



**RESPONSE TO
*CONSTITUTIONAL REFORM: A SUPREME COURT
FOR THE UNITED KINGDOM***

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For further information: contact Roger Smith, rsmith@justice.org.uk (020 7762 6412)

JUSTICE
59 Carter Lane,
London EC4V 5AQ
www.justice.org.uk

Proposed Response to *Constitutional Reform: a Supreme Court for the United Kingdom*

Introduction

1. JUSTICE welcomes this consultation paper: we have been associated with arguments for a Supreme Court for some time. We argued for a Supreme Court in our evidence on House of Lords reform in 1999; JUSTICE's annual lecture in 2001 by Lord Bingham dealt with the same topic; and JUSTICE published a briefing paper approved by Council last year.
2. This paper is the submission of JUSTICE and is without prejudice to the right of individual Council members to hold and express different opinions on individual matters.
3. We agree with the fundamental nature of the Government's proposals and commend the core elements, namely;
 - Transference of the jurisdiction of the House of Lords Appellate Committee to a Supreme Court for the United Kingdom;
 - Severance of the Supreme Court from the upper House of Parliament;
 - Transfer of the existing Lords of Appeal in Ordinary to initial membership of the court.
4. We consider the following to be the essential elements of a viable Supreme Court:
 - 15 full-time justices;
 - An adequate and delegated budget for which the President is responsible;
 - Justices should be appointed by the Queen on the advice of the Prime Minister after consultation with the First Ministers of Northern Ireland (including the deputy) and Scotland. The Prime Minister will normally advance a name put forward by a nominating committee of five composed of the three chairs of the judicial commissions for the three UK jurisdictions, the President of the Supreme Court and the First Civil Service Commissioner as chair. The Prime Minister may reject this name only in exceptional circumstances, for good cause and with written confidential reasons;
 - Justices of the Supreme Court will cease to be members of the Upper House of the legislature.
5. We are extremely concerned at the issue of resources. The severance of the Supreme Court from the Upper House will bring considerable additional cost. The court will need appropriate accommodation. The office of the President will need to be adequately staffed. The government must be prepared to commit the additional resources necessary to replace the subsidy currently given through the presence of the court in Parliament. The Government will need to provide an estimate of this cost and to indicate how funds will be available without, for example, transferring money from the budgets of the Court, Criminal Defence or Community Legal Services. That would be unacceptable.
6. We are concerned at the apparent haste of the Government. The period for consultation on such a serious constitutional matter has been very short. Given this, time should be found for pre-legislative scrutiny of a draft Bill if the Government proceeds with legislation in the next Parliamentary session.

7. **Q1: Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?**
8. Yes. It is crucial. Otherwise, the same point may be decided differently by both the Judicial Committee and the Supreme Court. Litigation on the same point is quite likely to occur in a number of areas, particularly in relation to the Human Rights Act. Indeed, English and Scottish courts have already been put in this position.¹
9. In the longer term, we question the continued justification for the Judicial Committee of the Privy Council. In 2002, the Judicial Committee disposed of 89 appeals, with 101 outstanding at the end of the year. Of the decided cases, 26 related to appeals under regulatory provisions for the health professions. Overseas appeals overwhelmingly came from New Zealand and the West Indies. Over a reasonable time, the government should announce that it would like to abolish the Privy Council and encourage adequate domestic arrangements in those countries still dependent upon it. We note that New Zealand has decided to withdraw its appeals and have its own court of appeal in Wellington from the middle of 2004.² The government also proposes to remove the powers in relation to health professionals.
10. **Q2: Do you agree that the number of full-time members should remain at 12 but that the Court should have access to a panel of additional members?**
11. **Q3: If there were such a panel, under what circumstances could the court call upon it?**
12. **Q4: Should the composition of the Court continue to be regulated by statute, or should it be more flexible?**
13. The Supreme Court must be staffed by an appropriate number of members to cover its workload. We consider that the optimum number of judges is 15.³
14. Occasional and part-time members of the court raise difficulties though they clearly provide flexibility in the composition of the court. Their creation leads potentially to two classes of judge and may lead to the perception (or even the actuality) that the occasional judges are of inferior quality or less independent. Accordingly, there should be no 'occasional' members of the court.
15. The one exception to occasional membership may be devolution matters where it would be helpful to co-opt a senior judge from Northern Ireland or Scotland to provide a bench with an appropriate level of expertise from a devolved jurisdiction. It should be possible on this basis to co-opt the Lord President of Scotland and the Lord Chief Justice of Northern Ireland.
16. The President of the Court should be responsible for the composition of the benches to sit in any particular case and timetabling of cases. He or she should have a small office, headed by a registrar, to assist in this task. This should not be the responsibility of either the Department of Constitutional Affairs (DCA) or the Court Service. The President should also be responsible for a devolved budget in the manner of US Federal Courts and the High Court of Australia. Adequate funds should be supplied by the DCA.
17. **Q5: Should there be a Deputy President?**

18. Yes.
19. **Q6: Should the posts of President and Deputy President be 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 the Judicial Appointments Commission?**
20. Both posts should be appointed in the same way as Justices of the Supreme Court. There is no justification for any different procedure. There will be circumstances when there is no serving President to join the nominating committee. In that case, an appropriate member of the court (without any personal interest in the appointment) should take the President's position.
21. **Q7: 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?**
22. No. There may be a case for the President to have the same expectation of a peerage as is currently the case for the Cabinet Secretary and the Chief of the Defence Staff. However, the retired members of the Supreme Court should not automatically become members of the legislature. One of the objectives of this proposal is to sever the link between the judiciary and the legislature.
23. We understand that the House of Lords may miss the expertise provided by the Law Lords, particularly in some of its committee work. It will be important that the Upper House retains access to senior and experienced lawyers. Those concerned with its membership and organisation will need to bear this in mind. Transitional arrangements should apply to the existing Law Lords.
24. **Q8: Should the bar on sitting and voting in the House of Lords be extended to all holders of high judicial office?**
25. Yes. The bar should, in principle, be extended to all current holders of judicial office because of the principle of separation of the judiciary from the legislature. Thus, all full-time judges at any level should be excluded. A practical exemption should be made for holders of part-time appointments at the recorder level and below. In addition, the President should report annually relating to a Parliamentary Joint Committee on the Judiciary. This will provide the President with an opportunity to raise any matters of concern.
26. **Q9: Should there be an end to the presumption that holders of high judicial office receive peerages?**
27. Yes.
28. Justices of the Supreme Court should not receive automatic peerages. Furthermore, it would be somewhat anomalous if other senior judicial posts, such as the office of Lord Chief Justice, also attracted automatic peerages.
29. **Q10: 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?**
30. **Q11: 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 the First and Deputy First ministers in Northern Ireland. Or should it be statutorily empowered to advise The Queen directly?

31. **Q12: 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 Appointment bodies in each jurisdiction?**
32. The Queen should make the appointment on the advice of the Prime Minister who should receive a nomination of one name from a nominating committee. The Prime Minister, having consulted with the First Ministers of Scotland and Northern Ireland (including the Deputy), will normally accept this nomination. It may be rejected only for good reason. This must be confidentially communicated in writing to the nominating committee.
33. The nominating committee of five should be composed of the chairs of the three judicial appointment commissions for each jurisdiction together with the President of the Supreme Court and chaired by the First Civil Service Commissioner.
34. **Q13: Should the process of identifying candidates for the new Court include open applications?**
35. Yes. The interests of transparency require this.
36. **Q14: 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?**
37. We are in favour of a broader range of appointment to the Bench. In relation to an exceptional candidate, it should be possible to appoint direct to the Supreme Court. There should be no formal requirement that candidates have previous judicial experience.
38. **Q15: 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?**
39. The selection criteria are sufficiently important to be set out in statute – particularly in relation to the requirements for merit and diversity.
40. An acceptable alternative would be a code approved by Parliament or the proposed Joint Parliamentary Committee on the Judiciary.
41. **Q16: what should be the arrangements for ensuring the representation of the different jurisdictions?**
42. Each jurisdiction should have minimum membership. There should also be some flexibility so that appointment should be made of the best, whatever their nationality. Wales is not a separate jurisdiction but statute could require the nominating commission to pay regard to the desirability of the membership of the court reflecting judicial experience within Wales.
43. There should be a minimum of two justices from Scotland and one from Northern Ireland.

44. **Q17: What should be the statutory retirement age? 70 or 75?**
45. Government policy has been to reduce the statutory retirement age to 70. A return to 75 would be acceptable to reflect the value of experience for justices of the Supreme Court but for no lower jurisdiction.
46. **Q18: Should retired members of the Court up to five years over the statutory retirement age be used as a reserve panel?**
47. Justices should not sit over the age of 75. Members retiring at an earlier age might sit, in exceptional circumstances, if requested by the President. However, the increase of full-time appointments to 15 should mean that this is unnecessary.
48. **Q19: Should the Court continue to sit in panels, rather than every member sitting on every case?**
49. Yes. The US Supreme Court sits *en banc* with the intention that there is consistency in its decision-making and all judges are involved in all decisions. Even with the Human Rights Act, the Supreme Court of the UK will not be making so many potentially controversial decisions. The President of the court should have the power to require that the court sits *en banc* for a particular case and it would be expected to do so where now the House of Lords sits in a larger bench than its normal five.
50. **Q20: 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?**
51. A court should be able to certify that it considers that there should be an appeal in an exceptional case. This allows it to indicate where, for example, it considers that it has felt bound by precedent which it considers should be reviewed. However, this power should be very sparingly used and the Supreme Court should have a large measure of control over its cases (see below).
52. **Q21: Should the present position in relation to Scottish appeals remain unchanged?**
53. There are clearly Scottish sensitivities to be heeded in any change to the present situation. On the other hand, it is illogical for different jurisdictions to have different appeal rights in relation to a Supreme Court of the UK. Other than in exceptional cases where a lower court may certify an appeal, the Supreme Court should decide on those cases for which it gives leave. This allows the court to control its workload and to select the important cases for it to decide.
54. **Q22: What should the existing Supreme Court be renamed?**
55. The Higher Courts of England and Wales. Alternatively, the Court of Appeal and the High Court of England and Wales.
56. **Q23: What should members of the new Court be called?**
57. Justices of the Supreme Court.

58. Logically, the severance of the judiciary from Parliament should lead to the removal of any reference to Lords at any level. Failure to do so will lead to continuing confusion of perception. Logically, judges in the Court of Appeal would then be known as Justices of the Appeal Court – removing the confusing title 'Lord Justice of Appeal'. Scottish High Court judges should also cease to be called Lords.
59. **Costs**
60. The Government should not seek to make the Supreme Court self-funding. Nor should it seek to recoup from the Court, Criminal Defence or Community Legal Services or other heads of the DCA budget the increased costs that there will undoubtedly be in properly establishing a Supreme Court. The role of the highest court is to set precedent and maintain surveillance over the development of the common law. This is a public interest function and should be funded as such.
61. The Government must recognise that new arrangements for a Supreme Court will be more expensive than those made currently. Suitable accommodation will be costly and will need to be of a higher quality and extent than currently available. It would be highly unsatisfactory if the necessary additional funds were to be found by cutting legal aid or other court funds. Funds should be transferred from the DCA to the Office of the President who shall then be responsible for financial decisions in relation to the running of the Supreme Court.

¹ see *County Properties Ltd v Scottish Ministers* 2000 S.L.T 965 and *R v Secretary of State for the Environment* [2001] UKHL 23.

² See *ABC online* 19 October 2003

³ As argued by Sir Thomas Legg, former Permanent Secretary to the Lord Chancellor's Department, 'The New Supreme Court – a real step forward', Cambridge Centre for Public Law conference, 4 October 2003