JUDICIAL APPOINTMENTS
AND
A NEW SUPREME COURT

ALBA'S RESPONSE

CONTENTS

INTRODUCTION

1. This is a response by the Constitutional and Administrative Law Bar Association ("ALBA") to two consultation papers produced by the Department of Constitutional Affairs: "*Constitutional Reform: a new way of appointing judges*" ("JA") and "*Constitutional Reform: a Supreme Court for the United Kingdom*" ("SC"). ALBA is one of the four leading specialist bar associations represented on the Bar Council and it represents a wide range of practitioners in the fields of public and administrative law and human rights, as well as (as associate members) solicitors and others with an interest in these fields. The Association has over 750 members. This Paper has been approved by the ALBA's Executive Committee, which has 21 members representing all levels of seniority and fields of practice.

2. ALBA considers that the proposals under consideration raise important constitutional issues that will significantly affect the future relationship of the legislature, the executive and the judiciary. These issues are reflected in the consultation papers principally through the prism of proposals for the structural arrangements required for a judicial appointments commission and a new Supreme Court. Those arrangements need to be seen, however, in a wider perspective. Moreover the consultation paper on judicial appointments also touches on issues affecting the operation of any system of appointments suggesting radical changes that may significantly affect the character and quality of appointments, whilst disappointingly providing little or no detail of what such changes may involve[1]. Further, given the complexity and recognised constitutional importance of the issues with which the consultation papers deal and the long term nature of the changes contemplated, it is also unfortunate that consultation is being conducted over a period that is relatively short, including normal annual holidays.

3. Nonetheless, in principle, ALBA welcomes proposals for a commission to be involved in the making of judicial appointments and for a new Supreme Court for the United Kingdom.

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[1] For example, the Government suggests that there is a requirement for "fresh approaches and a major re-engineering of the processes for appointment": JA at [27]. But the consultation papers provide little or no detail of what they may be. To suggest that any commission should take this forward, as the Government does, only serves to indicate unease with the current arrangements without proposing anything specific to replace them. Indeed the Government is inconsistently now consulting, for example, about what steps could be taken by the Commission to encourage diversity (Q14) whilst proposing to leave such matters to the Commission to take forward.

4. ALBA considers, however, that:

(1) the criteria for the selection of judges should be determined by Parliament in primary legislation. They should not be left to the executive to formulate;

(2) the criteria for selection should be related to the specific tasks that the individual appointed will be called upon to discharge;

(3) the executive should have no role in the selection of individuals to be judges or members of tribunals, in their promotion or in their appointment to certain offices. Generally appointments and promotions should be decided by a judicial appointments commission applying the criteria that Parliament has chosen;

(4) the number of judges in particular courts and of members of particular tribunals should be fixed by regulations made following consultation by the Secretary of State subject to affirmative resolution and with a report explaining why that number should be sufficient to ensure the disposal of cases with reasonable expedition. Within these allocations, the deployment of individual judges once appointed should be for the judiciary or tribunals concerned themselves to determine;

(5) any appointments commission should include members of the judiciary as well as lawyers and non lawyers;

(6) the non-judicial members of any commission should be appointed, by a body independent of the executive, solely on the basis of their own personal merit and the contribution that they individually can make to the process of judicial appointment and promotion. They should not be appointed on the nomination of any organisation and they should have security of tenure for at least 5 years;

(7) there should be a different commission for appointments to (a) the new Supreme Court, the Court of Appeal, the European Court of Justice, the European Court of Human Rights and certain senior judicial offices and (b) the High Court, the Circuit Bench and other judicial appointments of less seniority including legal members of Tribunals. Appointments to the lay magistracy should be dealt with by another independent body;

(8) the composition of each of these commissions should reflect the different tasks that each will perform. The former should be chaired by the President of the Supreme Court; the latter by the Lord Chief Justice. Half of the membership of the former commission, and a third of the latter, should comprise members of

the judiciary. The remaining members of the latter commission should be divided equally between lawyers and non-lawyers;

(9) there should be further public consultation on the proposed manner of operation of any commission;

(10) the accountability of any such commission should be secured: (a) by making it a non departmental public body; (b) by requiring it to provide any disappointed candidate with reasons for its decision (while maintaining the confidentiality of any consultations it may undertake); and (c) by maintaining a separate body to review its operation and to consider complaints;

(11) complaints against judges, their discipline and dismissal ought generally to be the responsibility of the Lord Chief Justice in consultation with the relevant judicial appointments commission. The present position in relation to the dismissal of the senior judiciary should be maintained;

(12) the new Supreme Court should be given jurisdiction to deal with devolution issues and appeals from Scotland in both criminal and civil cases and it should only hear cases for which permission to appeal has been given by the Supreme Court itself;

(13) there should be 15 members of the new Supreme Court. They should include at least two members from Scotland and one from Northern Ireland. The members of the new Supreme Court should elect their own President and Deputy President;

(14) the Supreme Court should continue to sit in panels but members of the Court should devote their whole time to the business of the Supreme Court and the Privy Council. Former members of that court (or of the Appellate Committee) should not sit in the Supreme Court;

(15) the procedures of the new Supreme Court should be reformed and should not replicate the antiquated procedures of the Appellate Committee; and

(16) both the new commissions and the new Supreme Court must be provided with appropriate accommodation and other resources to enable them to discharge their functions.

THE CRITERIA AND LEGAL BASIS FOR JUDICIAL APPOINTMENT

5. Currently eligibility for judicial appointment is governed by statute. The criteria for appointment are not.

6. The Government proposes that "setting overall policy in relation to judicial appointments should remain a Government responsibility"[2]. It asserts that "it is....fundamental that the responsibility for defining the criteria for appointment remain a duty of government", apparently on the ground that "the Government is in an ideal position to determine how well the criteria are suited to achieving" the appointment of those "best able to meet the continuously evolving day to day challenge of working in the courts and tribunals"[3].

7. ALBA disagrees. Whatever process may be adopted for the appointment of individuals, the criteria for selection should reflect the character of the judiciary that it is desirable to achieve in the public interest. In ALBA's view, that decision is of sufficient importance for Parliament, not the executive or a judicial appointments commission, to take. Indeed the nature of that decision is such that Parliament should take it. The executive should not be free to frame the criteria for choosing those who should adjudicate in disputes which may involve the executive. Moreover, in ALBA's view, it is important that Parliament should define the criteria for appointment, as well as the process for the selection, of judges in order to help to maintain the legitimacy of the judiciary in a democratic society, given the powers which are entrusted to them. Whilst ALBA agrees with the Government that it is important "to emphasise and to enhance the independence of the Judiciary from both the executive and Parliament"[4], it will help, to some extent at least, to secure that the judicial decisions are generally acceptable, however unpalatable specific decisions may be to some, if those who deliver them have been selected by reference to criteria and by a process that Parliament has deliberately chosen.

8. In ALBA's view, therefore, the criteria for judicial appointment should be defined in primary legislation. Delegated legislation (subject to affirmative or negative resolution) or the promulgation of a code of practice even if it has to be approved by both Houses of Parliament

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2 JA at [92].

3 JA at [90].

4 SC at [45].

leave no scope for detailed amendment. Although the challenge of working in courts and tribunals may be "evolving day-to-day", the qualities required of those who have to meet such challenges are not. If the criteria for selection do need revising in the light of experience or changing requirements, there is no reason why Parliament should not decide whether or not that is so and in what manner to amend the primary legislation specifying the relevant criteria if required. ALBA does not accept any suggestion that Parliament is less well placed than the executive to make such informed choices. Embodying the criteria for the selection of judges in primary legislation would also comply with the provisions of the European Charter on the statute for judges[5].

9. Currently the basic criterion for appointment to most positions is that the individual or individuals should be selected who are best qualified on the basis of individual merit, assessed by reference to certain personal qualities[6], although the function of local Advisory Committees in recommending individuals for appointment as lay magistrates have to take into account "the need for Benches to be diverse in terms of age, gender, ethnic origin, disability, occupation, geographical spread and political affiliation"[7]. Throughout the consultation paper on judicial appointments, it is emphasised that the judiciary is currently not "reflective of the society it serves"[8] and that the Government wishes to "find more diverse and representative judges"[9]. The main steps envisaged to secure that end involve "opening up the appointments process" in an undefined manner and enhancing the prospects of promotion within the judiciary[10]. Although it is stated that "the fundamental principle in appointing judges is and must remain selection on merit"[11], there are indications that matters other than individual, personal, merit may be considered. Thus one suggestion mentioned for consideration in order to increase

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5 See Council of Europe publication DAJ/DOC(98)23 at [2.1] and the explanatory memorandum on the charter at [1.2].

6 See JA at [7]-[9].Lord MacKay once stated that "it is not the function of the judiciary to be representative of the population as a whole" and that "nothing would be worse for the reputation of the judiciary than for me to lower the standards for appointments to the judiciary simply to ensure a different racial or sexual mix": New Law Journal November 9th 1991.

7 See JA at [62]. It is stated, for example, nonetheless that "the Government wants to see a more representative magistracy that can really be seen to reflect the community": JA at [66].

8 See eg JA at [27], [93]

9 JA at [94].

10 See JA at [94]-[97]

11 See JA in the Lord Chancellor's foreword and at [28].

diversity is whether to reserve a number of places for certain candidates at recorder or district judge level whose lack of experience might otherwise count against them[12], another is to change the qualifications required to make it easier for academics to be appointed[13]; and one reason given for the Secretary of State retaining a "more direct input" in the appointment of Lord Justices of Appeal and Heads of Division is said to be "the overall public interest in a *balanced* and high quality group of judges"[14]. Similarly the Government considers that ensuring "adequate representation" from each jurisdiction should be a guideline for selection of members of the new Supreme Court for the United Kingdom in any event if there is no formal quota[15].

10. ALBA's views on increasing diversity are dealt with in paragraph 72 below. In ALBA's view the question whether the selection criteria should include making a contribution to the diversity of the judiciary, as is now the case for the lay magistracy, is one for Parliament to determine. It is not one that should be left for the executive or a judicial appointments commission to determine as they think fit, as it would be under the arrangements that the Government envisages. Parliament should define the selection criteria for the judiciary.

11. ALBA also considers that it is extremely important that the criteria for appointment should be related to the specific tasks that the individual appointed may be called upon to discharge. General skills and abilities are always relevant. But there are a number of specialised jurisdictions in which it is important that judges when appointed have the necessary experience and skills. These include, for example, in the High Court: the Chancery Division, the Family Division, the Commercial Court and the Administrative Court. It is also desirable in the public interest that courts hearing appeals, such as the Court of Appeal and the new Supreme Court, should have members who have a sufficient breadth of experience to deal with specialist cases. Quite apart from any question of the "representative" nature of the membership of the new Supreme Court, this is one reason why it is necessary for there to be members of that court who have experience of Scottish law as that has features that are quite distinct from the law applicable elsewhere in the United Kingdom.

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12 See JA at [96].

13 See paragraph 13 below.

14 See JA at [58].

15 See SC at [48].

12. In ALBA's view the Consultation papers fail to give sufficient attention to the need for appointments specifically to take into account the specific tasks that an individual appointed may be called upon to discharge. The assumption appears to be that allocations and authorisations to sit in specific jurisdictions are simply administrative arrangements that are made following appointment and have no relevance to the appointment itself[16]. ALBA considers that such an approach is wholly inadequate. Any selection criteria must take into account the particular tasks which a judge once appointed will be required to discharge and the needs of the court to which he is to be allocated. It would be absurd to invite a judicial appointments commission to appoint an individual simply to be a judge of the High Court, for example, without any regard to whether he or she will sit in one of the specialised jurisdictions exercised by that court.

13. The Government has presented for consideration the suggestion that there might be changes in the qualifications for appointment to make it easier to appoint distinguished academics in order to increase diversity[17]. In ALBA's view no individual should be appointed to the Supreme Court who has not first sat full-time as a judge. There may be a case for appointing individuals directly to the Court of Appeal or Court of Session (rather than in the first instance to the High Court or its equivalent in the other jurisdictions), as has previously been done, because of their outstanding abilities, but not in order to increase "diversity" as such. However there is no reason to assume, as the Consultation Paper appears to do, that only academics may have such abilities.

14. Specifically, in respect of the Supreme Court, ALBA considers that there is merit in formalising the current conventions so that at least two members of that Court are drawn from Scotland and at least one from Northern Ireland. Such an approach should ensure that there are sufficient members of the Supreme Court familiar with the law applicable in each of the main jurisdictions in the United Kingdom and to consider devolution issues and it will help to maintain the acceptability of the new court as the Supreme Court for the United Kingdom as a whole.

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16 See JA at [70]-[73], [91].

17 See SC at [46].

THE ROLE OF THE EXECUTIVE IN THE APPOINTMENT AND DEPLOYMENT OF JUDGES

(a) the number of judges and tribunal members

15. ALBA accepts that the number of judges and tribunal members to be appointed ultimately involves questions of public expenditure for which the executive is responsible to Parliament. It is nonetheless important that the number of those appointed are sufficient to secure that criminal charges and disputes that are directly decisive of civil rights and obligations are determined within a reasonable time[18] and for other litigation to be resolved expeditiously.

16. While the numbers of members of the new Supreme Court may need to be fixed by statute, in ALBA's view the numbers to be appointed to other courts (including specific parts of the High Court[19]) and tribunals should be fixed by regulations subject to affirmative resolution of both Houses of Parliament made by the Secretary of State, having consulted the judiciary and the Treasury. The regulations when laid in draft should be accompanied by a report by the Secretary of State that explains whether (and if so why) in his view the number of judges or tribunal members proposed should be sufficient to ensure that the number of cases anticipated in each area will be disposed of within a reasonable period.

(b) the selection and promotion of individual judges

17. ALBA considers that the executive should have no role in the selection of individuals to be judges or members of tribunals or in their promotion.

18. ALBA agrees with the Government that it is desirable to increase the independence of the judiciary from the executive. ALBA notes that the Government considers that "the present system of making judicial appointments in England and Wales has been successful in ensuring the appointment of judges who have the necessary independence, integrity and ability"[20] and

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18 as required by article 6 of the ECHR

19 Eg the Chancery Division, the Family Division, the Employment Appeal Tribunal and various parts of the Queen's Bench Division, such as the Commercial Court and the Administrative Court.

20 See JA at [28].

that "the fundamental problem with the current system is that a Government Minister, the Lord Chancellor, has sole responsibility for the appointments process and for making or recommending those appointments"[21]. Accordingly, in the Government's view, "if the judiciary is to be seen and trusted as independent of the government of the day, it must be appointed by a process which must be seen to be open and independent"[22]. Accordingly, so the Government says, "one of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament"[23].

19. The Government's views on the future role of the executive in judicial appointments, however, are not reconcilable with its professed objectives. In considering the judicial appointments commission two of the three models[24] put forward for consultation would retain a role for the executive in judicial appointments. The Government's preferred position is that, generally, a commission would recommend only one name but that the Secretary of State would be free to reject it and require another to be put forward[25]; that the Secretary of State would take the advice of the Commission and may consult the senior judiciary before he decides who should be appointed as a Head of Division or to the Court of Appeal[26]; and that the Prime Minister should choose who should be appointed to the new Supreme Court, from one or two candidates put forward by a separate Commission, after consultation with Ministers in Scotland and Northern Ireland[27]. Put simply, the Government proposes that the more senior the appointment the more influence the executive should have. This is fundamentally inconsistent with its own professed objectives to emphasise and to enhance the independence of the judiciary from the executive. Just as (in the Government's view) "giving Parliament the right to decide or have a direct influence on who should be the members of the [Supreme] Court would cut right across that objective", so equally (as a matter of logic) should giving any member of the executive such a right of decision or influence on who should be appointed to that or to any other court or tribunal. As the current Lord Chancellor has put it, "the

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21 See JA at [19].

22 See JA at [22].

23 See SC at [45].

24 Namely a recommending commission and a hybrid commission.

25 See JA at [52].

26 See JA at [58]. Even in the Appointing Commission model, the Commission might be required to consult the Secretary of State: ibid.

27 See SC at [41] and [42].

appointments system must be, and must be seen to be, independent of Government"[28].

20. ALBA views with concern the Government's current preferences. Broadly speaking, the current system has maintained public confidence in the independence of the judiciary from the executive. This position should not be viewed complacently. Indeed it has lasted for less than a century and not always without lapses. Lord Salisbury once informed his Lord Chancellor, Lord Halsbury, that "there is no clearer statute in that unwritten law [of our party system] than the rule that party claims should always weigh very heavily in the disposal of the highest legal appointments"[29]. Choosing judges to appoint to the High Court and Court of Appeal on the strength of their political connections may effectively have ended after 1912 and the political element in appointments to the Appellate Committee may have ceased by the late 1920s[30]. But even after that political considerations were not necessarily always absent[31]. Nonetheless public confidence has been maintained in the independence of the judiciary from the executive to a considerable extent as a result of conventions that political considerations should not influence judicial appointments[32]; by the relatively weak political and electoral accountability of the Lord Chancellor for individual appointments, in the context of those conventions and his position as head of the judiciary; and by the personal responsibility and integrity of holders of that office.

21. Against that background, the Government's current preferences must be seen as a retrograde step. Instead of an individual appointing judges who is head of the judiciary and protected from the influence of political considerations in making appointments by convention and relatively weak political accountability, the Government proposes that a politician should

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28 See his foreword to JA.

29 Quoted by Robert Stevens *the English Judges: their Role in the Changing Constitution* (2002) p14.

30 See Robert Stevens *the Independence of the Judiciary* (1993) OUP at p22, 40;Robert Stevens *the English Judges: their Role in the Changing Constitution* (2002) at p15-17, 20-21.

31 See the appointment of Lord Caldecote as Lord Chief Justice: Robert Stevens *the English Judges: their Role in the Changing Constitution* (2002) at p22. Lord Kilmuir announced, for example, that he would take political service into account so that judges had the experience to enable them to handle public law cases (see Robert Stevens *the Independence of the Judiciary* (1993) OUP at p82; Robert Stevens *the English Judges: their Role in the Changing Constitution* (2002) at p40. Lord Kilmuir was Lord Chancellor between 1954 and 1962). Even in the 1970s and 1980s, at least in one case, political views about the merits of a candidate appear to have influenced his promotion: ibid p172.

32 Cf eg the professed attitude of Lord Jowitt (the Lord Chancellor between 1945-1951): see Robert Stevens *the English Judges: their Role in the Changing Constitution* (2002) at p28, 38.

be responsible for judicial appointments who is likely not to be a lawyer, who will not be subject to such conventions, who is likely to be a member of the House of Commons and who will be directly exposed to political pressures. Such a step would undermine public confidence that judges will have been appointed on merit rather than by reference to political considerations. The fact that the names of those to be appointed may in many cases have been recommended by an independent commission of some description may reduce the scope for grosser abuse of the power of appointment. But it will not eliminate the potential for decisions to be made by reference to political considerations nor will it eliminate the suspicion that they may have been, not least given that it is far from clear what contribution to the process of appointment the Prime Minister and the Secretary of State are personally expected to make.

22. The Consultation papers fail to provide any explanation of the criteria by reference to which the Government proposes members of the executive may determine who to appoint or not to appoint. (i) If the Prime Minister and the Secretary of State are to decide whom to appoint *only* by reference to the criteria that any commission are required to use, then they have no different function to perform than any commission has and there is no reason to believe they will perform it better. Indeed they will be less qualified and in a worse position to do so. (ii) If the Prime Minister and the Secretary of State are to decide whom to appoint by reference to different criteria than those any commission are required to use, such criteria will be unjustifiable (otherwise they should have been used by the commission).

23. But, in any event, whatever criteria the Prime Minister and the Secretary of State are supposed to use, it will not remove suspicion that their choice has been influenced by political considerations. Detecting and proving the effect on such members of the executive of any such political influence, conscious or unconscious, in making such decisions, even from a shortlist put forward by a commission, will in practice be highly unlikely. Indeed, even if any current Prime Minister or the Secretary of State were wholly uninfluenced by political considerations and even if that can be shown to have been the case after the event, the mischief of the involvement of the executive will not be avoided. Those seeking appointment or promotion may feel that their prospects would be enhanced by taking decisions favourable to the particular administration in office or its policies or ideology (or those of any likely replacement), even if that perception is unfounded in fact. In any event and more significantly, the public may think that judges or those seeking appointments as full time judges may be

influenced by such a prospect, even if they are not.

24. The continued involvement of the executive in the appointment of judges in the forms currently envisaged by the Government and without the protection that the Lord Chancellor currently affords will thus tend to corrode public confidence in the independence of the judiciary from the executive that it is the Government's professed objective to enhance.

25. The reasons suggested for retaining any role for the executive in individual judicial appointments are unconvincing. The principal reason advanced is that the Sovereign, when making appointments, does so only on the advice of Ministers so that Ministers (and not the Sovereign personally) can be held accountable to Parliament for the appointments process[33]. ALBA agrees that the monarch should not be held personally responsible for any appointments made in her name. But ministerial accountability for individual appointments begs the relevant question in this case and, in any event, in practice it would either be devoid of substance or highly damaging to the public interest.

(1) The reason why Ministers are accountable to Parliament for the decisions they take is that they are responsible for taking those decisions or for those who take them on their behalf. There is no reason, however, why Parliament should not make others responsible for decisions and accountable to it for how they discharge their responsibilities in such manner as Parliament may choose, as the Government recognises that Parliament has already done in other cases[34]. Thus the question is not whether ministers should be accountable for their decisions. It is whether decisions on judicial appointments should be for ministers. The doctrine of ministerial accountability to Parliament does not answer that question. It simply begs it.

(2) Moreover ministerial accountability to Parliament for individual[35] judicial appointments would be either devoid of substance or highly damaging to the public interest in practice. The consultation papers fail to reveal how in practice ministers would be held to account for such decisions. In practice neither House

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33 See JA at [38], [39], [48], and [52]; SC at [39].

34 See JA at [40].

35 Any appointments commission can be accountable to Parliament for other aspects of its work by making it a non departmental public body and there are other ways (considered below) for making it accountable for individual decisions.

> would be able to form an informed judgement on the respective merits of those involved in any specific appointment. Ministerial accountability for its merits would thus be devoid of substance. But any attempt to achieve it would be damaging. Making public the identity of those who have been rejected so that others might form their own judgement on the merits of the decision would be damaging not merely for those involved (as the government recognises[36]) but also for the prospect of attracting many able candidates who would not wish to expose themselves to the possibility of any such publicity and public controversy.

But, even if ministerial accountability to Parliament for individual appointments could be achieved in practice without any harmful consequences, it is difficult to reconcile this as an argument for maintaining executive influence on judicial appointments with the Government's own view that "giving Parliament the right to decide or have a direct influence on who should be the members of the [supreme] court would cut right across [the] objective" "to emphasise and enhance the independence of the Judiciary from both the executive and Parliament"[37]. Effective practical ministerial accountability for individual decisions would only liable to increase the pressure for appointments to be made taking into account political considerations.

26. It may also be suggested, however, that such is the power of the higher judiciary that they must effectively be appointed by those who are electorally accountable for such appointments if the acceptability of judicial decisions is to be maintained in a democratic society. ALBA disagrees.

27. In ALBA's view it is for Parliament to decide the criteria for judicial appointment and to decide by whom and by what process such appointments should be made. But, unless political considerations are to be influential in appointments, the persons appointing judges should not be politicians. Nor should such considerations be allowed to have any role in the selection or promotion of judges. To allow them to do so would undermine not merely public confidence in the independence of the judiciary but also the public confidence in the rule of law. It is vital to maintaining public confidence in both that individuals feel that the person determining any dispute that they may have with the government is not indebted to the government for any

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36 See JA at [47].

37 See SC at [45].

appointment and that he entertains no hope of obtaining any promotion in the future from it.

28. It is, of course, the case that judicial decisions may prove to be unpopular or unpalatable to the government and Parliament of the day and that they may lead to friction between Parliament or the executive and the judiciary. But the involvement of the executive or the current members of Parliament in judicial appointments is no solution to such difficulties. Indeed it may make them worse. The decisions of judges appointed by previous administrations or Parliaments of a different political complexion may be even more liable to be castigated as 'political', and thus regarded as 'illegitimate', than they are now.

29. In ALBA's view it is inevitable that, if judges are to discharge their judicial functions conscientiously in accordance with their oath of office, decisions may be taken that are unpopular and politically inconvenient or that they may disappoint the hopes of those with claims against the government or who question the compatibility of legislation with Convention rights. The challenge for any judicial system is to retain the confidence of those who disagree with the decisions reached. Ultimately the legitimacy and acceptability of such decisions in a country governed under the rule of law depends on the reasons given for them, the fairness of the hearing afforded to the parties, and on the confidence of those concerned not only that the judge involved was appointed on merit without regard to political considerations but also that he is independent of Parliament and the executive (as well any of other parties to any dispute). Retaining any role for the executive in judicial appointments will not enhance the legitimacy or acceptability of judicial decisions. It will undermine it.

30. For similar reasons the executive should play no role in the selection of the President or Deputy President of the new Supreme Court, the Lord Chief Justice, the Master of the Rolls, the Heads of Division in the High Court or other specific judicial offices.

31. ALBA considers, therefore, that the executive should have no role in the selection of individuals to be judges or members of tribunals or to hold specific judicial offices or in their promotion.

32. It equally follows that the executive should have no role in any group that selects any individual to be a member of a commission for judicial appointments.

(c) the deployment of individual judges

33. ALBA further takes the view that the Secretary of State should not be involved in decisions on the deployment of individual judges once appointed. The Secretary of State should not have the power to alter the conditions of service of individual judges in this manner.

34. ALBA agrees that any commission should have no role in this matter. ALBA considers that the deployment of judges should be a matter for the judiciary itself to determine. They should also determine the selection of judges to hear individual cases.

(d) the discipline and dismissal of individual judges

35. Just as the executive should have no role in the appointment or promotion of judges, so equally it should have none in their discipline or dismissal.

A COMMISSION OR COMMISSIONS FOR JUDICIAL APPOINTMENTS

(a) general

36. ALBA welcomes the proposal for one or more judicial appointment commissions. In ALBA's view, generally appointments and promotions should be decided by a judicial appointments commission applying criteria that Parliament has chosen. ALBA recognises that making a commission, rather than one individual, responsible for appointments may tend to encourage appointments that are "bland". But appointments made by a commission need not be so, any more than those made by an individual will necessarily be "imaginative" or "exciting". The quality of appointments will depend on the quality of the candidates, the procedures followed by whoever is responsible for any appointment and on the qualities which any individuals involved in selection bring to that task.

37. Given that judges have considerable powers and that they have security of tenure, however, the consequences of any mistakes in the selection of judges are serious and may affect not only particular litigants but also public confidence in the competence of the judiciary as a whole. It is vital, therefore, that those who select judges should themselves be well qualified for that task.

38. ALBA considers that any judicial appointments commission should not be comprised simply of judges. A self perpetuating judicial 'oligarchy' is not desirable in the public interest. Nor does ALBA consider that those involved in appointing judges should all be lawyers. While the assessment of the legal abilities that candidates possess will inevitably be of considerable importance, judges also require other attributes of which lawyers may not always be the best judges. Moreover ALBA recognises that the participation of those who are not lawyers is important in order to reassure the public that any system for judicial appointments is not a system of patronage exercised by lawyers for the benefit of other lawyers in which the public interest may be overlooked. ALBA considers, therefore, that a mix of backgrounds and a variety of perspectives are essential in any commission.

39. ALBA considers that any non-judicial member of a commission should not be appointed on the nomination of any organisation, whether that organisation be the Bar Council, the Law

Society or one claiming to be representative of users of the court or tribunal system. Any such system of nomination will not produce members of a commission that are likely to be of sufficient individual quality. Moreover it may give (no doubt unintentionally) the wholly undesirable impression that nominated members of the commission are there to act in relation to particular appointments in some manner that represents the views of the organisations nominating them. Members of any appointment commission should not only be independent of any vested interest group, as well as of the executive. They should also be seen to be independent of such bodies. They should owe their membership of such a commission solely to their own personal merit and the contribution that they individually can make to the process of judicial appointment and promotion.

40. In ALBA's view the non-judicial members of any commission should be chosen following open competition by a small body whose membership must be independent of, and not appointed by, the executive. Its members should not be members of the judiciary.

41. Each non-judicial member should normally have tenure for at least five years which may be continued for another term. Initial appointments ought to be for a variety of periods, however, so that new appointments fall to be made at regular intervals.

42. The numbers of commissioners required and the mix in any commission should depend, however, on the precise functions that any commission and its individual members are expected to perform. In this respect ALBA considers that there is a strong case for having more than one commission. It considers in particular that it is desirable to have a separate commission to deal with the small number of appointments to the new Supreme Court and to the Court of Appeal, as well as to international courts and certain senior judicial offices.

(b) a judicial appointments commission for appointments to the Supreme Court and the Court of Appeal

43. The consultation papers recognise that appointments to the new Supreme Court and to the Court of Appeal need to be approached differently from other judicial appointments and that they require special arrangements.

44. ALBA agrees. In part this reflects the nature of the appointments process at this level. The number of appointments to be made is limited; the pool of potential candidates is relatively small; and the views of the most senior judiciary on the relative suitability of particular candidates is likely to be (and should be) particularly influential, as they are likely to be the best qualified to assess the legal abilities of candidates which are of particular importance at such levels in the judicial hierarchy[38].

45. ALBA considers, however, that a judicial appointments commission should operate at this level to appoint judges for the reasons already given, although its composition and procedures should reflect the tasks it has to perform.

46. Although the Government contemplates a separate commission limited to the new Supreme Court, ALBA considers that the functions of such a commission should also embrace appointments to the Court of Appeal for which special arrangements are also necessary and in respect of which the task of the commission will be similar. As explained below, this will have advantages and the potential difficulties are not insuperable.

47. Such a commission will also be suitable for considering appointments to positions nationally such as the Lord Chief Justice, the Master of the Rolls and the Heads of Division in the High Court. It would also be suitable for considering international appointments, such as those to the European Court of Justice and the European Court of Human Rights.

48. ALBA considers, however, that the members of the new Supreme Court should themselves select who is to be the President and Deputy President of that Court.

49. At this level a commission of ten members, half of whose members are holders of the most senior judicial offices and which is chaired by the President of the Supreme Court, would be appropriate to deal with the relatively small number of appointments involved. Such a commission should be required to consult relevant members of the judiciary in respect of any

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[38] As the Government puts it in relation to the Supreme Court, "intimate knowledge of performance by a defined group is the best evidence that is likely to be available" and, in relation to the Court of Appeal, the Government accepts that "the views of a [general appointments Commission] might not be as well informed or useful as the detailed and first-hand knowledge of the different candidates which the senior judges are able to bring to bear under the current system": see SC at [40] and JA at [56].

candidates[39].

50. The judicial members of such a commission should include the President and Deputy President of the Supreme Court, one other member of the Supreme Court selected by the existing members of that court, the Lord Chief Justice and the Master of the Rolls[40]. For reasons given below, at least one of the members of the commission who is already a member of the new Supreme Court should be one of the Scottish members.

51. It is important when dealing with appellate appointments at this level that those members of the commission who are not judges should be of particular eminence and quality if they are to make an effective and worthwhile contribution to the process of appointment, given the identity of the judicial members of any such commission and given that judicial views on the suitability for appointment to such positions are likely to be the most informed and to carry the most weight. Non-judicial members of such a commission should include at least one eminent lawyer but otherwise their appointment should be based on personal merit alone. In ALBA's view it should be possible to attract individuals who will be of sufficient quality to carry weight to sit on such a commission, which is likely to be particularly prestigious and whose work should not be particularly time consuming given the limited number of appointments to be made.

52. Entrusting such a commission with appointments to the Court of Appeal as well as to the new Supreme Court will have a number of benefits. The number and frequency of appointments to be made to the new Supreme Court is very limited. Including appointments to the Court of Appeal will give the commission a sufficient workload to enable it to develop a more cohesive approach to appointments without imposing demands that its members may not be able to meet and it would provide a commission whose membership is more likely to be better equipped to deal with appointments to the Court of Appeal than one constituted to

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39 For example, they should be required to consult (inter alia), in the case of appointments to the supreme court, other members of that court and, in the case of appointments to the Court of Appeal, members of that court.

40 In the event that the Lord Chief Justice or the Master of the Rolls seeks appointment as a member of the new Supreme Court or a member of that court who is a member of the Commission seeks appointment as Lord Chief Justice or Master of the Rolls, they should be unable to sit on any such application and their place should be taken by another member of the judiciary selected by the remaining judicial members of the commission.

deal principally with appointments to the High Court, the Circuit bench and other less senior appointments.

53. The main potential problem that extending the functions of such a commission to deal with appointments to the Court of Appeal and to specific senior judicial offices in England and Wales poses is that the commission must also deal with appointments to the new Supreme Court from Scotland and Northern Ireland.

54. ALBA does not consider that this is an insuperable objection. ALBA accepts that the composition of the commission must be acceptable to those in all three jurisdictions and that it must enable judgements to be made about candidates from each of the three jurisdictions for membership of the new Supreme Court. ALBA sees no reason why the non-judicial members of such a commission should be unacceptable, whatever their origins or current residence may be, if they are of sufficient quality and chosen on the basis of their own personal merit. Such non-judicial members should be able to command public confidence, for example, in England and Wales if they originate from, or reside in, Scotland or vice versa. Equally ensuring that at least one of the judicial members of the commission should be one of the Scottish members of the new Supreme Court should ensure that any judgement takes into account any specific skills specific to the Scottish legal system and ALBA can see no reason why a judge of such eminence cannot form an informed view of the qualities of candidates for appointment from, or in, another jurisdiction. More generally, however, ALBA does not consider that the judicial composition of such a commission need be regionally constrained. The acceptability of the new Supreme Court in each of the three jurisdictions, and specifically in relation to devolution matters, will be secured by appointment on merit after appropriate consultation by a body whose composition commands general respect, coupled with requirements (a) that at least two members of that Court are drawn from Scotland and at least one from Northern Ireland and (b) that the composition of the court when dealing with devolution matters includes judges from the jurisdiction in question.

(c) a judicial appointments commission for appointment to the High Court, Circuit Judge and other judicial positions

55. ALBA supports the proposal for a judicial commission to deal with appointments to the

High Court, the Circuit Bench and certain other judicial positions.

56. In 2001-2 the Lord Chancellor was involved in over 900 judicial and tribunal appointments[41] and the appointment of 1,786 lay magistrates[42]. In ALBA's view there is a strong case for appointments as lay magistrates to be made by another independent body, rather than the judicial appointments committee proposed. The task of appointing lay magistrates is quite different from the task of appointing individuals to the High Court or Circuit Bench. The organisation and qualities required for the former do not match those required for the latter and imposing the former task on those responsible for appointing individuals to the High Court or Circuit Bench would severely circumscribe the time that commission members have available to deal with such appointments. In ALBA's view the judicial appointments commission should have responsibility for appointing stipendiary magistrates and legal members of tribunals. ALBA does not express a view on whether it should also be responsible for appointing lay members of tribunals. In its view that task should be given either to the judicial appointments commission or to the independent body responsible for appointing lay magistrates on the basis of administrative convenience.

57. Even if not responsible for appointments of lay magistrates, it is unrealistic to expect that members of any appointments commission for the High Court and below will all be able to devote detailed personal attention to each of the appointments for which they will be responsible, whether they be judges or any other part time members. In this they will be unlike the commission for appointments to the new Supreme Court, the Court of Appeal and very senior judicial offices. In addition the qualities to be sought of members of each commission are not necessarily the same. The function of this commission and the task of individual members will thus be significantly different. This should affect both the size and the composition of the commission.

58. ALBA sees no reason to disagree with the Government's proposal that the Commission should have fifteen members.

59. Equally, if the commission is to have the task of appointing tribunal members and lay

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41 See JA at [31].

42 See JA at [61].

magistrates, ALBA agrees with the Government's proposal that its membership should have five judicial members, five legally qualified members and five lay members.

60. ALBA considers, however, that the commission should be chaired by the Lord Chief Justice and that members of the commission should select one of their non-judicial members to act as Deputy Chairman to preside in the absence of the Lord Chief Justice. The Deputy Chairman should have specific responsibility for the effective administration of the commission's activities.

61. ALBA also agrees that the judicial members of the commission (other than the Lord Chief Justice) should be chosen by the Judges Council.

62. ALBA considers the commission must be properly resourced if it is to fulfil the tasks to be given it. Much of the work of the commission, including much work requiring the exercise of considerable judgement, must inevitably be handled by the staff of the commission, given the size of its workload and the number of part time commissioners. It is vital, therefore, that the numbers and quality of the commission's staff should be sufficient.

63. ALBA recognises that the appearance of independence of the commission would be enhanced if it recruited its own staff, including a Chief Executive. It considers that the Commission should be able to do so, while remaining free to take civil servants 'on loan'. The commission's staff should also support the commission for more senior appointments recommended above. Existing staff working in the Department for Constitutional Affairs could transfer initially to the commission.

64. ALBA is concerned, however, about the lack of detailed proposals for the operation of the commission in making appointments and for the consultations that it should be required to undertake. These will be vital to the quality of the judicial appointments made. It is unsatisfactory for "a major re-engineering" of the process of appointment to be carried out (as the Government contemplates) without public consultation about the detail of what is proposed. ALBA considers that these matters should be the subject of further detailed public consultation before changes are made.

(d) the accountability of any judicial appointments commission

65. In ALBA's view any commission should be a Non-Departmental Public Body. This would mean it would be subject to the scrutiny of a Parliamentary Select Committee and that it would be required to submit an Annual Report to Parliament.

66. ALBA considers that any applicant for appointment should be entitled to be given the reasons why his or her application was unsuccessful, whilst preserving the confidentiality of any consultations undertaken.

67. ALBA also considers that the current Commission for Judicial Appointments should continue to have a scrutiny and auditing function in relation to the work of the two Commission proposed, as the Consultation Paper has suggested[43]. Obviously, the current body's title will need amendment to avoid confusion[44]. The existence of such a body should help to underpin the independence of the appointments process whilst also serving to guarantee its legitimacy, transparency and accountability.

68. Against this background, ALBA does not agree (as the Government assumes[45]) that the the Secretary of State should have "overall responsibility..for ensuring that the appointments system is efficient and effective". That should be the responsibility of any commission charged with such appointments.

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43 JA [74]-[76]

44 the Ombudsman for Judicial Appointments is an obvious option.

45 See JA at [89].

OTHER ISSUES RELATING TO JUDGES GENERALLY

(a) a duty to promote judicial independence?

69. The Government proposes that the Secretary of State for Constitutional Affairs should have a statutory duty to protect judicial independence.

70. If there is to be any such duty, it should not be one limited to the Secretary of State. Preserving judicial independence is not merely the responsibility of the the Secretary of State: no member of the government should interfere with it.

71. In any event, however, ALBA considers that any duty imposed on the the Secretary of State to "protect" judicial independence would be opaque in content and unenforceable in practice. Its function would be merely symbolic: it would serve no useful, practical purpose. The independence of the judiciary will not be secured by the proclamation of general statutory duties of this character. It will be protected by more detailed and specific institutional arrangements which secure that judges are indeed independent of the executive and of the parties to any dispute they have to determine.

(b) increasing diversity

72. The Government seeks suggestions on how the diversity of the judiciary may be increased. ALBA agrees that it is desirable that the judiciary as a whole should be more reflective of the society it serves. Some of the reasons for that have been described in lectures by Dame Brenda Hale[46]. Indeed a more diverse judiciary appointed on merit is more likely to command more general public respect. Accordingly ALBA fully supports any reasonable and lawful steps that may be taken to ensure that no one is discouraged from applying for judicial appointment and that the true merits of each individual applicant are fairly assessed, regardless of his or her gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability.

(1) ALBA considers that the current pool of potential candidates might be increased

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[46] See her lecture "Equality and the Judiciary – Why we should want more women judges" [2001] Public Law 489-504 and her lecture to the Plymouth Law Association summarised in the Guardian October 30th 2003.

by closely examining what criteria are used in the selection of judges and how they are applied in practice, thus making more lawyers potentially eligible for selection[47]. It is important to consider carefully whether the conditions for eligibility, and the criteria used, for appointment impose any unnecessary constraints. But, in addition it is important to ensure that the criteria chosen and the manner in which the assessment of how they are met are not indirectly discriminatory;

(2) if the most is to be made of the existing pool of potential candidates, however, the way in which judicial functions are discharged and the working and social environment of judges also require critical appraisal. Thus, for example, many judges tend to be recruited in their forties and fifties, at a time when many families will have young or teenage children. The likelihood that potential candidates may have such responsibilities will not be diminished if more judges are recruited at a younger age, a possibility that the Consultation Paper envisages. But, unless reformed, the demands of life on circuit for Queen's Bench Judges or of a full time working week may discourage those with parental and child care responsibilities from seeking appointment. Moreover, although a judicial appointment may offer greater predictability than private practice in relation to the hours to be worked for some, it also may involve a loss of flexibility that may be valued by others. What is required of judges must be critically appraised in order to ensure it does not fit an outmoded (and potentially discriminatory) model suitable only for the people that used to fit it;

(3) ALBA is concerned by the apparent suggestion in the Consultation Paper, however, that a lack of diversity in the current judiciary can be addressed *principally* by changes in procedures leading to judicial appointment or possibly by changes to the selection criteria in certain cases. It is a (regrettable) fact that there are currently very substantial barriers to entry to the legal profession (whether as solicitors or barristers or legal academics) and to subsequent success in the profession that affect women (though perhaps less so at the younger end of the profession) and, more particularly those from ethnic minorities and underprivileged backgrounds. However judges must be

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47 As explained above, it is ALBA's view that the conditions for eligibility and the criteria to be used in making appointments are for Parliament to determine

appointed from a pool of suitably qualified candidates. Measures to change the composition of the judiciary in terms of gender, ethnic or social origin or any other relevant attribute must address the problem principally from the bottom upwards and not *vice versa*. Thus, for example, the costs of undertaking university education followed by those involved in professional training are very substantial barriers to entry which must be satisfactorily addressed if there is to be a healthy and (so far as is possible) "reflective" pool of qualified candidates from which to choose;

(4) ALBA would view any positive discrimination in appointments with concern. Such discrimination would not merely be divisive: it may also undermine public confidence in those appointed. Moreover in ALBA's view there are legal limits to what may be done. For example, the Equal Treatment Directive (76/207/EEC) applies with full vigour to judicial employment. It has vertical direct effect with respect to public sector appointments. Yet consistent ECJ case law has set appreciable limits upon the forms of positive discrimination permissible under national law, particularly on the use of target numbers or quotas. The approach of the ECJ suggests strongly that the outcome of equal opportunities should be a matter of natural evolution, as women who have been given the opportunities to compete on an equal footing with men actually do so.

(c) the use of retired judges

73. ALBA considers that judges who have retired having reached the applicable retirement age should be ineligible to sit thereafter. The reason for such compulsory retirement is that individuals concerned are to be presumed to be no longer capable of discharging competently the duties of judicial office, the onerous nature of which should not be underestimated[48]. Where judges have retired before the statutory retirement age, such objections do not apply. ALBA considers that such judges should be able to sit on an *ad hoc* basis provided that in each and every case the relevant judge with responsibility for that division or circuit continues to be satisfied of the current capability of that judge.

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[48] Where judicial abilities remain undimmed despite passing retirement age, ALBA considers that such individuals may play valuable roles on an *ad hoc* basis in other areas such as in (i) public enquiries; (ii) mediation and arbitration (providing much needed continuity between different forms of dispute resolution); and (iii) academia.

(d) complaints by judges

74. In principle it should be for the judiciary itself to devise procedures for the handling of complaints by individual judges against other members of the judiciary. ALBA considers, however, that provision should be made enabling an appeal to made to the relevant Judicial Appointments Commission for that Judge.

(e) judicial discipline and dismissal

75. ALBA considers that the role of investigating complaints against, and disciplining, judges should be undertaken by the Lord Chief Justice, in consultation with whichever of the two Judicial Appointments Commissions is relevant according to the seniority of the judge against whom the complaint has been made[49].

76. The present position in relation to the dismissal of the senior judiciary, that is, that they can only be removed from office by The Queen, acting after receiving a formal address from both Houses of Parliament, should be retained. The power to dismiss the lower ranks of the judiciary should be vested in the Lord Chief Justice by statute. The statute should make it clear that this power should only be exercised in consultation with the relevant judicial appointments commission and the grounds upon which a judge may be removed should be specified in primary legislation.

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[49] In the case of any complaint against the Lord Chief Justice, the investigatory and disciplinary role should be transferred to the President of the Supreme Court (or such other Justice of the Supreme Court as the Supreme Court may appoint), in consultation with the senior Judicial Appointments Commission.

THE JURISDICTION OF THE NEW SUPREME COURT AND OTHER ISSUES AFFECTING THAT COURT

(a) jurisdiction

77. Under the present system, the Appellate Committee can hear appeals from the decisions of the Court of Session, the highest Scottish civil court. Such civil appeals may be brought without the need to obtain leave, either from the Court of Session or the Appellate Committee. By contrast there is no appeal from the High Court of Justiciary, the highest Scottish criminal court. There is an appeal to the Judicial Committee of the Privy Council, however, in relation to devolution issues, which may arise in criminal as well as civil cases.

78. ALBA agrees that jurisdiction in respect of devolution matters should be transferred from the Judicial Committee of the Privy Council to the new Supreme Court. The previous objection to disputes regarding the competence of the Scottish Parliament being decided by the Appellate Committee of one of the Houses of Parliament at Westminster will not apply to the Supreme Court as there should be no link between that membership of that court and Parliament.

79. ALBA considers, however, that the establishment of the Supreme Court as "a single apex to the UK's judicial system where all the constitutional issues can be considered" requires more far reaching changes than the Government proposes. The Supreme Court, as a UK-wide court, should have jurisdiction to hear appeals from Scottish courts in criminal, as well as civil cases, whether or not a devolution issue is raised. Just as in civil cases, the courts of the UK in all three jurisdictions often have to deal with the same issues in criminal cases, for example in the context of Convention rights or the interpretation of UK-wide statutes. To ensure the consistent application of law which is applicable throughout the United Kingdom requires the Supreme Court for the United Kingdom to be given jurisdiction to determine authoritatively what that law is, whether it falls to be applied in criminal or civil cases.

80. ALBA agrees with the proposal to retain the Judicial Committee of the Privy Council as the court to which appeals may be made from jurisdictions outside the UK.

(b) the requirement for permission to appeal to the Supreme Court

81. In ALBA's view there should be no right to appeal to the Supreme Court without permission. The present system whereby Scottish civil appeals may be brought without leave is anomalous and, on occasion, leads to the valuable time of the Appellate Committee being wasted in the consideration of cases which are of insufficient importance to warrant a second tier appeal.

82. ALBA considers that in all cases the Supreme Court should itself decide whether or not to grant permission to appeal. This would enable the Court to control its own caseload and to develop a consistent approach in the selection of cases across all its jurisdictions upon which it should rule. In practice, in view of the relatively small number of appeals which now reach the Appellate Committee without the requirement of leave or with the leave of the lower court, this would be a modest change. While ALBA proposes, therefore, that the infrequently used power of a lower court to grant permission should be withdrawn, ALBA recognises that providing the Supreme Court with the lower court's opinion as to the importance of the case is of value. Parties wishing to appeal to the Supreme Court should be required to apply to the lower court for its opinion as to whether the case raises a point of general public importance. The lower court's opinion would not bind the Supreme Court to grant or refuse permission, but it would provide it with valuable guidance. Such an opinion may also be of assistance to parties considering whether or not to incur the costs of petitioning for permission to appeal.

(c) the composition of the new Supreme Court

83. ALBA considers that the number of full-time members of the Supreme Court should remain fixed by statute.

84. It is important that the Supreme Court should consist of no more than a small group of judges of the highest calibre. But the number must be sufficient to deal with the cases that a Supreme Court should deal with without undue pressure on its members. ALBA considers that the present practice of sitting in panels of five, or, very occasionally, seven or nine, should be maintained if the number of cases dealt with by the Supreme Court is not to be drastically reduced or the quality of its membership unacceptably diluted. ALBA also considers that the

members of the Supreme Court should devote their time exclusively to the business of that court and also to cases heard by the Privy Council. There is no reason why a member of the Court of Appeal or Court of Session cannot be used if a senior judge is required to conduct an inquiry or investigation. The practice of using members of the Appellate Committee to conduct such public inquiries and other investigations should cease. Furthermore only current members of the court should sit on such panels: retired members should not. Accordingly ALBA considers that on this basis the number of members of the Supreme Court should be 15. This should allow the court to function normally with two panels whilst giving sufficient opportunity for members to participate in the judicial work of the Privy Council and also allow members time to prepare for hearings and write their judgements.

85. As indicated above, ALBA considers that the President and Deputy President of the Supreme Court should be elected by the members of the Supreme Court themselves. The executive should play no part in making any such appointments. It should also include at least two members from Scotland and one from Northern Ireland.

86. ALBA considers that members of the Supreme Court should retire from full-time membership at the age of 70.

(d) membership of the Supreme Court and membership of Parliament

87. In order to maintain the objective of separating the Supreme Court from Parliament, as well as the executive, members of the supreme and other courts should not be active members of either House of Parliament. There should be a convention governing the question whether retired members should be appointed to the House of Lords. That convention should be either that *all* members are appointed, or that *no* members are appointed, by virtue of their service as members of the Supreme Court. It is undesirable that the executive should be able to choose which former members should be appointed.

Appendix 1: Responses to questions on Judicial Appointments

Question 1: Do you prefer:
i. An appointing commission?
ii. A recommending commission? or
iii. A hybrid commission?

An appointing commission

What are your reasons? ***See paragraphs 17 to 32.***

Question 2: If you favour a Recommending Commission, what degree of discretion do you think should be exercised by the Secretary of State or Prime Minister?

N/A see above. But, if there is to be such a commission, however, ministers should only have a veto in relation to a single recommendation made by any Commission and they should be obliged to give their reasons for rejecting any such recommendation.

What are your reasons? ***To prevent, or reduce the scope for, abuse.***

Question 3: If you favour a Hybrid Commission, which appointments do you think should be made by the Commission and which should it recommend? How much discretion should the Secretary of State or Prime Minister have in relation to recommended appointments?

NA but see above

What are your reasons?

Question 4: Do you have a view as to any special arrangements that will need to be made by the Commission in dealing with senior appointments from among the existing judiciary?

Yes. There should be a separate appointments commission. See paragraphs 42 to 57.

Question 5: Do you agree that the Commission should not be involved in authorisations to allow judges who have retired before their compulsory retirement age to then sit part-time as deputies until they reach the compulsory age of retirement?

The Commission should not be involved; neither should the Government: see paragraph 73.

Question 6: What arrangements should be made for the appointment of magistrates? In particular (a) should there be a continuing role for local Advisory Committees? and (b) what role should there be for the Judicial Appointments Commission?

There should be a separate, independent body for the appointment of lay magistrates: see paragraph 56.

Question 7: Do you agree that the appointment of coroners should be brought into line with that of other judicial office holders?

No view.

Question 8: Do you agree that tribunal appointments should be the responsibility of the Judicial Appointments Commission, under the arrangements discussed in paragraphs 68-69?

The appointments commission for the High Court and below should be responsible for the appointment of legal members of tribunals. Whether the commission or an independent body for the appointment of lay magistrates should be responsible for appointing lay members of tribunals should be determined by considerations of administrative convenience.

Question 9: Do you agree that the Commission should not be involved in the allocation of responsibilities, as described above?

The Government should not be involved in authorisations and allocations. Nor should any Commission. But any commission

should select individuals by reference to the particular post to be filled: see paragraphs 11-12, 33-34.

Question 10: Do you agree that there should be a separate body with a reviewing and complaints function once the Judicial Appointments Commission has been established? ***Yes: see paragraph 67.***

Question 11: What formal status should the Commission have? Should it be:

i. Non-Departmental Public Body?
ii. a Non Departmental Public Body supported by an agency?
iii. a non-Ministerial Department? or
iv. should it have some other status? If so what?

A Non-Departmental Public Body

Question 12: Do you agree that the Commission should take on those functions which relate directly to the appointments process (**paragraph 88**) and that the Government should retain responsibility for policy relating to appointments (**paragraphs 90-92**)? If not, please provide views on which responsibilities should, and which should not, pass to the Commission and why.

Parliament should establish the criteria for appointment in primary legislation. The numbers of posts should be determined in delegated legislation subject to affirmative resolution. Deployment of those appointed should not be a matter for the Government. Changes to the procedures leading to appointments should be the subject of public consultation: see paragraphs 5-14, 15-16, 33-34, and 64

Question 13: Do you agree that the Commission should be tasked with establishing how best to encourage a career path for some members of the judiciary?

It is unclear what this question envisages the Commission doing.

Question 14: What other steps could be taken by the Commission to encourage diversity? ***See paragraph 72.***

Question 15: Should either (i) the Judicial Appointments Commission, or (ii) a body overseeing the work of the Commission, have a role in advising the Secretary of State for Constitutional Affairs or the Lord Chief Justice on complaints and disciplinary matters? ***See paragraphs 74-76***

Question 16: Should the Commission have a role in an internal grievance procedure? If so, what should that role be?

No.

Question 17: Should the responsibility of the Secretary of State for protecting judicial independence be enshrined in statute?

See paragraphs 69-71.

Question 18: Who should be responsible for appointing Commission members?

See paragraphs 50 and 61 for judicial members of any commission and paragraph 40 for non judicial members.

Question 19: Should the Commission include judicial members, legally-qualified members and lay members as proposed?

ALBA considers that there should be two commissions: one for appointments for the Supreme Court, the court of appeal and certain senior judicial offices. This commission and that for the High Court and below should comprise all three groups but in different ratios: see paragraphs 49, 51 and 59-60.

If so, how should the balance between the membership groups be struck?

The former commission should be divided equally between judges and others (including at least one lawyer).

The latter commission should be composed equally of judges, lawyers and lay members.

If not, how should the Commission be constituted?

Question 20: Who should chair the Commission?

The first commission should be chaired by the President of the Supreme Court; the second commission by the Lord Chief Justice.

Question 21: Should all Commission members be appointed following open competition?

All non-judicial members should be appointed following open competition.

If not, should some members be nominated? ***N/A***

If you think some members should be nominated, which bodies should be invited to provide nominations?

Should these bodies be given a statutory right to have a member on the Commission?

If not, should they be consulted by the separate recommending body to put forward candidates to apply for the selection process, under open competition?

Question 22: Do you have any views on the working arrangements for Commission members?

No

Appendix 2: Responses to questions relating to the Supreme Court

***Question 1*:** Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?

Yes.

Question 2: Do you agree that the number of full-time members of the Court should remain at 12 but that the Court should have access to a panel of additional members:

No. The number of members should be 15. Retired members should not sit: see paragraph 84

Question 3: If there were such a panel, under what circumstances could the Court call on it?

N/A

***Question 4*:** Should the composition of the Court continue to be regulated by statute, or should it be more flexible?

It should be fixed by statute: see paragraph 83

***Question 5*:** Should there be a Deputy President?

Yes.

Question 6: Should the posts of President and Deputy President by filled by the same process as membership generally, or should these appointments always be made on the advice of the Prime Minister after consultation, without involving any Judicial Appointments Commission?

The members of the Supreme Court should elect their own President and Deputy President.

Question 7: Should the link with the House of Lords and the Law Lords be kept by appointing retired members of the Supreme Court to the House?

There should be a convention that either all or no retired members should be appointed: see paragraph 87.

***Question 8*:** Should the bar on sitting and voting in the House of Lords be extended to all holders of high judicial office?

Yes

***Question 9*:** Should there be an end to the presumption that holders of high judicial office receive peerages?

See the answer to Q7.

***Question 10*:** Should appointments to the new Supreme Court continue to be made on the direct advice of the Prime Minister, after consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland and with the profession?

No: see paragraphs 17- 32 and 43-45.

Question 11: If not, should an Appointments Commission recommend a short-list of names to the Prime Minister on which to advise The Queen following consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland? Or should it be statutorily empowered to advise The Queen directly?

An appointments commission should advise Her Majesty directly.

Question 12: If there is to be an Appointments Commission for Supreme Court appointments, how should it be constituted? Should it comprise members drawn from the existing Appointments bodies in each jurisdiction?

The commission should comprise ten members as described in paragraphs 49-51.

Question 13: Should the process of identifying candidates for the new Court include open applications?

Yes

***Question 14*:** Should there be any change in the qualifications for appointment, for example to make it easier to appoint distinguished academics? Or should this be a change limited to appointment to lower levels of the judiciary, if it is appropriate at all?

See paragraph 13.

Question 15: Should the guidelines which apply to the selection of members of the new Court be set out administratively, or through a Code of Practice subject to parliamentary approval, or in legislation?

The criteria for selection should be determined by Parliament in primary legislation: see 5-8.

Question 16: What should be the arrangements for ensuring the representation of the different jurisdictions?

There should be at least two members from Scotland and one from Northern Ireland.

Question 17: What should be the statutory retirement age? 70 or 75?

70

***Question 18*:** Should retired members of the Court up to five years over the statutory retirement age be used as a reserve panel?

No: ***see paragraph 73 and 84***

***Question 19*:** Should the Court continue to sit in panels, rather than every member sitting on every case?

Yes.

Question 20: Should the Court decide for itself all cases which it hears, rather than allowing some lower courts to give leave to appeal or allowing some appeals as of right?

Yes.

Question 21: Should the present position in relation to Scottish appeals remain unchanged?

No: see paragraphs 77-79.

Question 22: What should the existing Supreme Courts be renamed?

The Court of Appeal and the High Court.

Question 23:What should members of the new Court be called?

Justice of the Supreme Court.