



The Odysseus Trust

RESPONSE TO

CONSTITUTIONAL REFORM: A NEW WAY
OF APPOINTING JUDGES

AND

CONSTITUTIONAL REFORM: A SUPREME COURT
FOR THE UNITED KINGDOM

The Odysseus Trust¹ is a non-profit company limited by guarantee, which seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC², together with his Parliamentary Legal Officers, Kay Taylor and Lydia Clapinska. This paper responds to both consultation papers cited above, as there are many overlapping issues. We regret that given the limited time for consultation, we have not been able to respond to the consultation papers on the future of Queen's Counsel and the office of the Lord Chancellor but hope to be given an opportunity to do so in the future.

A NEW WAY OF APPOINTING JUDGES

It is important to clarify from the outset that there will be four Commissions in total – one for Scotland and one for Northern Ireland (these Commissions already exist), one for England and Wales for all courts and finally one to deal solely with recommendations of appointments to the Supreme Court. A separate Commission is needed for the Supreme Court as it would be constitutionally unsatisfactory for a Commission appointing/recommending judges to courts in England and Wales only, to be able also to recommend judges to a Supreme Court that would also have jurisdiction over cases from Scotland and Northern Ireland.

¹ For more information about the work of the Trust, please visit www.odysseustrust.org

² Lord Lester is a Liberal Democrat Peer. He is also a member of the Select Committee on the European Union, Sub Committee E and the Joint Committee on Human Rights. He is also a Council Member of JUSTICE and President of the Liberal Democrat Lawyers Association.

Appointment based on merit is of fundamental importance. Equally it is essential to avoid any appearance of a self-appointed judicial oligarchy. Furthermore, the executive should have no role in the selection of individuals to be judges or in their promotion or appointment to certain offices.

Judicial Appointments Commission for England and Wales (CP 10/03 Qs 1-3)

For the Commission for England and Wales, a hybrid commission is the preferred option. The commission should have power to appoint directly the junior judiciary, members of which are unable to create binding precedent and whose appointments are not politically sensitive. This would include all judges up to (but not including) the High Court. In this respect we disagree with the Judges' Council. High Court judges exercise very significant constitutional powers not least in the Administrative Court.

For appointments to the High Court and above, the Commission should put forward *one name only* of its preferred candidate to the Minister. The Minister would then be able to exercise the very limited discretion of either approving the Commission's proposal or rejecting it and requiring the Commission to submit another name. If the Minister chose to exercise his discretion *not* to accept the proposed candidate, the Minister would be under a duty to provide confidential written reasons, for that decision, to the Commission, but not to Parliament or the general public.

It is important that the Minister is presented with only one name to accept or reject. The Minister's discretion would be increased unacceptably by being able to choose from a list of two or more names. The reason for allowing the Minister to accept or reject one name rather than allowing the Commission to appoint directly with no Ministerial involvement at all is to address the need for constitutional legitimacy.

The Judicial Appointments Commission for the Supreme Court

This special Commission should operate in a similar way to the Commission for England and Wales with regard to appointments to the High Court and above i.e. the Commission should put forward one name only, not to the Secretary of State, but to the Prime Minister who would then exercise the minimal discretion of either accepting or rejecting (with confidential written reasons to the Commission) that candidate. The Prime Minister would then recommend that person to the Queen. The Prime Minister, rather than the Secretary of State will be required to exercise the limited discretion. This will be compatible with the devolved system of government.

The Composition of the Judicial Appointments Commission for England and Wales (CP10/Q19)

This Commission should have 15 members with an eminent and manifestly independent lay chair. There should not be a majority of lawyers. Other than lay members, there should be members of the judiciary and legal professionals and legal academics.

Who should be responsible for appointing members to the Commission for England and Wales? (CP10/Q18)

There should be a small committee consisting of a senior judge, an eminent layperson and with the First Civil Service Commissioner as chair. The First Civil Service

Commissioner is well placed to chair the Commission since she has the vital constitutional responsibility for upholding the merit principle in applications to the civil service. The suggestion in paragraph 116 (CP10) that the Permanent Secretary should be involved is strongly opposed. That would give rise to the appearance of executive interference, even in the case of retired Permanent Secretaries.

The Composition of the Judicial Appointments Commission for the Supreme Court

This Commission should have an eminent lay chair with a significant judicial membership but should not be dominated by judges and lawyers. The Supreme Court Commission would be smaller than the Commission for England and Wales, given that it would be responsible for fewer appointments.

Who should be responsible for appointing the members of the Commission for the Supreme Court?

This Commission needs to have a significant judicial membership reflecting each of the devolved systems. Changes may be necessary to the scheme of devolution with respect to Scotland and Northern Ireland.

Criteria for selection (CP11/Q15 & 16)

The criteria for selection of all judges should be determined by Parliament in primary legislation and not left for the executive to formulate. There is a need for further consultation on the proposed manner of operation of all of the commissions mentioned above.

Merit and Diversity (CP10/Q14) (CP11/Qs13-14)

Appointment on merit for all appointments is essential. Promoting diversity is equally important and the two should not be seen as mutually exclusive. Furthermore, merit should not be defined solely by the particular characteristics and careers of existing members. There should be no mandatory requirement for appointments to appellate courts including the Supreme Court that the office holder will have been an advocate.

Complaints and Disciplinary Matters (CP10/Q15)

The Lord Chief Justice in consultation with the relevant judicial appointments commission should deal with complaints against judges and disciplinary matters.

Promotions (CP10/Q4)

It is extremely important for the judicial commissions, and not Ministers, to deal with promotions.

A SUPREME COURT FOR THE UNITED KINGDOM

The Role of the Privy Council (CP11/03/Q1)

The jurisdiction of the new Supreme Court should include devolution cases presently heard by the Judicial Committee of the Privy Council. This will ensure consistent jurisprudence.

So long as there are Commonwealth countries for which the Privy Council is the final Court of Appeal it may be necessary to include members of the new Supreme Court on important Constitutional appeals. The rest of the work currently heard by the Judicial Committee of the Privy Council should be heard by members of the Court of Appeal, Courts of Session and visiting judges from other jurisdictions.

The membership of the new Supreme Court (CP 11/03/Q2 - 4)

The membership of the Supreme Court should consist of permanent, full time judges. We do not agree with ad hoc appointments. Judges of the Supreme Court should be concerned exclusively with the work of that court. They should not, other than in exceptional cases, conduct public inquiries or sit, vote or otherwise take part in the work of the House of Lords.

The number of judges should not exceed 12.

Relationship with the House of Lords (CP 11/03/Q7 -9)

We do not agree with the Judges' Council that the exclusion of Justices of the Supreme Court from the legislature would be 'an unhealthy genuflexion to constitutional fundamentalism' (para. 159). Nor do we agree that the valuable function of one of the Law Lords in chairing sub-committee E justifies the Judges' Council recommendation that members of the Supreme Court should on retirement, be appointed members of the House of Lords (para. 162). We see no reason why the chairing of sub-committee E, like the chairing of other important select committees, could not be performed by non-judicial members of the House. The proposal of the Judges' Council would mean all Justices of the Supreme Court would become members of the House of Lords at the age of 75 in order that one of them can chair sub-committee E. We consider this to be a disproportionate response to the need for a legally qualified peer to chair sub-committee E.

We strongly agree with Lord Bingham of Cornhill and the three other Law Lords that 'the functional separation of the judiciary at all levels from the legislature and the executive is a cardinal feature of a modern, liberal, democratic state governed by the rule of law'. Serving Justices of the Supreme Court should therefore be completely removed from the work of the legislature and be prevented from sitting, voting or otherwise taking part in the work of the House of Lords.

So long as there are appointed members of the House of Lords there is no reason why the Justices of the Supreme Court or any other senior judge should not be eligible for appointment on retirement.

Qualifications for membership (CP 11-03/Q 14)

We recognise that membership of the Supreme Court will mainly comprise senior jurists who have exercised judicial responsibilities. We do not consider appointment to the Supreme Court should be confined to those with experience of advocacy. Experience in other jurisdictions³, as well as our own, indicates that solicitors as well as legal scholars may enrich the work of an appellate court. Just as not every Appeal Court judge is an expert in every field of law and yet decides cases beyond his or her expertise so a former solicitor, law professor or member of the Government Legal Service may make wise and informed judgments without having had trial experience. Opening up the qualification for membership would be one of the best ways to ensure greater diversity in the Supreme Court whilst maintaining the very high standard of work.

Tenure (CP 11-03/Q17 -18)

The statutory retirement age of judges of the Supreme Court should be 75. Given that retired judges should not continue to sit as occasional members of the Court it would deprive the Court of judges with very active and able minds if they were retired artificially early at the age of 70. A retirement age of 75 would also make it unnecessary to bring back retired Law Lords to sit in the Supreme Court.

The Operation of the Court (CP 11-03/Q19)

The advantage of the current system of sitting in panels is that it enables the Law Lords to cover a greater number of cases. The Court should continue normally to sit in panels. However, the Court, at its own instigation or on the application of the parties, should have the power to sit in larger panels in cases of great constitutional importance or where a consistent decision is necessary for precedent.

The composition of the panels should be determined by the President of the Court, assisted by the Registrar. Where the Court is sitting as a panel, the composition of a particular bench should be completely divorced from political influence.

Administration, funding and support (CP 11-03/paras 63 to 66)

It is essential that the funding for the Supreme Court should not come directly from the Department for Constitutional Affairs. It would undermine public confidence in the due administration of justice if the Court were subject to funding applications and potential cuts as if they were simply another department of Government. The Court should control its own budget and enjoy corporate independence. The best model is that suggested by the Law Lords of the High Court of Australia where a one-line budget is agreed annually between the High Court's chief executive officer and the Attorney-General.

The Supreme Court of the United Kingdom as a whole should not be administered by the Court Service for England and Wales. The Supreme Court should control its own administrative arrangements and be given an adequate budget to do so.

³ For example Justice Bertha Wilson, former member of the Supreme Court of Canada was a solicitor and law teacher. Sir Kenneth Keith of the New Zealand Court of Appeal is a former Law Professor and Chair of the New Zealand Law Reform Commission. Similarly Justice Frankfurter was a distinguished member of the US Supreme Court whose previous experience was as a Law Professor.

Accommodation (CP 11-03/para. 67)

The Government should be under no doubt as to the size of the undertaking. A suitably prestigious building with adequate facilities must be located and prepared before the Law Lords can begin to contemplate moving from their existing accommodation. The following facilities are a minimum requirement and whilst they are perhaps obvious, most of them are completely lacking from the existing arrangements:

- A properly equipped law library (paper and electronic) with a qualified law librarian.
- A registrar and other lawyers to work in the Court office to prioritise and list cases with administrative staff to support them.
- Other legal support staff such as clerks for each judge.
- Adequate administrative support for each judge.
- Interview rooms for legal representatives and their clients.
- Adequate facilities for counsel and solicitors to conduct their cases e.g. photocopiers, access to law reports.
- Refreshment facilities for the litigants and interested parties as well as separate facilities for Counsel and the judiciary.
- Adequate accommodation for law reporters and judicial assistants.
- A press officer
- IT staff
- Security staff
- Facilities for people with special needs such as hearing amplification.

Adequate facilities are essential not only to promote efficiency and quality in the judicial process but also to provide proper facilities for the legal representatives of parties and the general public.

7th November 2003