

## **Reform of the Lord Chancellor's Department A JUSTICE briefing paper June 2003**

### **Summary**

This paper addresses some of the issues raised by the Prime Minister's decision to replace the Lord Chancellor with a Secretary of State for Constitutional Affairs:

1. The Department for Constitutional Affairs should have responsibility for:
  - Judicial appointment and a judicial appointment commission (subject to the decision made on the matters above);
  - Administration of courts and tribunals (subject to the decision above)
  - Access to justice, the Criminal Defence and Community Legal Services, legal services and the legal professions (subject to the decision above);
  - Police complaints;
  - Human rights, freedom of information, data protection, electoral law and the administration of electoral policy (subject to the decision above);
  - Law reform (civil, administrative and, ultimately, criminal);
  - Compliance with European law and international human rights treaties;
  - Promotion of equalities: race, religion, gender, disability, age and sexual orientation.
2. The head of the judiciary should be the Lord Chief Justice.
3. The Prime Minister's role in judicial appointment should be removed.
4. All judicial appointments should be made by the Secretary of State for Constitutional Affairs on the advice of a commission for judicial appointments. The commission should advance the names of all those considered suitable for appointment to a maximum of three for all 'senior' appointments. 'Senior' appointments would be defined to include appointments to the High Court and above together with such other posts as were designated, eg certain Circuit appointments with special responsibilities. The commission might wish to rank the list. The Secretary of State can appoint anyone on the list.
5. For 'junior' appointments, such as district judges, recorders and most circuit judges, the commission could choose either to give the Secretary of State a choice or to advance one name for each post. The Secretary of State could require the commission to resubmit a further name but would be required to give reasons to the commission for so doing.
6. Future consideration should be given to the addition of an element of scrutiny by the legislature of very senior judicial appointments but no action should be taken at the present time.

For further information: ring Roger Smith (work 020 7762 6412, home 020 7609 1411, mobile 07964 634 168) or email [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk).

## Introduction

1. This paper focus on two considerations:
  - (a) what should be the relationship of any judicial appointments commission with the Secretary of State for Constitutional Affairs?
  - (b) should reform of the Lord Chancellor's role lead to further reform of the responsibilities of the Department for Constitutional Affairs?
2. Debate on these topics can be traced back to the Haldane Report of 1918 and, no doubt, beyond. Haldane argued for merger of the Lord Chancellor's office and the Home Office with the Home Secretary becoming a Secretary of State of Justice<sup>1</sup>. The Labour Party's 1992 manifesto committed it to the creation of a Department of Legal Administration 'headed by a minister in the Commons who will be responsible for courts and tribunals in England and Wales'. The Institute for Public Policy Research has reported further alternative names advanced at various times as including a Department of Law Reform, Department of Law, Department of Legal Affairs and the Courts and Legal Services Department<sup>2</sup>.
3. The Lord Chancellor's Department itself has been nudging its way into the definitional game. It proclaims on its website:

Since 1997, the LCD has grown from a small, quiet department run by lawyers and focused on the legal professions, to a central Whitehall department with such important responsibilities that we are now virtually the Department of Justice, Rights and the Constitution.

The department had begun the process of titling itself accordingly.

## Existing functions of the Lord Chancellor's Department

4. The Lord Chancellor's Department website gives the 'four main components' of its functions as:
  - Appointing, or advising on the appointment, of judges;
  - The administration of the court system and a number of tribunals;
  - The provision of legal aid and legal services; and
  - The promotion of reform and revision of English civil law.In the modern way, the website is then stronger on detail of the current 'departmental change programme' with its lead strength of 'a bold vision for the LCD' than actually listing its current functions in a bit more detail. More forthcoming is the website for the newly created Parliamentary Committee on the Lord Chancellor's Department which sets out the current departmental functions as in Appendix 1. Appendix 2 sets out a current list of ministerial responsibilities.

## The Home Office

5. Debate on the functions of a Department for Constitutional Affairs cannot avoid discussion of the Home Office and a least glancing reference to the roles of other departments such as the Department of Trade and Industry – responsible for funding some advice services and the Equal Opportunities Commission. However, most relevant is the Home Office. This divides its functions up as follows on its website:
  - (a) community and race;
  - (b) crime and policing;

---

<sup>1</sup> See eg p208, D Woodhouse *The Office of Lord Chancellor* Hart, 2001

<sup>2</sup> S Spencer *Time for A Ministry of Justice: the future of the Home Office and the Lord Chancellor's Department* IPPR, March 2001.

- (c) justice and victims;
- (d) terrorism;
- (e) immigration and nationality;
- (f) passports.

This is not actually as revealing as the list given in a recent IPPR's report (amended for the subsequent removal of some of the constitutional and court functions to the LCD) though the alliance of crime with policing and justice with victims reveals a certain orientation. The alternative listing is:

- community issues to include race equality/race relations, animal procedures/fox hunting, gambling/horse racing/liquor licensing, Channel Islands/Isle of Man;
- criminal justice to include criminal law and policy, prisons, probation, drugs;
- emergency services to include the Police service/Metropolitan police, police training and complaints;
- volunteering and the family – volunteering, parenting;
- broadcasting – obscenity, video classification;
- crime reduction – strategy and programmes;
- migration – immigration and asylum, nationality, passports
- miscellaneous – disaster management, fire service [plus coroners who seem otherwise omitted].

A list of ministerial responsibilities is attached as Appendix 3.

### Judicial appointments

6. Lords of Appeal in Ordinary and Lord Justices of Appeal are appointed by the Queen on the recommendation of the Prime Minister who acts on the advice of the Lord Chancellor. This is somewhat of an anomaly since only these appointments involve the Prime Minister. The extent to which the Prime Minister actually is involved in the decision-making is unclear. Professor Woodhouse's textual analysis of the descriptions of the process by Lords Hailsham and Mackay suggested to her that Mrs Thatcher's practice was that she certainly 'liked to discuss appointments' (expressly stated by Lord Hailsham); never made an appointment other than on a list submitted to her by the Lord Chancellor; did not always agree with the preferences of her minister. As Lord Mackay somewhat characteristically put it: 'I am neither surprised nor disappointed by any appointment advised during my term of office and I have supported wholeheartedly every one of them'. He was, however, 'careful not to say' that his own preferred candidate was always accepted.<sup>3</sup>
7. A preliminary issue is whether there is any justification for the involvement of the Prime Minister in any judicial appointment. Sir Tom Legg, former permanent secretary to the LCD, puts the case against:
 

I agree with the Home Affairs Committee's recommendation in 1996 that the Prime Minister should end his involvement in judicial appointments. In my experience, it has done no harm in practice. But it fragments responsibility without compensating benefit. And the Prime Minister's inevitably high party political profile could fuel suspicions, however unjust, of a party or governmental slant to appointments.<sup>4</sup>

---

<sup>3</sup> Woodhouse *op cit*, p133-4 quoting from Lord Hailsham's autobiography and Lord Mackay's evidence to the Home Affairs Committee that reported on judicial appointments in the 1995-6 session.

<sup>4</sup> P74, Sir T Legg 'Judges for the New Century' 74 [2001] *Public Law* Spring

8. **Accordingly, the Prime Minister's role in judicial appointment should be removed.**
9. High Court judges, circuit judges and recorders are appointed by the Queen on the advice of the Lord Chancellor. Deputy High Court judges are appointed by the Lord Chancellor alone.<sup>5</sup> District judges, masters and registrars of the Supreme Court are appointed by the Lord Chancellor though District Judges (Magistrates' Courts) are appointed by the Queen on the advice of the Lord Chancellor. Appointments are processed by the judicial group in the LCD. This constitutes 194 staff (as at 30 June 2002)<sup>6</sup>. 915 judicial appointments were made in 2001-2. In the same period, 1 appointment was made to the House of Lords; one to the Court of Appeal; and 9 to the High Court.
10. The minimum role for a judicial appointments commission would be to take over the work of the current LCD judicial group. Four questions arise:
- (a) Are some judicial appointments different from others in that they involve a significant degree of greater responsibility for decision-making e.g. can we have a different procedure for appointments under, say, the High Court level?
  - (b) Should all or some appointments be made by a Minister on the advice or recommendation of the commission rather than by the commission itself?
  - (c) What choice of candidates, if any, should be put forward to the Minister by the commission and what are the powers of the Secretary of State to accept or reject names?
  - (d) Is there a role for any Parliamentary engagement in the process of the appointment of senior judicial appointments along the lines of the United States nomination hearings into the appointment of Supreme Court justices?
11. Judicial appointments commissions come with a variety of powers over appointment.<sup>7</sup> Four countries within the European Union – Italy, France, Spain and Portugal - had systems comparable to ours but have replaced them with stand-alone judicial self-governing bodies rather different from that envisaged in this country.
12. Experience in North America is somewhat different. US Federal judges are appointed by the President on the advice, and with the consent, of the Senate. Many US states have established 'Merit Commissions' designed to take the politics out of appointment. Canada has tended to follow the same form with different language. As succinctly reported by Sir Tom Legg:
- These North American commissions are not normally free-standing. The Governor or the Minister or other executive authority usually makes the final selection and appoints the judges. Some commissions advise on names referred to them by the appointing authority. In the stronger and more typical form, the commission conducts the recruitment process and recommends between two and five candidates to the appointing authority, which is obliged to choose one of them, though not necessarily the first on the list.<sup>8</sup>
13. The key issues of principle seem to be as follows:

---

<sup>5</sup> under s9(4) Supreme Court Act 1981

<sup>6</sup> *Judicial Appointments Annual Report 2001-2*, Lord Chancellor's Department

<sup>7</sup> See eg C Thomas and K Malleson *Judicial Appointments Commission: the European and North American Experience and the possible implications for the UK LCD*, December 1997.

<sup>8</sup> As above p72.

- (a) Transparency;
  - (b) Accountability;
  - (c) Quality of the appointment process;
  - (d) Objectivity;
  - (e) Legitimacy.
14. A key practical consideration is that a commission might find it difficult to make the most imaginative decision and would find itself understandably tempted to go for the most defensible decisions in relation to the most politically visible appointments. The most testing appointments would probably be the Lord Chief Justice and the Master of the Rolls. A commission might well find itself drawn to the attractions of seniority as a factor that it could easily defend. Would a commission – to take an historical example discussed by Lord Hailsham and reported by Woodhouse – have appointed Sir John Donaldson to the Master of the Rolls? Mrs Thatcher did: Lord Hailsham reported the prime minister's retort to the fact that Sir John was a somewhat controversial figure among the judiciary (and, indeed, politically): 'Fortunately, Lord Chancellor, you judges do not appoint the Master of the Rolls, I do'. Would a commission be so brave?
15. The Human Rights Act advances the position of the judiciary: they are no longer quite so easily containable as 'lions under the throne'. Judges are making decisions in highly politically charged areas – as can be traced, for example, in the exasperated utterances of the Home Secretary along the lines of:  
Frankly, I am fed up with having to deal with a situation where Parliament debates the issues and the judges then overturn them.<sup>9</sup>
16. The strain between the executive and the judiciary recently led to a debate in the House of Lords. This is not a new issue. Lord Rodgers proposed debates on the same subject on both 23<sup>rd</sup> May 2003 in reaction to the words of David Blunkett and on 5<sup>th</sup> June 1996 to the words of Michael Howard. Lord Plant sought in the later debate to put this tension within a wider framework:  
... the current controversies are a symptom of something rather profound. It is important that what is usually called comity between Parliament and the courts should be preserved. Hitherto, comity has been preserved, I think, by an assumption shared between the two institutions that Parliament made the law and the courts applied them. In this sense, it was what has come to be called a uni-polar concept of parliamentary sovereignty. This assumption no longer holds. In an indirect and rather crab-wise way, I think we are moving to what Lord Justice Sedley has called a bi-polar concept of sovereignty, 'of the Crown in Parliament and the Crown in the courts – to each of which the Crown's ministers are answerable: politically to Parliament: legally to the courts'.  
If this is so we are on the move from a strongly majoritarian Parliament-based view of British democracy towards a much more constitutionalised and judicialised one.<sup>10</sup>
17. This shift in the role of the judiciary, which JUSTICE supports as a necessary element of an expanding commitment to human rights, means that it is particularly important to consider anew the role of the executive and the legislature in the appointment of the third element of the constitution, the judiciary.

<sup>9</sup> *World at One* interview quoted by Lord Rogers *House of Lords Debates* 21 May 2003 col 877.

<sup>10</sup> *HL Debates* 21 May 2003, col 898

18. **For a variety of reasons, not least legitimacy with the executive and public, all judicial appointments should formally be made by a Secretary of State who would usually be a member of the House of Commons.**
19. Thus, the role of a judicial appointments commission is necessarily advisory. However, there is a clear difference between the requirements that may be appropriate for appointment to higher judicial posts than with those of lesser importance. For the latter – leaving aside the definitional issue for the moment – the constitutional requirement is a level of competence that could be safely left to a commission to identify. In relation to appointments at a higher level – for example to the Court of Appeal and the House of Lords – there may well be a more complicated balance of relevant factors to decide which would justify the commission coming to a view that more than one person might meet the requirements of the post – perhaps in different ways.
20. The question is this: what should the practice of the commission be in advancing names of those it considers suitable for appointment to the decision-making minister? JUSTICE argues the following:

**The commission should advance the names of all those considered suitable for appointment to a maximum of three for all ‘senior’ appointments, defined to include appointments to the High Court and above together with such other posts as were designated, eg certain Circuit appointments with special responsibilities. The commission might wish to rank the list. The Secretary of State can appoint anyone on the list. For ‘junior’ appointments, the commission could choose either to give the Secretary of State a choice or to advance one name for each post. The Secretary of State could require the commission to resubmit a further name but would be required to give reasons to the commission for so doing.**
21. Thus, appointment of the judiciary will be made by the executive. The question then arises as to whether the legislature should have any engagement in the process in terms of consent or scrutiny. There is an argument that, as our judges take more politically exposed decisions in relation to matters such as human rights, that the legislature should be involved to some extent. Such an involvement might happen in a variety of ways ranging from something like the US Senate hearings in relation to federal judicial posts to the more gentle scrutiny of the Treasury Select Committee of appointments to the board of the Bank of England.
22. There is both an advantage here – the greater legitimacy that such a process grants to appointments that are confirmed – and a disadvantage – appointments might become much more politicised, contentious and contested. The possible scrutiny body might be the Parliamentary Committee on the Lord Chancellor or a new committee perhaps of both Houses or even one of the upper chamber alone.
23. Scrutiny by the legislature might, in time, assist in the somewhat unedifying exchanges between the Home Secretary and various judicial representatives. Politicians might feel happier with a judiciary in whose appointment the legislature had played a role. The judges might feel greater support from the legitimacy thereby confirmed upon them.
24. The judiciary, however, as a whole, would probably be somewhat against such a development and it might be that, in the context of the reforms that are being proposed, it is better to delay the question of adding an element of scrutiny by the

legislature to a later date. It would be important that any scrutiny element had the confidence of all concerned as well as the public and that it added legitimacy to the process of appointment rather than threatened it in any way.

25. **Future consideration should be given to the addition of an element of scrutiny by the legislature of very senior judicial appointments but no action should be taken at the present time.**

### **Departmental arrangements**

26. There are three options in relation to the establishment of a Department of Justice to take up the functions which might be transferred from the current LCD:
  - (a) subsuming of LCD roles into the Home Office (Haldane's solution);
  - (b) straightforward translation of the LCD into a new Department;
  - (c) some realignment of roles between those of the current LCD and Home Office to create a new Department.

As Professor Woodhouse puts it:

For some a ministry of justice is simply an extended, renamed Home Office. For others, it is a replacement of the LCD, and yet others see it as an addition, with responsibility for 'the general work of judicial administration in connection with justice, the courts buildings and staff, legal aid, tribunals, prisoners' complaints, land registration and public records', the Home Office concentrating on law and order and the LCD on judicial appointments.<sup>11</sup>

27. Amalgamation with the Home Office seems unattractive and has been rejected by the Prime Minister.
28. The big issue in relation to the division of responsibility with the Home Office is that of criminal justice. The LCD is responsible for civil law reform but not criminal law reform. It is, however, responsible for the criminal courts and legal aid. There are a number of consequences. For example, everyone agrees that codification of the criminal law would be desirable in terms of accessibility and understanding. The Law Commission has done the work. The Home Office, however, has no interest – precisely because its focus is operational not strategic. Its emphasis is on crime reduction not crime definition. Efforts are being made to bring together the stakeholders in the criminal justice system. However, there is some ambiguity about whether criminal legal aid and defence legal costs are to be included in the model because the criminal justice system is a Home Office responsibility. Similarly, the police are the operational responsibility of the Home Office; the case for the Crown Prosecution Service to be detached from the Home Office is accepted; yet it is the Home Office and not the LCD that is responsible for the legal rules governing the collection of evidence in criminal cases.
29. Accordingly, responsibility for criminal law reform of both substance and procedure might be transferred from the Home Office to the Department for Constitutional Affairs (DCA). The Home Office would be responsible for operational matters relating to terrorism, the police, the probation service and the prisons. The DCA would be responsible for the legal structure. The Prime Minister should, therefore, reconsider his decision to make no changes to the Home Office's responsibilities.

---

<sup>11</sup> as above p210

30. As a relatively minor change of responsibility, there would be some case for transfer to the DCA of responsibility for the authority dealing with police complaints, which, as IPPR point out, is necessary to secure its independence in accordance with European Convention principles.
31. The government is currently consulting on whether a Single Equality Body should replace the three existing anti-discrimination commissions. Human rights might be included within the responsibilities of such a body. The three existing commissions are the responsibility of three different sponsoring departments. Human rights is that of a fourth, the LCD/DCA. Responsibility for equality should, therefore, reasonably be housed also within the DCA.
32. **Accordingly, the Department for Constitutional Affairs should be responsible for:**
- **Judicial appointment and a judicial appointment commission;**
  - **Administration of courts and tribunals;**
  - **Access to justice, the Criminal Defence and Community Legal Services, legal services and the legal professions;**
  - **Complaints against the police;**
  - **Human rights, freedom of information, data protection, electoral law and the administration of electoral policy;**
  - **Law reform (civil, administrative and criminal);**
  - **Compliance with European law and international human rights treaties;**
  - **Promotion of equalities: race, religion, gender, disability, age and sexual orientation.**<sup>12</sup>
33. These arrangements (or those proposed by the Prime Minister) will add further distance to the relationship between the judiciary and the executive. They would also mean that there would no longer be a minister of the government who was head of the judiciary. As such, this is desirable. However, there will be an even greater role for a senior figure to head the judiciary and lead negotiations and discussions with the executive. Lord Hope explained arrangements in Scotland in the recent House of Lords debate on the judiciary:
- I should explain that ... I was ... Lord President of the Court of Session and Lord Justice General for Scotland. These combined offices impose on a single judicial figure ... the responsibilities which in England and Wales by the Master of the Rolls and the Lord Chief Justice. The holder of these offices is the head of the judiciary in Scotland. That position brings with it, of course, numerous responsibilities, one of which is that of representing the judiciary as a whole in discussions with the executive.<sup>13</sup>
34. **The most logical arrangement for England and Wales would be that the role of head of the judiciary is taken by the Lord Chief Justice.** This would retain the existing criminal and civil responsibilities respectively of the current posts with, effectively, a president with overall responsibility.

---

<sup>12</sup> This list is based upon that of IPPR though the paper is recommending more accountability for judicial appointments.

<sup>13</sup> 21 May 2003, col 902.

## Appendix 1

### Functions of Lord Chancellor's Department

As set out by the Parliamentary Committee on its website<sup>14</sup>

- **constitutional issues**, including: Church and State, and Royal matters; relations with the Channel Islands and Isle of Man; electoral law; party funding
- **civil justice and the legal services market**, including: legal aid and the Legal Services Commission; private legal services and the Legal Services Ombudsman; civil court procedure and civil law; alternative dispute resolution; law reform and the Law Commission
- **family justice and the vulnerable**, including: marriage, divorce and relationship support; family breakdown and arrangements for children; Children and Family Court Advisory and Support Service (CAFCASS); international child abduction; mental incapacity; the Public Guardianship Office; the Official Solicitor and Public Trustee; transsexuals
- **criminal justice**, including: policy and legislation affecting the criminal courts (as distinct from criminal law, which does not fall within this Committee's remit); international and European matters affecting the criminal courts
- **the courts and tribunals** (but excluding individual cases)
- **judicial matters**, including: judicial appointments, training and conduct; appointments to tribunals; appointment of QCs (but excluding individual appointments)
- **international legal matters.**

The Committee's remit also covers three other Departments for which the Lord Chancellor is responsible to Parliament, namely, [HM Land Registry](#), the [Public Record Office](#), and the [Northern Ireland Court Service](#).

---

<sup>14</sup> March 2003

## **Appendix 2**

### **List of Ministerial responsibilities<sup>15</sup> in the LORD CHANCELLOR'S DEPARTMENT**

#### **The Lord Chancellor: *The Rt Hon The Lord Irvine of Lairg QC***

- the resourcing of his Departments;
- constitutional issues – including House of Lords reform;
- all appointments judicial or otherwise;
- royal, Church and Hereditary issues, and Lord Lieutenants; and
- any delegated matter which merits the Lord Chancellor's personal attention.

#### **Parliamentary Secretary:**

##### ***Ms Yvette Cooper MP***

- Criminal Justice Policy;
- Court Service;
- Magistrates' Courts;
- IT and E-Government Policy;
- Human Rights;
- Freedom of Information;
- Data Protection, data sharing and privacy project;
- The Electoral Commission;
- Policy on Electoral Law;
- Referendums; and
- Party Funding.

#### **Parliamentary Secretary: *Ms Rosie Winterton MP***

- Family Policy;
- CAF/CASS;
- Tribunals policy and strategy;
- Social exclusion;
- Devolution issues and regional policy;
- Channel Islands and the Isle of Man;
- Northern Ireland Court Service;
- Public Guardianship Office;
- Official Solicitor's Office;
- Council on Tribunals;
- Public Record Office; and
- Statutory Publications Office.

#### **Parliamentary Secretary: *The Rt Hon The Baroness Scotland Of Asthal QC***

- Legal Aid, the Legal Services Commission and Community Legal Service;
- Civil Justice Policy;
- Civil Law Development;
- Domestic and International Legal Services;
- Legal Services Ombudsman;
- Law Commission;
- Commonhold and Leasehold;
- Immigration and Asylum Policy;
- International Policy and the European Union, including the Convention on the future of Europe;
- Judicial Group, other than individual appointments and casework;
- Land Registry; and
- Government spokesperson in the House of Lords for Gender and Equality issues (supported by the Women's Unit in the Cabinet Office).

---

<sup>15</sup> *List of Ministerial Responsibilities* Cabinet Office, October 2002

### **Appendix 3**

#### **List of Ministerial responsibilities of the HOME OFFICE**

##### **Secretary of State for the Home Department: *The Rt Hon David Blunkett MP***

- Overall responsibility for the work of the Home Office;
- Civil Emergencies;
- Security;
- Terrorism;
- Expenditure Issues; and
- Family Policy.

##### **Minister of State (Police and Crime Reduction):**

###### ***The Rt Hon John Denham MP (now resigned)***

- Crime Reduction;
- Policing;
- Community Safety; and
- Young People.

##### **Minister of State (Criminal Justice System): *The Lord Falconer of Thoroton QC***

- Criminal Justice System;
- Sentencing; and
- Law Reform.

##### **Minister of State (Citizenship and Immigration):**

###### ***Ms Beverley Hughes MP***

- Citizenship;
- Immigration; and
- Community cohesion.

##### **Parliamentary Under-Secretary of State: *Bob Ainsworth Esq MP***

- Anti-drugs co-ordination; and
- Organised crime.

##### **Parliamentary Under-Secretary of State: *Hilary Benn Esq MP***

- Community; and
- Custodial Provision.

##### **Parliamentary Under-Secretary of State: *The Lord Filkin CBE***

- Race equality;
- Community policy; and
- European and International Policy.

##### **Parliamentary Under-Secretary of State: *Michael Wills Esq MP***

- Criminal Justice System – Information Technology; and
- Performance of the Home Office’s correspondence system.

##### **Agencies of the Secretary of State for the Home Department:**

***Criminal Records Bureau***

***Forensic Science Service***

***Passport and Records Agency***

***HM Prison Service***

