not normally its conduct in relation to specific appointments).**

82. The Department’s Consultation Paper raised the possibility of enhancing the status of the members of the Court by establishing confirmation hearings before one or other of the Houses of Parliament. This could, it argued, help to ensure that Parliament had confidence in the Judiciary. This was the view of Sir Thomas Legg, former Permanent Secretary in the Lord Chancellor’s Department<sup>106</sup> and of Professor Robert Hazell.<sup>107</sup>

83. The consultation paper dismissed this option, concluding that:

‘The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees’ legal or judicial skills. If the intention was to assess their more general approach to issues of public importance,

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<sup>105</sup> Q 294

<sup>106</sup> Ev 117, para 13

<sup>107</sup> Director of the Constitution Unit, School of Public Policy, University College London; Ev 121–122

this would be inconsistent with the move to take the Supreme Court out of the potential political arena. One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be the members of the Court would cut right across that objective'.<sup>108</sup>

84. In her paper on the Supreme Court, Dame Brenda Hale discusses the view on parliamentary confirmation hearings expressed in the Government consultation document. She argues that the paper states that the appointments should remain in the hands of a Minister accountable to Parliament and asks “what exactly does this mean”. She goes on to state that:

“So far as I am aware, neither the Prime Minister nor the Lord Chancellor is ever questioned in the House about individual appointments. The Consultation paper on judicial appointments is careful to refer to Ministerial accountability to Parliament ‘for the judicial appointments process’. But it is only quite recently that the Lord Chancellor’s department has had a Minister in the House of Commons, which is the true source of Parliamentary accountability unless and until the House of Lords becomes at least a partially elected body. It is even more recently that its work has become subject to select committee scrutiny in the same way as that of other departments. Yet I think it is important that the process of appointing judges, if not the individual appointments made, is subject to some sort of democratic accountability. Otherwise it will be more difficult to introduce innovation in criteria and procedures”.<sup>109</sup>

85. We agree with the Government’s view that confirmation hearings for judges would not be desirable.<sup>110</sup> That does not preclude a parliamentary Committee from seeking formal opportunities—from time to time—to meet Justices of the Supreme Court, including recently appointed ones. This Committee has done so. Following discussions with the Lord Chief Justice, we have been able to hold evidence sessions with members of the judiciary from almost every tier, including the Law Lords and the Lord Chief Justice. We have found these sessions very fruitful and we all believe that they are welcomed by the judiciary.<sup>111</sup>

86. The views of Judges on the role of the Supreme Court, approaches to broad questions of law, especially constitutional law and human rights and law reform are all matters of legitimate public interest. A constructive dialogue between Parliament and the UK’s most senior judiciary need in no way undermine judicial independence. The Supreme Court itself has much to gain from such dialogue, especially if senior members of the judiciary cease to sit as peers in the House of Lords.

**87. While we heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges, we recognise the potential**

108 DCA Consultation Paper CP 11/03, para 45

109 Dame Brenda Hale’s response to CP 11/03, *A Supreme Court for the United Kingdom*, p 10

110 This was also the view of various witnesses: e.g. Sir Colin Campbell, Q 56ff; and the Law Society and Bar Council Q 137ff

111 This Committee in relation to its present inquiry heard evidence from, among others, Dame Brenda Hale, Sir Robert Carswell, Lord Bingham, Lord Hope of Craighead and Lord Nicholls of Birkenhead. Another example of the appearance of judges as witnesses is in the Committee’s inquiry into Asylum and Immigration Appeals

benefits to public understanding of the role of the new Supreme Court if a practice were to be adopted of inviting Judges, including recently appointed ones, to appear before an appropriate Committee from time to time (including this Committee).

## Operational matters

### Case selection

88. At present, appeals to the House of Lords from England and Wales and from Northern Ireland are by way of leave to appeal granted by the court below (rarely granted) or leave given by the Appellate Committee of the House of Lords itself. The appellate Committee will hear civil and criminal appeals from England and Wales as well as Northern Ireland; as discussed above,<sup>112</sup> appeal from Scotland lies only in civil matters. The House of Lords also hears appeals from the Courts-Martial Appeal Court. Usually, the House of Lords chooses its own cases from among those appealed. Applications for leave to appeal are heard by the Appeal Committee, which is made up of three Law Lords. This Committee also considers any other interlocutory matters relating to the case.

89. The Consultation Paper invited views on whether the appeals procedure should be entirely a matter for the new court to determine. This would remove the right of the Court of Appeal to determine that a matter should be heard by the highest court of appeal. It would also remove the automatic right of appeal from Scotland in civil cases where two counsel certify that there is a suitable ground of appeal.

90. We have already discussed the matter of Scottish appeals above.<sup>113</sup> As far as removing the right of the Court of Appeal to give leave to appeal is concerned, the Consultation Paper sets out the argument for change as being that :

“...such a general rule would give the Supreme Court the control it needs over its own caseload, and would enable it to develop its own policies and approach about the categories and importance of the cases on which it should rule. It would enable it to work out where it sees its greatest added value and concentrate on developing jurisprudence in the areas which most need it. It would also bring the Court broadly into line with other English-speaking Supreme Courts.”<sup>114</sup>

91. The Law Lords opinion is:

“The lower courts in England and Wales and Northern Ireland are very sparing in granting leave, recognising that the Appellate Committee is almost always better placed to decide whether leave should be given or not. But there are cases of obvious urgency when the lower court judges that an Appeal Committee is likely to grant leave, and in such a case leave may be given to avoid a needless waste of time. There are other cases where the lower court may have good reason to think that the final court should consider (or reconsider) a question. This is a valuable discretion. In our collective experience leave is very rarely given by the lower court in cases where the

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112 See para 29ff above

113 See para 29ff above

114 DCA Consultation Paper CP 11/03, para 55



Appellate Committee feels it should not have been given. Appeals as of right are infrequent. The present system works well. We see no reason to alter it.”<sup>115</sup>

### **Administration, funding and support**

92. The new court will be without precedent in the United Kingdom. It will require a completely new set of arrangements for its administration which recognise its absolute need for independence and its United Kingdom role. It is not an English court and the administrative and funding arrangements cannot be part of the English courts system, a danger pointed out by Lord Hope in the passage quoted above.<sup>116</sup>

93. It is vital that the administrative arrangements for the new court reflect the two priorities of judicial independence and the fact that it is a United Kingdom court. At the same time, the new court must be accountable for the public money at its disposal.

94. At present, the Appellate Committee is funded through the House of Lords and its administrative support is provided by the House’s administration under the Clerk of the Parliaments. The new court will need a new funding system.

95. The Government’s proposal is that the administration and resources should come within the responsibility of the Department for Constitutional Affairs.<sup>117</sup> It argues that, although the Department is responsible for the courts in England and Wales it is able to administer the United Kingdom responsibilities when circumstances demand it. It already administers some tribunals which have responsibility which goes beyond England and Wales. In addition, the Government points out that it is the Department which has a United Kingdom responsibility for constitutional matters. The Government argues that establishment of a United Kingdom court by statute would mean that the jurisdiction of the court would be sufficiently clearly defined for the separation of the Court from the English and Welsh system to be guaranteed, in compliance with the Act of Union.<sup>118</sup>

96. There are two problems with this solution. The first problem: this fails to address the concerns of those operating in Scotland and Northern Ireland. If the new court is to be a court which represents all legal traditions in the United Kingdom equally, it cannot be seen to be run by one (the largest) of the jurisdictions that make up the United Kingdom legal framework. Lord Hope of Craighead emphasised the concerns of those brought up on the Scottish legal tradition about anything that might tend to dilute the Scottish legal identity.<sup>119</sup> Lord Bingham was absolutely clear that the new court:

“...which is not of course an English and Welsh court and therefore cannot be and should not be administered by the Court Service of England and Wales, should have its own staff and employees and should have its own budget.”<sup>120</sup>

115 Law Lords’ response to CP 11/03, Question 20

116 See para 25 above

117 DCA Consultation Paper CP 11/03, para 64

118 *ibid*

119 Q 296

120 Q 449

97. The second problem relates to judicial independence. An explanation of the reason for giving a Government department responsibility for administering the new court was given by Sir Thomas Legg, former Permanent Secretary at the Lord Chancellor's Department:

"..... resources come from the House of Commons. It is they—you—who vote them to the judicial branch of government just as you do to every other branch of government. Historically, for good reasons, I think, the House of Commons has never been willing to vote significant resources to the stewardship of people that it cannot in the last resort dismiss. Judges cannot be dismissible by the legislature except for good grounds, which one hopes will have nothing to do with disagreements about the way resources are used. Therefore, for the protection of the judges and not for any other reason I have always thought that we ought to be very cautious about entrusting significant resources to the judges alone. I think they should be in the hands of a minister accountable to Parliament."<sup>121</sup>

98. An alternative approach is that the new court should have an independent corporate status. This would mean that the Supreme Court would formulate its annual budget and present it to Parliament. It would receive its funds directly from the Consolidated Fund. Professor Ian Scott gave evidence to the Committee on this point:

"..... if you look at the proposal in the consultation paper about the administration of the new court, it does not seem to me to be satisfactory because if you are going to be serious about having a Supreme Court which is independent, it pays to do everything you can, consistent with good government, to make it safe. My argument simply is that one way of making it so would be to make it responsible for its own administration. As I say in my paper .....this is not accomplished entirely in one bound by arguments based on constitutional principle. You can argue forever on the basis of the concepts of separation of powers, rule of law and judicial independence and still not come to any conclusion as to how the court should be funded or administered. It is really a matter of good government, and good government is a matter of sustaining, sometimes just by image as much as by rules, independence of the court."<sup>122</sup>

99. The Law Lords unanimously regard it as essential that:

"....a new Supreme Court should enjoy corporate independence in the sense used by Professor Ian Scott in his response to the Consultation Paper. The new court will be a United Kingdom court and cannot be appropriately administered by the Court Service of England and Wales. It must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here."<sup>123</sup>

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121 Q 250

122 Q 246

123 Law Lords' response to CP 11/03

100. Clearly the new court must be seen to be independent. We take Professor Scott's point that the reality of day to day administration is as important for safeguarding the independence of the judiciary as any theory. The argument that Parliament should be able to dismiss all those to whom it votes money is ingenious, if theoretical—there is no prospect of a minister in modern political circumstances being dismissed by Parliament. The ordinary reality of having independence in managing the affairs of the new court is more important. Close attention should be paid to the Australian system, which preserves independence of the High Court within a parliamentary tradition similar to the one in the United Kingdom. **The Department of Constitutional Affairs is not the appropriate organization to run the new court because it is too associated with the England and Wales court system and because giving the Government control over the administration of the new court could offend against the principle of judicial independence.**

### *Names and Titles*

101. A major aim of the proposed changes is an attempt to improve public perception of the judicial system and to increase general understanding of how the system works. If this is to be achieved, the title of the new court is not to be misleading. It is not a United Kingdom court, as far as its jurisdiction goes. The name "Supreme Court" is not a happy choice. Leaving aside the consideration that it partly replicates the formal title Supreme Court of Judicature of England and Wales, it also suggests that in some way it will act as a Supreme Court along the lines of the U.S. model or of other jurisdictions where the Supreme court is a constitutional court which may strike down laws that are held to be inconsistent with the constitution. This will not be the function of the new court.

102. We took some evidence on the titles of the members of the new court. The final choice depends to a great extent on personal taste, but again, the titles should be clear and distinctive from the titles of other members of the judiciary in each of the three jurisdictions. At the same time, they should reflect some of the joint traditions within the legal systems of the United Kingdom.

### *Accommodation*

103. JUSTICE has indicated in its response to the consultation that it is extremely concerned at the issue of resources, since the severance of the Supreme Court from the Upper House would bring considerable additional cost. It states that:

‘The court will need appropriate accommodation. The office of the President will need to be adequately staffed’.

It goes on to emphasise that:

‘Suitable accommodation will be costly and will need to be of a higher quality and extent than currently available’.

104. In a November 2002 paper,<sup>124</sup> JUSTICE complains that the current Appellate Committee of the House of Lords occupies a cramped corridor in the Palace of

124 A Supreme Court for the United Kingdom, para12, JUSTICE policy paper, November 2002

Westminster. It states that this accommodation is not conducive to public accessibility and that there is no room for any support staff, as is usually enjoyed by a court at such a level. It argues that the creation of a Supreme Court would with its own building would:

‘Afford a valuable opportunity to make the court system more open and transparent to the general public’.

105. This stance has been challenged. In a paper issued in January 2003<sup>125</sup> Lord Cooke of Thorndon states that:

‘Like most of the offices in the Palace of Westminster, the rooms of the Lords of Appeal in Ordinary are not spacious. But the accommodation, secretarial services, computers and so forth are not seriously inadequate. In any event grumbling about the facilities would seem in themselves hardly a sufficient reason for changing the constitutional functions of the Law Lords’.

106. The new court, as the Consultation paper recognises, will need new accommodation outside the House of Lords.<sup>126</sup> The Paper goes no further than this, apart from saying that the Law Lords will be consulted as to their precise accommodation needs and that:

“There are a number of options which might be suitable, and a detailed business case will need to be drawn up and costed before any firm proposals can be made. This work will be undertaken in parallel with this consultation exercise”.<sup>127</sup>

107. The court might have as its base a building in central London, or its base might be in a city outside the capital in order to reflect the United Kingdom nature of the court or it might even sit regularly in various parts of the Kingdom, while maintaining a permanent administrative base.

108. The Law Lords’ view is that:

“...we are at one in regarding it as essential that a new Supreme Court of the United Kingdom, if established, should be properly accommodated and resourced, and equipped with the facilities it will need to discharge its public duties to the best possible effect. The Consultation Paper eschews any detailed consideration of this fundamental aspect. While some preliminary thought has, we appreciate, been given to the accommodation which a Supreme Court will require, no business plan has to our knowledge been prepared and no estimate of cost made. The building in which the Court is housed must reflect the importance of the rule of law in a modern democracy; and it must afford the judges (plus their librarians, secretaries, judicial assistants, law reporters, press officer, IT staff; doorkeepers and security staff) the resources and facilities they need.”<sup>128</sup>

109. The argument of convenience, assuming that the new court judges remain members of the Judicial Committee of the Privy Council, is that the court should be based in London.

125 ‘The Law Lords: An endangered heritage’, *Law Quarterly Review*, January 2003

126 DCA Consultation Paper CP 11/03, para 67

127 *ibid*

128 Law Lords’ response to CP 11/03

It will be necessary to give it a “proper building with proper facilities and support services, appropriate to the influence, both historic and continuing, of the United Kingdom’s legal system in shaping the law and legal systems elsewhere in the world and our continuing economic and political standing.”<sup>129</sup>

110. The choice of site for the new court will be very difficult. Of the two possible venues mentioned in evidence to the Committee, Middlesex Guildhall was flatly dismissed by Lord Bingham, the Senior Law Lord, as being unsuitable because of its layout which English Heritage would be unlikely to allow to be altered.<sup>130</sup> He said that he attached “very considerable importance” to the building in which the court is to be housed and that he wanted:

“to preserve the ambiance of our existing hearings. In other words I would not want a court which sat half way up the wall with litigants in pews way below, as is the normal pattern of courts. I would want to preserve the horseshoe table with counsel very close and on the same level and a lack of formality, in dress at any rate, on our part, because I think it is an extraordinarily good medium for discussion”.<sup>131</sup>

Lord Hope said of Somerset House that he was concerned about being drawn back to The Strand, closer to the Inns of Court, which would tend to strengthen the English link.<sup>132</sup>

**111. Delay in finding and making available such accommodation has raised the possibility that the new Court might continue to sit in the House of Lords. Given that the principle argument is that the highest court should be seen to be separate from the legislature, it seems perverse to implement the change in a way which leaves many of the same judges sitting in the House of Lords doing the same job in the same place, possibly with the same staff seconded by the House of Lords. If more time is needed to establish the Court as a distinct body, the timing of its introduction should be adjusted accordingly. Such an important change should not be rushed.**

**112. In the nineteenth century the great reform of the courts system involved the removal of the courts from Westminster Hall, their historic home for centuries, to the Royal Courts of Justice in the Strand. The new court of final appeal for the United Kingdom requires a building which is functionally effective, but which also reflects its authority and significance.**

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129 Dame Brenda Hale’s response to CP 11/03, p 1

130 Q 454

131 Q 453

132 Q 279

## 3 Judicial Appointments

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### Reasons for change

113. The abolition of the office of Lord Chancellor will have very significant consequences for the system of appointing judges to all courts in England and Wales below the final court of appeal. Up to now, the office, combining that of senior judge, cabinet minister and Speaker of the House of Lords, has occupied a unique position in the constitution. Its status has meant that the complex interplay of conflicting demands of independence of the judiciary and Government control have been resolved within a system which, whatever its theoretical defects, has had the confidence of the judiciary and has produced judges who are highly regarded internationally.

114. The appointment of judges of the highest quality is of central importance to the constitution, since they provide the front-line protection of the rule of law, on which liberties of the citizen depend. Direct evidence of the respect in which our judges are held can be found in the fact that the courts in London are a major source of overseas earnings for the United Kingdom. Many foreign companies use the England and Wales courts to arbitrate disputes. The Commercial Bar Association in its response to the Consultation Paper emphasised this point:

“The financial sector is by far the largest single positive contributor to the UK balance of payments with net exports of over £16.7 billion in 2002. Exports of law firms totalled £1.35 billion in 2002, three times more than in 1990. As the Government has rightly accepted, there is a link between the strength of the English legal system and the strength of the UK financial and legal services sector”.<sup>133</sup>

In particular it singles out:

“The international success of English law. In our field, this can be demonstrated empirically. English law and jurisdiction clauses are commonly found in commercial contracts. Significantly, these are contracts entered into by parties who have a choice which system they adopt. The contracts concerned are large, both in number and value. Why do commercial parties chose this jurisdiction? There are a number of reasons... but fundamentally, the jurisdiction is chosen because it is seen as having a reliable system with a history of resolving commercial disputes effectively”. Above all, there is confidence in the judiciary’s ability to decide complex commercial cases. This is a skills issue, as well as being an issue centred upon crucial questions as independence, impartiality and lack of corruption, which in the case of the judiciary in this country are largely taken for granted”.<sup>134</sup>

Professor Stevens, who practises as an American Lawyer, and who advocates a new system of appointing judges involving a Judicial Appointments Commission, emphasised the need

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133 The Commercial Bar Association’s response to CP 10/03, *Building on Strength*

134 *ibid*

to ensure that the present quality of judges had to be maintained.<sup>135</sup> We agree. This is of primary importance.

115. A major function of the Lord Chancellors has been to nominate to judicial posts, as well as to act as an adviser and to consult the senior judges in the case of the most important judicial appointments in England and Wales. With the abolition of the office, the Government's proposals to set up a Judicial Appointments Commission have raised complex issues. We set out below some of the main points. The broad nature of the Government's proposals have left many areas of detail unclear. This is of crucial importance as the devil is in the detail in respect of many of the planned changes relating to the appointment of judges.

116. At present, the Queen, on the recommendation of the Prime Minister, appoints Lords of Appeal in Ordinary, the Heads of Division of the Supreme Court of England and Wales and Lord Justices of Appeal. The Prime Minister makes his or her recommendations on the basis of advice from the Lord Chancellor. The Queen, on the recommendation of the Lord Chancellor, appoints High Court Judges, Circuit Judges, Recorders, District Judges (Magistrates' Courts), Social Security Commissioners, the Judge Advocate General and the Judge Advocate of Her Majesty's Fleet. The Lord Chancellor appoints a wide range of full-time and part-time members of the judiciary, including District Judges (Civil) and Deputy District Judges, and members of a wide range of tribunals.

117. The Legal and Judicial Services Group in the Department for Constitutional Affairs administers the judicial appointments system on the Lord Chancellor's behalf. The Group supplies the information and advice which the Lord Chancellor needs to fulfil his responsibilities in this field and provides him with the material on which to make a judgement about every appointment. This includes consulting judges and members of the profession and others as required. This involves 140 staff. 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.<sup>136</sup>

118. An important change was made to the appointments system in 2001 when a Commission for Judicial Appointments was established for England and Wales with a remit limited to considering complaints about the appointments system and to carrying out audits of its operations, but not to appoint judges. Sir Colin Campbell was appointed the First Commissioner for Judicial Appointments in March 2001 and, by open competition, a further seven commissioners were appointed. These are four men and four women drawn from different sectors, none of whom is a lawyer or judge. The members of the Commission have access to all the relevant departmental and interview papers. They are able to have confidential discussions with those responsible for administering the system. They have also investigated complaints. In their first two annual reports the Commissioners "identified serious and chronic problems" in the old system such that they

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135 Q 72

136 A small proportion of the work included in these figures related to casework post appointment, and not strictly to the appointments process itself; see Department for Constitutional Affairs (DCA) Consultation Paper CP 10/03, *Constitutional reform: a new way of appointing judges*, para 6

recommended that it should be abandoned and that there should be a Judicial Appointments Commission to appoint judges.<sup>137</sup>

119. There is a difficult balance between ensuring the independence of the judiciary and ensuring that the system for appointing the judiciary is properly democratically accountable. The Commission for Judicial Appointments acknowledged in its Annual Report for 2002 that the system's record of ensuring appointments of well qualified people of impeccable probity was very good. It has further stated that in looking at the criticisms of the procedures for appointing holders of judicial office it was important not to lose sight of the fact that the judiciary in the United Kingdom:

‘is the envy of many jurisdictions [and that] unlike many other jurisdictions, there have been virtually no scandals and there is no record of corruption’.

It went on to add that:

‘The [previous] Lord Chancellor has made considerable improvements to the judicial system in recent years and has devoted significant efforts to addressing key issues including those relating to equal opportunities and diversity’.

120. The Government has cited three main reasons for changing the system of judicial appointments in England and Wales:

- at present, the entire process for the appointment of judges is effectively in the hands of the Lord Chancellor.

In the Government's view:

“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.”<sup>138</sup>

- 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 Government said:

“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

137 Q 1

138 DCA Consultation Paper CP 10/03, para 22



the administration of justice and deters some potential candidates from applying for judicial office”<sup>139</sup>

- there is a need to increase diversity in the judiciary.

The Government quoted the existing Commission for Judicial Appointments as pointing out that the judiciary is overwhelmingly white, male and from a narrow social and educational background.<sup>140</sup>

121. The two other jurisdictions in the United Kingdom (Scotland and Northern Ireland) already have Judicial Appointments Commissions. The creation of a Commission in England and Wales would bring the last and largest jurisdiction into line with practice in the rest of the country.

122. Even if the office of Lord Chancellor were to be preserved, there would still be a reason to create a new Judicial Appointments Commission. As Sir Colin Campbell said in oral evidence, the existing Commission for Judicial Appointments:

“... felt that the old system, if it had ever been adequate, [was] for a much smaller profession with a different culture, different expectations about values, transparency and so on ...”<sup>141</sup>

123. Not all the witnesses welcomed the proposed change to a commission instead of the Lord Chancellor. In its response to the Government consultation paper, the Society of Black Lawyers said:

“There has been some, but not substantial, improvement to the appointments’ system for the ethnic minority. This has largely come about as a result of the personal attention to appointments... paid by the Lord Chancellor, Lord Irvine of Lairg. He took a pro-active approach to the appointment of judges. In particular... he was happy, if a case warranted it, not to act on the recommendation given by his officials or by any advisory panel but instead to make appointments based on his personal assessment of an applicant... He actively encouraged ethnic minority applications, agreeing to look personally into the grievances of any applicant [and] the Society is aware of a number of occasions where Lord Irvine reversed a decision not to give an interview or to appoint”.

Mr Peter Herbert, of the Society of Black Lawyers added in oral evidence:

“... I think the issue with the Judicial Appointments Commission is that it will, generally speaking, appoint people who look like, sound like it.”<sup>142</sup>

He emphasised that the membership of the Commission had to be diverse. In addition, he thought that there should be a special appeal process, possibly to the Minister who could intervene and either:

139 DCA Consultation Paper CP 10/03, para 24

140 DCA Consultation Paper CP 10/03, para 27

141 Q 3

142 Q 411

“... firstly, order that the individual case be sent back for a review; or, secondly, intervene and make an appointment; or, thirdly, as a piece of positive action, meet with that person and give positive recommendations as to how their career progression can be developed in the ensuing appointments round.”<sup>143</sup>

Clearly, such an appeal process would be difficult to arrange without undermining the independence of the Commission or opening up the process to charges of political interference. What was possible in practice for a Lord Chancellor is unlikely to be possible for a Secretary of State.

124. Professor Stevens thought that a Judicial Appointments Commission would be cautious in its selection of candidates:

‘Can any Commission, no matter how widely staffed, ever have the Solomonesque judgment of a good Lord Chancellor—or some appropriate single person?’<sup>144</sup>

He has also illustrated the difficulties of entrusting the promotion of judges to higher courts to a Committee, referring to Lord Woolf’s comments of ‘Buggins turn next’<sup>145</sup> and indicating that it would:

‘Surely be more difficult for a Commission, no matter how distinguished its membership, to pass over less distinguished judges to make a promotion to the Court of Appeal, than it was for a wise Lord Chancellor’.

He warns that an executive Appointments Commission runs the danger of leading to a ‘bland, antiseptic bench, technically competent, but ‘safe’’.<sup>146</sup>

**125. The Government must make it a clear objective of the new Judicial appointments Commission to ensure that active efforts of the kind made by Lord Irvine to promote diversity will be continued in the future.** It should be noted that Lord Falconer also talked about diversity in the course of giving evidence. We refer below (paragraph 133) in greater detail to the issue of diversity.

## Model of commission

126. The Government sought views on three possible alternative types of Commission:

- one which makes recommendations directly to the Queen, without intervention by any minister, and which makes those appointments itself which the Lord Chancellor makes at present;
- a Commission which makes recommendations to the minister as to whom to appoint (or recommend to the Queen for appointment);

143 Q 411

144 *Reform in haste and repent in leisure*, paper by Professor Robert Stevens received by the Committee as a response to the consultation exercise

145 Lord Woolf, Speech at the annual dinner for HM Judges, 9 July 2003

146 *Reform in haste and repent at leisure*, paper by Professor Stevens’s and Q 64

- a hybrid Commission which would appoint directly more junior office holders such as part-time judicial and tribunal posts and act as a recommending Commission for more senior posts.<sup>147</sup>

127. In respect of appointments other than the most senior, namely the Court of Appeal and Heads of Division, the Government's initial view was that, on balance, the best combination of independence, accountability and constitutional propriety would be achieved by a Recommending Commission which would generally put forward only one name for appointments to the Secretary of State, who could however reject that name and require another to be put forward. As far as the most senior positions are concerned, the Government preferred that the Commission should continue to play a role but that the Commission should either consult the Secretary of State before making recommendations to the Queen or, if the recommending or hybrid model is used, that the Secretary of State should be required to consult the senior judiciary personally before making a decision and take the advice of the Commission as well.<sup>148</sup>

128. The Law Society indicated that it favoured a hybrid commission, taking the view that all appointments up to and including the Circuit Bench should be made by the Commission. It stated that there needed to be:

“Democratic accountability in relation to the more senior judicial appointments”<sup>149</sup>

It concludes, however, that the Commission should recommend only one person to the Secretary of State, or the Prime Minister, and goes on to state that:

“The...Commission should also have a duty to audit and to publicise information about the number of recommendations turned down by the Secretary of State or the Prime Minister and the stated reason for doing so. Care should be taken to protect the identity of candidates, which should remain confidential”.

129. The Bar Council indicated that it preferred an appointing Commission, with appointments currently made by the Lord Chancellor being made directly by the Commission and more senior appointments (excluding appointments to the Supreme Court, which would be dealt with by a separate appointment body) made by the Queen, upon recommendation of the Commission.

130. On 26 January 2004 the Lord Chancellor announced the Government's latest plans for the arrangements for a Judicial Appointments Commission.

- For magistrates and General Commissioners of Income Tax the Lord Chief Justice will receive advice from local Advisory Committees and make recommendations to the Secretary of State. When it is able to do so, the Judicial Appointments Commission will take over the responsibility for making recommendations to the Secretary of State. There is no indication of when this might be.

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147 DCA Consultation Paper CP 10/03, para 34

148 *ibid*, para 58

149 The Law Society's response to CP 10/03, *Calibre, Diversity and Independence*, p 4

- For judicial appointments above this level, the Judicial Appointments Commission or a special panel will make recommendation of one name per vacancy to the Secretary of State who will be able to accept the recommendation, ask the Commission to reconsider, reject the recommended candidate, or ask the Commission to re-run the application procedure.<sup>150</sup>
- A significant number of senior judicial appointments will not be dealt with directly by the whole Commission, but by special panels of 4 members, two judicial and two lay. In respect of appointments to the Court of Appeal a panel will be appointed chaired by the Lord Chief Justice (who will have a casting vote). The other members will be a Head of Division or Court of Appeal judge, the (lay) Chairman of the Judicial Appointments Commission and a further lay member of the Commission. In respect of appointments to Heads of Division (and the post of Lord Chief Justice), the panel will be chaired by the senior Supreme Court judge from England and Wales (who will have a casting vote). The other members will be the Lord Chief Justice (unless that is the post to be appointed to, when it will be a Head of Division), the Chairman of the Judicial Appointments Commission and a further lay member of the Commission.

**131. The balance of democratic accountability and judicial independence is hard to strike. Witnesses who generally agreed on the need for reform disagreed on the extent to which the Government should have the final say in appointments.<sup>151</sup> The question of the number of names to be proposed is of central importance—and the Government now proposes that only one name be put forward as a recommendation but that the names of other appointable candidates are given to the Secretary of State.**

**132. Any system of appointment must be transparent and any discretion exercised by the Secretary of State will need to be open to challenge in the first instance by way of appeal to the Judicial Appointments and Conduct Referee. Under the current proposals the Secretary of State will be required to give reasons for any choice made. Although it is likely that these reasons will, in the first instance, be given in confidence to the Committee, they may well become public knowledge as a result of an appeal to the Referee. Although we do not regard this as a fatal objection to giving the Secretary of State a choice of names to appoint, it raises practical difficulties, mentioned by witnesses, relating to attracting good candidates who may be put off from applying by the prospect of too public a refusal.**

### ***Diversity***

133. One of the main aims of the Government is to promote diversity in the appointments to the Bench.

### ***The problem***

134. The judiciary does not reflect the composition of society as a whole:

<sup>150</sup> *Constitutional Reform: The Lord Chancellor's judiciary-related functions: Proposals*, January 2004. Paras 114ff

<sup>151</sup> See e.g. Qq 62 and 63

### Statistics on Judicial Appointments:

- Of the 12 Lords of Appeal in ordinary only one is a woman.
- Of the five Heads of Division, only one is a woman.
- Women make up only 7.9% of Lord Justices of Appeal and 5.7% of High Court Judges.
- There are no ethnic minority judges sitting in the High Court, Court of Appeal or the House of Lords.<sup>152</sup>

135. In its 2002 Annual Report, the Commission for Judicial Appointments, however, noted that:

“Appointments to judicial office ... are made from those who have a substantial level of experience in practice. Therefore it is not appropriate to draw comparisons with current gender or ethnic composition of the profession as a whole, but from those who are realistically in the field for appointment.”<sup>153</sup>

136. Gender imbalance is not a phenomenon which is confined to the British legal structure. For instance, in the European Court of Human Rights women only make up a quarter of the Court’s composition.<sup>154</sup> Nonetheless, both there are concerns about the representation of women and ethnic minorities in the judiciary. The Law Society has commented that the statistics reveal that the judiciary:

“...remains the preserve of white male barristers. Solicitors, women and people from ethnic minorities are largely excluded from the ranks of the higher judiciary [whilst] women and ethnic minorities remain under represented throughout the judiciary, despite the fact that over the past 10 years their participation in both branches of the profession has increased.”<sup>155</sup>

The Law Society argues that the under representation of solicitors in the judiciary means that one of the difficulties in ensuring that the judiciary reflects the steadily improving diversity of the legal profession is that the pool from which potential candidates could be chosen remains small.<sup>156</sup>

### *Trickle up approach*

137. It has been suggested that the lack of diversity in the legal system could eventually be

<sup>152</sup> Department of Constitutional Affairs Statistics, as of 1 September 2003; although ethnic or other forms of diversity is a rather elastic concept. Three Lords of Appeal are from South Africa and two are Jewish

<sup>153</sup> The Commission for Judicial Appointments, Annual Report 2002

<sup>154</sup> *Judicial Independence: Law and Practice of appointments to the European Court of Human Rights*, a paper published by Interights, May 2003, indicated that there are currently 11 female judges and 32 male judges on the Court

<sup>155</sup> *Judicial Appointments*, Law Society proposals for reforming the way that judges are appointed, October 2000

<sup>156</sup> *ibid*

addressed by the ‘trickle up effect’.<sup>157</sup> That is due to the fact that the pool of potential applicants under the present system is not the legal profession as a whole, but rather those who entered the profession about 20 years ago. The proportion of women and ethnic minority lawyers entering the profession is now much higher than it was then, which is reflected in a greater proportion of appointments at lower levels of the judiciary.<sup>158</sup>

138. In the Foreword to the Annual Report of the Judicial Appointments Commission for 2002–2003, Lord Falconer indicated that:

‘This year the appointment of candidates from minority ethnic groups to judicial office, including lay appointments, rose to 8.9% from 7.8% last year. The percentage of women appointed to judicial office, including lay appointments, stood at 31%, down 3% when compared with last year’s figures. These figures must be viewed in the context of the pool of appointable lawyers. The proportion of women lawyers, and lawyers from minority ethnic backgrounds, appointed remains higher than the respective proportions eligible to apply. Encouraging though these comparisons are, we will renew our efforts in the current year to move towards a fairer representation of society as a whole’.<sup>159</sup>

139. Although coping with low entry rates is a prerequisite for ensuring a wide range of candidates, an additional problem is the retention of able minority candidates in the legal profession. One reason frequently put forward for an under representation of women, in particular, is that the legal career structure is not particularly compatible with family life. In his paper ‘Reform in haste and repent at leisure’ Professor Robert Stevens contends that some diversity could undoubtedly be produced by building on a wider recruitment base, including not only barristers and solicitors, but also employed lawyers. This idea could encourage well qualified lawyers, who had already been selected and trained by the Government Legal Service, to apply for positions in the judiciary.

140. The Commission for Judicial Appointments identified a “wider systemic bias” in the way in which the legal professions and the judiciary conduct business which does not arise from discrimination by individuals:

“We have found... that there is a disproportionate number of women who drop out of practice before they reach the stage of applying for judicial office. Some of the factors reported to us as particularly affecting women include working practices at the Bar which are not ‘family friendly’, e.g. long working hours, requirements to travel long distances and work away from home; partnership requirements on solicitors, which may delay women’s decisions to start a family; and difficulties in both branches of the profession in re-establishing a career after breaks to have a family.”<sup>160</sup>

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157 In its 2003 report, the Commission for Judicial Appointments acknowledged that the Commission had heard views on whether time alone would result in increasing diversity, which has been referred to as the ‘trickle up effect’, although it was not in favour of that course. Sir Colin Campbell reported that the previous Lord Chancellor had favoured waiting for ‘trickle up’; Q 4

158 The proportion of female Recorders in September 2003 was only 14%, however the proportion of female Reporters in training was 25%. The proportion of ethnic minority Recorders was 3%, however the proportion of ethnic minority Recorders in training was up to 8.5%, DCA Statistics

159 Judicial Appointments 5th Annual Report 2002-2003, Foreword, p 4

160 Commission for Judicial Appointments, Annual Report 2003, para 5.50-5.51

To a great extent, the remedy to problems for women arising from working practices (such as unsocial hours) lies in the hands of the legal profession.<sup>161</sup>

141. The evidence of the Bar Council and the Law Society was that matters had improved a great deal in recent years. Ms Elizabeth Gloster QC said:

“Certainly today it is a far more diverse profession than it has ever been before: 18% of our intake are from an ethnic minority background; 49% are women; 10.5% of the Bar overall are from an ethnic minority background and 30% overall are women”.<sup>162</sup>

Mr Peter Williamson, President of the Law Society, said the women made up 60 per cent of admissions as solicitors.<sup>163</sup>

142. Even with the best practices in place to encourage retention of able minority and women (especially women) potential applicants for judicial posts, we note what Sir Colin Campbell said in oral evidence:

“...we think that the [new] Judicial Appointments Commission will have a very hard job and it will take them seven or ten years to address the balance.”<sup>164</sup>

### *Merit versus positive action*

143. The Government has indicated that primary legislation will provide that the sole criterion for making judicial appointments will be merit.<sup>165</sup> There is a potential conflict between the commitment to appoint on merit alone and the need to encourage and promote diversity. Clearly, any suggestion of appointing candidates solely or primarily because they are members of a minority or female would undermine any successful appointees.<sup>166</sup> This is very different from the extra targeted effort to assist minority and women applicants for judicial posts referred to in above (paragraph 125).

144. There is an argument that promoting diversity improves the quality of judges. In a lecture Dame Brenda Hale has said:

“I prefer to regard the present judiciary as disadvantaged. They mean well. Few if any of its members are actively misogynist or racist: but they have a lamentable lack of experience of having female or ethnic minority colleagues of equal status. They often simply do not know what to do with us or how to interpret what we say. Giving them a greater diversity of colleagues would do them no end of good. So what I am really saying is let's have some affirmative action to rid them of their disadvantages”.<sup>167</sup>

In evidence to the Committee, she said:

161 As an example of a Chambers which is committed to equal opportunities, Lord Lester of Herne Hill's Chambers have 65 barristers of whom two are from an ethnic minority; there are 16 women (four of whom are QCs) and 49 men (24 of whom are QCs); Q 260

162 Q 103

163 *ibid*

164 Q 4 [Sir Colin Campbell]

165 *Constitutional Reform: The Lord Chancellor's judiciary-related functions: Proposals*, January 2004, Para 128

166 Q 424

167 *Equality in the judiciary: a tale of two continents*, 10th Pilgrim Fathers' Lecture, Dame Brenda Hale; and see Q 181

“I am a supporter of confronting the merit principle head on and saying that there are many more very able, capable, independently minded people of integrity who could make a contribution as judges than the ones who are currently regarded as the obvious candidates under the present system.”<sup>168</sup>

145. JUSTICE<sup>169</sup> has rejected the notion that there is a potential conflict between the objectives of sustaining merit and improving diversity. It stated in its consultation response that:

‘There should be no conflict between appointment criteria that include a requirement of merit with an objective of diversity, though this is sometimes erroneously argued. There must be no diminution of the quality of our Bench and, in particular, its independence of government. An independent and courageous spirit must remain a major criterion for senior judicial appointments’.

146. **We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments.** As Mr Oba Nsugbe QC said:

“... you have got to get there much earlier, to people coming out of college, coming out of Bar school, coming out of law school. This means workshops, it means lecturing, it means mentoring and it means supporting those people who have got through the system so that they can play an important role in encouraging other people much, much earlier. I was fortunate. I was in a set of Chambers where we had plenty of information and there was a track record of appointments. There were lots of recorders and circuit judges ..... so I got information pretty much after three or four years. I think the other issue ..... is ..... access to work because if you do not get access to the quality work and you are not tested where it really matters, with responsibility, you will not get appointed...”<sup>170</sup>

### *Current system – “secret soundings”*

147. A major feature of the present system of appointments to the judiciary is the system of consultation, often called “secret soundings”.<sup>171</sup> These consist of exhaustive confidential references about candidates collected from judges and senior members of the profession. Sir Thomas Legg, who ran the system when he was Permanent Secretary at the Lord Chancellor’s Department, is “an unrepentant believer” in confidential consultations about candidates for judicial appointment. In a paper for the Committee he commented:

“[Private consultation] will always happen anyway, here as [...] in other professions and (as research shows) in other countries. The important thing is to regulate and

168 Q 183

169 JUSTICE is an all party law reform and human rights organisation. Its stated aims are to improve the legal system and quality of justice, in particular by: (i) Promoting human rights; (ii) Improving access to justice; (iii) Improving criminal justice; and (iv) Raising standards of EU justice and home affairs

170 Q 421

171 And see paragraph 49 above; but see Mr Mathias Kelly QC’s objection to calling it “secret soundings”—Q 114



legitimate the consultation process, though not so heavily as to make it impracticably politically correct, and to make its coverage as wide as possible, with the aim of getting a true verdict of the relevant professional community. What is needed is not a recommendation but an assessment. The views of the professional community are and should be an essential part of this, though not the only part. That is why I have always favoured the introduction of the best available human resources techniques from other walks of life, going beyond the necessary but fallible device of interviewing, and I welcome the introduction of such methods as assessment centres.”<sup>172</sup>

148. The system of confidential consultation has many critics inside and outside the profession. Lord Lester of Herne Hill, who had taken part in the appointments for Assistant Recorders for five years, when Lord Mackay had been Lord Chancellor said:

“I have been sounded, especially for QCs, and nothing is more arbitrary, I promise, than being able in confidence to put down your views about colleagues with no come-back. My colleague from the Lord Chancellor’s Department, who has never shown me the secret soundings because it would be quite improper, I could tell was himself shocked by some of the comments that judges were making about would-be candidates...”<sup>173</sup>

149. Sir Thomas Legg described in detail the criteria for selection for judicial appointment:

“Up to now, broadly speaking, judges, and especially senior judges, have been appointed on the basis of two fundamental principles. One could argue about those principles; one could say the time has come to change them, but these have been the principles up to now. One is that we have appointed people who have established themselves as among the most eminent practising advocates of their day. There are a few individual exceptions to that but that has been the norm. Actually, although I have never seen it written down, that has been the number one provision in the job description. It has been supposed that that is the primary formation for a senior judge. Secondly, we have tried to appoint people (and it is not always easy to do) on the basis of what I have called (and you have referred to this) maximal merit, that is to say, there is only one candidate who is appointable and that is the best one who is available, if you can identify the person. Perhaps I should add a further principle, that is, that it is not the function of the judiciary to represent or reflect any particular group in the community. Against that background we have felt that it was right for us to encourage people to apply who we felt were not applying when they should, and that has particularly applied to women and members of the ethnic minorities.”<sup>174</sup>

150. In its response the consultation exercise, the Association of Women Judges stated that:

“The current system of appointing to the High Court by invitation is discriminatory to women, who are likely to be less visible than men. Further, it is an approach which places undue emphasis on advocacy and on seniority of barristers. That approach is

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172 Ev 117 para 9

173 Q 268

174 Q 263

unlikely to identify others, e.g. members of the junior bar, academics and solicitors, who might be suitable to hold office. All those who aspire to judicial office should be prepared to make an application and submit to assessment and interview”.

151. The Commission for Judicial Appointments has also drawn attention to concerns in relation to appointment procedures in its 2003 Annual report, noting that there is a risk that:

“Consultees and panel members may have held underlying assumptions about the relevance of the type of experience a legal practitioner, other judicial experience or personal background and experience which might have influenced their views about who is suitable for appointment... and inhibited their consideration of other candidates against the published appointment criteria.”<sup>175</sup>

The Commission for Judicial Appointments considered that there was “a strong case for discontinuing the use of automatic consultation, at least in its present form, in the judicial appointments procedures in England and Wales”.<sup>176</sup> Sir Colin Campbell said that the present system of informal consultation should be replaced.<sup>177</sup>

152. There have been criticisms that appointment to the senior judiciary depends upon being ‘known’ by members of the professional community. Karon Monaghan, a Barrister at Matrix Chambers, specialising in discrimination and employment law, has claimed that there is strong evidence that such a requirement disadvantages ethnic minority lawyers and women who may be outside the traditional networks.<sup>178</sup> Such a requirement is also perceived to discourage otherwise qualified candidates.<sup>179</sup>

153. Since 1998, it has been possible to apply for appointment to the High Court. However, the Lord Chancellor also reserved the right to invite persons who had not applied to accept appointment. The majority of appointments, 23 out of 36 between 1999 and 2003, were by invitation. Because of concerns with the transparency and fairness of the process the Bar Council’s working party on judicial appointments and silk, chaired by Sir Iain Glidewell, recommended (by a majority) that all candidates should apply. A minority, however, expressed the view that that would lead to the risk of missing some outstanding candidates who might be reluctant to put themselves forward.

### *Career structure for the Judiciary*

154. A change in the criteria for selection of judges from choosing well-known advocates to opening the field to a wider group of candidates inevitably leads to the question of age of first appointment and, therefore, the question of promotion for judges. In its response to the consultation, JUSTICE envisaged:

<sup>175</sup> The Commission for Judicial Appointments, Annual Report 2003

<sup>176</sup> *ibid*, para 5.39

<sup>177</sup> Q 29

<sup>178</sup> In a paper entitled *Discrimination in the Appointment of the senior judiciary and silk*

<sup>179</sup> The Law Society’s evidence (among others) supported this view; Q 106 and Q 112ff

‘A major policy initiative aimed at women in their 30’s who currently leave the profession... designed to encourage them to take lower judicial posts, particularly those of tribunal chairs, in the knowledge that internal appointment will allow for promotion within the profession on merit’.

It also suggests that:

‘In time, one could imagine a multi-track judiciary in which some of the senior judiciary come from senior practitioners as now, but mixed much more with a hybrid model between domestic and European experience, whereby a practitioner can develop a career through the judiciary after a fairly short period in practice’.

The suggestion for part time arrangements has already been attacked, however, by a leading woman barrister, who suggests that it is a way in which the government can manipulate the judiciary.<sup>180</sup>

155. The Consultation Paper indicated that the Government did not believe that a fully career judiciary on the Continental model would be appropriate for the common law system of England and Wales, but that:

“...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.”<sup>181</sup>

156. The Bar Council agreed with this approach, but emphasised that :

“...although it should be possible to be promoted in this way, it should remain the case that appointments are mainly made to the Circuit and High Court bench from practitioners rather than more junior judges, since many of the individuals most suitable for appointment to the High Court bench, for example, would not be willing to serve as District Judges or Circuit Judges and would thus be lost from the appointments process if service in these more junior judicial roles was a pre-requisite of appointment.”<sup>182</sup>

**157. The rule of law is fundamental in maintaining basic freedoms; considerable emphasis is placed on judicial independence in the constitutional system. Judges (especially in the junior ranks) who wish to be promoted but who may be dealing with cases in which the Government is a party must not be put in a position where their**

180 Barbara Hewson, in a letter to the *Financial Times*, July 18 2003, ‘Acknowledge the judiciary’s diversity before letting a mums’ army loose in the courts’ in which she notes that 49% of the lay magistracy is female and that three of the 12 Law Lords are from South Africa and two are Jewish. She goes on to conclude that there is ‘a corrosive message in these diversity campaigns: no one can be trusted to be neutral or impartial. We are all in thrall to sectarian interests’

181 DCA Consultation Paper CP 10/03, para 95

182 Bar Council’s response to CP 10/03, para 68

future professional prospects are—or may seem to be—open to influence as a result of decisions in particular cases. This might be the case if a continental system of career judges were adopted. We agree that such a system would not fit with the legal system in England and Wales.

158. Flexibility in the system of selecting candidates and encouraging people to apply must not threaten—or seem to threaten—judicial independence. A career structure that involves an expectation of promotion makes it even more vital that the current freedom from partisan interference in appointing and promoting judges is maintained.

159. A successful approach to ensuring that there is a greater diversity in judicial appointments requires leadership. In the past, the Lord Chancellor has provided this, as we acknowledge Lord Irvine did during his tenure of office (see paragraph 125 above). The new Judicial Appointments Commission must provide this leadership by implementing strategies to widen the field of applicants for judicial office. Merit will remain the key criterion for appointment. The new Commission should define “merit”.

### *Duties of the Appointments Commission*

160. Sir Colin Campbell has a view of the work of the proposed new Judicial Appointments Commission as involving a series of boards to design systems and to delegate the task of implementing newly designed systems. He sees this as including the development as work progresses of other reforms to increase diversity in the legal profession and the judiciary.<sup>183</sup> His approach makes possible a Commission with an open role to promote diversity which will mean a set of changing tasks. It is not clear how far this will be possible within a statutorily defined structure, but it raises the question of the extent to which the Commission should merely nominate and how far it should design appointment systems. The wider the remit of the Commission is made, the greater the need for democratic accountability will be.

161. The Government has sought views on whether 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. The status of a judge after appointment is that of an office-holder not of an employee and the Commission would not be an employer. This is to ensure judicial independence. 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 on the basis of an Address from both Houses of Parliament. Notwithstanding this, the Government has suggested that there may nevertheless be merit in the Commission having a role in some aspects of the working life of judges once they are appointed. 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.

162. In addition to discipline, the Lord Chancellor has duties covering judicial training, responsibility for policy related matters on judicial appointments and administrative matters such as assigning judges to circuits.

163. Sir Colin Campbell said that:

“.....when it comes to questions of appointment, appraisal, promotion and discipline, they must help to design the systems but, if you care for the independence of the judiciary, it will be the senior judiciary that manage these systems.”<sup>184</sup>

He further explained that if judges were to be appointed at a younger age and progress up the judicial ladder, then:

“You would have to have an appraisal system in place to decide if this judge or that judge was actually good enough to go up to the next level. So, I think that the Judicial Appointments Commission would help to design such an appraisal, but I think the people carrying out the appraisal of me, as a junior judge, would be senior judges because they are the ones with the true expertise able to do it.”<sup>185</sup>

The same would be true of disciplinary matters.

164. There is clearly going to be a vacuum created by abolition of the role of the Lord Chancellor in connection with discipline of the judiciary. It is unlikely that a Judicial Appointments Commission will be able to take over this role satisfactorily. Apart from the demands of its own core tasks, such a body might find it harder to carry out the delicate function of guiding and warning judges as well as a single office holder. The arguments are strongest in favour of leaving this matter to a senior judge—presumably the Lord Chief Justice of England and Wales. We note the Government’s proposals in respect of judicial discipline. We took no evidence specifically on the role of the Lord Chancellor in relation to these and other matters such as training and assigning judges to circuits. There are serious issues related to these functions which go to the heart of judicial independence. It is a matter of regret that the timescale of the inquiry prevented close examination of this aspect of the abolition of the office of Lord Chancellor.

**165. We regard it as self-evident that any powers to discipline judges or decision to promote them should be within a system that the judiciary and public believe preserves judicial independence. The Lord Chancellor has always played a central role in reaching a compromise between the conflicting imperatives of maintenance of discipline and judicial independence. There is—and always has been—a clear tension between the right of judges to hold office during good behaviour and the need to ensure proper standards are maintained. It is a reflection of the success of the system that up to now so few cases have caused serious controversy. Any new system of discipline will need to be firmly within the control of the judiciary in individual cases, and we believe that the Lord Chief Justice should be the person primarily responsible for it. The relevant provisions of the Bill will need to be very carefully examined.**

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184 Q 48

185 Q 49

### *Status, organization and funding of Commission*

166. The status of the Commission is a most important question, from the point of view of independence of the judiciary. It will be established on a statutory basis, with a legal personality of its own. The Government put forward three options as models for the structure of the Commission: a Non-departmental public body;<sup>186</sup> a Non-departmental public body supported by an agency;<sup>187</sup> and a Non-ministerial Department.<sup>188</sup> These options vary in the degree of independence from Government and in their financial arrangements and accountability:

- A Non-Departmental Public Body—the Commission would be responsible for recruiting and employing its own staff, possibly including civil servants on loan. The Commission would be independent of Government but would be sponsored by the Department for Constitutional Affairs which would fund it. It would be subject to scrutiny by this Committee and would be required to submit to Parliament an Annual Report.
- A Non-Departmental Public Body supported by an Agency—the Commission would be staffed by civil servants of the Department for Constitutional Affairs, working in an executive agency under a chief executive who would also be the Secretary of the Board. 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.
- A non-ministerial department—the Commission would be financially accountable to Parliament, and not dependent on the Department for Constitutional Affairs for its resources, but it would remain a Government department rather than being independent.

167. The Government’s initial view was (and remains) 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.

168. We note Professor Stevens’s comments that to some extent a commission will be just a more expensive way of doing what is done now: Because of this he emphasised that the Commission had to represent an improvement in the system of appointments,

“...but actually a large part of its function will be doing more expensively and more properly what has been done in the past and the Government will have to come up with the money for that. It would be a tragedy if that money were to come from the obvious sources within the DCA budget, that is to say the Court Service, the Community Legal Service and the Criminal Defence Service.”<sup>189</sup>

We agree.

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186 DCA Consultation Paper CP 10/03, para 79

187 DCA Consultation Paper CP 10/03, para 80

188 DCA Consultation Paper CP 10/03, para 81

189 Q 73

## Membership of the Commission

169. The various possible permutations of the size, membership and method of appointment of the Commission are crucial details. They will determine whether the Judicial Appointments Commission manages to combine an appropriate degree of Government control with sufficient independence to create confidence in the system.

### *Size of Commission*

170. The Government proposes that the new Commission have 15 members: 5 judicial, 2 representative of the legal profession, 1 lay magistrate, 1 tribunal member and 6 lay persons. This would make it large compared to the senior boards of other similar bodies, but it states that 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.”<sup>190</sup>

171. The Government Consultation paper indicates that 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. Sir Colin Campbell said that the proposed size of the Commission would make it a large group to organize, but that the workload of the Commission would be “immense”.<sup>191</sup> This would be particularly true if, as Sir Colin suggested, the work of the Commission were to include designing the system for all judicial appointments.<sup>192</sup>

## Composition of Commission

### *Nomination by members of the legal profession*

172. The Government intends that members of the new Commission will be appointed using open and transparent methods in accordance with the Nolan principles. Nevertheless, it has indicated that there will be one barrister and one solicitor member of the board.<sup>193</sup>

173. The two parts of the legal profession disagree about the extent to which both parts of the legal profession ought to have an automatic right to be represented on the

<sup>190</sup> DCA Consultation Paper CP 10/03, para 117

<sup>191</sup> Q 24

<sup>192</sup> Qq 25 and 26

<sup>193</sup> HL Deb, 26 January 2004, cols 13-17; *Constitutional Reform: The Lord Chancellor's judiciary-related functions: Proposals*, January 2004

Commission. The Bar Council states that members of the Commission who are lawyers should be nominated by the Chairman of the Bar Council and the President of the Law Society respectively.<sup>194</sup>

174. The Law Society does not concur with this view, stating that all Commission members should be appointed following open competition. It has indicated that it does not:

“... favour bodies being given a statutory right to have a member on the Commission. We are influenced in this view by our perception that some existing non-departmental government bodies, and some judicial appointments commissions in other parts of the world, feel they work less effectively and cohesively because individual members are there by virtue of nomination from a particular body. This arises from a view by nominated members that part of their role is to represent the view of a particular constituency, or perhaps a group of candidates”.

The Law Society thinks that various bodies should be consulted and encouraged to identify candidates to apply to the Commission, but considers that as well as the professional bodies, bodies such as the Civil Justice Council, JUSTICE, The Constitution Unit and various networks for women and ethnic minority solicitors and barristers should be considered.<sup>195</sup> JUSTICE also thought that all non-judicial members should be appointed after open competition, claiming that there should be ‘no nomination rights, e.g. for the professional bodies’.<sup>196</sup>

**175. We recognise that members of the Commission should not regard themselves as representing a narrow sectional interest. However, it would be strange if leading members of the two branches of the legal profession were not included among the Commission’s members.**

### *Balance of membership between judges and lay people*

176. The question of the balance of membership is also important: should the Commission be predominantly made up of judges or mainly of lay people? What should the proportions be? The Government’s preferred option is for the judges, legally qualified or lay judicial members and lay members to be nearly equally represented. The Government proposed to include any academic lawyers in the five places reserved for the legal profession, rather than in the five lay places—it now proposes to include academic lawyers in the lay membership.<sup>197</sup> Sir Colin Campbell expressed the point of view of the (current) Commission for Judicial Appointments:

“We say a lay majority because we think that nowadays the public happen to be more comfortable if there is a lay majority over medics or a lay majority over academics or a lay majority over lawyers. It gives you confidence that they are not people with

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194 Bar Council’s response to CP 10/03, p 8

195 The Law Society’s response to CP 10/03, *Calibre, Diversity and Independence*, p 20

196 JUSTICE’s response to CP 10/03; Q 68

197 DCA Consultation Paper CP 10/03, para 121, and *Constitutional Reform: The Lord Chancellor’s judiciary-related functions: Proposals*, January 2004



vested interests. Having chaired the Commission that I am on just now with seven lay people, I can tell you that it works in an outstanding way”.<sup>198</sup>

177. The Law Society has concluded that the Commission should be chaired by a lay person and that half of its members should be lay. It has indicated that an appropriate balance could be three judges, three members of the legal profession (selected by open competition), one legal academic and eight lay members, including the chair. It is influenced in its desire to see a strong lay element by the achievements of the Commission for Judicial Appointments, noting that:

“It is an entirely lay body and yet demonstrates clearly that if people of the right calibre are appointed they are well able to grapple with the complex issues surrounding the appointment of judges”.<sup>199</sup>

178. The Bar Council contend that the majority of the membership should be judicial members, with two legally qualified members appointed by the two legal professional bodies and the rest of the Commission being made up of lay members. Ms Elizabeth Gloster said:

“...we took the view that it is important that the Commission reflects a suitable amount of judicial knowledge about applicants and therefore....there should be a considerable number of members of the Commission who are judges, not just Court of Appeal judges but also representatives of the Circuit Bench and the District Bench as well as the High Court Bench.”<sup>200</sup>

179. This view is also backed by the Council of Europe’s voluntary ‘European charter on the statute of judges’ which sets out a set of principles for an independent judiciary, and suggests that “at least one half of those who sit [on the appointing body] are judges elected by their peers.”<sup>201</sup> The Bar considers that the Chair should be a lay member, but that he should be legally qualified, and thus not lay in the strict sense.

180. In its response, JUSTICE has indicated that it would prefer a Commission where there would be four judges and four lawyers, academic and practising, while the other seven would be lay members, including one who would always be the chair. In particular, it has argued that:

‘We think it highly desirable that a legal academic of some distinction be appointed to the Commission as one of the lawyers. Such a commissioner should be able to hold their own, both intellectually and as a lawyer, with the most senior of the judiciary’.<sup>202</sup>

181. In a response the Consultation exercise, Lord Justice Keene has commented that:

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198 Q 31

199 The Law Society response to CP 10/03

200 Q 120

201 Daj/Doc (98) 23

202 JUSTICE’s response to CP 10/03

“The proposed composition... seems to have paid scant regard to the recommendation of the European Charter on the Statute of Judges that at least half the membership of such a commission should be judges”.<sup>203</sup>

He goes on to note that the existing Court of Appeal and House of Lords judges are undoubtedly in the best position to assess the merits of candidates for the Court of Appeal, since they see the civil judgments and criminal summings-up of High Court judges every working day.

182. As Sir Colin Campbell pointed out:

“...any chairman will try to get his committee to work together rather than having the lawyers against the laymen or vice-versa.”<sup>204</sup>

Nonetheless, the balance of who serves on the Judicial Appointments Commission is important. There is no identifiable strand of generally agreed opinion on the precise balance between lay and judicial or legal members, although the choice of approach between a predominantly lay Commission and one dominated by judges depends on the degree to which the judiciary are seen as potentially appointing members of the profession in their own likeness. The Appointments Commission in Scotland has worked successfully without a majority of judges or even of lawyers.

### **Chair of Commission**

183. The Government put forward two options for who could chair the Commission. The Chair would be drawn from one of the membership groups discussed above and could be either: (a) an eminent non-legal person, which would help to ensure that the lay voice in the Commission was heard, and could enhance public confidence in the independence of the Commission; or (b) a senior judge, such as the Lord Chief Justice, in order to strengthen the judicial representation on the Commission, bring prestige to the Commission and ensure that it commanded the respect of the judiciary and the legal profession.

184. When we spoke to Sir Colin Campbell about whether there should be a lay or a legal chair, he was firmly of the view that “in terms of the current mood about transparency and accountability”<sup>205</sup> there should be a lay chair. This would, in Sir Colin’s view, ensure that no vested interests were being served by the occupant of the chair. Thus, the occupant of the chair should be—if not a judge—then a person who had exercised a significant role in life outside the legal world.<sup>206</sup>

**185. Notwithstanding the arguments in favour of a lay Chair, we believe that the Commission should be chaired by a judge.**

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203 Lord Justice Keene’s response to CP 10/03

204 Q 32

205 Q 33

206 Qq 35ff

### ***Method of appointing commissioners***

186. The Government proposes that members of the Judicial Appointments Commission for England and Wales should be appointed using open and transparent methods, in accordance with the Nolan principles.<sup>207</sup> 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. There would be a separate recommending body, whose recommendations would be passed to the Prime Minister who would make the formal recommendation for appointment to The Queen. The Government originally thought that this body should be chaired by the Permanent Secretary of the Department for Constitutional Affairs, but now has said that it should be chaired by the Commissioner for Public Appointments. Other members of that recommending body would be the Lord Chief Justice, ex officio, a member chosen by the Commissioner for Public Appointments and the Chair of the Commission, once appointed. Further details have still to be worked out.

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207 The seven Nolan principles are selflessness, integrity, objectivity, accountability, openness, honesty, and leadership

## 4 Conclusion

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187. Opinions differ about the need for the changes proposed. Every informed commentator agrees, however, that they are extensive. Our concern is that all the proposed changes consequent on the abolition of the office of Lord Chancellor are being bundled together and dealt with over a very short timescale as a single reform. This makes the process unwieldy and, in the case of some of the proposals, precipitate. The Consultation Paper on the abolition of the office of Lord Chancellor admitted that the consultation period was less than the usual period of twelve weeks which has been seen as appropriate for far less sweeping changes.<sup>208</sup> In evidence to the Committee the Lord Chancellor said that the period of consultation and debate would stretch over eighteen months, from the first announcement to final agreement of the legislation.<sup>209</sup> He emphasised two reasons for the need for speed in legislating to bring the proposals into law: a technical one that authority for spending money on a new building or extensive refurbishment of an old building needs prior agreement at Second Reading for giving authority; and a more general “leadership” one, namely that the proposals would run out of steam if they were delayed at all.

188. These objections to delaying the process, especially to having draft legislation, do not explain why the proposed changes could not be brought in incrementally. For example, many of the objections to having members of the final court of appeal in the House of Lords might be dealt with by changes to the Standing Orders of the House of Lords (as pointed out by Lord Hope<sup>210</sup>) that Lords of Appeal in Ordinary who are serving do not speak or vote in matters relating to legislation. The early introduction of a Judicial Appointments Commission in England and Wales means that the experience of the similar bodies in Northern Ireland and Scotland—which are very new and have little operational experience—would prevent the England and Wales Commission from benefiting from the lessons to be learnt as a result of the establishment of those bodies. In any event, loss of momentum could be used to justify never having any draft bills at all on important subjects. Draft bills are appropriate whenever there is any significant proposal which is complex, introduces fundamental change and is controversial. The use of draft bills should not be confined to matters of technical complexity. **The Constitutional Reform Bill is a clear candidate for examination in draft.**

189. We are concerned that an over-hasty introduction of fundamental reform may jeopardise the success of the new arrangements for the final court of appeal and appointment of judges—not least because of a lack of confidence in them among members of the judiciary. We note and agree with the comments of Lord Woolf, the Lord Chief Justice, on 26 January 2004 in responding to the Government’s latest announcement about the proposed changes:

“A settlement responding to the proposed new situation would have to ensure: first, that the judges retain the confidence of the public; secondly, that the independence

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208 DCA Consultation Paper CP 13/03, *Constitutional reform: reforming the office of the Lord Chancellor*

209 Q 505

210 Q 282

of the judiciary is maintained; thirdly, that the quality of the judiciary continues to be outstanding; fourthly, that there is an appropriate and harmonious relationship between the judiciary, Parliament and the Government; fifthly, that the resources essential to an effective and efficient court system are provided.”<sup>211</sup>

190. Whatever changes Parliament agrees to, it is of central importance that there should be strong safeguards to preserve judicial independence if the reforms are not to have the reverse effect of the one intended. Although the judiciary should not have a veto over reform, in the final analysis if the judges are not confident that the reforms provide such protection, it is highly doubtful that the proposals should be allowed to proceed. If the reforms fail to reassure public opinion of the extent of judges’ freedom to carry out their duties without interference then they will not achieve the Government’s stated aims of “taking account of people’s expectations about the independence and transparency of the judicial system”<sup>212</sup> or of the judiciary being “seen and trusted as independent of the government of the day”.<sup>213</sup>

**191. The abolition of the office of Lord Chancellor should be delayed until the reforms are established.**

**192. If the reform is inaugurated in the form of a Supreme Court which is still temporarily sitting in the House of Lords, looking much like its predecessor, it will not meet the desire of the Government and the supporters of reform to make the Court appear clearly separate from the legislature.**

**193. The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political. In the light of the complex issues raised and the ambition on the part of the Government to create a new settlement for a final court of appeal for the United Kingdom we recommend that the Government proceed with the Constitutional Reform Bill on the basis of its being draft legislation—in particular in respect of the proposals for a new court of final appeal. If this course of action is followed, it is likely that many of the arrangements could be agreed on a consensual basis. If the plan is to create a court to last for centuries, then this must be an objective worth spending some time on.**

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211 HL Deb, 26 January 2004, col 22

212 DCA Consultation Paper CP 11/03, para 1

213 DCA Consultation Paper CP 10/03, para 22

# Conclusions and recommendations

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## General

1. Whoever carries out the functions of the office of Lord Chancellor will be in charge of the Court Service and will play a central role in the administration of justice. Part of that role is the protection of the judiciary from political pressure in Cabinet and, when necessary, in public. There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with possible advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion. (Paragraph 13)
2. The way in which these fundamental proposals were announced, as a part of a Cabinet reshuffle and without consultation or advice, has created anxieties amongst the most senior members of the judiciary and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them. (Paragraph 14)
3. These are not simple matters on which to legislate. We set out to examine the proposals and their consequences in more detail, in order to establish whether difficulties could be resolved, and to establish how much time would be needed to resolve them. We became increasingly aware of the complexity of the issues. (Paragraph 15)

## A Supreme Court

4. Both those in favour of the change and those against were united in emphasising that the present system was one which worked. The arguments for change were about principle and perception. (Paragraph 23)

## *Jurisdiction*

5. The legislation establishing the new court will need to make clear the jurisdiction of the court. It will need to establish the extent to which it is a United Kingdom court as opposed to a final court of appeal serving each of the United Kingdom's three jurisdictions. (Paragraph 27)

## *Scottish Appeals*

6. The jurisdiction of the Supreme Court over Scottish appeals and any changes will require legislation or a resolution of the Scottish Parliament. These issues are significant to the maintenance of Scottish law as a distinct entity. They were not addressed when the Government first announced its proposals and the timetable for decisions on the Supreme Court needs to allow for proper resolution and discussion of them in the Scottish Parliament. (Paragraph 39)

### ***Membership of the Court***

7. There are two aspects which need to be kept in mind when discussing the membership of the new court. The first is the need for special expertise in the laws and understanding of the society in all parts of the United Kingdom—this is particularly true of the distinction between Scottish law and the law in the rest of the United Kingdom. The second is the need for there to be an equal sense of ownership of the new court in all parts of the United Kingdom. The Constitutional Reform Bill will need to make clear provision for the arrangements relating to representation of the various parts of the United Kingdom. It will need to set out clearly the principles under which members of the new court are appointed. (Paragraph 47)

### ***Selection and appointment process***

8. The reality of the situation affecting the new court is that the range of possible candidates is always going to be small. Increasing diversity depends on increasing the pool of available talent from which to choose. It is possible to envisage candidates being selected straight from practice or academic life, but we expect that the more productive route towards increasing the diversity of the membership of the new court will be by way of more broadly based appointments to the courts below. Once a person has sat frequently as a judge they will be in the same position as any other candidate. (Paragraph 63)
9. Vacancies in the new Court should be publicised and open to application in line with most other public service appointments. It will still be necessary for some element of active searching for candidates to take place. (Paragraph 64)

### ***Relationship between Supreme Court and Parliament***

10. From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers. (Paragraph 80)
11. As a minimum we would expect the new court to provide an Annual Report to Parliament of the use of the money in its budget and a description of its work over the course of the year. If necessary, Parliament should be ready to hold hearings relating to the financial support required by the new court. The general work of the Judicial Appointments Commission responsible for recommending appointments to the new court will also fall to be examined by this Committee (though not normally its conduct in relation to specific appointments). (Paragraph 81)
12. While we heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges, we recognise the potential benefits to public understanding of the role of the new Supreme Court if a practice were to be adopted of inviting Judges, including recently appointed ones, to appear

before an appropriate Committee from time to time (including this Committee). (Paragraph 87)

### **Operational matters**

13. The Department of Constitutional Affairs is not the appropriate organization to run the new court because it is too associated with the England and Wales court system and because giving the Government control over the administration of the new court could offend against the principle of judicial independence. (Paragraph 100)

### **Accommodation**

14. Delay in finding and making available such accommodation has raised the possibility that the new Court might continue to sit in the House of Lords. Given that the principle argument is that the highest court should be seen to be separate from the legislature, it seems perverse to implement the change in a way which leaves many of the same judges sitting in the House of Lords doing the same job in the same place, possibly with the same staff seconded by the House of Lords. If more time is needed to establish the Court as a distinct body, the timing of its introduction should be adjusted accordingly. Such an important change should not be rushed. (Paragraph 111)
15. In the nineteenth century the great reform of the courts system involved the removal of the courts from Westminster Hall, their historic home for centuries, to the Royal Courts of Justice in the Strand. The new court of final appeal for the United Kingdom requires a building which is functionally effective, but which also reflects its authority and significance. (Paragraph 112)

### **Judicial Appointments**

16. The Government must make it a clear objective of the new Judicial appointments Commission to ensure that active efforts of the kind made by Lord Irvine to promote diversity will be continued in the future. (Paragraph 125)
17. The balance of democratic accountability and judicial independence is hard to strike. Witnesses who generally agreed on the need for reform disagreed on the extent to which the Government should have the final say in appointments. The question of the number of names to be proposed is of central importance—and the Government now proposes that only one name be put forward as a recommendation but that the names of other appointable candidates are given to the Secretary of State (Paragraph 131)
18. Any system of appointment must be transparent and any discretion exercised by the Secretary of State will need to be open to challenge in the first instance by way of appeal to the Judicial Appointments and Conduct Referee. Under the current proposals the Secretary of State will be required to give reasons for any choice made. Although it is likely that these reasons will, in the first instance, be given in confidence to the Committee, they may well become public knowledge as a result of an appeal to the Referee. Although we do not regard this as a fatal objection to giving



the Secretary of State a choice of names to appoint, it raises practical difficulties, mentioned by witnesses, relating to attracting good candidates who may be put off from applying by the prospect of too public a refusal. (Paragraph 132)

19. We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments. (Paragraph 146)

### ***Diversity***

20. The rule of law is fundamental in maintaining basic freedoms; considerable emphasis is placed on judicial independence in the constitutional system. Judges (especially in the junior ranks) who wish to be promoted but who may be dealing with cases in which the Government is a party must not be put in a position where their future professional prospects are—or may seem to be—open to influence as a result of decisions in particular cases. This might be the case if a continental system of career judges were adopted. We agree that such a system would not fit with the legal system in England and Wales. (Paragraph 157)
21. Flexibility in the system of selecting candidates and encouraging people to apply must not threaten—or seem to threaten—judicial independence. A career structure that involves an expectation of promotion makes it even more vital that the current freedom from partisan interference in appointing and promoting judges is maintained. (Paragraph 158)
22. A successful approach to ensuring that there is a greater diversity in judicial appointments requires leadership. In the past, the Lord Chancellor has provided this, as we acknowledge Lord Irvine did during his tenure of office (see paragraph 125 above). The new Judicial Appointments Commission must provide this leadership by implementing strategies to widen the field of applicants for judicial office. Merit will remain the key criterion for appointment. The new Commission should define “merit”. (Paragraph 159)

### ***Duties of the Appointments Commission***

23. We regard it as self-evident that any powers to discipline judges or decision to promote them should be within a system that the judiciary and public believe preserves judicial independence. The Lord Chancellor has always played a central role in reaching a compromise between the conflicting imperatives of maintenance of discipline and judicial independence. There is—and always has been—a clear tension between the right of judges to hold office during good behaviour and the need to ensure proper standards are maintained. It is a reflection of the success of the system that up to now so few cases have caused serious controversy. Any new system of discipline will need to be firmly within the control of the judiciary in individual cases, and we believe that the Lord Chief Justice should be the person primarily responsible for it. The relevant provisions of the Bill will need to be very carefully examined. (Paragraph 165)

### ***Composition of Commission***

24. We recognise that members of the Commission should not regard themselves as representing a narrow sectional interest. However, it would be strange if leading members of the two branches of the legal profession were not included among the Commission's members. (Paragraph 175)

### ***Chair of Commission***

25. Notwithstanding the arguments in favour of a lay Chair, we believe that the Commission should be chaired by a judge. (Paragraph 185)

### ***Conclusion***

26. The Constitutional Reform Bill is a clear candidate for examination in draft. (Paragraph 188)
27. The abolition of the office of Lord Chancellor should be delayed until the reforms are established. (Paragraph 191)
28. If the reform is inaugurated in the form of a Supreme Court which is still temporarily sitting in the House of Lords, looking much like its predecessor, it will not meet the desire of the Government and the supporters of reform to make the Court appear clearly separate from the legislature. (Paragraph 192)
29. The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political. In the light of the complex issues raised and the ambition on the part of the Government to create a new settlement for a final court of appeal for the United Kingdom we recommend that the Government proceed with the Constitutional Reform Bill on the basis of its being draft legislation—in particular in respect of the proposals for a new court of final appeal. If this course of action is followed, it is likely that many of the arrangements could be agreed on a consensual basis. If the plan is to create a court to last for centuries, then this must be an objective worth spending some time on. (Paragraph 193)

# Formal minutes

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**Tuesday 3 February 2004**

Members present:

Mr A J Beith, in the Chair

Peter Bottomley	Mr Jim Cunningham
Mr James Clappison	Andrew Rosindell
Ross Cranston	Mr Clive Soley
Mrs Ann Cryer	Keith Vaz

The Committee deliberated.

Draft Report [Judicial appointments and a Supreme Court (court of final appeal)], proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 50 read and agreed to.

Paragraph 51 read, as follows:

The details of the proposals are crucial. There is a great difference between presenting to the Prime Minister a single name and presenting two or more names. The procedure for refusal of a single name would be very different from allowing the Government to choose from a range of names. This is particularly true in the case of the new court, where at best very few qualified candidates would fall to be considered and where appointments are infrequent. The independence of the judiciary could be compromised if the head of the Government of the day could exercise more than a direct (and rarely used) veto of a particular candidate. Such a veto would need to be explained in terms that were acceptable to the other members of the new court and to the appointments commission. The Law Lords said:

“An Appointments Commission, if established, should recommend one appointee to the Secretary of State for Constitutional Affairs. The Secretary of State should be authorised to invite the Commission to reconsider its recommendation, giving reasons. If so invited, the Appointments Commission should reconsider its recommendation and then recommend an appointee (whether the same appointee or another) to the Secretary of State. The Secretary of State would then advise the Prime Minister of that recommendation, and the Prime Minister would advise The Queen accordingly. The Secretary of State would be bound to accept the Commission's recommendation (either initially or after reconsideration) and the Prime Minister would be bound to advise The Queen in accordance with the Secretary of State's advice.”

This approach was also advocated by other witnesses.

Amendment proposed, to leave out from the beginning of the paragraph to the first word “the” in line 9.—(*Ross Cranston.*)

Question put, that the amendment be made.

The Committee divided.

Ayes, 4

Noes, 3

Ross Cranston  
Mrs Ann Cryer  
Mr Jim Cunningham  
Keith Vaz

Peter Bottomley  
Mr James Clappison  
Mr Clive Soley

Paragraph, as amended, agreed to.

Paragraphs 52 to 66 read and agreed to.

Paragraph 67 read, amended and agreed to.

Paragraphs 68 to 145 read and agreed to.

Paragraph 146 read, as follows:

We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments. As Mr Oba Nsugbe QC said:

“... you have got to get there much earlier, to people coming out of college, coming out of Bar school, coming out of law school. This means workshops, it means lecturing, it means mentoring and it means supporting those people who have got through the system so that they can play an important role in encouraging other people much, much earlier. I was fortunate. I was in a set of Chambers where we had plenty of information and there was a track record of appointments. There were lots of recorders and circuit judges ..... so I got information pretty much after three or four years. I think the other issue ..... is ..... access to work because if you do not get access to the quality work and you are not tested where it really matters, with responsibility, you will not get appointed...”

Amendment proposed, to leave out from the beginning of the paragraph to the first word “The” in line 2.—(*Mr James Clappison.*)

Question put, That the amendment be made, put and negatived.

Paragraph agreed to.

Paragraphs 147 to 184 read and agreed to.

Paragraph 185 read, as follows:

We note the argument in favour of a lay chair of the Commission. There is a strong symbolic benefit in having a non-judicial figure as Chair.

Amendment proposed, to leave out lines 1 and 2 and insert the words, “ Notwithstanding the arguments in favour of a lay Chair we believe that the Commission should be chaired by a judge”.—(*Keith Vaz.*)

Question put, that the amendment be made.

The Committee divided.

Ayes, 6

Noes, 1

Mr James Clappison  
 Ross Cranston  
 Mrs Ann Cryer  
 Mr Jim Cunningham  
 Mr Clive Soley  
 Keith Vaz

Peter Bottomley

Paragraph, as amended, agreed to.

Paragraph 187 to 193 read and agreed to.

Conclusions and recommendations read, amended and agreed to.

Summary read, amended and agreed to.

*Resolved*, That the Report, as amended, be the First Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

*Ordered*, That the provisions of Standing Order No. 134 (Select committees (reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

*Ordered*, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 10 February at 9.00am

## Witnesses

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### (See Volume II)

#### Tuesday 11 November 2003

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**Sir Colin Campbell**, First Commissioner for Judicial Appointments, The Commission for Judicial Appointments Ev 1

**Roger Smith**, JUSTICE and **Professor Robert Stevens**, Honorary Senior Research Fellow, Constitution Unit, University College London Ev 8

#### Tuesday 18 November 2003

**Peter Williamson** and **Barbara Cahalane**, The Law Society, **Matthias Kelly QC**, **Richard Drabble QC** and **Elizabeth Gloster QC**, The Bar Council Ev 17

**Dr Katherine Rake**, Fawcett Society and **Seamus Taylor**, Commission for Racial Equality Ev 26

**Dame Brenda Hale DBE**, Lord Justice of Appeal Ev 30

#### Thursday 27 November 2003

**Rt Hon Lord Lloyd of Berwick** and **Professor Lord Norton of Louth** Ev 36

**Lord Lester of Herne Hill QC**, **Sir Thomas Legg KCB, QC** and **Professor I R Scott** Ev 41

**Leolin Price CBE, QC** and **Professor Anthony Jolowicz QC** Ev 50

#### Tuesday 2 December 2003

**Rt Hon Lord Hope of Craighead**, a Lord of Appeal in Ordinary Ev 54

**Professor Brice Dickson**, Chief Commissioner, Northern Ireland Human Rights Commission Ev 59

**Winston Roddick QC**, Counsel General, National Assembly of Wales, and **Professor Timothy H Jones**, Department of Law, University of Wales Ev 61

#### Tuesday 9 December 2003

**Rt Hon Lord Cullen of Whitekirk**, Lord Justice General of Scotland and Lord President of the Court of Session and **Rt Hon Sir Robert Carswell**, Lord Chief Justice of Northern Ireland Ev 65

**His Honour Judge Michael Brodick** and **His Honour Judge Shaun Lyons**, Council of Her Majesty's Circuit Judges, **District Judge Jeremy Cochrane** and **District Judge Michael Walker**, Association of District Judges Ev 71

**Peter Herbert**, Society for Black Lawyers, **Oba Nsugbe QC**, Leader of the minority lawyers on the South-Eastern Circuit and **Gelaga King**, South-Eastern Circuit Ev 76

#### Thursday 11 December 2003

**Rt Hon Lord Woolf**, a Member of the House of Lords, Lord Chief Justice of England and Wales, **Rt Hon Lord Bingham of Cornhill**, a Member of the House of Lords, **Rt Hon Lord Nicholls of Birkenhead**, a Member of the House of Lords and **Rt Hon Lord Justice Thomas**, Senior Presiding Judge, Royal Courts of Justice Ev 83

#### Tuesday 6 January 2004

**Rt Hon Lord Falconer of Thoroton QC**, a Member of the House of Lords, Secretary of State and Lord Chancellor, and **Sir Hayden Phillips GCB**, Permanent Secretary, Department for Constitutional Affairs Ev 95

## List of written evidence

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### (See Volume II)

Department for Constitutional Affairs	Ev 107
Matthias Kelly QC, Chairman, The General Council of the Bar	Ev 110
The Fawcett Society	Ev 112
The Council of Circuit Judges and The Association of District Judges	Ev 113
Lord Norton of Louth	Ev 113
Sir Thomas Legg KCB QC	Ev 115
The Association of District Judges	Ev 117
The Council of Circuit Judges	Ev 119
Professor Robert Hazell, University College London	Ev 121

## Reports from the Constitutional Affairs Committee

The First, Second and Third Reports were published by the Committee under its previous name, Committee on the Lord Chancellor's Department

### Session 2002–03

First Report	Courts Bill <i>Government response</i>	HC 526 <i>Cm 5889</i>
Second Report	Judicial Appointments: lessons from the Scottish experience <i>No Government response expected</i>	HC 902
Third Report	Children and Family Court Advisory and Support Service (CAFCASS) <i>Government response</i>	HC 614 <i>Cm 6004</i>
Fourth Report	Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 1171

### Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
Second Special Report	Government Response to the Fourth Report from the Committee on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299