



Ministry
of Justice

The Government Response to the House of Lords Constitution Committee's 7th Report of Session 2017–19

Judicial Appointments: follow-up

December 2017

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Judicial Appointments: follow-up

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

December 2017



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Overview

1. In January 2011, the former Lord Chancellor wrote to the Chair of the House of Lords Constitution Committee detailing the findings of an internal review of judicial appointments and relevant arms length bodies. Shortly after, in May 2011, the Constitution Committee conducted its own inquiry on the judicial appointments process.
2. At the same time as the Committee's review of the appointments process, the Government launched a public consultation. This focused on recommendations to change the statutory and regulatory frameworks for judicial appointments and considered measures to increase the diversity of the judiciary.
3. In May 2012, the Government published a response to the public consultation and a command paper to respond to the Committee's report.
4. Five years on, the Committee has published a follow-up report which examined the progress that has been made since 2012. The Committee also focuses on the issues which it considers are affecting the recruitment to the judiciary, including morale of the serving judiciary and the attractiveness of a judicial appointment for potential applicants.
5. The Committee acknowledges that a number of the recommendations made in their 2012 report have since been implemented and that progress has been made across the judicial appointments process, but considers that there is room for improvement. The Government is grateful for the continuing work of the Committee and for its views and recommendations.

The Attractiveness of Judicial Careers

Pay and Pensions

“We recognise the growing disparity in pay between the private and public sectors, particularly at the senior levels of the judiciary. Without wishing to pre-empt the Senior Salaries Review Body’s review, we note that, given the restraints on public sector pay, it is unlikely judicial pay will increase in a way that significantly reduces this difference. The Government should address the other issues which undermine the attractiveness of the judiciary as a career path, which we consider later in this report.

We do not comment on the economic circumstances in which the Government made changes to the arrangements for judicial pensions. However, we are deeply concerned that the sense of grievance created by the pensions issue has damaged morale throughout the judiciary and will have reduced the appeal of a judicial career to those who might otherwise have been thinking of one”.

(Paragraphs 16,23)

6. The Government notes the Committee’s comments about the impact of judicial pension issues on judicial morale. The Government recognises that, taken together, workload, pension reform and pay restraint have had an impact on morale and on recruitment and retention in some areas of the judiciary.
7. We are committed to addressing this through court reform and through a major review of judicial pay led by the Senior Salaries Review Body (SSRB). The Government is also committed to considering how the current concerns about pensions can best be alleviated within the context of the Government’s overall public sector pension policy.
8. The SSRB is currently undertaking a review of the salary structure for the judiciary and whether the current judicial salary groups are fit for purpose in the light of future plans for the justice system.
9. The purposes of the review are to:
 - determine whether the structure of judicial salary groups can be simplified;
 - consider whether there are newly created and transferred judicial posts which need to be allocated to salary groups;
 - consider evidence on the appropriate grouping of judicial posts;
 - consider whether the difference in remuneration between judicial salary groups is justified by the relative job weight of the posts in each group, taking into account the nature of the different roles and the skills required, and different recruitment pools;
 - consider whether total remuneration for each salary group is correctly set, including in relation to that of appropriate recruitment pools in the legal profession, in order to recruit high calibre office holders at all levels of the judiciary;

- consider whether total remuneration for each salary group is correctly set, including in relation to senior people elsewhere in the public sector, bearing in mind the unique responsibilities and constraints of judicial office, in order to retain and motivate high calibre office holders at all levels of the judiciary;
- consider how best to reward and incentivise judicial leadership; and
- make recommendations as appropriate in the light of evidence received and the review body's judgement.

10. The SSRB is due to report in summer 2018 and the Government will engage seriously with the recommendations of this review and will do so in a timely manner.

Working Conditions and Resources

“We are concerned about the working conditions of the judiciary and the detrimental effect they may be having on retaining and recruiting judges. The dilapidated state of some courts coupled with administrative burdens, under-resourcing of staff and IT shortcomings all need to be addressed.

We are pleased that the Government has said that it is committed to addressing these problems, both in partnership with the senior judiciary, and ultimately through legislation. However, a considerable investment of funds and political energy will be needed to achieve the required improvements both in the immediate future and long-term”.

(Paragraphs 34, 35)

11. The Government will continue to invest in the estate to make courts and tribunals a better working environment for all those who use and work in them, including the judiciary.
12. Since 2014, the Government has spent over £84m fixing buildings and has earmarked £35m for 2018–2019. To develop a proactive and sustainable maintenance programme, the Government is undertaking building surveys across the courts estate to assess the state of our buildings.
13. For the current financial year, the Government has created a one-off revenue maintenance fund of £5m which will be specifically focused on improving the working environment in courts and tribunals. This investment will help fund priority refurbishments at 200 courts and tribunal sites.
14. The Government is also investing in the modernisation of courts and tribunals through a £1billion change programme. This investment will assist in improving the working conditions for the judiciary and courts staff. Having formally begun in April 2015, it is due to complete in 2022/23.
15. The reform programme, which is being delivered in partnership with the judiciary will bring:
- **Better IT infrastructure and straightforward digital services:** rolling-out basic IT infrastructure, such as WiFi and screens together with the creation of new, digital services across all jurisdictions, including online divorce and civil money claims, will make the court process better for both judges and litigants. There is

also the investment in remote technology, which will allow judges to be more flexible with their time.

- **Better support for judges:** allowing legally-trained case officers to perform basic administrative functions by increasing the use of delegated authority, will help, reserve judicial time for the work which most requires it. In addition, by introducing simplified digital services, we expect the amount of corrective work undertaken by our administrative staff to diminish, allowing them to devote more time to supporting magistrates and judicial office holders.
- **Better buildings:** new online systems are designed to reduce the time required in a physical courtroom. This will allow the consolidation of the courts estate and better maintenance of the remaining buildings.
- **Smarter working:** allowing for the online submission of cases, and case management will reduce current reliance on physical paperwork, as well as costs. This will mean time savings for staff and users who will be able to retrieve information electronically.

16. Through this investment, the Government will improve the working conditions of the judiciary in the immediate future and for the longer term.

Returning to Practice after a Judicial Career

“We recognise that the concept of judges returning to practice law is controversial. We invite the Lord Chancellor and the Lord Chief Justice to examine the continuing value of the convention, and in particular, whether it serves to operate as a significant disincentive to applications for full-time judicial appointment”.

(Paragraph 38)

17. The issues arising from any change to the convention on judges returning to practice are complex and would need to be considered carefully.
18. The Government recognises that there could potentially be some benefits to a change in the convention, such as increasing the attractiveness of a judicial career for those who only wish to spend part their legal career in judicial office. This may also attract a more diverse range of applicants for judicial office. However, there are long standing arguments in favour of the status quo.
19. Judicial conduct, including avoiding conflict of interest and upholding the reputation of the judiciary are covered in the Lord Chancellor’s Conflict of Interest Policy and the ‘Guide to Judicial Conduct’. As mentioned by the Committee in their report, the convention against a return to practice is based on the belief that candidates looking to become a member of the judicial bench have enjoyed successful careers in the law and having sat as fee-paid judges, have an understanding of their responsibilities as a salaried judge.
20. In addition, a former judge may still be regarded by the general public as a representative of the judiciary and this could include in providing legal advice or acting as an advocate in a court or tribunal. The current convention therefore ensures that those appointed to salaried roles are fully committed to full-time judicial office for the

long term. The convention extends to salaried judges not returning to practice after retirement.

21. The Government recognises the value in considering this question further and will seek the views of legal professions on whether any changes to the existing return to practice arrangements would make entering the judiciary more attractive for some applicants. The Government will also work with the judiciary to consider what the impacts of changing the current convention on judges returning to practice would be, including on the public's perception of judicial independence and impartiality.

Retirement

“Given the difficulties in recruiting judges, which we address in the next chapter, the Lord Chancellor, with the Heads of the Judiciary in England and Wales, Scotland and Northern Ireland and the President of the Supreme Court, should reflect on whether the current fixed retirement age throughout the judiciary continues to be appropriate. Consideration should also be given to whether a higher retirement age would be appropriate at the senior levels of the judiciary, given that most judges do not reach the higher ranks until later in their careers”.

(Paragraph 45)

22. The Government acknowledges the Committee's view that there should be a review of the current mandatory retirement age.
23. Having a mandatory retirement age for judges is intended to promote and preserve judicial independence by having a set retirement age, rather than individual decisions in every case. It also avoids the need for a system of individual assessment of health and capacity and maintains public confidence in the judge's decision making ability.
24. A mandatory retirement age also supports the objective of increasing judicial diversity by balancing the need for experienced judges to continue in office for a reasonable time against career progression opportunities for newer appointments.
25. The current age limit of 70 was standardised in 1993. Extensions to the mandatory retirement age may be granted to judges below the High Court, where it is considered desirable in the public interest. This requires approval from the relevant member of the senior judiciary, in concurrence with the Lord Chancellor. Such extensions are granted for one year at a time but no judge may be granted an extension beyond the age of 75. There are also opportunities for retired courts and tribunal judges to sit on a fee-paid basis until they are 75.
26. There are 211 fee-paid and 7 salaried extensions and 209 judges sitting in retirement (on a fee paid basis at a level equivalent to their previous salaried appointment) across all jurisdictions (approximately 4.6% of the total judiciary).
27. The Government is aware that in recent years a number of eminent senior judges have left the bench because they have reached the mandatory retirement age. In this context, the Government notes the Committee's view that as a result of judges taking up senior posts later into their careers, there should be an increase in the mandatory retirement age so that those who wish to apply for judicial office later in their careers, and wish to advance to the senior judiciary, have the opportunity to do so.

28. Change to the mandatory retirement would need to be considered alongside the questions raised by the Committee around the convention on returning to practice, and in light of the implications for judicial diversity. The Government will consider whether there should be a change to the mandatory retirement age in light of the points raised by the Committee.

Relationship with the Government

“It is imperative that the independence of the judiciary is protected and that it is well-understood by the public. This does not impinge on the right of the free press to challenge or to criticise court judgments.

However, there is a difference between criticism and abuse; between challenging the content of a judgment and attacking the character and integrity of the judge handing down that judgment. In such cases, the Lord Chancellor’s constitutional duty is clear—as stated in the oath of office, the Lord Chancellor must defend the independence of the judiciary. Should members of the judiciary suffer such personal attacks in future, we expect any person holding the office of Lord Chancellor to take a proactive stance in defending them publicly, as they are unable to defend themselves.

We welcome the new Lord Chancellor’s commitment to be “resolute and unflinching” in defending the independence of the judiciary”.

(Paragraphs 56–58)

29. The Lord Chancellor has committed to steadfastly uphold the independence of the judiciary.
30. The constitutional independence of the judiciary and the ability of individual judges to make decisions according to the law is of critical importance to society. The Lord Chancellor, and Her Majesty’s Government, not only recognise that, but will continue to defend the duty incumbent on judges to make decisions according to the law. The Lord Chancellor in particular is, and will continue to be, a strong advocate for judicial independence.
31. Abuse directed at judges is, of course, unacceptable.
32. The Lord Chancellor has duties in relation to: the judiciary and the justice system; defending judicial independence; the judiciary having support to carry out its functions; and for matters relating to the public interest, judiciary or administration of justice to be properly represented when decisions are made. These duties go beyond the statutory duty on all ministers to uphold judicial independence and to refrain from seeking to influence judicial decisions. The Lord Chancellor has been clear in his commitment to these duties.

Recruitment

“We are seriously concerned about recruitment to the bench. However, we also agree unequivocally with the Judicial Appointments Commission that the threshold for appointment should not be lowered in order to fill judicial vacancies. It is essential that the high quality of the judiciary, and by extension the legal system in the UK, is not compromised”.

(Paragraph 67)

33. Our judiciary is world class and should continue to be so. The Government agrees that in order to maintain the quality of the judiciary the merit threshold for appointment must continue to be high. This will not be compromised in order to fill outstanding judicial vacancies.
34. The Government will consider whether changes to the existing eligibility criteria can be made to encourage a broader range of talented applicants, without compromising the quality of judicial appointments. This will help increase diversity by attracting the best possible candidates from a range of backgrounds.
35. The Government, judiciary and the Judicial Appointments Commission (JAC) will also continue their ongoing work, and work with the Judicial Diversity Forum to attract the best legal talent from a broad pool, through a combination of judicial shadowing and mentoring.

CPS and Government Lawyers

“We recognise the concerns about potential conflicts of interest if serving government and CPS lawyers undertake judicial work. However, these lawyers are an important potential source of recruits to the judiciary—and the CPS in particular has an ethnically diverse workforce which remains largely untapped.

We welcome the opportunity for government lawyers to gain judicial experience, particularly in tribunals. We encourage the Lord Chancellor and the Lord Chief Justice to consider whether there are other ways in which CPS and government lawyers can gain relevant judicial experience without compromising the public perception of the independence and impartiality of the judiciary. This might involve, for example, allowing government lawyers to sit to try cases when they are either geographically removed from their normal place of work or when the subject matter lies outside their usual areas of work”.

(Paragraphs 88, 89)

36. The Committee suggests that Crown Prosecution Service (CPS) and government lawyers can become an important source of recruits for the judiciary and that the Government should explore ways to help them gain judicial experience across the jurisdictions.
37. The Government is keen to see more CPS and government lawyers apply successfully for judicial office. The government will work to encourage this and to help

them to more easily combine fee paid judicial office with their career as a government lawyer. In doing so, the government recognises the need to ensure this does not lead to perceptions of conflict or bias arising from their continued work as government lawyers while serving as fee-paid judges.

Chartered Legal Executives

“We see no reason why chartered legal executives who have been appointed as district judges and demonstrate the requisite attributes are unable to achieve promotion beyond the district bench. We encourage the Lord Chancellor, in consultation with the Lord Chief Justice, to reconsider this”.

(Paragraph 95)

38. Currently Fellows of CILEx are eligible to apply for some judicial offices including the office of District Judge. Any person who has served three years in certain judicial offices, including as a District Judge, can already apply for promotion to the Circuit Bench, providing a route to the Circuit Bench for Fellows of CILEx.
39. There are indications that CILEx members will be the most diverse pool of legal professionals in the future, in terms of gender, ethnicity and social mobility. The Lord Chancellor will discuss with the judiciary on how best to ensure that all talented lawyers, whatever their background, have the prospect of a judicial career, and what steps could be taken to remove unnecessary barriers to this.

Non-Barrister Applicants

“We welcome the outreach work undertaken by the Judicial Appointments Commission and the professional bodies to ensure that there are development opportunities and tools available to assist potential applicants for judicial roles.

However, we are concerned about the disparities that remain between the number of solicitors and chartered legal executives applying for judicial roles and the number being recommended for appointment. Non-barrister applicants may still perceive that those with advocacy experience are preferred as candidates, and that this is in part responsible for the low application rate. A significant cultural shift is required to address this.

We encourage the JAC to collect data on the reasons why applicants are not successful. We recommend that the Lord Chancellor, the senior judiciary, and all professional bodies work with law firms to encourage a cultural change within the solicitors' profession in general, and within law firms in particular, to provide better support for solicitors applying for judicial positions”.

(Paragraphs 112–114)

40. The Government recognises that there is a disparity between barrister and non-barrister applicants for judicial office and the proportion of those recommended for appointment. The Government will seek to understand the reasons behind the disparity and why there is a perception that those with advocacy experience are preferred as candidates.
41. In November 2017, the JAC published the judicial recruitment five year forward programme which included measures to support candidates to better plan their

careers and have time to prepare for recruitment exercises. The JAC is also undertaking analysis of the difference in performance for different groups, including non-barristers, in recruitment exercises, which will be available in 2018.

42. The JAC already provides feedback to help candidates understand why their application was unsuccessful and to consider this for future applications. Candidates unsuccessful at selection day who would like feedback can receive details of how and when to request it.
43. For very large exercises where it is not possible to provide individual feedback to candidates at the shortlisting stage, the JAC has published generic feedback reports on qualifying tests, online scenarios, telephone assessments and large paper sifts. These reports give candidates guidance on what characterised stronger applications in comparison to weaker applications in a particular exercise. The JAC is also exploring providing more in-depth feedback to candidates who are unsuccessful at interview.
44. The Government acknowledges the Committee's recommendation to encourage a cultural change within the solicitors' profession and support solicitors in applying for judicial roles.
45. A range of steps have already been put in place to support prospective eligible candidates. The judiciary, through the Diversity and Community Relations Judiciary, and the MoJ through the Judicial Diversity Forum (JDF) have a proactive ongoing campaign to challenge misconceptions about judicial appointments and a judicial career, including provision of case studies about judges with different professional backgrounds holding salaried and fee-paid office.
46. Solicitors are one of the JAC's target groups. However, existing research into barriers to application indicates that solicitor candidates are less likely to feel supported by their employer in applying for judicial posts. The JAC and the judiciary, in conjunction with the professions, undertake targeted outreach to solicitors, chartered legal executives and other under-represented groups. The aim of this is to raise awareness of judicial roles and tackle misperceptions about the selection process and judicial careers more generally.
47. Alongside the other members of the JDF, the Government will continue to help the Law Society, and law firms, encourage and support solicitors to apply for judicial office.

Reserve Lists

We agree with the Judicial Appointments Commission that their responsibility is to recommend appointment of the most meritorious candidates from the eligible pool, provided that the candidates themselves meet the required standards. The use of "reserve lists" identifying appointable candidates to fill unanticipated vacancies is obviously sensible, but each new competition must identify the most meritorious candidates, and may produce better candidates than those on the "reserve list".

(Paragraph 116)

48. Candidates on the reserve list have met the high threshold to take a position on the judicial bench and as the Committee suggests, it seems sensible to fill unanticipated vacancies by using candidates who have been placed on a reserve list.
49. Currently, the JAC keeps all 'reserve lists' under review and each list is closed after 12 months, unless there is a compelling business need for it to remain open.
50. The JAC has recently reviewed the approach it will take where a new vacancy request is issued before the end of the twelve-month period and confirmed that any suitable candidates on an existing reserve list will be recommended before launching any new recruitment exercise. This will ensure fair treatment of candidates on the reserve list, while also making sure that the new competition identifies the most meritorious candidates.

Diversity

"While there has been some improvement in the diversity of the judiciary since our last report, it has been limited.

We welcome the changes made to address diversity since our 2012 report. These should make high-level judicial posts a viable option for a wider pool of potential applicants and encourage diversity within the wider judiciary.

We applaud the increased emphasis on diversity training for the judiciary and professional development opportunities for potential applicants. We encourage greater emphasis on pre-application education and mentoring for applicants, especially those who belong to groups that are underrepresented in the judiciary.

We also welcome the efforts being made by professional bodies to encourage applicants from a wider range of professional backgrounds for judicial roles.

We recognise that it may take more time for recent legal changes and initiatives by the sector to deliver greater diversity. We therefore encourage the Lord Chancellor and Lord Chief Justice, the Judicial Appointments Commission and the legal professions to monitor progress closely and to continue to look for new ways to improve and encourage diversity on the bench".

(Paragraphs 147–150)

51. The Government is grateful for the Committee's recognition of the work and progress that has been made in achieving greater diversity in terms of both the gender and ethnicity of our judges. Since 2014, there have been small increases (by 4% and 3% respectively) in proportion of women and BAME judges in both the courts and tribunals, but it remains a complex picture and there is more to be done.
52. It is important for the quality, independence and impartiality of our judiciary that we always appoint the most talented candidates on merit, and we know that there are many talented potential candidates from a diverse range of backgrounds. We want to encourage and support even more of them to apply for judicial office.
53. The MoJ works as part of the JDF to coordinate action to increase judicial diversity, including ethnicity. The JAC, judiciary and legal professions undertake a range of outreach events, shadowing programmes, pre-application support and mentoring to attract and support eligible candidates.

54. The JAC also publishes details of its diversity strategy, and the Judicial Diversity Committee of the Judges' Council published their progress report and 2017–18 Action Plan in April 2017. This action plan will be updated in Autumn 2018.
55. The Government believes that the legal sector should reflect the society it serves and continues to work closely with the legal services sector and the legal profession to support and encourage the promotion of a diverse range of individuals from the broadest possible background. The Government notes the Committee's view and will continue to look for new ways to improve and encourage diversity on the bench.
56. The Government is also looking to monitor diversity across the legal profession more closely and will consider the ways in which this can be done.

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