# Chief Executive's review of the process followed by Selection Commissions making recommendations for appointment to The Supreme Court

## Background

In 2014 I agreed with Lord Neuberger that, given we did not anticipate any retirements from the UKSC until late 2016 when Lord Toulson has to retire, this would be a good opportunity to review the selection commission process. The process has its basis in statute (Constitutional Reform Act 2005 (CRA) as amended by the Crime and Courts Act 2013 (CCA)) but, in practice, individual selection commissions have considerable freedom to determine how they will carry out their work. The statutory provisions were first used in late 2008/early 2009 on a voluntary basis, as they did not come into force until 1 October 2009 i.e. at the same time as the other provisions of the CRA relating to the Supreme Court.

The basic methodology that was established for the first selection commission has remained largely unchanged, although with some refinements on each occasion. The main elements of the process are:

- Open advertisement and applications
- Eligibility extended to non-Judges (statutory requirement)
- Short-listing and interview process
- Consultation with a set of "statutory consultees"

The make-up of a selection commission itself is determined by statute. The original provisions in the CRA have been amended by the CCA and are summarised below:

- A selection commission has to be convened by the Lord Chancellor when a vacancy arises or is imminent.

- A selection commission must have an odd number of members, not less than five.

- For the selection of an ordinary Justice the selection commission must consist of:

  The President (Chairman)

  A member of the Judicial Appointments Commission (E&W)

  A member of the Judicial Appointments Board for Scotland

  A member of the Northern Ireland Judicial Appointments Commission; and

  A senior UK Judge nominated by the President, and having due regard to the territorial composition of the selection commission.

Those with responsibility for nominating a person to be a member of a selection commission (normally the Chairman of the relevant Judicial Appointments Commission/Board) must have regard to the fact "that it is desirable that the members of the selection commission should include –

(a) Both women and men; and

(b) Members drawn from a range of different racial groups (within the meaning of section 9(3) of the Equality Act 2000).

- At least two members of the selection commission must be non-legally qualified.
- A selection commission can determine its own process but must consult:
  (a) Such of the senior Judges that are not members of the commission and are not willing to be considered for selection (as defined in the CRA).
  (b) The Lord Chancellor.
  (c) The First Minister in Scotland.
  (d) The First Minister in Wales.
  (e) The Judicial Appointments Commission in Northern Ireland.
- Selection must be on merit.
- In making selections for the appointment of Judges of the Court the commission must ensure that between them the Judges will have knowledge of, and experience of practice in the law of each part of the United Kingdom.
- The commission must have regard to any guidance given by the Lord Chancellor.
- Any selection must be of one person only.

If the selection commission has been convened to make recommendations for the post of President then the selection commission has to be chaired by one of the lay representatives, starting with the representative of the Judicial Appointments Commission (England and Wales); and the Deputy President sits on the commission unless they are a candidate.

The further most significant change brought about by the CCA is the ability for future selection commissions to recommend part-time appointments. The legislation has been changed so that the number of Judges in the Court cannot exceed twelve full-time equivalents. This is a factor the next selection commission will need to take into account when advertising.

**Approach**

In deciding how to approach this review I concluded it would be appropriate to concentrate on the non-statutory aspects of the process: given that there have been two sets of legislation over the past eight years I did not think it sensible to start from the premise that any future government would be willing to entertain further statutory change without good reason. Nonetheless, there are some issues which have been raised with me which, if it is decided they should be taken further, would require looking again at the statutory provisions. I also concluded, with Lord Neuberger's agreement, that, at least at the initial stages of the review, I

should not open this up as a full public consultation, but involve a limited number of people. The categories I adopted were:

- The statutory consultees as set out by the CRA
- All those who have been members of selection commissions
- Some officials who were involved in advising Ministers/Judges who were statutory consultees
- Academics who had a known interest in the subject

In all I wrote to 45 people and I received 28 responses. Those figures are slightly deceptive, however, as the officials to whom I wrote have, with one exception, subsumed any views they might have in responses sent by their Minister/Judge. To assist in eliciting relevant responses I posed nineteen questions (copy **attached** at Annex 1). Some questions were very specific; and others, particularly question 19 allowed individuals to make any comments they wished on the process. Some responded to all the questions, some to a few and some to none of the questions specifically but gave me general views on selection processes.

The general issues of selecting Judges and improving diversity have, of course, been the subject of a number of other studies and reports in recent years, including a report by the Constitution Committee of the House of Lords. Most recently the Labour Party commissioned a review on Judicial Diversity led by Sir Geoffrey Bindman QC and Karon Monaghan QC. Many of the issues these reviews have looked at have been different, although related: my review has been heavily focussed on practical, process-based points.

**Responses to the Questions**

As might be expected there have been a few areas where I received a generally consistent response to the questions asked. What I have tried to do below is to group the questions into themes and set out the main points made in the responses. I have also made some recommendations at the end for further action.

**The nature and scope of the role**

To date we have not attempted to produce a detailed job description of the role and this is something which a number of responses highlighted. Specific points include:

- Include more introductory and contextual material about the role of the Court, including key facts about caseload etc.
- Explain more fully what a Justice needs to be able to do.
- Expand those features of the role which are the critical distinction between the Supreme Court Justice role and other senior judicial roles.
- Be clearer about the balance between different aspects of the role.
- Include more detail on what is meant by the representative function.

- Expand the criteria to make them more specific to the role.
- The way the criteria have been devised has the potential to encourage an over-narrow view of merit.
- The criteria currently lack a specific reference to the devolution settlements and issues the Court needs to consider.

Included in the suggestions for dealing with some of these issues were:

- Get together a group of Justices to define key skills required.
- Possibly undertake a full consultation involving individuals and the professions to identify the skills required.
- Have some downloadable podcasts of individual Judges talking about the role and what it involves.

**Merit**

One area where there was complete unanimity was in the answer to my question 6: "Should a selection commission try and define merit/set out the components of merit it needs to consider?" All who responded were clear that merit should be determined by reference to the criteria and the criteria should be an expression of merit. A number also made a point which I will cover in my section below about diversity and merit – one who responded said "Diversity and merit are not competitors but diversity is intrinsic to merit".

One suggestion made was that the criteria need to be more clearly weighted which would, in turn, assist with making final decisions about individuals who might be of otherwise equal standing.

Another question raised with me was how important it was for individual Justices to be respected internationally.

**The needs of the Court**

My questions focussed on the balance between specialists and generalists, and whether there was a need to try and avoid too great a concentration of Justices with their main experience in one area of the law, particularly given the developing nature of the Court's caseload.

There was a general consensus that a mixture of specialists and generalists was required; and that the most successful Justices are able to turn their mind to any legal problem as well as bring in-depth experience of certain areas. At least one person said that specialists in commercial and chancery were required; and others suggested taking a more careful look at the likely future focus of the Court's work. This point is of course always tricky as none of us have a crystal ball and, if we were to be holding a selection commission now it would be particularly challenging to try and determine how the Court was likely to develop for the future, given that such a lot may depend on external events. More than one respondent made the point that it was possible to use ad hoc Judges from time to time to deal with particular specialist needs.

Three particularly important points which came up in the responses were:

- A view that specialism might help improve diversity.
- A collegiate court benefits from a diversity of background and experience.
- The need to focus on the overall capacity of the Court, which again had a potential impact on merit.

**Wales**

The majority of responses to this question suggested it would be necessary to have a "Welsh Justice" at some point, but that the time might not yet have arrived. There were exceptions to this point on timing with some strong views that Wales should be represented now in the same way as Scotland and Northern Ireland.

Most were of the view that there is not yet a sufficiently defined body of specifically Welsh law, and consequent Welsh cases (however defined), to justify the appointment of a Welsh Judge (again however defined). There is, however, an important question of the Court having the confidence of the communities it serves and there is a certain amount of asymmetry at present given that we have two Justices from Scotland and one from Northern Ireland. Our current pragmatic solution is to bring in an Acting Judge who is seen as "Welsh" for any cases which come from Wales. We can certainly continue to do that for the foreseeable future.

As the body of Welsh law increases I believe that section 27(8) of the CRA will require consideration of the appointment of a Welsh Justice: this section requires a selection commission to "ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom". This is certainly something which the next selection commission will have to take into account at an early stage of its deliberations and before a vacancy is advertised.

Against all the above there are some people who feel very strongly that geographical diversity should not necessarily have priority over other forms of diversity and the related issue of public confidence.

**Attracting the widest range of candidates**

There is a very clear consensus that by the time a selection commission is established, it is not practical to expect that commission to undertake outreach work to ensure that the widest possible range of potential candidates considers applying for the post. There are also risks attendant with any member of a selection commission being in the position of encouraging particular individuals to consider applying for appointment.

There was not a complete consensus that the Court itself should carry out outreach work and, for example, offer opportunities for mentoring and shadowing; but a majority view that Justices and senior staff had a role to play in encouraging able people to consider applying. The point was also made that this was not just about individuals, but also looking at particular groups, for example, legal academics, perhaps working with The Society of Legal Scholars.

There were mixed views about how far it was appropriate to be looking at academics and senior practitioners as potential Supreme Court Justices, with some expressing the view that prior judicial experience was at the very least helpful, if not essential; and that the improving levels of diversity in the lower courts, particularly the Court of Appeal and High Court of England and Wales would feed into Supreme Court appointments. On the other hand there were strong views that non-judicial candidates needed to be reassured that their applications would be taken seriously.

There were three particular issues which came up in this context which I suggest do require further consideration:

- Examine the advertisement and other material to see if there is anything which is potentially off-putting to potential candidates.
- Ensure that the criteria give appropriate weight to a demonstrated contribution to the law in areas other than in the judiciary.
- Consider the establishment of a mechanism such as a "search committee". This would be a standing committee which would be completely non-statutory but which would be charged with keeping an eye open for potential future candidates and giving them appropriate encouragement/experience so that they were better placed to make an application at an appropriate time.

**Diversity**

This is clearly related to the previous sections, and to other comments on merit etc. A number of people emphasised that diversity has many dimensions, and is not restricted to those characteristics which are protected under the Equality Act.

Some respondents also raised the issue of diversity as potentially a component of merit. The late Lord Bingham, when Senior Law Lord said:

> "Merit…directs attention to proven professional achievement as a necessary condition, but also enables account to be taken of wider considerations including the virtue of gender and ethnic diversity."

There was a pretty clear view that each selection commission should receive, at the very least, a briefing from the Secretary to the commission on diversity issues and particularly the risk of unconscious bias. Some who responded thought formal training would be better but accepted that, in the time available that might not be possible.

A view did emerge that Supreme Court selection commissions needed a published policy on the way the equal merit provisions in the CCA would be applied. (The JAC has already undertaken this exercise for appointments in England and Wales.)

A number of respondents raised concerns about the composition of selection commissions, even though there have been changes introduced by the CCA and are referred to on page 2. Some suggested a larger commission with representatives from, for example, the legal professions, academia, and politicians.

One person suggested the possibility of ring-fencing some vacancies for under-represented groups.

**Comments/References**

The general view on encouraging more evidence-based comments from consultees was to give them clearer guidance and specific questions to answer – but not in such a way as to prevent narrative answers.

There were mixed views on the value of references, but a reasonably wide acknowledgement that for those who were not serving Judges references could be particularly important. But again the view was that we needed to ask more specific questions directed toward the criteria and the job description. In particular, for those who were not Judges, we needed to gather as much evidence as possible of their ability to make decisions on the basis of different forms of evidence.

There was also some support for extending the range of those consulted to include, for example, representatives of the professions, and organisations such as The Society of Legal Scholars.

**The decision-making process**

The general view was that an interview was inevitable and could be very useful in exploring some of the criteria. The interview was particularly important for lay members of a selection commission who were unlikely to know the candidates. There was more limited support for a process involving two interviews, although a number thought it should be possible if it was thought helpful in the context of a particular competition.

The main issue here though was the timing of an interview/interviews, and the need to try and avoid the interview playing too great a part in the final decision making process at the expense of other evidence.

I suggest that, having talked this through with a number of those who have responded, the answer to this is to organise the selection commission process so that the selection commission has a lengthy meeting <u>in advance</u> of any interviews (rather than, as now, after the interview) when they go through all the material available, and arrive at preliminary and provisional views on who should be recommended, and identify areas where they wish to probe individual candidates. The interview would then follow and that probing would take place. It might then be helpful to wait for a day or so after the interviews before a final decision is taken, so as to provide an opportunity to reflect fully on all the available evidence.

The other issue on which I consulted people was the question of having some kind of written test; and whether a short presentation should continue to form part of an interview. Taking the latter point first, most of those who responded supported the use of a short presentation. Until now, we have asked everyone interviewed to make a presentation on the same topic; if, however, interviews were to be more tailored to individual perceived strengths/weaknesses it would be possible similarly to tailor the presentation topic.

There were mixed views on whether a selection commission should invite specific written material, other than judgments etc which are already asked for. Most people felt a written test

was unnecessary at this level although the following suggestions were made by some who responded:

- Ask short-listed applicants to write a two page essay on a particular legal topic.
- Ask short-listed candidates to write a short draft judgment on a real case.
- Give them a legal problem/case study, either for discussion at an interview or on which they might be asked to write a short note, which could then be discussed with them at interview.

**President/Deputy President**

Only a few responded to question 18: "Are there any specific points you want to make in relation to the appointment of the President and Deputy President?" The points made were as follows:

- Both the President and Deputy President must have external credibility.
- They must have a track record of substantial judgments in order to have the respect of their colleagues.
- They must demonstrate leadership skills and inter-personal skills.
- They must demonstrate a willingness to engage with the other branches of government.

There were also suggestions that consideration should be given to appointing/electing the President/Deputy President for a fixed period. This is a practice which is followed by some other Supreme Courts, but would require a change in UK legislation.

**Flexible working for Supreme Court Justices**

I did not ask any specific questions about this as a part of my review and few of those who responded mentioned the recent legislative changes and the impact they might have on recruitment to the Supreme Court.

The Crime and Courts Act 2013 (Schedule 13) amended the provisions of the Constitutional Reform Act 2005 in a number of ways, including a change from the provision that the UKSC should comprise a maximum of twelve judges to a maximum full-time equivalent number. This opens up the possibility of appointing a Justice/Justices who work less than full-time individually, but together their working pattern equates to one or more full-time equivalent. This clearly has the potential to facilitate appointments from a more diverse range of applicants but there are a number of practical issues that need to be resolved. We have already concluded that for listing purposes individuals would have to be available in blocks of one week. An issue which is yet to be resolved, however, is what, if any, other activities a Supreme Court Justice working flexibly, could undertake on a paid basis. Given that flexible working patterns are now

available for other levels of the judiciary this is an issue where we would need to work with others responsible for making appointments.

**Other Issues**

Other issues which came up in my discussions with individuals were:

1. Consider introducing a formal application form.
2. How to avoid bunching of retirements.
3. How far might it be possible to reproduce the good aspects of the old system particularly the regular collection of information on a wide range of individual practitioners to facilitate talent spotting, and to identify individuals for appointments in the lower courts with a view to seeing whether they would merit future promotion.
4. In what circumstances should the Lord Chancellor provide guidance to a selection commission, as permitted by the CRA.
5. What, if any role, should Parliament have in the process; and what do we mean by "parliament"?
6. The pros and cons of a formal scoring system for assessing candidates. (This could be important in the context of applying an equal merit policy.)
7. How to undertake succession planning within the current statutory framework.

**Summary of Recommendations**

1. Consider further the merits of having a formal application form as part of the process. Even if there was an application form, I do not think we should omit the necessity for a CV and a short personal statement; but an application form would ensure a selection commission had the same basic data on every applicant.
2. Establish mechanisms to draw up a more detailed job description than currently appears in information packs. This should be done in consultation with external stakeholders as well as with a group of Justices. It might then be necessary to revise/reformulate some of the criteria.
3. Draw up a new "standard" timetable for a selection commission process to ensure adequate time for consideration of all the available written evidence, prior to any interview taking place.
4. Draw up a policy to give effect to the Equal Merit provision in the Crime and Courts Act 2013 and consult on that policy in draft, the policy to be in place for the next selection commission expected in 2016.
5. Research and agree the most appropriate form of diversity training/briefing for a selection commission to receive before they start detailed work.
6. Establish a mechanism to discuss the likely nature of the future work of the Court and how that might impact on the selection process. This would need to involve a wide range of stakeholders, for example, court users and academics.

7. Consider how best to assess and provide information to a selection commission on the extent and nature of specifically Welsh law so that a selection commission can take a view on the applicability of Section 27(8) of the Constitutional Reform Act 2005.
8. With a view to improving diversity, consider how far it is possible to develop mechanisms for identifying individuals with the potential to be considered for appointment to the Supreme Court and how they might be appropriately supported/and developed.
9. Develop mentoring and similar opportunities for those interested in, and qualified for appointment, who wish to know more about the work of the Supreme Court and the Justices.
10. Consult with the Society of Legal Scholars and other relevant bodies about appropriate engagement with academics.
11. Develop a more structured set of questions for referees with the aim of eliciting the most useful information for selection commissions about individual applicants.
12. In preparation for the possibility of a Supreme Court Justice, who did not want to work full-time, being appointed at some time in the future, consult with appropriate colleagues in England and Wales, Scotland and Northern Ireland about what constraints there should be on a Judge undertaking other paid work.
13. Consider with the Judicial Appointments Commissions/Boards how to undertake succession planning within the current statutory framework, but in a way which ensures that selection processes remain clearly fair and open.

To the extent that most, or all, of these recommendations are accepted, there will be a significant agenda of work for my successor to take forward. A number of these issues would benefit from the input a selection commission, comprising experienced members of other selection bodies could bring. I believe it would be consistent with the provisions of the CRA 2005 for the President to recommend to the Lord Chancellor that he be invited to convene an ad hoc selection commission this autumn, with a view to considering some of these issues further, and then proceeding to determine and carry out the process to identify a successor to Lord Toulson. I recommend that this happens.

**JENNY ROWE**
**Chief Executive**
**July 2015**

## Annexe: Appointments Review – Questions sent to consultees

1. How far have we properly identified the scope and nature of the job?
2. Are the criteria sufficiently comprehensive/too full, and are they properly expressed?
3. What is your view on whether the Supreme Court should aim to have specialists in certain subject areas, or generalists who are capable of dealing with any cases which might come before them?
4. Should selection commissions try and ensure there is not too great a concentration of expertise in any one area?
5. What is your view on the issue of whether there should be a Justice with specific knowledge of Wales and the law of Wales?
6. Should a selection commission try and define merit/set out the components of merit it needs to consider?
7. How does a selection commission ensure applications from the widest range of eligible candidates, for example, should there be more proactive outreach/encouragement/mentoring/arrangement of observation days at the Court?
8. Is there anything in the advertisements or other written material that needs revising?
9. Should each selection commission routinely have refresher training on best practice, especially in relation to diversity?

10. What more can a selection commission do to encourage proper evidence based comments?
11. In addition to the statutory consultees are there others a selection commission should routinely consult?
12. Is there an alternative to a selection commission interviewing short-listed candidates? If not, should there be more than one interview?
13. Should there be a written test? If so what should it comprise?
14. Should selection commissions continue to ask shortlisted candidates to make a presentation at the outset of their interview? If yes, what kind of presentation might provide the best evidence?
15. Should a selection commission ask for references? What alternatives might there be, particularly for applicants who are not serving Judges?
16. Insofar as you have not already dealt with it, what views do you have on how selection commissions might achieve greater diversity in appointments to the Supreme Court.
17. To what extent should a selection commission be looking to appoint outside the senior judiciary? If you believe they should, then what specific categories of people do you think would be most appropriate?
18. Are there any special points you want to make in relation to the appointment of the President and Deputy President?
19. Are there any others matters on which you would like to comment?