

**CONSULTATION PROPOSALS ON JUDICIAL
APPOINTMENTS AND DIVERSITY**



THE CHARTERED INSTITUTE OF LEGAL EXECUTIVES

RESPONSE TO CONSULTATION

Introduction

1. This response represents the views of The Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the *Legal Services Act 2007*.
2. We welcome the opportunity to respond to the Ministry of Justice's consultation paper: *Appointments and Diversity, "A judiciary for the 21st Century"*. Increasing the diversity of the judiciary to reflect our communities is vital in the need to continue to deliver effective justice. CILEx applauds the various commitments by the government and other stakeholders in the pursuance of this important initiative.
3. CILEx is focused and committed to equality and diversity in relation to the members it represents, the staff it employs and its stakeholders. CILEx has already been recognised as a diverse organisation which has an "all are welcome" approach to its members, turning away no one via subscribed mandatory requirements but ensuring progress is achieved through vigorously tested capability. CILEx has thrived for almost 50 years in recruiting those interested in pursuing a career in law and yet at the same time ensuring access to all, regardless of social background or status.

Greater Diversity in the Judiciary

4. CILEx is of the view that diversity and quality go together. The higher the pool from which lawyers are selected the higher the quality of the profession and ultimately the bench.
5. Judicial legitimacy rests on public confidence in the courts, in the judiciary and in their judgments. Public confidence in the court depends upon judges; and in their selection, the court is dependent upon the selection process of the judiciary. It is therefore incumbent that the judicial selection process does not prevent meritorious candidates with different backgrounds or characteristics from being adequately considered for appointment. Otherwise, there is a very real risk:

“That an unrepresentative judiciary may result in a loss of confidence in the system, all the more so when judges are called upon to apply community standards as part and parcel of their daily work. Once that is acknowledged, as it must be, it is important that efforts be made to ensure that the judiciary is more representative than it is at the present time and that its composition is fairly balanced”¹

6. In view of the above, CILEx supported the inclusion of the term “diversity” as part of the Judicial Appointment Commission’s (JAC) amended merits criteria in the appointments process.
7. Although the need for greater diversity in the judiciary is now generally accepted, there is no real consensus as to what is the right system for judicial appointments. Therefore any changes to the existing arrangements should be judged against the fundamental principles for making judicial appointments, and against the doctrine of the separation of powers as exists in England and Wales.

¹ Mason, Bastion 7

8. The fundamental principles should continue to be:

- An independent judiciary
- Appointment on merit
- Equality
- Openness and transparency
- An efficient and effective system

9. *Section 63 (2) of the Constitutional Reform Act 2005* (hereinafter "*the 2005 Act*") enshrines the important principle that appointments 'must be solely on merit'. Merit and diversity are not mutually exclusive objectives. Baroness Prashar observed "there is no question of compromise in the name of diversity, because there is no need to compromise. Merit and diversity are not incompatible. For us the diversity is the search for merit"².

10. CILEx has a total membership of approximately 22, 0000 of which 7500 are Chartered Legal Executive lawyers practising predominantly in England and Wales. Of the membership 74% are female and 24% of students come from a BAME background. To date only one Chartered Legal Executive has been appointed as a fee paid Deputy District Judge. It is the policy of CILEx to encourage its membership, following accumulation of the requisite degree of experience and qualification, to apply for judicial posts. CILEx recommends its members to take a realistic approach to such applications and wherever possible, gain extensive knowledge through the JAC website and where possible by Judicial work shadowing the variety of posts available and the work involved. CILEx believes that diversity does not begin and end with gender, race or disability, but in fact extends to socio-economic background, and therefore wishes to see greater social mobility within the legal profession as a whole.

² Baroness Prashar speech at the LSE, Student Law Society, 22 February 2007.

11. CILEx supports the progression of diversity in practical terms through its website and monthly Journal. It supports both financially and physically diversity events and is an active participant of the JAC and professions outreach scheme, in addition to the Advisory Panel on Judicial Diversity.

12. We also support the government's commitment to implementing all 53 of the Judicial Diversity Taskforce Panel's recommendations on creating a more diverse judiciary and will continue to work together with the Lord Chief Justice, JAC, Bar Council and the Law Society and other appropriate bodies to implement the recommendations.

13. CILEx agrees that the appointments process, particularly for the more junior judicial posts, takes too long and seems unnecessarily bureaucratic and costly. We would not object to progression towards on-line testing of a more general intelligence-based nature rather than being lawyer specific. There is scope in the later stages for testing an applicant's legal knowledge and potential qualities as a Judge. The initial testing phase is simply a method of reducing the number of candidates applying to a more manageable level for the interview process and therefore a more arbitrary method of testing can be adopted if this will significantly speed up the process.

14. CILEx is concerned that the current make-up of the senior judiciary seems to be self-perpetuating although it is hoped that in due course the judiciary will reflect the society it represents as a whole. That said, CILEx recognises a judiciary more reflective of our communities may take many generations to achieve. CILEx is further concerned that access to the legal profession as a whole by the more traditional routes of solicitor or barrister may become limited for the next generation of lawyers due to the prohibitive costs of a university education which may prove to be beyond the economic means of most, save for a small privileged socio-economic group. This in itself will impact upon the diversity of the judiciary certainly

in terms of its socio-economic nature and the social mobility of its members, which may have a knock on effect for those of an ethnic background as many of these are associated with more deprived socio-economic groups. Access to the legal profession cannot be confined to the elitist and "Russell Group" university educated as this will simply preserve the present make-up of the judiciary, at least in terms of socio-economic background.

15. At present, Chartered Legal Executives are only eligible for prescribed appointments up to District Judge posts (including part-time District Judge posts) or as members or chairs of tribunals. As such, CILEx will not enter fully into the consultation process insofar as it is related to the more senior judicial posts save to observe that any initiative that leads to greater diversity at this level is welcome and should be pursued. CILEx answers are set out below to the questions in the consultation, where CILEx can offer a view. CILEx encouraged members to respond to a questionnaire in relation to questions 12 to 13 and 20. 83 members responded and their views are incorporated in our response below.

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister?

16. 69% of respondents agreed that the Lord Chancellor should make recommendations directly to HM the Queen instead of the Prime Minister. This appears to support the constitutional principle of the separation of powers. Two verbatim comments were as follows:

"The Prime Minister has a political bias, whichever party is in control at any given point. It would instil better confidence in the judicial process as a whole for the public to know that the laws of its land are not solely run potentially for any individual's personal ends and that there is some form of independence retained by nation in the form of opinion of the Queen as the head of state. Popular opinion puts more trust in the Queen than the Prime Minister and for any judicial

system to work to its full potential; it must surely have the backing of the people it purports to serve given point"

"A Prime Minister's selection will always be influenced by party politics. It is hoped HM the Queen would be fairer"

17. CILEX supports this view

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above?

18. 79% of respondents agreed that part-time working should be extended to the higher courts.

19. CILEx supports the view that the extension of fee paid part time working where appropriate does seem sensible although it is accepted that occasionally anomalies will be thrown up as a consequence of a part time Judge when, for example, practising in his or her capacity as an advocate, appears before a more junior member of the judiciary. There is, however, already existing scope for this in the form of Recorders who may be appearing before District Judges when not engaged in their judicial duties.

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable?

20. Practitioner feedback was mixed. Most of the respondents agreed that fairness must always be upheld above all. Subject to the comment below, CILEx has no objection in principle to the application of positive action provision in the event two candidates are indistinguishable on merit. That said, we do see a potential anomaly: would the positive action provisions apply if the two indistinguishable candidates

both come from different under-represented groups? For example, a female candidate and a candidate from a BAME background.

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

Question 16: How many Judicial Appointments Commissioners should there be?

Question 17: Should the membership of the Commission be amended as proposed above? (Schedule 12 pt1 to CRA)

21. With regard to Questions 16, 17 and 18, CILEx has no specific views upon the number of Judicial Appointments Commissioners there should be save to make the obvious observation that there should be enough to discharge their responsibilities properly. CILEx is however of the view that a more general membership should be created that is not specific to certain groups. This should create a more diverse group of commissioners affording an opportunity for Chartered Legal Executives and lawyers from other groups, securing membership.

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

22. CILEx would wish to see the JAC's resources used as effectively as possible but it does not see how a judicial appointment not requiring a legal qualification can be distinguished from any other judicial appointment.

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

23. The affirmative procedure can be commended on the basis that it brings about a debate and therefore increases awareness. It also means that in effect this form of delegated legislation can only be brought into effect if approved by Parliament.

24. However, in reality, only a small number of S.I.'s are introduced in this way. The enabling Act sets out whether an affirmative resolution is required. The procedure has been used where individual rights are affected and an example of this being that any new or revised Codes of Practice under the Police and Criminal Evidence Act 1984 can only be introduced using this method. The significance is that Parliament cannot amend the statutory instrument. Under this procedure it can only be approved, annulled or withdrawn. CILEx is not totally convinced this will enable proper debate or transparency bearing changes will impact on constitutional principles.

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

25. Subject to further comments below, practitioner feedback appears to suggest that prospective candidates would like to see the appointments process expedited. A long delay not only undermines a candidate's prospects with their employer but also becomes an endurance test. Practitioner feedback also indicates that the appointments process should be kept under review.

Conclusions

26. CILEx is of the view that diversity will widen the talent pool from which to appoint talented applicants regardless of their ethnicity or background. Indeed, this was evident in the talent pool being widened to include Chartered Legal Executive

lawyers and the appointment of the first Chartered Legal Executive judge in August 2010.

27.90 Chartered Legal Executives applied for judicial posts in selection exercises concluded between April 2009 and September 2011; 43 for deputy district judge (civil) positions; one to be a district judge (magistrates' court); and more than 40 to be tribunal judges. We were encouraged by the high number of attendees who would consider a judicial career following attendance at our 2011 judicial workshops. In order to encourage more applicants, CILEx would support a line management progression from Deputy District Judge and tribunal judge level through up to the highest ranks as this would afford greater opportunities for our members who may be entering at more junior levels but show potential for advancement.

28. However, while our already diverse membership - with 74% women and 24% of students from BAME groups - could help improve judicial diversity, Chartered Legal Executives face the same problems as solicitors in that their primary duty as fee earners is considered by some firms to be incompatible with a judicial career. This requires a change in law firm culture that sees a judicial career as benefiting a firm similar to barristers' chambers.

29. CILEx is of the view that *the 2005 Act* really needs more time to "bed in" and there is no evidence that major change is needed, save to promote greater diversity initiatives. As such, we continue to support the general principles of the *2005 Act*, but with greater transparency and accountability.