RESPONSE OF THE BIRMINGHAM LAW SOCIETY TO THE MOJ PAPER ON APPOINTMENTS AND DIVERSITY

Question 1 – *Should the Lord Chancellor transfer his decision making role and power to appoint the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court?*

Answer: Yes. It is desirable that there is a separation of powers in connection with judicial appointments in so far as this is both possible and practicable. Clearly, the Lord Chief Justice ("LCJ") is best placed to assess the recommendations of the JAC and to understand the requirements of a particular judicial role when compared to the position of the Lord Chancellor.

Question 2 *-Do you agree that the JAC should have more involvement in the appointment of Deputy High Court Judges? (Part 4, Chapter 2 of the CRA, S.9 Senior Courts Act 1981)*

Answer: Yes. The Society supports the involvement of the JAC at the outset of the process of selection of Deputy High Court Judges and that as far as possible the process should be consistent with the appointment of full time High Court Judges. The current system involving three routes by which Section 9 Judges can be appointed is both illogical and unsustainable, running counter to the underpinning philosophy of the paper of a transparent procedure for judicial appointments.

In many ways the appointment of Section 9 Judges should be considered as the key towards achieving the objective of a senior judiciary which better reflects society. By the very nature of the position applicants tend to be experienced practitioners of high calibre and proven ability many of whom might reasonably be expected to move on to provide the next generation of senior full time judges. There is no doubting that the position becomes a test bed of ability and is a means of ensuring that those of proven merit can be advanced to a full time position, if they so wish. It also enables the JAC, without taking unacceptable risks, to experiment and encourage applicants who might otherwise be deterred by the present process.

Question *3* *Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)?*

Answer: Yes. It is accepted that the principal established in relation to appointments to the Supreme Court (s. 27(2) CRA) should be applied to the appointment of Justices to the Court of Appeal and above. The argument put forward in para.53 of the Consultation is accepted in that it would be beneficial, prior to the consideration of candidates, to secure the views of the Lord Chancellor. It is not clear whether the paper is suggesting that this prior consultation should replace the veto contained within the CRA or be in addition to it. In either case, prior consultation is seen as beneficial. The selection panel will know in advance of any significant reason why their recommendation may be vetoed but more generally will have the considered views of another senior law officer to assist in their more detailed deliberations.

Question 4 – *Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (S71, 75C and 80, of CRA)*

Answer: Yes.

The Society strongly urges that in order to ensure that there is "*independent scrutiny, oversight and transparency to the appointments process*" the panel should consist of the Chair of the JAC, two additional lay members and two judicial members. This will help to safeguard the objective of achieving diversity and avoid suspicion that the status quo is being perpetuated. Were it to be otherwise and the judiciary were to be in the majority on the panel, there would be an increased risk that an appointment might raise doubts, irrespective of how well founded, of bias in the judges recruiting in their own image. If the process at the very highest level does not carry the confidence of society it is quite likely that the process as a whole will be brought into question.

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

Answer: Yes. It is vital that the LCJ and the heads of the divisions operate as a cohesive unit and form a strong team with a common purpose and vision. The paper recognises that they are regularly liaising with one another 'on a day to day basis'. It is entirely appropriate that the LCJ should chair the panel for the purpose of making these appointments and for similar reasons given in response to the previous question the lay representation on the panel should be in the minority because personalities are as important as ability in forming working partnerships. The judges will have a greater insight into who can work with whom.

The Chair of the JAC should or their nominee should always be one of the lay members of the panel. So far as the mix on the panel is concerned whilst a gender and ethnic mix might be desirable, it is crucial that the panel members are the most knowledgeable and experienced individuals to take part in the selection process.

Question 6 – *Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales?*

Answer: Yes: the Society can see sense in having a system that steers away from any perceived criticism of partiality.

Whilst the current regime may work well, the appointment of a Judge from the Territories replacing a second Justice would ensure a broader church of knowledge, avoid any sense of preconception, and present the opportunity of a 'grass roots' view.

Question 7- *Do you agree that the Lord Chancellor should participate on the Selection Panel for the appointment of the Lord Chief Justice as the fifth member and in so doing lose the right to a veto (s 71, 73 74 of CRA)*

Answer: Yes. The Committee supports the recommendation.

The Lord Chancellor should be involved in the appointment provided he loses the right to a veto because of the nexus between him and the LCJ as the head of the judiciary and for the need to be able to have a constructive working relationship.

Question 8 - *Do you agree that as someone who is independent from the executive and the judiciary, the chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (s71 of CRA)*

Answer: Yes. For the reasons stated above in the answer to Q4 the Society is content for the chair of the JAC to chair the panel. The majority of the members should comprise lay members of the Commission.

Question 9- *Do you agree that the Lord Chancellor should participate in the Selection Committee for the appointment of the President of the UK of the Supreme Court, and in doing so lose the right to a veto? (526, 27, 29, 30 of and Schedule 8 to, the CRA)*

Answer: Yes: as a matter of public policy the Committee is in agreement with the view that the Lord Chancellor should sit in addition to the Deputy President and other members confirmed to be from each of the territorial appointment bodies in order to ensure accountability to the government for the same reasons as set out in the answer to Q7 (appointment of LCJ).

Question 10- *What are your views on the proposed make-up of the selection panel for the appointment of the President of the UK Supreme Court?*

Answer: The Society agrees with the proposal that there should be a seven member selection commission chaired by a lay member of the JAC or their counterpart in Scotland or Northern Ireland. However, whilst the selection panel should require the significant involvement of the serving judiciary, there should be a balance of lay members in order to avoid the problem of appointments being made "*in their (the judges') own image.*" It is suggested that that rather than three out of the seven persons of the panel being made up from the Judiciary that two of the selection panel should be members of the Judiciary to ensure a balance lies with the lay representatives.

The selection process needs to be as open as possible but not at the expense of political correctness. Whilst efforts should always be made to gather a racial and gender mix, the overriding objective of appointment should always be the best candidate, rather than the 'slotting in' of gender and minority appointments.

Question 11 – *Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court, should be a lay member from either the JAC for England and Wales, the JAB for Scotland or the Northern Ireland JAC?*

Answer: Yes as this will avoid any suspicion of partiality and ensure fairness.

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

Answer: Yes. This is one of the more obvious ways in which the separation of powers can be illustrated. No doubt the historical practice has developed as a result of the Prime Minister exercising powers which had previously resided with the Monarch. In the 21st century the Monarch's role has changed. It would help in lending distance between the executive and the judiciary if all recommendations for the senior judicial offices were to be made directly to the Queen and for the Prime Minister to be seen to be playing no role in the process.

Question 13 – *Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (Sections 2 and 4 of the Senior Courts Act 1981)*

Answer: Yes and, in order to enable this, the statutory limits will need to be removed.

The Society considers that part time working will increase the size of the pool from which suitable candidates can be drawn especially, although not exclusively, women. Consideration has been given to the practicalities of part-time working at this level but they are surely not significantly different from part-time judges at the lower levels. Indeed at the higher levels, including the Court of Appeal and above, it should be easier for cases to be allocated in such a way as to make the best possible use of the part-time judge's available time since there are fewer "unknowns" affecting time estimates etc..

The pattern of the working upon one project at a time may lend itself to part-time working. It is a person's choice in such circumstances whether they are able to devote half their time in London as the role for example in the High Court of Justice may demand.

To open opportunities for more flexible working arrangements may strengthen the calibre of candidates applying.

Question 14– *Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (S63 of the CRA)*

Answer: No.

The Society strongly believes that there should be no other factors affecting the choice of a candidate other than (1) merit and (2) good character. It is doubted whether in practice two candidates will ever be so similar as to be "*essentially indistinguishable*." There will invariably be strengths and weaknesses and individual characteristics (other than gender, ethnicity etc.) that enable distinctions to be drawn.

In suggesting that positive action guidelines for the appointment of judges should be applied, by implication it raises questions on the objectivity of the JAC. There should be sufficient confidence in the composition of the panel to remove any suspicion of bias. As far as is known, there has been no such suggestion since its creation that the JAC has been anything other than objective.

There are further possibilities for concern. First, there is the potential problem of the perception that a given appointment might have been made on grounds other than those mentioned above and raise questions of whether in fact the best candidate was chosen. Second, there is a risk that the very fact of the existence of positive discrimination might act as a deterrent to people who might otherwise be considering applying. Therefore the present process maintains confidence in the system.

Question 15– *Do you agree that all fee-paid appointments should ordinarily be limited to three renewable five year terms, with options to extend in exceptional cases where there is a clear business need?*

Answer: Yes. This will prevent blocking and allow through new candidates to gain experience. It is recognised that there may be special circumstances in exceptional cases requiring specific skills but the exception should be invoked rarely and should be the only permissible ground.

We take the next two questions together:

Question 16 – *How many Judicial Appointments Commissioners should there be? (Schedule12 to CRA)*

Question 17 -*Should the membership of the Commission be amended as proposed above (Schedule 12 Pt1 to CRA)*

Answer: The numerical make-up of the JAC and Schedule 12 should be retained. There are two reasons for maintain the present composition.

(1) The work of the JAC is already heavy with the members meeting regularly for their deliberations and having to consider thoroughly the paperwork. The work of JAC under the proposed changes will increase significantly requiring a greater input from the members. It is important for both the judiciary and lay members that they do not lose touch with their everyday work/activities since it is this wider experience which brings balance to their views and opinions. The only change that should be made is to substitute a member of ILEX or another lay representative in place of the current magistrate representative.

(2) It is envisaged under the proposals that the composition of the 8 member JAC will be a lay chairman, 3 members of the judicial council and 4 lay members. In comparison with the JAC as presently constituted this will lead to the exclusion of the following:

- a representative of the solicitors' profession
- a representative of the bar
- a District Judge

Each of the above plays a vital role in securing diversity and contributing informed views to the deliberations of the JAC. The solicitors' profession is increasingly providing a corps of experienced and well qualified advocates in the Higher Courts some of whom have now found their way to the bench in the higher courts. The profession has for many years filled most of the District Judge and Tribunal Chairmen positions. It is in this respect that the loss of a District Judge serving on the JAC substantially weakens it since, with all due respect to the judicial members, their knowledge and experience of the lower courts and tribunals is extremely limited and yet the number of cases they deal with far exceeds the work of the higher courts and is often highly specialist, particularly in the area of case management. This latter aspect is fundamentally important to the efficient administration of the courts' business.

In summary, it is difficult to see how the JAC with 8 members is going to cope. Ironically, the reduced membership runs the risk of denuding the JAC of some vital experience and in the Society's submission, runs counter to the objective of achieving diversity based on merit.

Question 18 – *Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (S85 CRA)*

Answer: It is understood that such appointments do not generate any significant amount of work and, accordingly, it is suggested that the position should remain as it is unless there is an overriding reading to justify the change.

Question 19 – *Do you agree with the proposed approach to delivering these changes?*

Answer: Yes.

Question 20 –*Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?*

The demographics of the legal profession has changed in the last twenty years or so with women entering in increasing numbers to the point where there is now a majority of women students reading for law degrees and taking professional qualifications. A growing number of these are from the state sector[1]. There has been a similar growth in BAME entrants[2]. The paper recognises in its first six years out of 2,500 appointments made by the JAC "*over 35% … were women and at least 9% were BAME candidate."* (perpara 16). As has been pointed out in this paper, these appointments were made solely on the basis of merit and good character. It is contended that the growth in numbers is roughly in line with what one might expect with regard to the numbers of entrants into the professions two to three decades ago. It is reasonable to suppose that the trends will continue until they reflect the professions (as opposed to society, if the two were to be any different).

It is vital that the confidence of the lawyers has to be retained in the quality of the judiciary. This is both on the domestic as well as on the international stage. We ignore this at our peril. The laws of England and Wales are pre-eminent worldwide in the field of commerce and beyond and the same goes for the courts which have the highest reputation. From the most senior to their more junior colleagues a great responsibility is borne by them to maintain the reputation of the courts. Nothing should be done which might undermine confidence and jeopardise this. Once lost, which could happen all too easily, it would prove difficult if not impossible to recover. Therefore, extreme care must be taken to avoid anything which might raise suspicions of social engineering to secure judicial positions for women and BAME lawyers. They should always be there on merit alone.

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President Birmingham Law Society

[1] In 2009 the percentage of women solicitors with practising certificates was 45.2%, the percentage of students in their first year was 63.7% and percentage of enrolled trainees was 61.7% (per The Law Society)
[2] For BAME the percentage with practising certificates was 10.6%, the percentage of students in their first year was 32.1% and the percentage of enrolled trainees was 20.3% (per The Law Society)