

*The Process of Appointment of Judges  
in Some Foreign Countries:  
The United Kingdom*

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## **EXECUTIVE SUMMARY**

1. In the U.K., the method of appointment of judges on the High Court Bench and above is a matter of practice and convention, not of written law.
2. In the U.K., the U.K. Parliament save the Prime Minister, who is both head of government and leader of the majority party in Parliament, is not involved in the process of appointment of judges on the High Court Bench and above.
3. Lords of Appeal in Ordinary in the House of Lords, Heads of Divisions and Lords Justices of Appeal in the Court of Appeal are appointed by the Queen on the recommendation of the Prime Minister, but the Lord Chancellor's opinion is generally sought. Justices of the High Court are appointed by the Queen on the recommendation of the Lord Chancellor.
4. The administration of judicial appointments is carried out by the Lord Chancellor's Department. The Lord Chancellor is supported by a Permanent Secretary and a Judicial Appointments Group in exercising his judicial appointment functions.
5. When selecting candidates for judicial appointment, including those for the High Court Bench and above, the Lord Chancellor adopts the followings principles: (a) appointment is strictly on merit; (b) part-time service is normally a pre-requisite of appointment to full-time office.
6. The appointments of Lords of Appeal in Ordinary, Heads of Divisions and Lords Justices of Appeal are by invitation. Before 1997, the appointments of Justices of the High Court were by invitation only. Applications are now also invited by public advertisement for vacancies in the High Court.
7. An important feature of the process of judicial appointment in the U.K. is consultation. Views and opinions about the qualities and work of an applicant are collected from a wide range of judges and senior practitioners in the legal profession. On the basis of the recommendation by the Prime Minister and the Lord Chancellor, the Queen appoints qualified persons as judges on the High Court Bench and above.

# **THE PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED KINGDOM**

## **PART 1 - INTRODUCTION**

### **1. Background**

1.1 On 17 June 2000, the Panel on Administration of Justice and Legal Services requested the Research and Library Services (RLS) Division of the Legislative Council (LegCo) Secretariat to conduct a study on the process of appointment of judges in some foreign countries.

### **2. Scope**

2.1 This research studies the process of appointment of judges in three common law jurisdictions, namely, the United States (U.S.), the United Kingdom (U.K.) and Canada. The U.K. is chosen because it has the longest tradition in practising common law. This report describes the process of appointment of judges in the United Kingdom.<sup>1</sup>

2.2 In this study, only the appointment of judges on the High Court Bench and above is examined. We have not studied the process of appointment of the Lord Chancellor<sup>2</sup> as he also plays the executive and legislative roles in his capacity as a Cabinet Minister and Speaker of the House of Lords respectively. The considerations for the Lord Chancellor's appointment are different from those for the appointment of the judges on the High Court Bench and above.

2.3 The focus of this research is the process of appointment, the role played by the legislature in the process, and the judicial selection standards.

### **3. Methodology**

3.1 This study involves a combination of information collection, literature review and analysis. Information has been obtained from relevant overseas government organisations, legislature, academic and professional institutions.

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<sup>1</sup> The U.K. judges refer to judges under the courts in England and Wales only. Scotland and Northern Ireland have their own court and legal systems.

<sup>2</sup> The Lord Chancellor is a Cabinet Minister, an ex officio Speaker of the House of Lords, also a judge and head of the judiciary. Unlike other judges, he has no security of tenure, and his office is at the disposition of the Prime Minister.

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## PART 2 - SOME BASIC INFORMATION

### 4. Courts, Judges and Jurisdictions

#### *Court System and Structure*

4.1 The court system and structure in England and Wales are summarised in figures 1 and 2.

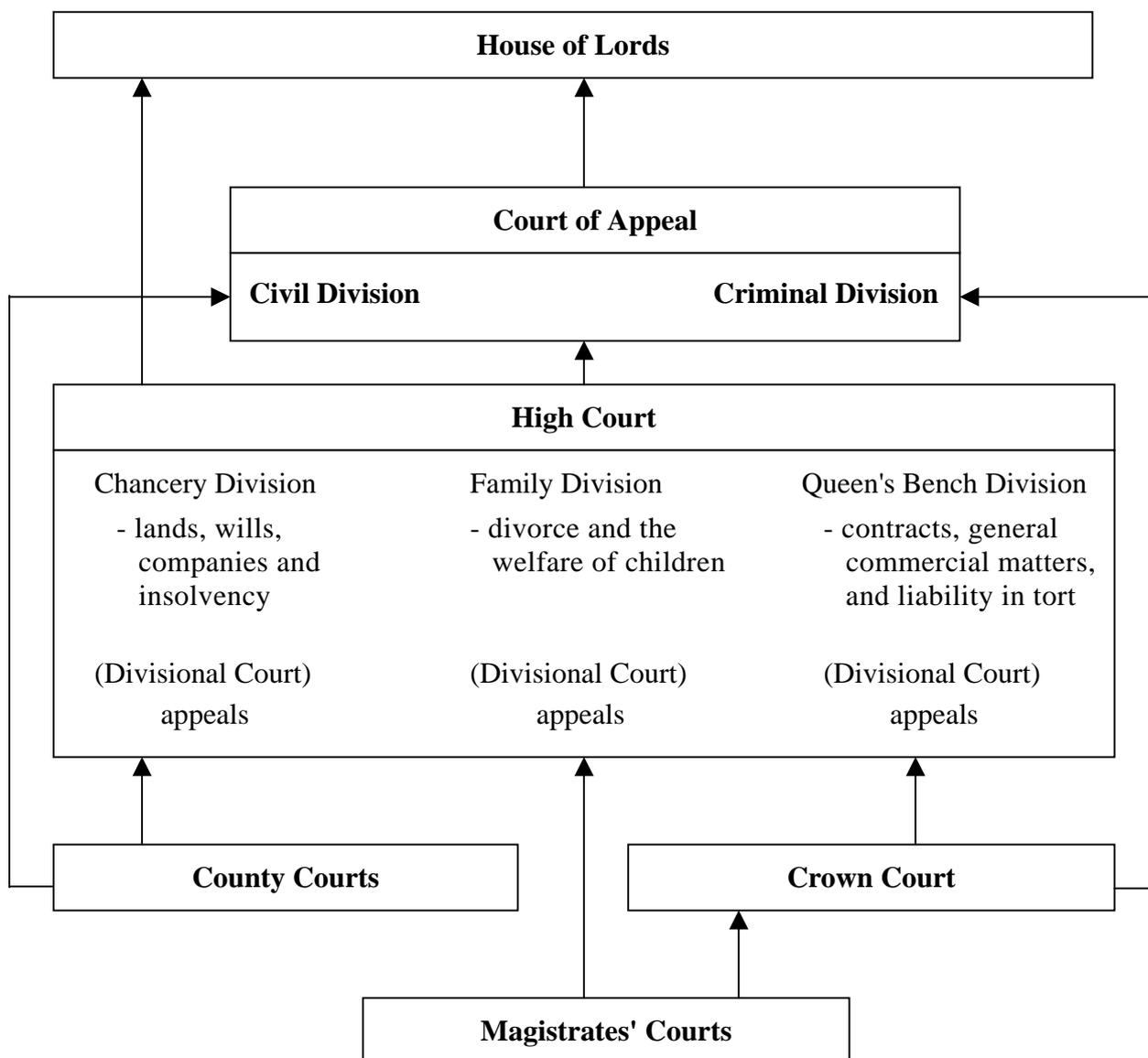
**Figure 1 - A Summary of Court System**

<b>Courts</b>	<b>Heads of Courts</b>	<b>Judges</b>	<b>Jurisdictions</b>
House of Lords	Lord Chancellor (1)	Lords of Appeal in Ordinary (12)	Final court of appeal for civil cases in the United Kingdom and for criminal cases in England, Wales and North Ireland.
Court of Appeal	Lord Chief Justice* and Master of the Rolls (2)	Lords Justices of Appeal (35)	Appeals from the Crown Court in criminal cases; appeals from the High Court and County Court in civil cases.
High Court			
The Queen's Bench Division	Lord Chief Justice (1)	Justices of the High Court (68)	The Queen's Bench Division deals with disputes relating to contracts, general commercial matters, and liability in tort.
The Chancery Division	Vice-Chancellor (1)	Justices of the High Court (17)	The Chancery Division deals with disputes relating to lands, wills, companies and insolvency.
The Family Division	President of the Family Division (1)	Justices of the High Court (16)	The Family Division deals with matters relating to divorce and the welfare of children.

\* Lord Chief Justice is also the head of the Queen's Bench Division.

( ) Indicates number of judges.

**Figure 2 - An Outline of Court Structure**



\* adapted from *Judicial Statistics Annual Report*, Lord Chancellor's Department, 1998.

### *House of Lords*

4.2 The House of Lords is the final court of appeal for civil cases in the United Kingdom and for criminal cases in England, Wales and North Ireland.<sup>3</sup>

4.3 The appellate jurisdiction of the House is exercised by the salaried Lords of Appeals in Ordinary (commonly known as "Law Lords").<sup>4</sup> The maximum appointment of Lords of Appeal in Ordinary is 12.<sup>5</sup>

### *Court of Appeal*

4.4 The Court of Appeal is the appeal court of the High Court and County Court in civil cases and the Crown Court in criminal cases.

4.5 The Court of Appeal consists of ex-officio judges and not more than 35 ordinary judges. The ex-officio judges are the Lord Chancellor, former Lord Chancellors and Heads of Divisions of the High Court and the Court of Appeal. The Heads of Divisions are the Lord Chief Justice, the Master of the Rolls, the Vice-Chancellor, and the President of the Family Division. The ordinary judges of the Court of Appeal are known as "Lords Justices of Appeal".<sup>6</sup>

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<sup>3</sup> In Scotland, the High Court of Justiciary is the Supreme Criminal Court with jurisdiction in cases involving murder, treason and rape. *Britain 2000*, The Stationery Office, the United Kingdom, p.229.

<sup>4</sup> Former Lords of Appeal in Ordinary, former Lord Chancellors and holders of other high judicial office are entitled to sit as Law Lords to hear cases in the House of Lords under the Appellate Jurisdiction Act 1876. In practice, they sit in the House of Lords to hear cases occasionally. Their appointments are not included in this study.

<sup>5</sup> The number of judgeships can be found in the website of the Lord Chancellor's Department: <http://open.gov.uk/lcd/judicial/>.

<sup>6</sup> Supreme Court Act 1981 s.2(1)-(3).

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## High Court

4.6 The High Court is divided into three Divisions<sup>7</sup>:-

- a) The Queen's Bench Division deals with disputes relating to contracts, general commercial matters, and liability in tort. The Divisional Court of the Queen's Bench Division hears appeals from Crown Court and magistrates' courts by way of cases stated and judicial review.
- b) The Chancery Division deals with disputes relating to lands, wills, companies and insolvency. The Divisional Court of the Chancery Division hears appeals from county courts on bankruptcy and land registration.
- c) The Family Division deals with matters relating to divorce and the welfare of children. The Divisional Court of the Family Division hears appeals from county courts and magistrates' courts on family matters.

4.7 The High Court is headed by the Lord Chancellor and its judicial staff consists of the Lord Chief Justice, the President of the Family Division, the Vice-Chancellor, the Senior Presiding Judge,<sup>8</sup> the vice-president of the Queen's Bench Division,<sup>9</sup> and not more than 106 puisne judges of the High Court.<sup>10</sup> The puisne judges of the High Court are known as "Justices of the High Court".

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<sup>7</sup> "The court structure in England and Wales", Judicial Appointment Annual Report 1998; "An outline of the court structure in England and Wales", Judicial Statistics Annual Report 1998 and *Britain 2000*, The Stationery Office, the United Kingdom, p.226.

<sup>8</sup> The Senior Presiding Judge is appointed from the Lords Justices of Appeal. The appointment is made by the Lord Chief Justice with the agreement of the Lord Chancellor. Apart from being an ordinary judge who sits in the Court of Appeals, a Senior Presiding Judge's duties include: (1) advises the Lord Chancellor in "allocation of business between High Court and county courts"; (2) nominates Circuit judge candidates to the Lord Chancellor. Courts and Legal Services Act 1990, s.1, s.11 and s.72.

<sup>9</sup> The vice-president of the Queen's Bench Division is appointed from the Lords Justices of Appeal. The appointment is made by the Lord Chancellor. Access to Justice Act 1999, s.69(1).

<sup>10</sup> Supreme Court Act 1981 s.4(1)-(2).

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## 5. Methods of Appointment and Qualifications

### *Lords of Appeal in Ordinary*

5.1 Lords of Appeal in Ordinary in the House of Lords are appointed by the Queen on the recommendation of the Prime Minister, but the Lord Chancellor's opinion is generally sought. This method of appointment is a matter of practice and convention, not of written law.<sup>11</sup>

5.2 The statutory qualification for a candidate of Lord of Appeal in Ordinary is:

- (a) must have held not less than two years judgeship of one of the superior courts<sup>12</sup> in England and Wales, Scotland or Northern Ireland; or
- (b) must have held not less than 15 years a Supreme Court qualification,<sup>13</sup> or been an advocate in Scotland, or a solicitor entitled to appear in the Court of Session or the High Court of Justiciary, or a practising member of the Bar in Northern Ireland.<sup>14</sup>

### *Heads of Divisions*

5.3 The four Heads of Divisions, i.e. the Lord Chief Justice, the Master of the Rolls, the Vice-Chancellor and the President of the Family Division, are appointed by the Queen on the recommendation of the Prime Minister, but the Lord Chancellor's opinion is generally sought. This method of appointment is a matter of practice and convention, not of written law.<sup>15</sup>

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<sup>11</sup> The Supreme Court of Jurisdiction Act 1873 provided that judges were to be appointed 'in the same manner as heretofore'. The Appellate Jurisdiction Act 1876 and the Supreme Court of Judicature (Consolidation) Act 1925 followed this spirit. These Acts provided that the Queen appoints the judges, but nothing is said of the officer upon whose advice Her Majesty makes the appointments. Abstracted from "Judges on Trial," Shimon Shetreet, 1976, Hebrew University of Jerusalem, p.47.

<sup>12</sup> The superior courts refer to the Court of Session in Scotland; the High Court and the Court of Appeal in the North Ireland; and the High Court and the Court of Appeal in England. Appellate Jurisdiction Act 1876 s.25.

<sup>13</sup> The Supreme Court of England and Wales consists of the Court of Appeal, the High Court and the Crown Court. A "Supreme Court qualification" refers to a right of audience in relation to all proceedings in the Supreme Court in England and Wales. A right of audience is reference to a right of audience granted by an authorised body. Courts and Legal Services Act 1990 s.71 (3)(a) and (4).

<sup>14</sup> Appellate Jurisdiction Act 1876 s.6 as amended by Courts and Legal Services Act 1990 s.10. The Lord Chancellor's Department website.

<sup>15</sup> Shetreet, loc. cit.

5.4 The statutory qualification for appointment as Lord Chief Justice, Master of the Rolls, Vice-Chancellor and President of the Family Division is:

- (a) qualified for appointment as a Lord Justice of Appeal; or
- (b) having been a judge of the Court of Appeal.<sup>16</sup>

#### *Lords Justices of Appeal*

5.5 Lords Justices of Appeal in the Court of Appeal are appointed by the Queen on the recommendation of the Prime Minister, but the Lord Chancellor's opinion is generally sought. This method of appointment is a matter of practice and convention, not of written law.<sup>17</sup>

5.6 The statutory qualification for appointment as a Lord Justice of Appeal is:

- (a) 10-year right of audience in the High Court in England and Wales;<sup>18</sup> or
- (b) having been a judge of the High Court.<sup>19</sup>

#### *Justices of the High Court*

5.7 Justices of the High Court are appointed by the Queen on the recommendation of the Lord Chancellor. This method of appointment is a matter of practice and convention, not of written law.<sup>20</sup>

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<sup>16</sup> Supreme Court Act 1981 s.10 as amended by Courts and Legal Services Act 1990 s.71, abstracted from "Senior Judicial Appointments," the Lord Chancellor Department's website.

<sup>17</sup> Abstracted from "Judges on Trial," Shimon Shetreet, 1976, Hebrew University of Jerusalem, p.47.

<sup>18</sup> Courts and Legal Services Act 1990 s.71 (3)(b) and (4).

<sup>19</sup> Supreme Court Act 1981 s.10 as amended by Courts and Legal Services Act 1990 s.71, abstracted from "Senior Judicial Appointments," the Lord Chancellor Department's website.

<sup>20</sup> Shetreet, loc. cit.

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5.8 The statutory qualification for appointment as a Justice of the High Court is:

- (a) 10-year right of audience in the High Court in England and Wales; or
- (b) having been a Circuit judge for at least two years.<sup>21</sup>

## **6. The Administration of Judicial Appointments**

6.1 The Lord Chancellor is supported by a Permanent Secretary<sup>22</sup> and a Judicial Appointments Group in exercising his judicial appointment functions.<sup>23</sup>

6.2 The Judicial Appointments Group supplies all the information to the Lord Chancellor to make judgement on every appointment. The information includes correspondences and interview records with the consultees, i.e. judges, senior members of the legal profession, and others as required and those who are, or may become candidates.<sup>24</sup>

6.3 The appointment of the judges on the High Court Bench and above are made by the Queen on the recommendation of the Prime Minister or the Lord Chancellor.

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<sup>21</sup> Appointments to the High Court, if not on promotion from another full-time office (usually the Circuit Bench), have in practice generally been made from members of the Bar of high standing who have been in practice for perhaps 20 or 30 years and hold the rank of Queen's Counsel. However, the Courts and Legal Services Act 1990 has made it possible for suitably qualified solicitors to be appointed to the High Court Bench. Practitioners who are appointed to the High Court Bench will normally have had a substantial and successful practice, often having developed areas of specialisation, and be held in high regard by the profession. They will normally have sat previously as Deputy High Court Judges and/or Recorders. "Senior Judicial Appointments," the Lord Chancellor Department's website and Supreme Court Act 1981 s.10 as amended by Courts and Legal Services Act 1990 s.71.

<sup>22</sup> The Permanent Secretary, a civil servant, is the Official head of the Lord Chancellor's Department. One of the main functions of the Department is "appointing, or advising on the appointment of, judges." The Lord Chancellor's Department website.

<sup>23</sup> In the Judicial Appointments Group, Division one (A) is responsible for providing support on appointment procedures of Justices of the High Court and above. House of Commons Home Affairs Committee, *Judicial Appointments Procedures*, vol. II, HMSO, London, 5 June 1996, p.127 and p.155.

<sup>24</sup> *Ibid.*, p.127-128.

## **7. Selection of Candidates**

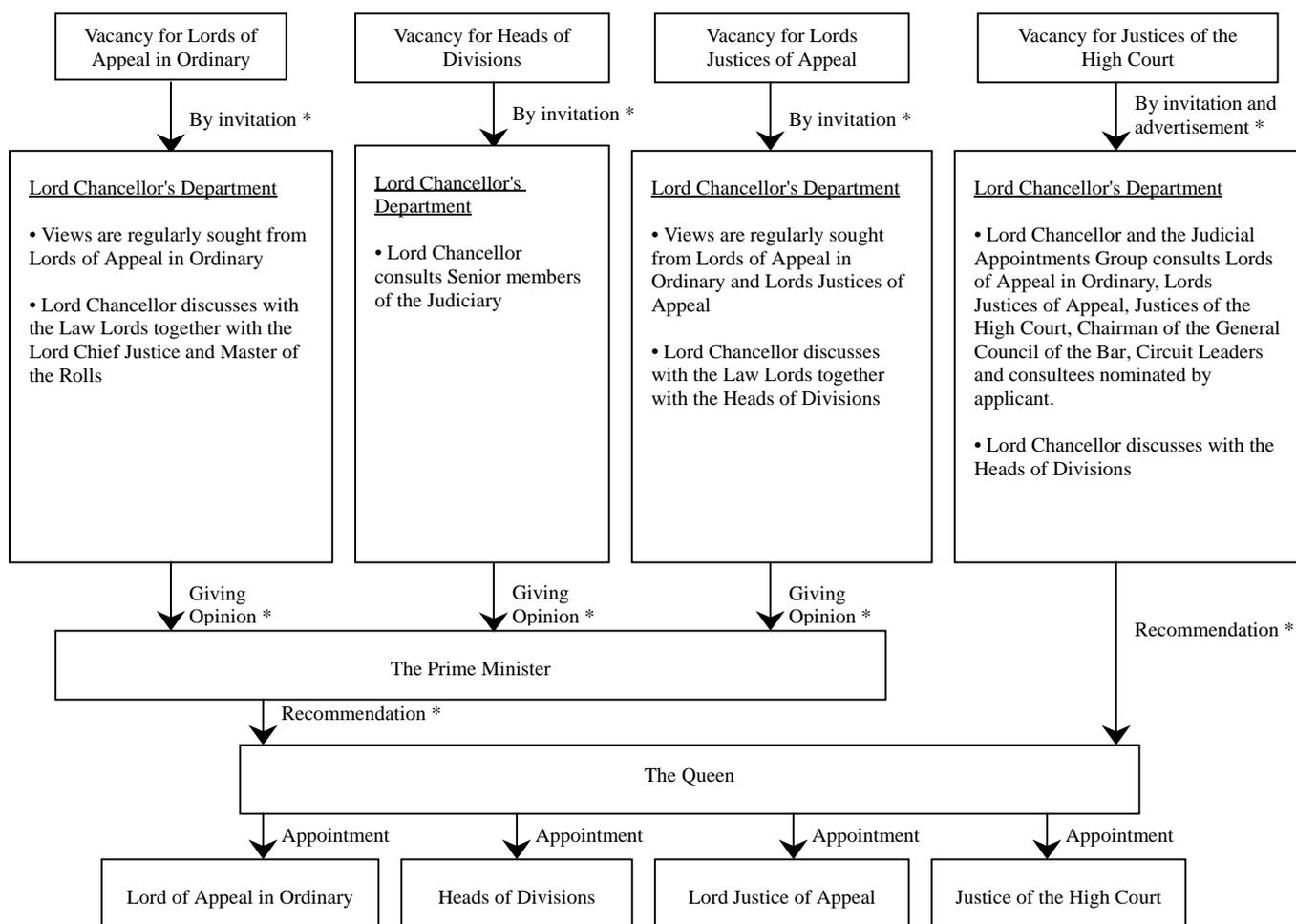
7.1 When selecting candidates for judicial appointment, including those for the High Court Bench and above, the Lord Chancellor adopts the followings principles:

- (a) Appointment is strictly on merit. The Lord Chancellor appoints those who appear to him to be the best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability, except where the disability prevents the fulfilment of the physical requirements of the office.
- (b) Part-time service is normally a pre-requisite of appointment to full-time office. Before being considered for any full-time judicial post, a candidate must usually have served in that or a similar post in a part-time capacity long enough to establish his or her competence and suitability for full-time appointment.

### PART 3 - THE PROCESS OF APPOINTMENT OF JUDGES

8.1 Appointments of Lords of Appeal in Ordinary, Heads of Divisions and Lords Justices of Appeal are made to fill particular vacancies as they arise.<sup>25</sup> Appointments of Justices of the High Court are made by invitation and advertisement.<sup>26</sup> A summary of the process of these appointments is in Figure 3.

**Figure 3 - The Process of Appointment**



\* All invitations to apply for judicial appointments are made by the Lord Chancellor. The information on whom to be invited by the Lord Chancellor, the number of persons recommended by the Lord Chancellor to the Prime Minister and the Queen, and the number of persons recommended by the Prime Minister to the Queen, is confidential. (See Part 4 for details of the communication between the Prime Minister and the Lord Chancellor in judicial appointments.)

<sup>25</sup> Judicial Appointments Annual Report 1998-99, the Lord Chancellor's Department, the United Kingdom, October 1999.

<sup>26</sup> According to "The High Court 2000 Timetable", the advertisement on Justices of the High Court was published in February 2000. The Department will dispatch of letter informing applicant the result in November 2000.

## 9. Appointment Procedure

### Invitation and Advertisement

9.1 The appointments of Lords of Appeal in Ordinary, Heads of Divisions and Lords Justices of Appeal are by invitation.

9.2 Before 1997, the appointments of Justices of the High Court were by invitation only. Applications are now also invited by public advertisement for vacancies in the High Court.<sup>27</sup> Any legal practitioner or serving judge who satisfies the statutory requirements is eligible to apply for appointment. The Lord Chancellor reserves the right to appoint those who have not made an application.

### Consultation

9.3 An important feature of the process of judicial appointment in the U.K. is consultation. Views and opinions about the qualities and work of applicants are collected from a wide range of judges and senior practitioners in the legal profession. This information is mainly collected in writing and sometimes at face-to-face meetings.

### *Lord of Appeal in Ordinary*

9.4 In respect of an appointment of Lord of Appeal in Ordinary, the views of the Lords of Appeal in Ordinary on the relative merits of a potential candidate are regularly sought by the Lord Chancellor. The views collected then form the basis for the Lord Chancellor's discussions with the Law Lords together with the Lord Chief Justice and the Master of the Rolls.<sup>28</sup>

### *Head of Division*

9.5 In respect of an appointment of a Head of Division, the Lord Chancellor customarily consults senior members of the judiciary. Heads of Divisions are generally appointed from among the Lords of Appeal in Ordinary or Lords Justices of Appeal.<sup>29</sup>

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<sup>27</sup> The first advertisement of High Court Bench judges was in 1997. Judicial Appointments Annual Report 1998-99, the Lord Chancellor's Department, the United Kingdom, October 1999.

<sup>28</sup> House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996, p.131.

<sup>29</sup> "Senior Judicial Appointments," the Lord Chancellor Department's website.

### *Lord Justice of Appeal*

9.6 In respect of an appointment of the Lord Justice of Appeal, the views of the Lords of Appeal in Ordinary and of Lords Justices of Appeal on the relative merits of potential candidates are regularly sought by the Lord Chancellor. The views collected then form the basis for the Lord Chancellor's discussions with the Law Lords together with the Heads of Divisions.<sup>30</sup>

### *Justice of the High Court*

9.7 In respect of an appointment of the Justice of the High Court, consultations are carried out by the Judicial Appointments Group with the Lords of Appeal in Ordinary, the Lords Justices of Appeal, the Justices of the High Court, Chairman of the General Council of the Bar, Circuit Leaders and the consultees nominated by the applicant.<sup>31</sup> The Lord Chancellor also personally discusses with the Heads of Divisions whenever an appointment has to make.

9.8 In an effort to make the appointment process of Justices of the High Court more transparent, the Lord Chancellor's Department has published "High Court 2000 - Guide for Applicants", a Guide on the consultations process. This Guide is available for public consumption via the Internet. Relevant details are extracted in Appendix I.

### Recommendation

9.9 The appointments of the Lord of Appeal in Ordinary, the Heads of Divisions and the Lord Justice of Appeal are recommended by the Prime Minister to the Queen, but the Lord Chancellor's opinion is generally sought.<sup>32</sup> The appointment of the Justice of the High Court is recommended by the Lord Chancellor to the Queen.

### Appointment

9.10 The Queen by letters patent appoints qualified persons as the Lord of Appeal in Ordinary, the Heads of Divisions, the Lord Justice of Appeal and the Justice of the High Court.<sup>33</sup>

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<sup>30</sup> House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996, p.131.

<sup>31</sup> The High Court 2000 – Guide for Applicant, Application for appointment as Justice of the High Court, the Lord Chancellor's Department, 2000.

<sup>32</sup> When appointing Lords of Appeal in Ordinary, Heads of Divisions and Lord Justices of Appeal, the Lord Chancellor's opinion is generally sought by the Prime Minister. This method is a matter of practice and convention, not of written law. "Judges on Trial," Shimon Shetreet, 1976, Hebrew University of Jerusalem, p.47.

<sup>33</sup> Appellate Jurisdiction Act 1876 and Supreme Court Act 1981 s.10(1) & (2).

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## PART 4 - THE ROLE OF THE LEGISLATURE IN THE PROCESS OF APPOINTMENT OF JUDGES

### 10. Overview

10.1 In the U.K., the U.K. Parliament save the Prime Minister,<sup>34</sup> who is both head of government and leader of the majority party in Parliament, is **NOT** involved in the process of appointment of judges on the High Court Bench and above.

### 11. Home Affairs Committee

11.1 The Home Affairs Committee of the House of Commons is responsible to examine "... the policy, administration and expenditure of the Lord Chancellor's Department (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointment)."<sup>35</sup> In 1994, the Home Affairs Committee conducted an enquiry into the methods for appointing members of the judiciary and magistracy in England and Wales.<sup>36</sup>

11.2 In the enquiry, Lord Mackay, the then Lord Chancellor, was asked how many names were on the list which he submitted to the Prime Minister for particular judicial appointment. He was also asked to talk about the judicial appointment in more general terms. He replied:

*"I am open to talk about the subject as generally as you [Committee members] like, but when it comes to a communication between myself and the Prime Minister then I think, with the greatest possible respect, you would be kind enough to respect that confidentiality."<sup>37</sup>*

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<sup>34</sup> To the question on the justification for the Prime Minister's role in senior judicial appointments, the Lord Chancellor said "I think the justification for it is the very highest offices in the judiciary should be the subject of recommendations to her Majesty by the head of the executive and I do believe that the character of those who have been Prime Ministers of this country, of any party, certainly within anything like recent times, have been of a character that would help to give people confidence that they believed that these highest offices were being filled by the appropriate people." House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996, p.66-69.

<sup>35</sup> Standing Order No. 130, the House of Commons.

<sup>36</sup> The Committee invited written evidence and held eight oral evidence sessions. House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996.

<sup>37</sup> House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996, p.64-79.

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11.3 When the Permanent Secretary of the Lord Chancellor's Department was asked for opinions collected on an applicant's suitability, he declined to release any information and told the Committee:

*"...the statements of opinion about their [applicants'] suitability are given on a strict understanding of confidentiality to the person or people who give them, and we do not, and indeed we are bound not to, allow applicants or any one else outside the Lord Chancellor and his very small circle of advisers to see them."<sup>38</sup>*

11.4 Lord Mackay told the Committee that he gave confidential advice to the Prime Minister, who received it confidentially and then made his recommendation to the Queen. During the evidence sessions, the Lord Chancellor declined to release any information in relation to his communication with the Prime Minister on the process of judicial appointment. The Lord Chancellor also told the Committee that during his Lord Chancellorship from 1987, he had never received any complaint from Members of Parliament about particular appointment.<sup>39</sup>

11.5 The overall conclusion of the 1994 Home Affairs Committee enquiry was:

*"[the Committee] have not found that there is a need for large-scale change in the procedures for the appointment of professional judges and of lay magistrates."<sup>40</sup>*

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<sup>38</sup> House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. II, HMSO, London, 5 June 1996, p.1-14.

<sup>39</sup> Ibid, p.66-69.

<sup>40</sup> House of Commons Home Affairs Committee, Judicial Appointments Procedures, vol. I, HMSO, London, 5 June 1996, p.xxxii.

## **PART 5 - CRITERIA FOR APPOINTMENT FOR HIGH COURT JUDGES**

12.1 For appointment of High Court judges, the Lord Chancellor uses the following three criteria:

- (a) Legal Knowledge and Experience;
- (b) Skills and Abilities; and
- (c) Personal Qualities.

12.2 The Lord Chancellor states that an appointment will only be referred to those individuals who best satisfy these criteria and display the relevant attributes to the highest degree.<sup>41</sup> (Please refer to Appendix II for details of these criteria and attributes)

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<sup>41</sup> "The High Court 2000 – Guide for Applicant", Application for appointment as Justice of the High Court, the Lord Chancellor's Department, 2000.

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## PART 6 - COMMISSION FOR JUDICIAL APPOINTMENTS

13.1 In July 1999, the Lord Chancellor announced that Sir Leonard Peach, then the Commissioner for Public Appointments, would conduct a scrutiny of Queen's Counsel and judicial appointments selection procedures. The Lord Chancellor decided to commission this scrutiny because judicial appointments selection procedures must be seen to be fair to everyone, irrespective of race or other irrelevant factors.<sup>42</sup>

13.2 In December 1999, Sir Leonard Peach produced to the Lord Chancellor a report "An Independent Scrutiny of the Appointments Process of Judges and Queen's Counsel in England and Wales" on evaluation of the judicial appointment process in the U.K. (The Peach Report).<sup>43</sup>

13.3 The Peach Report recommended to set up a "Commission" on judicial appointments. In February 2000, the Parliamentary Secretary of the Lord Chancellor's Department stated in the House of Commons that the Lord Chancellor had accepted there should be a Commission for Judicial Appointments.<sup>44</sup> The Parliamentary Secretary also stated that the Commission would undertake the tasks outlined in the Peach Report. (Please refer to Appendix III for the details of the Commission).

13.4 The main duties of the "Commission" are to perform audits of judicial appointment procedures and to carry out the role of Ombudsman for judicial appointments. In the Report, Sir Leonard Peach stated that "the Commission will provide a valuable addition in building credibility by supplying an opportunity for appeal and complaint outside the Lord Chancellor's Department, supplementing the impressive feedback to disappointed candidates which already exists."

13.5 The "Commission" has not yet been officially established as of the date of publication of this research report.

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<sup>42</sup> There have been complaints from the legal communities on the procedure for appointments to the judiciary in U.K for years. The complaints focus on "consultations", "processing applications", "composition of the judiciary", and the question "do current appointment procedures threaten judicial independence?" Judicial Appointments Procedure, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.19-40.

<sup>43</sup> Lord Irvine of Lairg, the Lord Chancellor, Speech at the launch of The Judicial Studies Board's Equal Treatment Benchbook, London, 28 September 1999. The Report is available on the Lord Chancellor's Department website.

<sup>44</sup> House of Commons Hansard Debates, 2 February 2000.

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**PART 7 - ARGUMENTS AGAINST AND FOR THE CURRENT SYSTEM**

14.1 The 1994 Home Affairs Committee enquiry received criticisms of the current system of appointment of judges of the High Court Bench and above. It also received opinions which supported the current system. A summary of both arguments is given in this part.

*Arguments Against the Current System*

14.2 Major criticisms concerned the system of consultation and the issue of judicial independence.

14.3 Both academics and lawyers criticised the system of consultation as unstructured and that comments were drawn from a group of people who had themselves been selected from a narrow pool.<sup>45</sup> This has been criticised by some as resulting in a judiciary in which certain sectors of the community are underrepresented.<sup>46</sup>

14.4 Secondly, there was criticism that the Lord Chancellor's role in appointing judges contravenes the principle of separation of powers between the executive, the legislature and the judiciary. It was argued that judges should not be chosen by a political Lord Chancellor and should be chosen by a Judicial Appointments Commission.<sup>47</sup> There was also criticism that the involvement of the Prime Minister in the appointment of the most senior judges was political control over the judiciary.<sup>48</sup>

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<sup>45</sup> Opinions were given by Professor Robert Stevens, Master, Pembroke College, Oxford, Mr Geoffrey Robertson, QC, Head, Doughty Street Chambers, and Mr Nicholas Alexander, Partner, Travers, Smith, Braithwaite (Solicitors), Judicial Appointments Procedure, Vol. II, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.80-93.

<sup>46</sup> The then Chairman of the General Council of the Bar, the Law Society and the Association of Women Barristers criticised that some groups, such as women and ethnic minorities, were under-represented in the judiciary; others, such as criminal barristers and those with a so-called "elitist" education were said to be over-represented. Judicial Appointments Procedure, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.25-36.

<sup>47</sup> Prof. Robert Stevens, *The Independence of the Judiciary*, Oxford, London, 1993, p.179. For details of the discussion of the Judicial Appointments Commission, please see *Judicial Appointments Procedure*, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.38-54, Appendix 18 and 34. For details of the discussion of the independence of the judiciary in the UK, please see: Prof. Robert Stevens, "The Independence of the Judiciary: the case of England," *International Political Science Association and The Independence of the Judiciary*, Oxford, 1993; Dawn Oliver and Gavin Drewry, *The Law and Parliament*, Butterworths, 1998 and Kate Malleson, *The New Judiciary*, Ashgate, 1999.

<sup>48</sup> Joshua Rozenberg, *The Search for Justice*, 1995, chapter 1 and Appendix 33, *Judicial Appointments Procedure*, Vol. II, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.272-273. Joshua Rozenberg is an eminent and long-standing BBC television and radio legal correspondent.

*Arguments For the Current System*

14.5 The General Council of the Bar and the Judges' Council believed that the system of consultation was essential, and argued that there was a greater chance of making the correct decision if it was informed by assessments of candidates made over a large portion of their professional lives.<sup>49</sup> In addition, the Lord Chancellor affirmed that he had set out a policy on equal opportunities in relation to appointments to the professional judiciary and encouraged women and ethnic minority practitioners to apply for appointment. The Lord Chancellor's efforts in this field were welcomed by the Association of Women Barristers, the Association of Women Solicitors and the General Council of the Bar.<sup>50</sup>

14.6 On the Lord Chancellor's role, the Lord Chancellor suggested that if a Lord Chancellor failed to appoint a candidate who had been universally recommended, senior members of the judiciary who played a significant part in the consultations process would publicize that fact.<sup>51</sup> And, even those who objected to the Lord Chancellor's role in appointing judges have made no complaint on this score.<sup>52</sup>

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<sup>49</sup> Opinions were given by Mr Penry-Davey, Vice-Chairman of the Bar Council and Lord Taylor, Chairman of the Judges' Council. *Judicial Appointments Procedure*, Vol. II, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.57 and 220.

<sup>50</sup> *Judicial Appointments Procedure*, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p. 34

<sup>51</sup> *Judicial Appointments Procedure*, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.38.

<sup>52</sup> *Judicial Appointments Procedure*, Vol. I, the Home Affairs Committee ordered by The House of Commons, 5 June 1996, p.39.

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## Appendix I

### **CONSULTATIONS OF THE APPOINTMENT OF THE JUSTICE OF THE HIGH COURT** (Extracted from " High Court 2000 - Guide for Applicants ")

#### *Consultees*

The names of all those who apply will be included on lists for consultation with serving judges of the High Court and above, the Chairman of the General Council of the Bar and Circuit Leaders. All consultees are asked to provide their written comments on an assessment form (Please refer to Appendix IV for an example of the assessment form). The consultees are asked to comment on candidates in light of three criteria for appointment: "Legal Knowledge and Experience", "Skills and Abilities" and "Personal Qualities". The consultees are requested to give a grade among five gradings in relation to each of these three criteria from the highest grade of "Very well demonstrated" to the lowest grade of "Not demonstrated" to the applicant.

At the end of the assessment form, the consultees are asked to allocate an overall mark: "Well fitted for appointment", "Fitted for appointment" and "Not fitted for appointment" to the applicant.

Comments are collected and made available to the Lord Chancellor without editing. The Lord Chancellor discusses the views collected from the consultees with the Heads of Divisions and then determines which applicants should remain under consideration for appointment.

#### *Names for Further Consultation*

The applicant is asked to nominate, up to three, names whom he or she considers will be able to comment upon his/her qualities and experience to the Lord Chancellor for further consultation. Those named by the applicant for further consultation should be judges or senior members of the profession. Applicants should not approach those whom he or she named.

### *Allegations of Misconduct*

Only specific allegations of misconduct in their full context will be considered by the Lord Chancellor. If a specific allegation of misconduct is made, the Lord Chancellor's Department will seek the commentator's consent to send details of the allegation to the applicant, to enable the applicant to comment on the allegation. The Lord Chancellor has emphasised that if consent is not given to reveal details of any specific allegations of misconduct to the applicant concerned, the allegation will be disregarded.

### *Feedback*

Applicants who fail the application may ask to discuss their position with a senior member of the Lord Chancellor's staff. Assessments are given in confidence. The staff of the Lord Chancellor's Department will not be able to identify those who have commented or disclose what they have said, they will be able to give applicants feedback on the degree of support received and the overall tenor of the views obtained.

## Appendix II

### **CRITERIA FOR APPOINTMENT FOR HIGH COURT JUDGES**

(Extracted from " High Court 2000 - Guide for Applicants ")

#### **Legal Knowledge and Experience**

All successful candidates will have attained

- a) A high level of understanding of the principles of law and jurisprudence.
- b) A comprehensive knowledge of the rules of evidence and of court practice and procedure.

Practitioners will in addition have attained

- c) A high quality of effectiveness and performance in any part-time judicial appointment held.
- d) An outstanding level of professional achievement in the areas of law in which they have been engaged whilst in professional practice.

**Judges who are to exercise the more specialised jurisdictions of the High Court - for example in the Commercial Court or the Patents Court - will, of course, also be expected to have specialist experience in the area of law concerned.**

**It should be noted that prior sittings in a part-time capacity (preferably as a Deputy High Court Judge and/or Recorder) are highly desirable but are not a necessary condition of application or appointment.**

#### **Skills and Abilities**

- a) Sound judgement, being able to:
  - exercise discretion effectively;
  - apply knowledge and experience to make decisions which are in compliance with the law and appropriate to the circumstances of the matter in hand; and
  - consider competing arguments and reason logically to a correct and balanced conclusion.

- b) Intellectual and analytical ability, being able to:
- concentrate for long periods of time, understand and assimilate facts and arguments, and recall such evidence and information speedily and accurately;
  - apply legal principles to particular facts and to determine from a large body of information those issues and facts which are relevant and important and those which are not; and
  - weigh relevant issues and matters of law in order to be able to formulate them for reasoned and coherent presentation.
- c) Decisiveness, having the ability to reach firm conclusions (often at speed), to think, decide and act independently of others, and to rely on their own judgement.
- d) Communication skills, being able to communicate effectively with all types of court user including lay people (whether defendants, witnesses, members of a jury, litigants in person or children), giving instructions, explaining complex issues and giving decisions in judgements clearly and concisely, both orally and, where necessary, in writing.
- e) Authority, being able to:
- command the respect of court users and to maintain fair-minded discipline in the court and chambers without appearing pompous, arrogant or overbearing; and
  - promote the expeditious dispatch of business, preventing unnecessary prolixity, repetition and irrelevance whilst ensuring that all participants (whether represented or not, and including children) are enabled to present their case or their evidence as fully and fairly as possible.

### **Personal Qualities**

- a) Integrity:
- having a history of honesty, discretion and plain dealing with professional colleagues, clients and the courts;
  - possessing independence of mind and moral courage, being prepared to take and maintain unpopular decisions when necessary; and
  - having the trust, confidence and respect of others.

- b) Fairness:
- being open-minded and objective, with the ability to recognise any personal prejudices and to set them aside; and
  - being able to deal impartial with all matters which come before them and ensure that all those who appear before them have an opportunity for their case to be clearly presented and that it is then considered as fully and dispassionately as possible.
- c) Understanding of people and society: Having a knowledge and understanding of, and respect for, people from all social backgrounds, being sensitive to the influence of different ethnic and cultural backgrounds on the attitudes and behaviour of people whom they encounter in the course of their work.
- d) Maturity and sound temperament:
- displaying a maturity of attitude and approach; and
  - being firm and decisive while remaining patient, tolerant, good-humoured and even-tempered.
- e) Courtesy and humanity:
- being courteous and considerate to all court users and court staff; and
  - having and conveying understanding of, and sympathy for, the needs and concerns of court users, as appropriate, and being sensitive and humane.
- f) Commitment: A commitment to public service and to the proper and efficient administration of justice, which they pursue conscientiously, with energy and diligence.

### Appendix III

#### **COMMISSION FOR JUDICIAL APPOINTMENTS**

(Extracted from “Independent Scrutiny of the Appointments Process of Judges and Queen’s Counsel in England and Wales”  
by Sir Leonard Peach, December 1999)

##### *Role*

The Commission should be concerned with the ongoing audit of the processes and policies for making and renewing judicial appointments, for handling grievances and appeals resulting from the application of these processes/policies and for recommending improvements and changes to the Lord Chancellor.

##### *Membership*

A part-time Chairman or First Commissioner and ten or so part-time Commissioners. Not more than one third of the membership will have a legal background; judges or retired judges may be appointed as part-time Commissioners, but not as the First Commissioner; the other members will be lay, though a number will have special knowledge of selection techniques and processes. There will be female and ethnic minority representation. Members will receive appropriate training. Members of the Commission will share the commitment of the Lord Chancellor to ensuring that his principles are implemented.

##### *Activities*

The Commission will meet quarterly as a body to discuss its plan of work, exchange experiences and formulate recommendations to the Lord Chancellor.

Members of the Commission will fulfil the role in a number of selection panels currently undertaken by the lay member, sufficient to fulfil the purposes of an ongoing audit. They will be both full members of the shortlisting and interview panels and also act as independents, monitoring the performance of the panel and any deficiencies in procedure or possible improvements. Any criticisms or suggestions must be voiced to the Chairman of the panel so enabling immediate implementation if deemed necessary by the Chairman. Since it is intended either to increase or to change some of the existing lay members there is no additional expense in this part of the proposal, other than the cost of the four meetings per annum.

The First Commissioner/Chairman or appointed members will handle grievances and complaints from individuals or bodies, providing that the existing procedures in the case of individuals, notably the feedback system, has been exhausted.

The First Commissioner/Chairman and the Commission will provide advice to the Lord Chancellor and the Permanent Secretary on the workings of the judicial appointments system and areas where improvements or reviews should be undertaken.

The Lord Chancellor may ask the Commission to audit or scrutinise any part of the judicial appointments procedures or policy.

The Commission may initiate an investigation resulting from a complaint and recommend action based on the outcomes.

The Commission will publish an annual report which shall be part of the Lord Chancellor's report to Parliament.

#### *Powers and Authority*

The Commission must have access to all relevant documents.

The Commission in the case of a successful appeal will have the right to restore the complainant concerned, in the subsequent cycle of the appointment which he or she is seeking, to the point at which he or she was disadvantaged. This is subject to practicality since there are one-off competitions, or competitions in respect of a single post.

The Commission will have powers to amend or expunge part of the records of any individual.

The Commission will be available to MPs or organisations for the discussion of appointment processes.

Other than in the above and in initiating an investigation, the Commission will not have the powers to take unilateral action and will recommend any proposed actions to the Lord Chancellor for his approval.

*Appointments of the First Commissioner/Chairman*

The First Commissioner/Chairman will be appointed to the Judicial Studies Board in order to provide advice and assistance on the content of training associated with the skills required by judges in taking part in shortlistings, interviews and as part of the consultation requirements

In addition he or she will become a member of the regular meeting between the Lord Chancellor and the senior judges, which conducts succession planning and which produces lists of candidates to the High Court and Court of Appeal. The Commissioner will provide advice to that meeting on the process and system to be followed.

**Appendix IV**

**CONSULTEES'S ASSESSMENT FORM**  
(Extracted from " High Court 2000 - Guide for Applicants ")

**RESTRICTED - APPOINTMENTS**

**HIGH COURT 2000 - ASSESSMENT FORM**

(This may be filled out on screen and printed or emailed to the High Court Team)

Name of Consultee:

Name of Applicant:

**1. PLEASE STATE HOW YOU KNOW THE APPLICANT:**

**2. PLEASE INDICATE WHETHER THE VIEWS EXPRESSED BELOW ARE YOUR VIEWS ALONE OR THOSE OF YOURSELF AND OTHERS:**

MINE     MINE AND OTHERS     How Many (including yourself)

**IF THE LAST, PLEASE INDICATE ANY AREAS OF DISAGREEMENT AND/ OR RECONCILIATION OF VIEWS CONTAINED IN THE DESCRIPTION BELOW**

Comment: -	<b>Legal Knowledge &amp; Experience</b>				
	1	2	3	4	5
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Highest &lt;-----&gt; Lowest</b>					

Comment: - (sound judgement, intellectual and analytical ability, decisiveness, communication skills and authority)	<b>Skills &amp; Abilities</b>				
	1	2	3	4	5
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Highest &lt;-----&gt; Lowest</b>					

Comment: - (Integrity, fairness, understanding of people and society, maturity, sound temperament, courtesy and humanity, commitment)	<b>Personal Qualities</b>				
	1	2	3	4	5
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Highest &lt;-----&gt; Lowest</b>					

Any additional comments: -	<b>Overall Marking</b>		
	A	B	C
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Highest &lt;-----&gt; Lowest</b>			

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Useful websites:

22. Home Office Internet Service, <<http://www.homeoffice.gov.uk>>
23. Houses of Parliament, <<http://www.homeoffice.gov.uk>>
24. The Lord Chancellor's Department, <<http://open.gov.uk/lcd/judicial>>
25. United Kingdom: Internet Law Library, <<http://www.priweb.com>>

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