

JUDGES' COUNCIL RESPONSE TO THE CONSULTATION PAPERS ON CONSTITUTIONAL REFORM

1. This document represents the response of the Judges' Council to the consultation papers on constitutional reform issued by the Department of Constitutional Affairs: *Reforming the Office of Lord Chancellor, A New Way of Appointing Judges, A Supreme Court for the United Kingdom* and *The Future of Queen's Counsel*.
2. The Judges' Council is a body on which all levels of the judiciary are represented. A list of members is attached at Annex D. The Council acts as the collective voice of the judiciary as a whole and the Lord Chief Justice is its Chairman. When magistrates become part of the new Unified Court, they will be represented on the Judges' Council. The Chairman of the Magistrates' Association was, therefore, a member of the team responsible for drafting this response.
3. This document consists of:

Part I	Summary
Part II	General response to the proposed constitutional reforms
Part III	The appointment and disciplining of judges
Part IV	A new Supreme Court
Part V	The future of Queen's Counsel
4. Annexes A, B and C are the Judges' Council's answers to the specific questions posed by the three consultation papers. These are provided for ease of reference, but should not be read in isolation from the more detailed responses.

PART I SUMMARY

GENERAL RESPONSE

5. In its general response to the consultation papers on constitutional reform, the Judges' Council urges the Government not to underestimate the scale of the changes that will be required to fill the vacuum left by its decision to abolish the office of Lord Chancellor which in the course of the development of our constitution has assumed such a key role.
6. As Head of the Judiciary and a very senior member of the Government, the Lord Chancellor has occupied a unique constitutional role binding together the three arms of the State; the legislature, the executive and the judiciary. The Government has decided to replace the Lord Chancellor with a Secretary of State whose role will be primarily political. He will no longer be constrained by judicial responsibilities and constitutional convention. In Part II of this document, the Judges' Council considers the implications of the Government's decision beyond those identified in the consultation papers. These implications need to be the subject of public dialogue.
7. The fact that the Lord Chancellor has presided over both the judiciary and the administration of the court system has enabled the development of constructive working relationships between the judiciary and the executive without the necessity for a formal recognition of their different responsibilities. The abolition of the office creates the need for a new constitutional settlement and for the respective roles of the executive and the judiciary to be set out in a legislative framework. Such an approach would protect the independence of the judiciary, maintain and promote the partnership that has been established, enhance the separation of powers and increase transparency and public confidence. Constructive discussions are already taking place with the Lord Chancellor on these issues.
8. The independence of the judiciary has to be preserved in the interests of the public. It is not a privilege granted to judges by virtue of their office, but an essential safeguard of individual liberty and for the impartial resolution of

disputes, particularly those between the citizen and the Government or other institutions of the State. The Judges' Council highlights four steps that should be taken to protect judicial independence:

- a) As the Secretary of State for Constitutional Affairs will not be a judge and cannot, therefore, continue to be Head of the Judiciary, it is the Lord Chief Justice who must assume that role. This must be reflected in statute together with a statement of the Lord Chief Justice's responsibilities, powers and duties. He must be given adequate resources to carry out these tasks.
- b) Arrangements for the deployment of judges and the hearing of cases should rest with the judiciary. The arrangements should be the responsibility of the Lord Chief Justice acting through judges nominated by him for the purpose.
- c) The funding must be sufficient for judges, courts and court staff to function effectively and efficiently. It is essential that a lack of resources does not impede the independence of the judges by preventing them from properly carrying out their judicial duties. The allocation of resources should not depend on political discretion alone and must be placed on a statutory framework with the necessary judicial involvement.
- d) The arrangements for the training of judges must remain in the hands of judges. The judiciary should continue to run the Judicial Studies Board.

THE APPOINTMENT AND DISCIPLINING OF JUDGES

- 9. In Part III, the Judges' Council addresses the question of how the proposed new Judicial Appointments Commission should operate. At present the judiciary plays a prominent role in the appointments process, although ultimate responsibility lies with the Lord Chancellor. The judiciary of England and Wales has a deservedly high reputation and a record of being free from corruption. The Judges' Council agrees with the Government that any new arrangements for the appointment of judges should reflect the need to preserve judicial independence and calibre and to increase diversity.

10. The Council suggests that the new Commission should consist of a maximum of twelve members drawn from a variety of backgrounds (judicial, legal, lay and the lay/part-time judiciary). It will not be practical for the Chairperson of the Commission to be a serving judge, but the selection process should not exclude retired judges, lawyers, or even serving judges who are prepared to resign to take on the challenge. What will be critical is that the best qualified candidate is appointed irrespective of his or her background.
11. For appointments below the Court of Appeal, it is proposed that the Commission act as the decision-making body; making the appointments direct or recommending names to The Queen as appropriate. Given the scope of the constitutional change envisaged, it should prove possible to relax the convention that nominations must be conveyed to The Queen by a Minister.
12. The promotion of High Court Judges to senior positions requires separate treatment. Accordingly, in relation to the appointment of the Heads of Division and appointments to the Court of Appeal, it is suggested that the primary decision be taken by a Promotions Panel operating under the auspices of the Commission. There are differing opinions as to the desirability of members of the executive having any decision-making role in relation to individual judicial appointments. Two alternatives are put forward, one of which enables the executive to exercise a limited discretion in relation, at least, to the appointment of the Heads of Division.
13. Discipline and complaints are areas in which the role of the executive has to be constrained in order to protect judicial independence. While this is critical, allegations of improper conduct by judges must be subject to a disciplinary process, operated by an independent panel, capable of scrutinising a complaint in a fair and transparent manner without compromising judicial independence. The Lord Chief Justice should take over prime responsibility for the disciplining of judges, in accordance with the decisions of this panel, but the Secretary of State will retain a defined role in the process and the existing Commissioner for Judicial Appointments (referred to in this document as the Ombudsman) could usefully have an input on behalf of individual complainants.

A SUPREME COURT FOR THE UNITED KINGDOM

14. In Part IV, the Judges' Council responds to the proposals for the establishment of a new Supreme Court. The Council concurs with the Government as to the jurisdiction of the Court.
15. The Court should consist of 12 members supplemented by *ex-officio* members, including the Lord Chief Justice and other senior members of the United Kingdom judiciary. Retirement age for the sake of consistency should be set at 75, not 80, years. Members of the Supreme Court should have the title "Justice of the Supreme Court" and should be presided over by a President and Deputy President.
16. Members of the Court should be appointed by the Queen on the recommendation of the Prime Minister. Names should be submitted to the Prime Minister by a Supreme Court Appointments Commission, a small, select body separate from the Judicial Appointments Commissions of the three separate UK jurisdictions. It should be open to the Prime Minister to reject, with reasons, a name submitted and to request another nomination.
17. While the House of Lords remains wholly, or mainly, an appointed (rather than elected) body there is a strong case for the Lord Chief Justice of England and Wales the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland and the President of the Supreme Court being members. It would not be sensible to exclude from a House of Lords those best placed to contribute to debates on the justice system and the judiciary. All other members of the Supreme Court, should cease to exercise any rights they may have to speak or vote in the House while they serve as judges.

THE FUTURE OF QUEEN'S COUNSEL

18. In Part V, the Judges' Council considers whether the QC system should be retained. The principal question should be whether the administration of justice benefits from the continued existence of a publicly acknowledged mark of distinction in the legal profession. The vast majority of the senior judiciary take the view that it does. The existence of the quality mark promotes high standards and public confidence in the legal profession. The QC system is perceived

internationally to be a hallmark of the British legal system and contributes to its international standing and thus to the UK economy.

19. It is accepted that the present selection system is not perfect, but the rank of QC should be retained as a public appointment. The selection process cannot be within the exclusive control of the profession. However, it would be perfectly appropriate for lists of approved candidates to be produced an appointment system under the control of the profession and for the judiciary to have an amended role (whether as consultees or with an ability to veto a particular candidate). Transparency could be achieved by the continuing involvement of the Ombudsman or a new supervisory role for the Judicial Appointments Commission.
20. Recommendations to The Queen could be made by the Attorney General, as head of the legal professions or, as in other common law jurisdictions, by the Lord Chief Justice. If the Secretary of State is to have any continuing role, he should be required to give reasons for rejecting a nomination and should have no power to advance a name on his own initiative.

PART II GENERAL RESPONSE TO THE CONSTITUTIONAL REFORMS

THE FOCUS OF THE CONSULTATION

21. The office of Lord Chancellor has been one of the most influential offices of State in this country for more than 800 years. The office has played a critical role in binding together the three arms of the State: the legislature, the executive and the judiciary. The office is a key pillar of the constitution. If it had not been for the office of Lord Chancellor, it is doubtful whether this country would have managed without a formal written constitution. The Lord Chancellor's wide range of responsibilities, including those of a Cabinet Minister with major responsibilities for the administration of justice, has resulted in him being a cohesive force. As Head of the Judiciary he has been able to represent the judiciary at the highest level within government. Historically, The Queen has been the source of justice and the Lord Chancellor has been the constitutional link between The Queen and the judiciary.
22. Although the title of one of the consultation papers is *Reforming the Office of the Lord Chancellor*, the introduction acknowledges that, in fact, the paper relates to the abolition of that office as announced by the Government in June 2003. However, that paper does not consider the significant effect that the abolition of the office will have on the position of the judiciary. The relationship between the judiciary and the executive will inevitably be transformed. There will no longer be a very senior member of the executive sitting in Cabinet, who is also Head of the Judiciary.
23. The Lord Chancellor's position as Head of the Judiciary has been described as:

“a central organising principle of our existing system of justice, [a principle which operates] in a whole range of examples quite beyond that of the traditional function of upholding the independence of the judiciary.” (Evidence to the House of Commons Select Committee on the Lord Chancellor's Department by Lord Irvine of Lairg, then Lord Chancellor, on 3 April 2003, HC 611-I).

In future, the Secretary of State for Constitutional Affairs (who will inherit many of the functions of the Lord Chancellor) will not be the Head of the Judiciary, but a minister no different from any other government minister. Unlike the Lord Chancellor, when the Secretary of State attends Cabinet he will not do so as both Head of the Judiciary and a senior Minister. It is this fact that makes the planned constitutional changes so significant and extensive consultation on the full implications of the proposals so necessary.

24. The Government is conducting open consultation and has issued a specific consultation paper on a new way of appointing judges. This is certainly one of the issues that arises in conjunction with the proposed abolition of the office of Lord Chancellor. The same consultation paper also addresses the issue of responsibility for complaints against judges and the disciplining of judges. However, the consultation paper, *Reforming the Office of the Lord Chancellor*, while dealing with a number of matters of less constitutional significance, does not deal with whether the office of Lord Chancellor should be abolished, or the consequences of the Lord Chancellor ceasing to be Head of the Judiciary. It neither seeks views nor indicates the Government's position on the many issues that will have to be resolved if the office of Lord Chancellor is abolished. The issues that arise are not identified in the paper. As discussed below, the Judges' Council believes the key issues are: the position of Head of the Judiciary, deployment, training and resources. The Council shares the concern of the wider judiciary that, so far, the Government has failed to appreciate the full extent of the constitutional deficit which will result from the abolition of the office of Lord Chancellor.

25. In the consultation paper, *Reforming the Office of the Lord Chancellor*, Lord Falconer states in the Foreword that he is:

“in consultation with the judiciary about the Lord Chancellor’s judicial functions; ...the abolition of the office of Lord Chancellor will put the relationship between the executive, the judiciary and the legislature on a modern footing and clarify the independence of the judiciary.”

He adds:

“..as Secretary of State for Constitutional Affairs I shall continue to have a duty to safeguard the independence of the judiciary, both within Government and outside and to ensure proper consideration of judicial concerns.”

26. Discussions have started between the Lord Chancellor and his Department and the Lord Chief Justice and the senior judiciary as to the implications of the changes. However, while this is reassuring, it is the view of the Judges’ Council that issues of this constitutional importance should be the subject of open and public debate to ensure that new constitutional arrangements are put in place which will achieve the Government’s stated objectives.
27. The Judges’ Council does not consider the recitation of the duty of the Secretary of State to safeguard the independence of the judiciary, even if contained in statute (and see our view on this at paragraphs 44 and 45), is anything like adequate to ensure that England and Wales continue to have a court system and judiciary which will be at least as well capable of serving the public in the future as it has been in the past. For this to be achieved, duties and responsibilities which, previously, the Lord Chancellor undertook, will have to be performed by the judiciary. In addition, the court system and the judiciary will have to be properly resourced. The new position will need to be spelt out in legislation. The increasing responsibilities of the judiciary to ensure the legality of the actions of the Government of the day and other public bodies on applications for judicial review, and to uphold human rights under the Human Rights Act, emphasise the importance of this.

THE SCALE OF THE CHANGES

28. The office of Lord Chancellor has accumulated a remarkably wide range of responsibilities. An indication of the scale of what is involved is provided by Schedule E to the consultation paper, *Reforming the Office of the Lord Chancellor*. This lists the 347 Acts of Parliament which include references to the Lord Chancellor, and which apply to England and Wales or the UK as an entirety, as at 23 July 2003. However, even that long list of legislation does not accurately illustrate the extent of the role of the Lord Chancellor. Many of the powers that

he exercises do not depend upon legislation, but rather upon the well-established constitutional position of the Lord Chancellor and, in particular, on his position as the Head of the Judiciary.

29. Since the Lord Chancellor has been both the Head of the Judiciary and a very senior member of the Government, it has not been of practical importance from which of these roles certain of his powers are derived. What mattered was that he was the repository of the powers and that, when he exercised the powers, he bore in mind the responsibilities that he had as Head of the Judiciary for the administration of justice and for the judiciary. It was the combination of responsibilities that made the role of Lord Chancellor a key pillar of the constitution. A myriad of conventions has developed around the role of Lord Chancellor upon which the relationship between the judiciary and the executive has depended. Once the Lord Chancellor became a Secretary of State in June 2003 the position was fundamentally changed. The change will be even more dramatic when the office of Lord Chancellor is abolished.
30. The present situation, in which Lord Falconer of Thoroton is both Lord Chancellor and Secretary of State, is a transitional arrangement. Views can differ as to his precise position during this transitional period. However, as that period is likely to be short, this is of no great importance. What is critical is what will happen on the abolition of the office of Lord Chancellor. It is at that point that the effect of splitting the roles will become so important. The Secretary of State for Constitutional Affairs will then be identical to any other minister. He will hold an office which will be purely political. He need not be a lawyer and he will almost certainly be a member of the House of Commons rather than the House of Lords. Hitherto, the fact that the Lord Chancellor is the Head of the Judiciary has meant that, both as a matter of practice and of constitutional convention, his role in politics has been constrained. Once he is no longer Head of the Judiciary, there will not be the same constraining influence, and the Secretary of State can be expected to be engaged fully in the political debate. Already, Lord Falconer has made clear that he sees himself as a mainstream Minister, responsible for delivering important public services. There is nothing constitutionally improper

in his adopting this approach, but it must follow that the relationship between the Secretary of State and the judiciary will be significantly different as a result.

31. The constitutional changes are also taking place at a time when the judicial role has evolved. This is due to the combined influence of the following factors:
 - a) By virtue of the European Communities Act 1972, the legislation and laws of the European Union can take precedence over legislation of the United Kingdom Parliament and, within the United Kingdom, the final responsibility for determining whether domestic legislation is invalid, insofar as it conflicts with European Union law, has been conferred by Parliament upon the judiciary.
 - b) The evolution of the scope of judicial review over the last 40 years has significantly enhanced the ability of the courts to exercise their historic responsibility of ensuring that the Government of the day complies with the law, particularly the law as laid down by Parliament.
 - c) As a result of the Human Rights Act 1998, the European Convention on Human Rights is now effectively part of our domestic law and Parliament has given the courts the responsibility of ensuring that public bodies comply with the Convention and that legislation whenever enacted is, where possible, construed in a manner that is consistent with the Convention and of making declarations of incompatibility where this is not possible.
 - d) We do not have a Constitutional Court which has the sole responsibility for adjudicating on the issues to which reference has already been made and these issues have to be determined from time to time by courts of all levels.

IMPLICATIONS OF THE CHANGES FOR THE INDEPENDENCE OF THE JUDICIARY

32. The rule of law and the liberty of the citizen depend upon a judiciary which is both independent and properly resourced to resolve disputes between citizen and citizen and disputes between the citizen and public bodies including the

Government. The judiciary is, and must be, an independent arm of the State, separate from the executive and the legislature.

33. One of the reasons given by the government for the abolition of the office of Lord Chancellor and the creation of a Supreme Court is to increase the separation of powers. The consultation papers, as a whole, make clear that the Government fully accepts the importance of retaining an independent judiciary of high quality. Lord Falconer has stated that the proposals for a Supreme Court “*seek to reflect and enhance the independence of the Judiciary from both the legislature and the executive*” and, in the context of the abolition of the office of Lord Chancellor, refers to the advantages of “*clearer constitutional mechanisms*”.
34. The consultation paper, *A New Way of Appointing Judges*, states that any appointment system must guarantee judicial independence, which at appointment is seen in terms of independence from the government of the day (paragraph 21 and 22), and, thereafter, is based on the security of tenure of judges (see the introduction on page 4). It must, however, be remembered that judicial independence also vitally depends on other factors, not addressed in any of the consultation papers. These include:
 - a) The position of the new Head of the Judiciary and arrangements for the provision of the resources that will be necessary to enable that office holder to undertake the responsibilities involved;
 - b) Separate arrangements, independent of the executive, for the deployment of judges and the hearing of cases;
 - c) Funding for sufficient judges, courts, and court staff to enable the system to function reasonably efficiently and the involvement of the judiciary to ensure this is so; and
 - d) Arrangements for judicial training.

Judicial independence depends, not just on law or resources, but on the tradition of restraint that the stronger arms of the State exercise in their relationship with the judiciary.

35. It is an essential requirement of judicial independence that certain activities are under the control of the judiciary. In the past, because of the dual role of the Lord Chancellor, it has been possible for the Lord Chancellor to be responsible for activities that it would not be constitutionally acceptable for any other minister to perform. The fact that the judicial branch and the administration of the court system were presided over by a single person fostered constructive co-operation between the judiciary and the Lord Chancellor's Department.
36. After the abolition of the office of Lord Chancellor, additional safeguards will be needed to preserve that partnership while protecting judicial independence.

THE EXISTING PARTNERSHIP AND CONSTITUTIONAL CHECKS AND BALANCES

37. Over recent years the partnership has been one of the most positive features of our justice system. It has meant that matters relating to the running of the courts, the judiciary (including their appointment), the use of resources and the role of the Court Service, have been in general conducted by an effective partnership between the Lord Chancellor, his Department and the Court Service and the judiciary. The respective qualities and skills of the judiciary and the administrators have combined to enhance the effective running of the system. It has been possible to operate the system without the need for constant debate as to whether it was the judiciary, the Court Service or the Department which was primarily responsible for a particular activity. There existed a meaningful and constructive partnership within a system of conventional and constitutional checks and balances.
38. There is no doubt that the fact that the Lord Chancellor was both Head of the Judiciary and a Government minister was fundamental to this approach. The arrangements meant that the independence of the judiciary was fostered while ultimate democratic accountability was maintained. The Judges' Council is anxious that the meaningful partnership between the judicial branch and the executive branch of government should continue and develop in the future. We are aware that Lord Falconer also wishes this and are encouraged by the fact that he has made this clear on a number of occasions.

39. The Judges' Council also recognises the importance of the judiciary being, so far as this is appropriate, accountable to Parliament. This must not mean that judges are held 'accountable' by the legislature (or, indeed, the executive) for the decisions which they make in individual cases. While there must be mechanisms in place to enable the judiciary to give Parliament an account of how they are discharging their administrative responsibilities, there must also be safeguards. The appointments system, for example, must not be capable of being used as a sanction against judges who have made decisions of which either Parliament or the Government disapprove.

THE NEED TO IDENTIFY IN LEGISLATION THE RESPECTIVE ROLES OF THE JUDICIARY AND THE GOVERNMENT

40. Once the roles of the Lord Chancellor as Head of the Judiciary and as government minister are separated, some of the present arrangements will have to change. They cannot survive. A new framework is required. To ensure the continuation of the partnership between an independent judiciary, the Department of Constitutional Affairs and the Court Service, it is necessary for the responsibilities of the new Secretary of State and the judiciary to be clearly defined in primary legislation. This will help to achieve one aim of the reforms, recognised by the Government to be necessary, namely to increase the separation of powers in our constitution. Such legislation would, of course, in no way touch any aspect of the courts' substantive jurisdiction.
41. In the past, as a result of the dual roles of the Lord Chancellor, the separation of powers has been blurred and it has not been necessary to define the respective functions of the judiciary and the executive in relation to the administration of justice. The new constitutional arrangements will make such definition necessary. Otherwise, the division of power, and the checks and balances imposed on the different branches, will create tensions between them. Clarifying responsibilities is in itself constitutionally desirable. It is also a means of ensuring that the executive and the judiciary co-operate while knowing who has the ultimate responsibility for any particular aspect of the justice system. Clearly setting out the respective responsibilities of the executive and

the judicial branches of Government is a requirement of the modern democracy that the Government is committed to bringing about.

42. The need for the respective responsibilities of the new Secretary of State and the judiciary to be defined thus stems from the very nature of the constitutional change. There are, however, two further reasons why it is important. The first is transparency. Lord Falconer states, in the Foreword to *Reforming the Office of the Lord Chancellor*, that separating out the different roles now fulfilled by the Lord Chancellor will bring greater transparency and increased public confidence. He is correct to favour clearer constitutional mechanisms. For there to be transparency, however, it is necessary that there be clarity as to respective responsibilities. The second reason is that if the issues arising out of the present reforms are to be discussed frankly, it has to be recognised that the manner in which the reforms were announced, without any consultation, has damaged the confidence of judiciary in the executive's commitment to preserving the independence of the judiciary. It was inconsistent with the principle of co-operation which had existed hitherto.
43. The concern of the judiciary is heightened by the failure of the Government sufficiently to appreciate the full significance of the changes that the reforms involve. This is illustrated by the fact that, as indicated already, no consultation paper is being issued on the effects of the reforms on the judiciary other than in relation to appointments and discipline.

INSUFFICIENCY OF A GENERAL STATUTORY DUTY TO UPHOLD THE INDEPENDENCE OF THE JUDICIARY

44. We have referred to the suggestion in the consultation papers that the Secretary of State should have a statutory duty to uphold the independence of the judiciary (see paragraphs 25-27 above). The role of the Lord Chancellor in protecting the judiciary within government could be inherited by the Secretary of State. However, in the new situation created by the reforms, it would be inappropriate for a Minister who is no longer the Head of the Judiciary to be seen as the spokesperson of the judiciary. The principle that there should be no interference with the independence of the judiciary should certainly be enshrined in statute.

But this requirement should apply to all Ministers and not just the Secretary of State (Question 17). Section 1 of the Justice (Northern Ireland) Act 2002 provides a useful precedent:

S.1 Guarantee of continued judicial independence

Those with responsibility for the administration of justice must uphold the continued independence of the judiciary.

45. But the statutory protection should go further. The duty to uphold the continued independence of the judiciary should be extended beyond those with responsibility for the administration of justice to all Ministers. In Parliament, the Secretary of State would have responsibility for responding on behalf of the Government on issues relating to the justice system, including the judiciary. It would be the obligation of the Heads of the Division to provide information required for this purpose. If a Committee of Parliament wished to inquire into issues relating to the judiciary, then it would be for the Lord Chief Justice or another appropriate senior judge to provide any assistance reasonably required. The new Appointments Commission and its Chairperson would have a like responsibility. The Attorney General, the Minister who acts as the guardian of the public interest, would have responsibility for advising Ministers not to infringe the legislation.
46. What is required to safeguard the independence of the judiciary is capable of being the subject of legitimate dispute. General statements, even if contained in statute, may be of limited value. Some states have constitutions that attach importance to the independence of the judiciary while, in practice, their judiciary is not independent. What is required is a clear statement, enshrined in legislation, that identifies the responsibilities of the judiciary on the one hand, and the Government on the other, in relation to the running of the justice system.
47. Judicial independence is not given to judges as a privilege which goes with their office. It is an essential safeguard of individual liberty and of the community's entitlement to have its disputes, particularly those with the Government of the day and the institutions of the community, heard and decided by a judge who is independent of them all.

THE PRIMARY MATTERS ON WHICH THE RESPECTIVE RESPONSIBILITIES OF THE JUDICIARY AND THE EXECUTIVE SHOULD BE IDENTIFIED IN LEGISLATION

48. We identify below some of the matters where, given the new constitutional position, the final responsibility should be identified in legislation. We do not deal here with appointments and discipline since we address those in our response to the *New Way of Appointing Judges* consultation paper. We do, however, emphasise that clarification is sought because of what we see as the constitutional consequences of the abolition of the office of Lord Chancellor, and to enable the concept of what is a partnership in practice to develop in the future as it has in the past.

a) The Head of the Judiciary

49. A Secretary of State cannot be the Head of the Judiciary. Therefore someone else must fulfil that role. The Senior Law Lord or the President of the new Supreme Court, when it is established, cannot be the Head of the Judiciary of England and Wales. This is because that judicial office holder's jurisdiction will extend beyond England and Wales. Moreover, judicial powers are devolved in Scotland and will be devolved in Northern Ireland. It would also be structurally difficult for him or her to take on this role. Although, hitherto, the Lord Chancellor has been the Head of the Judiciary, it has long been recognised that the senior full time judge who has the prime responsibility for the judiciary's role in the administration of justice in England and Wales is the Lord Chief Justice. The Lord Chief Justice should accordingly be the new Head of the Judiciary and this should be reflected in statute together with a statement of his responsibilities, powers and duties. Nowhere in the consultation process is this position acknowledged, though it is the only possible answer.

b) The deployment of the judiciary and arrangements for the hearing of cases

50. It is an important principle for the independence of the whole of the judiciary that responsibility for deployment should rest with the judiciary. A judge or magistrate who contemplates making a decision of which a Government might

disapprove should know that he or she cannot be moved to another location or court by a Minister. It is imperative, therefore, that the existing system, under which the Lord Chief Justice is responsible, through his senior judges, for deciding which judge or magistrate should be deployed to sit in a particular place, should be enshrined in statute. As to the allocation of cases and the distribution of Crown Court business, these are already the responsibility of the Lord Chief Justice, and are determined in accordance with directions given by him with the concurrence of the Lord Chancellor. Similar statutory provisions should be made in relation to court business generally. (See Supreme Court Act 1981 s75, but compare s78.)

51. At present some statutory provisions concerned with deployment give the Lord Chancellor formal power to make some deployment decisions; see for example the Supreme Court Act 1981 s5(2) in relation to the High Court and County Courts Act 1984, s5(1) in relation to the Circuit Bench. As the Lord Chancellor was Head of the Judiciary this was unexceptional. However, with the introduction of the new system, the statutory powers should be transferred to the new Head of the Judiciary. This is not a substantive change. Notwithstanding the statutory position, the Heads of Division and the Presiding Judges of the Circuits are, in practice, responsible for the allocation of the judge power of the Division and for the assignment of judges to various duties.
52. As part of the partnership to which reference has been made earlier, there are a number of judges who have administrative responsibilities in addition to their strictly judicial responsibilities. The Vice-Presidents of the Court of Appeal Criminal and Civil Divisions, the Deputy Chief Justice, the Senior Presiding Judge, the Presiding Judges, the Resident Judges (who are in charge of Crown Court Centres), the Designated Civil Judges, Designated Family Judges and the Liaison Judges are all obvious examples. It is through this network of judges that the Lord Chief Justice and the other Heads of Division are able to exercise the responsibilities they have for the running of the judicial system. Obviously, there should be consultation with the Secretary of State, but it would be inconsistent with the independence which the Government now proposes for the judiciary, for the executive to have any control over which judges exercise these functions.

Significantly, even with a Lord Chancellor who was Head of the Judiciary, the Presiding Judges were still appointed by the Chief Justice, albeit with the consent of the Lord Chancellor. In the new constitutional position the final decision should be made by the Chief Justice after consultation with the Secretary of State.

53. It has always been accepted that arrangements for the listing of cases, even though normally undertaken on a day-to-day basis by members of the Court Service, is a judicial function to be carried out under the overall control and direction of the judiciary. It is an important and obvious feature of the separation of powers that it should not be open to a minister to be able to decide which judge should be assigned to hear which cases. It should be made clear by statute that this is a responsibility of the Lord Chief Justice, acting through judges nominated by him for the purpose.

c) Resources

54. We have mentioned the impact that resource levels can have on the independence of the judiciary, since a lack of resources can impede independence in the exercise of judicial duties and responsibilities. The Working Group on *A Courts Commission for Ireland* stated, as part of its consideration of the separation of powers and the independence of the judiciary in creating a modern system for Ireland in 1996, that:

“If the functions of the judiciary are limited by an absence of adequate administrative infrastructure and resources there is an impingement on the capacity of the judiciary to exercise these functions.”

55. Besides being Head of the Judiciary, the Lord Chancellor is also head of and responsible for the administration of the courts; he is responsible for obtaining sufficient resources from HM Treasury and Parliament to ensure that the courts can function properly and be free from indirect interference. Furthermore, because the judiciary and the administration have one central authority in the person of the Lord Chancellor, the Lord Chancellor can ultimately resolve any dispute over the allocation of resources. As he obtains the budget and is responsible for it to Parliament, he can, as head of the administration and Head of

the Judiciary, allocate the budget in accordance with his duties and the conventions relating to the office of Lord Chancellor.

56. The abolition of the office of Lord Chancellor has three separate consequences:
- a) The need for statutory provisions to ensure that the courts and their administration are adequately resourced and that they are independently administered.
 - b) The need for the Lord Chief Justice to have directly provided to him resources to perform the functions that he will assume.
 - c) The need to ensure, insofar as this is possible, that the associated programme of constitutional reforms will not further deprive our already inadequately resourced courts of funds.

Resources for the courts and administration of justice

57. In an increasing number of jurisdictions the judiciary do carry at least part of the responsibility for the running of the court system. This has been the position for some years in many common law jurisdictions such as the Federal Courts of the United States and Australia. Ireland adopted in 1996 a broadly similar system. The Judges' Council considers that there should be debate as to whether the judiciary should at some point in the future take over this role in England and Wales, as this would help to ensure the independence of the judiciary, to which the Government rightfully attaches such importance. It is recognised, however, that it may not at present be possible to adopt a system of that kind.
58. Nonetheless, the abolition of the office of Lord Chancellor will mean that the existing arrangements no longer suffice and the position must be put on a more contemporary footing. The Judges' Council put forward, as an alternative to the adoption of the system that is part of the constitution of other major nations, the following:
- a) **Allocation of resources as a part of overall government expenditure**
Until now, decisions on the allocation of resources for the judiciary and the court system generally have been determined by Ministers after informal

discussions between senior members of the judiciary and representatives of the Court Service and the Lord Chancellor. This system has developed gradually and rather erratically over the years and has not operated in a consistent or very regular way. It must now be put on a proper statutory basis in order to preserve judicial independence and to ensure that the judiciary can provide the necessary input into the decision-making process. What is required is the placing of statutory duties on the Secretary of State:

- ◆ To consult and obtain recommendations from the Lord Chief Justice, as Head of the Judiciary and acting on behalf of the Judges' Council, as to the judicial and financial resources that should be included in the estimates submitted to HM Treasury; these resources should include the numbers of judges required at all levels.
- ◆ To consult the Lord Chief Justice, and through him the Judges' Council, before settling those estimates.
- ◆ To consult the Lord Chief Justice, and through him the Judges' Council, if targets were to be imposed upon the administration of the courts under a Public Service Agreement or similar arrangement, or any reductions were to be made in the budget.

b) **Relationship with the Administration**

Since the formation of the Court Service in 1995, there have been similar arrangements for consultation on the expenditure of the budget so obtained. There have also been close working arrangements between the judiciary and Court Service and the Lord Chancellor's Department at all levels in the actual administration of the business of the courts. Although working relationships have been close, consultation has not always been what it should. Consultation was, however, a sufficient mechanism, however imperfect, given the dual role of the Lord Chancellor. The Judges' Council wish the close working relationship to continue in a way that amounts to a partnership, but, because of the abolition of the office of Lord Chancellor, that relationship must be put on a basis that reflects the new constitutional settlement and enables that partnership to continue. Consultation alone

cannot suffice in this new constitutional order. The judiciary must have a voice in the strategic decision-making on the administration of the courts rests on shared decision-making. The Judges' Council suggests the following outline for a statutory scheme which it believes will produce a pragmatic and workable solution.

- ◆ Day-to-day executive functions should rest with the board of the new Unified Administration as the body responsible for the administration of the courts and the duties set out below.
- ◆ There should be a non-executive supervisory board for that body which would include representatives of the judiciary and members appointed by the Secretary of State under the chairmanship of the Lord Chief Justice.
- ◆ The supervisory board should have an overall supervisory responsibility for the performance of the duty, presently resting on the Lord Chancellor, to ensure that there is an efficient and effective system to support the carrying on of the business of the courts and that appropriate services are provided for them.
- ◆ The supervisory board should be responsible to Parliament through the Secretary of State. It should provide accountability to Parliament.
- ◆ This arrangement should underline the fact that the judiciary are a separate and independent arm of the State, distinct from the executive, but working in meaningful partnership with the executive, and should provide the mechanism through which matters which arise in any partnership can be resolved in a constitutionally acceptable manner.

The Judges' Council looks forward to a full discussion with the Department on the details of the implementation of such a statutory scheme.

Resources for the office of the Lord Chief Justice

59. The support available to the Lord Chief Justice has in recent years been extended. As a result of the constitutional changes now proposed, that support will have to

be further increased. His responsibilities in many areas, including discipline, will be greatly increased and he will need the staff to enable him to perform his duties. Resources for this purpose should be under his direct control. The judiciary is an arm of the State, and for the Lord Chief Justice to have to go ‘cap in hand’, as at present, for any expenditure, would not be appropriate in the new constitutional situation which the Government has now created. The Lord Chief Justice would have to have either an accounting officer, who would be responsible directly (or indirectly through the Permanent Secretary of the Department) to Parliament, or a memorandum of understanding covering the provision of resources directly to him. The sort of expenditure over which the judiciary should have control would include education and training, discipline, libraries, electronic and IT equipment for judges, attendance at conferences and the staff necessary to administer these functions. The sums involved would be modest in the overall context of the budget of the Courts.

60. Another important resource which should be available to the judiciary, and which is not currently, is its own press office. At the present time, the judiciary are ably supported by the Lord Chancellor’s press office. However, from time to time tensions arise in respect of the use of the press office by the judiciary for distributing speeches or other documents which are critical of the Government. Perhaps not surprisingly, even ministers find it strange that a document critical of the Government should be issued by another Government Department’s press office. Direct funding will be required for this.

Resources for the constitutional reforms

61. In relation to all the reforms, the judiciary are concerned as to whether implementation of the Government’s proposals will be properly resourced. The senior judiciary have made a number of statements in recent years about the need for the funding of the justice system to be increased to enable the courts to provide an adequate service to users. The changes set out in the consultation papers will inevitably involve the Department in considerable additional expense. There will be significant costs associated both with the establishment of a separate Appointments Commission, and with the provision of additional support for the senior judiciary to enable them to take responsibility for functions hitherto

exercised by the Lord Chancellor. And, while the inadequate facilities provided for the Lords of Appeal in Ordinary at the House of Lords have long been a source of complaint, the creation of a new, entirely separate, Supreme Court will entail extra cost.

62. These substantial costs will have to be met at a time when there are already urgent problems which are not being addressed because of a lack of resources. Examples include leaking roofs in courts across the country, and the fact that the Commercial Court, a cornerstone of the international reputation of our judicial system, is very poorly housed. The Judges' Council considers it essential that the Government commits itself to providing new resources to fund the programme of reforms on which it has chosen to embark.

d) The Judicial Studies Board

63. As a matter of principle, the training of judges must be the responsibility of the judiciary itself. The undoubted success of the Judicial Studies Board depends upon the fact that it is run by judges for the training of judges, albeit with the support of a Civil Service staff. The Lord Chancellor makes appointments to the Judicial Studies Board and its Committees. In the new constitutional situation, it would be wrong for the Secretary of State to be involved in the training and education of judges. The Lord Chancellor's previous role in respect of appointments to the Board and its Committees should be taken over by the Lord Chief Justice. Moreover, as stated above, judges should have control of expenditure for education and training. Otherwise, the Judicial Studies Board can continue to operate as it has done up to now, though within a clear statutory framework.

CONCLUSION

64. The reforms decided upon by the Government, without any prior consultation, require a new constitutional settlement. The judiciary is an arm of Government distinct from the executive. It is the least powerful arm of Government. Because of this it needs protection for its independence in the fullest sense. In this paper, the Judges' Council has sought to indicate the scale of the changes which are

necessary now that the roles of the Lord Chancellor as Head of the Judiciary and that of Government Minister are to be separated. The suggestions are driven by the constitutional implications for the judiciary of this increase in the separation of powers. The Council has sought only to deal with the essentials. It has not, for example, proposed that the judiciary be given entire responsibility for managing the administration of the courts, as happens in many major common law countries. The Judges' Council recognises the need to move forward in a realistic and measured manner. Its programme enables this to be done. The Council looks forward to early discussions with the Department on the proposals advanced.

PART III THE APPOINTMENT AND DISCIPLINING OF JUDGES

BACKGROUND

65. We have dealt with the general position following the proposed abolition of the office of Lord Chancellor. This section of the Judges' Council response addresses the issues raised by the consultation paper, *A New Way of Appointing Judges*.
66. The Judges' Council is pleased to note Lord Falconer of Thoroton's statement in his foreword to the consultation paper that "*the appointments system must be seen to be independent of Government*" and the Parliamentary Under Secretary of State, Lord Filkin's statement to the House of Lords that "*the ministerial role in the appointment of judges will be brought to a minimum*" (Hansard 8 September 2003 column 133). The Government must now put these statements of principle into practice in order to ensure the future independence of the judiciary.
67. The Judges' Council agrees with the proposal that an Appointments Commission should be established. (To distinguish this new Commission from the existing Commission for Judicial Appointments, we will refer to the existing Commission, whose role is supervisory, as 'the Ombudsman'.)
68. Opinions may differ as to what should be the membership and role of the Commission. The Government is right to consult on this. For this jurisdiction, the establishment of the Commission will be a radical departure from the existing system based on a Lord Chancellor who is Head of the Judiciary. Decisions as to the membership and role of the Commission must be geared towards ensuring that the Commission will:
- a) preserve and enhance both the institutional and individual independence of the judiciary; and
 - b) maintain the calibre of our existing judiciary, which has resulted in our judiciary being admired around the world.

69. The reputation of our judiciary rests on the fact that it has predominantly been recruited from practising members of the legal profession who have already had experience of sitting judicially part-time, and the fact that all appointments have been based purely on merit. Our judiciary also has a record of being entirely free from corruption – a record that not all other jurisdictions can match. This is very significant in relation to the appointment of judges, since the security of tenure to which they are (and must be) entitled makes it extremely difficult to remove a judge.
70. Lord Falconer acknowledges the quality of the judiciary. In the Foreword to the consultation paper he states “ *We have a judiciary of the highest calibre.* ” He adds: “ *We are fortunate to have a strong, independent judiciary respected nationally and internationally.* ” That this is the position reflects favourably on the present method of making appointments. It also emphasises the heavy responsibility that now exists to ensure that the proposed Commission will be at least as effective in making the right appointments as the present method. Our judiciary’s reputation as having the highest standards of integrity was difficult to build and could be jeopardised overnight. It is also critical to ensure that sight is not lost of one of the main purposes of the reforms; that is, to make the appointment process more independent of Government. In addition, the Commission will need to ensure that its methods of operation are properly transparent and objective and that, without reducing the reliance placed on appointments based exclusively on merit, it ensures that candidates who come forward for appointment are of suitably diverse backgrounds.

THE PROMINENT ROLE OF THE JUDICIARY IN THE CURRENT APPOINTMENTS PROCESS

71. A feature of the present method of making appointments is that, while the ultimate responsibility for making appointments belongs to the Lord Chancellor (or, on occasion, to the Prime Minister acting on the advice of the Lord Chancellor), the judiciary as a whole, and the Heads of Division in particular, are deeply involved in the process. The Lord Chancellor’s decisions have, in practice, drawn heavily upon the advice that the judiciary has been able to give. Indeed, in respect of senior judicial appointments made or recommended by the last two Lord

Chancellors, it is believed that no appointment has been made to which the Heads of Division raised objection. It would be fair to say that, without this contribution from the judiciary, previous Lord Chancellors would not have been able to discharge their responsibility so successfully. We stress this point, partly because it is not correct to regard the present system as being dependent on a Government minister. The present system depends on the judiciary collaborating with the Head of the Judiciary, who happens also to be a Government Minister. We also emphasise the point because it demonstrates how important it is to involve the judiciary in the judicial appointment process. The judiciary's experience as to the qualities required of judges, and its knowledge of those wishing to be appointed, are essential information that must be available to the new Commission.

72. One criticism that can be made of the existing situation is that the senior judiciary lacks diversity. The criticism is accepted, and the negative impact of this shortcoming is readily acknowledged. By increasing the diversity of our judiciary, while continuing to appoint the best candidates, we will help to generate public confidence in the justice system. This is an extremely worthwhile goal, which has been very much in the minds of those engaged in the appointments process in recent years. There is no quick and easy solution to the fact that women and members of minority ethnic communities are significantly under-represented in the pool of candidates from which senior appointments are made. The position is changing and considerable progress has been made in relation to Magistrates and District Judges. One of the challenges facing the new Appointments Commission will be to find ways of tackling the structural problems which have so far prevented the recruitment of a more diverse senior judiciary.

THE SPECIAL POSITION OF THE HIGH COURT JUDICIARY

73. In establishing and maintaining the quality of our judiciary, High Court judges play a crucial role. It is High Court judges who usually try the most high profile cases. They play a prominent part in judicial administration in London and on circuit. In practice, all the more senior judiciary are promoted from the High Court Bench.

74. The Commercial and Admiralty Courts are world leaders. Crucial to their standing internationally is, not only the integrity and calibre of the nominated judges, but also their experience. This experience is achieved over many years in practice prior to appointment. The quality of these two Courts makes London the jurisdiction of choice for dispute resolution. Our position is hard-earned in a very competitive market place. Great care will need to be exercised to avoid sacrificing it. Similar considerations apply to other specialist areas of work in the High Court, including the Administrative Court in the Queen’s Bench Division and the Chancery and Family Divisions. It will be critical for the Commission to make special arrangements for the appointment of specialist judges, and our recommendations as to this are set out in paragraph 117.
75. One reason why the standard of the High Court judiciary has been so impressive in this country, is that it is one of the few jurisdictions that has remained able to recruit the most able practitioners from the legal profession to the High Court Bench. This is an even greater achievement in England and Wales than it is in a number of other jurisdictions because of the very high level of earnings, prior to appointment, of some of the practitioners. For these practitioners, the acceptance of an appointment involves a dramatic financial sacrifice.
76. At one time, a compensation for the reduction in earnings would have been a more leisurely way of life, but the work load of a High Court Judge is now every bit as demanding as that of the most successful practitioner. The incentives for these practitioners to take an appointment are limited. The very best candidates frequently do not actively seek appointment. In practice, many judges take an appointment only when encouraged to do so out of a sense of duty. Now they will need to be encouraged to submit themselves to the appointment system devised by the Commission. The current Commission for Judicial Appointments has made clear in its latest Annual Report that it sees a continuing place for “headhunting” within the High Court bench selection process. We anticipate that the senior judiciary will take the lead in approaching potential candidates in consultation with the Commission.

RESPONSIBILITY FOR APPOINTMENTS POLICY

77. The policy in relation to the appointment of the full time judiciary has not been in dispute at least for the last 25 years and we believe it still is not in dispute. It has been accepted both by the judiciary and the Lord Chancellor of the day. It is set out more fully in pages 12 and 13 of the consultation paper, but can be stated succinctly.
- a) Appointments should be made on merit; that is, in relation to any appointment, the individual should be appointed who, of all those available, is best qualified by personal qualities and experience to fill the post.
 - b) Subject to this, the membership of the judiciary should be diverse and reflect the society in which we live.
78. In the consultation paper it is suggested that the Government should “*retain the policy relating to appointments*”. This cannot be right. It will amount to the Government of the day having the ability to dictate to the new Commission how it performs its role. The criteria for making appointments that we have set out should be included in the legislation creating the Commission. If this does not happen the responsibility for determining the criteria should be that of the Commission and not the Government. While the Lord Chancellor has hitherto determined the policy, this was part of his role as Head of the Judiciary. For the Government to inherit this role would enable a future Government to create a judiciary that was committed to its own political agenda by selecting criteria that would result in the appointment of judges sympathetic to its policies. To suggest, as the consultation paper does (page 44) that “*it is therefore fundamental that the responsibility for defining the criteria for appointment remains a duty of Government*” could not be more mistaken. This approach is wholly inconsistent with the declared aims of the Government’s proposals.
79. The consultation paper also suggests (non-controversially) that the Government should determine the numbers of judicial appointments. However, the appropriate Government ministers should be placed under a clear statutory duty to fund an adequate number of judicial appointments to enable the legal system to function with reasonable efficiency. Unless this happens, the public will be deprived of

access to justice. The remainder of Question 12 is accepted and the Commission should take on the directly related responsibilities to which the consultation paper refers.

INCREASING DIVERSITY

80. In relation to diversity, the last two Lord Chancellors, at least, were in agreement with the higher judiciary that more women and members of minority ethnic communities should be appointed to the judiciary as soon as practicable. Whatever may have been the position historically, the situation now is largely a result of the under-representation of women and members of minority ethnic communities within the pools from which appointments are made. Structural problems within the profession mean that potential candidates from these groups have been less likely to acquire the skills and experience which would make it appropriate for them to be appointed. The task of achieving increased diversity will be difficult, but we agree that the Commission should be given this task, subject to the overriding requirement that the best candidates be appointed on merit. We would caution against the Commission being placed in a position (which the existing appointment system has had to guard against) of becoming so anxious to achieve diversity that sight is lost of the primacy of merit. The justice system will be debased if the very best candidates are not appointed. The lay members of the Commission will have a particularly valuable role to play in identifying and addressing the structural problems which have impeded greater diversity of those available for appointment to the judiciary.
81. Substantial progress has been made towards achieving the necessary diversity in tribunals and in courts below the High Court. The relevant figures are set out in Annex E. The fact that more progress has not been made at senior levels is not surprising. An individual will probably spend up to 20 years in practice and at least 15 years as a judge before being appointed to the House of Lords. This means that, when assessing the current position, one has to compare the proportion of women and people from minority ethnic backgrounds within the higher judiciary with the pool from which appointments have been made over a long period. Even when assessing recent appointments, the comparison needs to be made with the pool of potential candidates rather than with the general

population. Thus, in 2001/2002 there were 593 lawyers appointed to judicial office. The average length of legal experience of those appointed was 22 years. Analysis of the total pool of lawyers with 10 to 29 years experience, reveals that 7.1% of the barristers and 3.6% of the solicitors are from minority ethnic backgrounds and that 23% of the barristers and 25% of the solicitors are women. Given this, it is relatively encouraging that 7.8% of lawyers appointed to judicial office in 2001/2002 were members of a minority ethnic community and 34.4% were women.

82. Of course, the fact that recruitment of women and members of minority ethnic communities is relatively healthy at the junior end of the judiciary does not provide immediate consolation to those who are rightly concerned that there are so few women and no Asian or Black judges on the High Court Bench or above. There is clearly no room for complacency. However, rather than seeking to identify in this paper the further action that might be taken to encourage greater diversity (as required by Question 14), we consider that task would be better left to the Commission, working in partnership with the wider judiciary.

JUDICIAL DISCIPLINE AND COMPLAINTS AGAINST JUDGES AND OTHER JUDICIAL OFFICE-HOLDERS

83. Before considering the Commission in more detail, it is helpful to refer to the changes that should be made to disciplinary procedures for judicial office-holders if there is no longer to be a Lord Chancellor. This is because the proposals as to an Appointments Commission could differ depending on whether or not it has a role to play in relation to discipline. We refer here to judicial office-holders as well as judges, since any new arrangements should apply to all those who hold a full or part time judicial office and perform judicial type functions (including, for example, tribunal members). Generally, when we use the term ‘judiciary’, we should be understood as referring to all judicial office-holders.
84. The freedom of the judiciary from interference and the independence of the judiciary after appointment is at least as important as freedom from interference and independence as to appointments. If freedom after appointment is to be achieved, the disciplining of judges should be subject to the control of the

judiciary. However, while the importance of ensuring the independence of the judiciary is critical, that independence brings with it a requirement that each and every judge carries out the responsibilities of his or her office in a proper manner. The judiciary therefore accepts that any alleged failure to perform its responsibilities must be subject to a disciplinary process capable of scrutinising a complaint in a fair and transparent without compromising judicial independence. This is what our proposals as to discipline are intended to achieve.

85. The Lord Chancellor has hitherto played a central role in the disciplinary process. This role was consistent with his position as the Head of the Judiciary. Even so, in more recent years it has been accepted that, because of the Lord Chancellor's connection with the Government, the judiciary required additional protection. This has been provided by the requirement that no formal action to discipline a judge would be taken without the consent of the Lord Chief Justice. Once the office of Lord Chancellor no longer exists, it must not be the executive that takes over this function. Instead, complaints and disciplinary matters relating to the judiciary should be dealt with broadly as they are at present, but with the present role of the Lord Chancellor being inherited by the Lord Chief Justice. The Secretary of State should remain responsible for complaints that do not involve the judiciary or judicial functions. There will be, as at present, separate staff responsible for complaints relating to the judiciary and members of the Department and court staff.
86. In future, complaints against judges should be addressed to the Lord Chief Justice. If a complaint is misaddressed, his support staff will refer the complaint to the correct recipient. As now, the first task of the officials administering the scheme would be to filter out complaints about issues that cannot be dealt with other than by an appeal to a higher court, or complaints which are manifestly without substance. An outline as to an appropriate method of dealing with complaints is included in Annex F. This outline presupposes that the Secretary of State should be able to initiate complaints and refer decisions to a review panel.
87. The Ombudsman's role should also be developed to cover complaints about judicial conduct (see paragraph 112 of the consultation paper and Questions 15 and 16). In respect of discipline and complaints, the Ombudsman would be

playing the traditional role of that office in relation to maladministration. The suggestions that we have made are intended to ensure that the legitimate interests of individual members of the public and of the public generally are addressed without the need for complainants to be involved personally in the disciplinary process.

88. A member of the public or a judge who is the subject of a complaint should be able to complain to the Ombudsman about the way the matter is being handled. The Ombudsman should also have the power to require the Lord Chief Justice to refer a provisional decision to a review panel of judges as indicated in Annex F.

THE SCOPE OF THE COMMISSION'S RESPONSIBILITIES

89. Before answering the remaining questions raised in the consultation paper, it is necessary to decide what will be the responsibilities of the Commission. We have already indicated that the Commission should not be involved in disciplinary proceedings. This would be the same position as in Scotland and Northern Ireland. On the other hand, the Commission should be involved in all initial appointments to the judiciary (including to the magistracy and to tribunals), up to and including appointments to the High Court. To these appointments the Commission can appropriately contribute a broader range of experience than would be provided by the judiciary alone. There is also a contribution which the Commission could make as to how the process of appointment is organised. First-time appointments (as distinct from the promotion of existing full-time judges) are not made at present directly to the courts above the High Court.
90. The Commission will need to be kept fully informed as to the appointments likely to be required at any particular time. If the appointments are to arise as a result of the judicial complement being increased, then it will be the Secretary of State who will have the responsibility of enabling the additional judges to be appointed. It should be the Secretary of State, therefore, who should advise the Commission as to what new appointments are pending. Where a vacancy arises in the existing judicial complement, responsibility for informing the Commission should rest with the Lord Chief Justice. Whether the responsibility rests with the Secretary of State or the Lord Chief Justice, they will need to consult each other.

91. The information given to the Commission by the Secretary of State or the Lord Chief Justice would identify the courts and, in the case of a High Court Judge, the Division for which the new judges are required. The Commission will need this information in order to select the appropriate candidate. As already set out in the introductory paper, it will be the responsibility of the Lord Chief Justice to determine, once a new judge has been appointed, where that judge is to be deployed. Paragraph 71 of the consultation paper, *A New Way of Appointing Judges*, sets out the current position as to assignment. The Lord Chancellor's role hitherto would not be appropriate for a Secretary of State.

The Criteria for Appointments

92. We have already set out the basic criteria for appointments at paragraph 77. These criteria, and any others that are considered necessary, should be set out in the legislation establishing the Commission.

Promotion

93. The question immediately arises as to whether the role of the Commission should not extend to the promotion of judges who already hold a full-time office. We consider that a clear distinction exists between initial appointments to the judiciary, and promotions from within the existing judiciary. The field of choice for initial appointments will be wider than that which exists in the case of promotion, where the selection is confined to those who already hold an appointment. In addition, in the case of a candidate for promotion, it will be necessary to take into account the candidate's track record as a judge. This is an area where the previous experience of non-judicial Commission members and more junior judges will provide little assistance. For these reasons, the Commission would not be well-equipped to select candidates for promotion (but see the role for the Chairman of the Commission indicated at paragraph 102).
94. Despite this, there is a role for the Commission in relation to promotions. Our views in relation to the different situations are as follows:

The High Court

95. The Commission should be fully involved in promotions to a judicial office for which many, but not all, the applicants will be applying as their first full time appointment, but for which existing judges can also apply so as to obtain promotion. The most important example is provided by appointments to the High Court Bench. The applicants for such an appointment can already be Circuit Judges. Alternatively, there will be applications from members of the profession seeking a first appointment. As those seeking a first appointment would be suitable for selection by the Commission, it is sensible for all candidates to be selected by the Commission. Otherwise, there would be different bodies dealing with the same appointment.

The Court of Appeal

96. In the case of promotions to the Court of Appeal, the Commission should have a limited role. At present, these appointments invariably involve promotion from the High Court Bench. There is no need to require applications for these appointments, since it can safely be assumed that any judge who would be worthy of consideration would almost certainly welcome promotion. We do not anticipate that interviews could make any contribution. The role of the Court of Appeal judge is quite distinct from that of less senior judges. It involves less direct contact with members of the public as witnesses. Members of the Court of Appeal are members of the Privy Council which means they have responsibilities beyond this jurisdiction.
97. In addition, candidates have to be considered from two different perspectives. There is the general quality of the candidate, as a judge of demonstrated outstanding ability, and there is the requirement that the candidate should also have expert knowledge of the specialist area of the law which will be required to meet the needs of the Court of Appeal.
98. The Court of Appeal judges are also the potential candidates for membership of the House of Lords (the new Supreme Court, when created). The scope for

further promotion must also be taken into consideration when determining at what stage of their judicial career particular candidates should be promoted.

99. The best testimony as to whether judges have the necessary qualities for promotion to the Court of Appeal is their track record since being appointed as judges. This, to a judicial colleague, will be demonstrated by the quality of their judgments. Those judgments will have been carefully studied on appeals by a candidate's senior colleagues, giving them an unrivalled opportunity to assess the ability of the candidate.
100. In addition, it is almost certain that the candidate will have already sat as a member of either or both the Civil and Criminal Divisions of the Court of Appeal. This will have given the members of those courts with whom the candidate sat an ideal opportunity to assess whether the candidate has the qualities necessary for promotion.
101. In view of these factors, the Heads of Division should play a leading role in recommending who should be appointed to the Court of Appeal, after taking account of the views of existing members of the Court of Appeal and of the House of Lords (Supreme Court). The Ombudsman should monitor the process, as is done now, and he and his colleagues should be entitled to attend all meetings and see any documents they wish, as at present.
102. For the reasons indicated, it is open to question whether the Commission should make any contribution to promotions to the Court of Appeal and above. However the Judges' Council accepts that, if a special *Promotion Panel* were to be established under the auspices of the Commission, it would demonstrate that, not only was the promotion process properly informed in relation to these important decisions, but that it was also sufficiently objective. We therefore suggest that a Promotion Panel should be responsible for deciding who should be promoted to the Court of Appeal. That Panel should be chaired by the Chairperson of the Commission and should include as members the four Heads of Division and two lay Commission members (who could be members of the lay judiciary). The Panel could also include the Senior Law Lord (or President of the new Supreme

Court) or his deputy (if the President is not a former member of the English and Welsh judiciary) if this was thought necessary.

The Heads of Division

103. The next category consists of the Heads of Division and other very senior statutory office-holders. Successful candidates for these posts have to be outstanding judges who combine considerable administrative and leadership abilities with their qualities as judges. They will usually already be members of, at least, the Court of Appeal. Wide-ranging consultation will be required before such appointments are made. The selection of the candidate to be appointed should, however, be made by the Promotion Panel.
104. In the case of the appointment of the Lord Chief Justice or the Master of Rolls, the Senior Law Lord or his deputy should certainly be a member of the Panel and not merely one of those consulted. The composition of the Panel will also need to be modified to replace any Head of Division who is a possible candidate for the office under consideration by the next most senior judge from the Court of Appeal with experience in that Division.

Involvement of the Prime Minister and the Secretary of State

105. The judiciary's views are split as to the desirability of members of the executive having any decision-making role in relation to individual judicial appointments. Many members of the judiciary believe strongly that, in order for the judiciary to be truly independent, the executive should not be able either to prevent or require the appointment of a particular individual to any judicial office. Others see advantages in the executive being given a limited discretion in order to strengthen the executive's commitment in respect of those appointed and to enable the executive to act as a check on the Commission. It is not disputed that the Secretary of State should be consulted as to appointments. After much discussion, the Judges' Council put forward two alternative models for the executive's involvement.
106. The first model is that the role of the Prime Minister and the Secretary of State should be confined to conveying the name of the judge to The Queen. Whether

even this involvement is necessary is open to doubt. We do not consider there is any constitutional difficulty in an approach whereby neither the Secretary of State nor the Prime Minister recommend appointments to The Queen. Once the new constitutional arrangements are in place, deference to the previous practice of The Queen being advised by a Secretary of State is unnecessary. Recommendations as to appointments could, in future, be submitted to The Queen by the Lord Chief Justice.

107. The first model has the advantage of achieving a clear separation from the executive as to the appointment of individual judges. It also avoids the bureaucratic complexity and delay that could result from the involvement of the Prime Minister and Secretary of State. Experience of the existing appointment system makes clear that it is desirable to keep formalities to a minimum because they can be the source of frustrating delays.
108. The second model gives the Secretary of State the power to reject a nominated candidate, giving reasons for so doing, and to call for a second candidate to be nominated. The Appointments Commission should also be able (but not required) to put forward two candidates at the outset if it wished to do so. This involvement for the executive is more appropriate in relation to the appointment of the Heads of Division because of their closer involvement with the Secretary of State on administrative matters.
109. Any greater involvement than that envisaged by the second model would mean that, while the reforms are intended to protect the judiciary, they actually result in the judiciary's role in appointments being substantially reduced and the executive's contribution remaining the same or, on one view, increasing. This latter argument is based on the fact that the involvement of a minister who was Head of the Judiciary will have been replaced by a minister who is not a judge.
110. We are confident that, whichever proposal is implemented, the judiciary and the Secretary of State will work closely together in the interests of the justice system as a whole. In practice, the Secretary of State would not only be kept fully informed, his views will be carefully considered in the case of all senior

appointments. This approach will achieve the objectives of the reforms identified in the consultation paper.

111. There is one anomaly as to appointments by The Queen. She appoints the District Judges (Magistrates' Courts), but not the District Judges who exercise a civil jurisdiction. All District Judges, and other judges and Masters who exercise similar jurisdictions should be appointed by Her Majesty The Queen. To avoid any further anomalies, those in office already should be appointed retrospectively by The Queen.
112. The consultation paper refers to the substantial number of appointments within the judiciary, made at present by the Lord Chancellor, that are of an administrative nature. We have explained in Part II of this document why these appointments should, in future, be made by the Lord Chief Justice or the appropriate Head of Division (see paragraph 52).

Democratic Accountability

113. Whether or not it is accepted that the Secretary of State and the Prime Minister should not have a decision-making role in the appointments process, we recognise the need for democratic accountability. This will be provided by the continuing role of the Ombudsman, who will scrutinise the appointments process and publish an annual report. In addition, the Chairperson of the Judicial Appointments Commission should be required to report annually to Parliament. We would also expect the Constitutional Affairs Select Committee regularly to scrutinise the appointments process.

What type of Commission?

114. In the case of the less senior appointments (below the Court of Appeal), the Commission should certainly identify the judges to be appointed, even though the Commission's nomination would have to be conveyed to The Queen by the Lord Chief Justice or the Secretary of State.
115. The detail as to how the Commission will operate should be determined by the Commission after it is established. However, we expect it will operate through

specialist sub-committees chaired by a judge and including a lay member and member of the legal profession. We reject the suggestion that a list of candidates should be submitted to the Secretary of State for the obvious reason that this would reduce the Commission's role to that of a sifting panel.

116. Consultation by the Commission with the Secretary of State and the judiciary, particularly in relation to the more senior posts, should be perfectly acceptable and expressly authorised by statute. As at present, the Ombudsman should have access to all meetings and notes should be kept as to what is said. The necessary transparency and openness must be maintained, while at the same time respecting the need to strictly preserve the anonymity of individual candidates. Anonymity will be of the greatest importance if practising members of the legal profession are not to be discouraged from applying for appointments.

Specialist Judges

117. Special arrangements will have to be made in relation to the appointments of specialists. The Commission will require advance notice as to when such appointments will be needed. That information will usually be provided by the Lord Chief Justice. For such appointments there will have to be a specialist sub-committee which would include among its members at least one judge who is, or has been, a judge having the relevant speciality. In the case of High Court appointments in particular, it will be important that candidates who have a high reputation within the speciality are considered by the Commission and, accordingly, the Lord Chief Justice and the Commission will have to co-operate to ensure that candidates of the highest quality apply.
118. The fact that specialist judges are appointed in accordance with this procedure, does not mean that they will necessarily be assigned initially to the specialist jurisdiction in which they are experienced. The Lord Chief Justice will be responsible for determining where they are deployed. It may be desirable that, prior to their becoming a member of a specialist court, they obtain more general experience. It may also be necessary to deploy them in a non-specialist area because of the needs of the court at any particular time.

Magistrates

119. The Commission should be responsible for the appointment of magistrates. However, it is most important that the existing method of appointment is incorporated into the new arrangements, involving local Advisory Committees with a duty to seek applications from candidates representative of their area. Applying the separate criteria for appointing Magistrates, laid down from time to time by the Commission, the Advisory Committees will recommend candidates to the Commission which will then make the appointments, usually in accordance with the recommendation. The Advisory Committees should continue to fulfil their existing disciplinary role. Here, however, in order to be consistent with the approach taken to other judicial office-holders, the Advisory Committees will report, via the Presiding Judges, to the Lord Chief Justice if disciplinary action is required.
120. The Lord Chief Justice would also be responsible for laying down standards of competence. Magistrates would be subject to their existing duty to make appropriate disclosure.

Retired Judges

121. We agree that, for the reasons set out in the consultation paper, the Commission should not be involved in authorising the sitting of retired judges. They do not hold an appointment. In the case of the senior judiciary, the authorisation should be by the Lord Chief Justice. In the case of less senior judges, the responsibility should be exercised by the Senior Presiding Judge on behalf of the Lord Chief Justice. For tribunals, the President or similar office-holder within the tribunal can perform this function. In the case of the Supreme Court, the President of that Court should have the responsibility. Notification of the arrangement will have to be given as necessary to the Department.

Coroners

122. Coroners should be subject to the same appointment process as members of the junior judiciary.

Tribunal Appointments

123. The same is true of Tribunals. Lay members appointments will be a variation of that for Magistrates.

Authorisation and Administrative Responsibilities

124. We agree that it would be unnecessary and inappropriate to involve the Commission in administrative appointments (for example, the allocation of Judges of the High Court to Divisions and the appointment of Presiding Judges). However, where, at present, the Lord Chancellor has a statutory responsibility for an appointment, the new legislative framework should ensure that responsibility is transferred to the Lord Chief Justice or another appropriate judicial office-holder with a statutory duty to consult the Secretary of State where this is justified.

Scrutinising the Appointment Process

125. We have already indicated that the Ombudsman should retain his existing responsibilities and have additional responsibilities in relation to complaints about judicial conduct.

STATUS AND ORGANISATION OF THE COMMISSION (QUESTION 11)

126. We agree with the “initial view” expressed in paragraph 83 of the consultation paper, that the Commission should be a Non-Departmental Public Body with its own staff (Option 1). This will increase its independence and will enable it to establish the appropriate administrative support. The Commission should have its own budget and its own staff.

COSTS OF THE COMMISSION

127. The costs associated with the existing appointment responsibilities of the Lord Chancellor are already substantial. Generic improvements to the system are required, such as an extension of the assessment programme. It is therefore important to limit expense to what is necessary. For example, avoiding giving responsibilities to the Commission or the Secretary of State when this is

unnecessary. In addition, the Commission should not have more members who have to be paid than necessary.

MEMBERSHIP OF THE COMMISSION

Appointment of Members

128. If the method of making appointments to the Commission is not independent of Government, its actual and perceived independence will be undermined. The consultation paper describes members as falling into three categories: judicial, legal and lay. We would argue that, in this jurisdiction, it is important to distinguish a fourth category, the lay or part-time judiciary, made up of magistrates and lay tribunal members. Members drawn from this group will be able to make a particularly useful contribution, since they are lay people who are familiar with the justice system. Of the four categories, we would argue that the full-time judicial members do not require an appointing body. They should be nominated by the Lord Chief Justice after appropriate consultation with the Association of District Judges and the Council of Circuit Judges. The appropriate professional body could nominate the lawyers who are to be members. The appointment of lay members and members of the lay or part-time judiciary should be by way of open competition and an appointing body will be required.

The Appointing Body

129. The appointing body should not be chaired by the Permanent Secretary of the DCA, as this would send quite the wrong message in relation to independence. The Chairperson should be the Lord Chief Justice. The members could be the First Civil Service Commissioner, the Commissioner for Government Appointments and the Chairman of the Committee for Standards in Public Life or similar individual office holders of undoubted integrity and independence. As the task of this body will be limited, we do not consider that its members need to be appointed by The Queen.

Size of the Commission

130. We have serious reservations as to whether it would be necessary or efficient to have a Commission consisting of 15 members as suggested. The range of specialist appointments that are necessary is growing all the time. For these appointments, as we have already pointed out, the Commission should operate through specialist sub-committees. The Commission can safely be left to decide upon the structure and membership of those sub-committees. The role of the Commission members will be to develop policy, monitor and supervise. A single member of the Commission could, but need not, chair a sub-committee. There would be no need to involve the Commission members regularly as members of sub-committees. It would be preferable if the Commission normally made its decisions after the sub-committee had sifted the applicants and the interview panel had reported back. In relation to less senior appointments such a system is working well now.
131. We agree there should be five judges on the Commission (a very senior judge such as the Deputy Lord Chief Justice or the Senior Presiding Judge, another member of the Court of Appeal, a High Court Judge, a Circuit Judge and a District Judge/Master). We agree that the Commission would be strengthened by the involvement of those not drawn from the ranks of the permanent judiciary, but suggest that the remaining three groups should together contribute six members of the Commission. Thus, there would be two members of the lay judiciary, two lawyers and two lay members.
132. From the point of view of balance (leaving out the Chairperson) that would produce four lay individuals and two lawyers who, if they combined, would be able to outvote the five permanent members of the judiciary (if the judges were all of one mind, which certainly could not be guaranteed). Eleven members plus a Chair is about the largest satisfactory number of members that would constitute a satisfactory working body. A Commission made up of eleven members and a Chairperson (five members of the judiciary, two members of the lay judiciary, two lawyers and two lay people plus the Chair) could provide sufficient expertise both as to judicial skills and appointment skills on the Commission. While we recognise the contribution that can be made by lay people and lawyers, it would

be quite wrong to give them quite the predominance proposed. There is no reason why we should not seek to comply more closely with the recommendation of the European Charter on the Statute of Judges (1998) that “*at least one half of those who sit are judges elected by their peers...*”. This is consistent with most well-established European models which have half or more places filled by judges. At the Commonwealth level, the Latimer House Guidelines require “*a majority of members drawn from the senior judiciary*”. What we propose could be said to be consistent with the Charter and the Guidelines if the lay judicial officers are treated as both lay members and judicial officers.

The Chair of the Commission

133. The Judges’ Council initially felt that the obvious answer was for this role to be played by the Lord Chief Justice. However we have reluctantly come to the conclusion that, if the Chairperson is to perform the role that we perceive for the head of the Commission, it will be a full-time or nearly full-time appointment which would rule out the Lord Chief Justice or any other senior judge. The head of the Commission would have a significant organisational responsibility.
134. In addition, we consider that it is essential that the head of the Commission visits the different parts of the country, so that he or she is familiar from first hand experience with the needs of different courts and tribunals and with ideas as to how those needs might be addressed. Needs and potential solutions differ according to geographical area, and the qualities required for a tribunal president will not be the same as those required by a Crown Court judge hearing criminal cases. The head of the Commission will have to acquire an insight into the structural inhibitions that are restricting progress in achieving greater diversity. He or she will need to be directly involved in encouraging a broader selection of candidates to come forward and apply for, initially, part-time and, subsequently, full-time judicial appointments. If there are structural changes needed to achieve greater diversity, then he or she should be responsible for encouraging their implementation.
135. Having concluded that neither the Lord Chief Justice nor any other very senior judge could be the Chair, we considered the possibility of a Court of Appeal or

High Court judge chairing the body for a fixed period of time as happens with the Judicial Studies Board or the Law Commission. The difficulty with this proposal is that, if the Chairperson is to be involved in promotions, he could hardly deal with appointments to positions more senior to his own. In addition, a difficulty would arise each time the Chairperson was a potential candidate for one of the posts under consideration. We have concluded that the Chairperson cannot be a serving judge. However, this does not mean that the ideal candidate for the office cannot be a lawyer, a former judge or even a serving judge who is prepared to resign to take on the challenge. What is critical is that the best qualified candidate is appointed irrespective of his or her background. While a serving judge could not fulfil the role of Chairperson, we consider that the most senior judge on the Commission should undertake the role of deputy Chairperson. This will ensure that the Commission has the necessary stamp of independence. As deputy Chairperson, the senior judge will be in an ideal position to act as a bridge between the rest of the senior judiciary and the Commission.

136. Having set out the answers above, it is possible to answer Question 21 shortly. The Chairperson and lay members of the Commission should be appointed by open competition. The Lord Chief Justice, the Bar Council and the Law Society can nominate the judicial and professional members.

Working Arrangements

137. As already indicated, the Commission would have to operate through a series of sub-committees. As to tenure, except for any members who are ex-officio, we do not dissent from what appears in the consultation paper.

CONCLUSION

138. The changes that we have proposed to the provisional views of the Government as set out in consultation paper are, we believe, essential if the Government's intentions are to be fulfilled.

PART IV A NEW SUPREME COURT

INTRODUCTION

139. In this section of the Judges' Council response, we address the issues raised by the consultation paper, *A Supreme Court for the United Kingdom*.
140. Section 1 of the consultation paper sets out arguments in favour of the replacement of the House of Lords by a new Supreme Court as the United Kingdom's highest court of appeal. These arguments are supported by some, but are regarded by others as unconvincing. It is not proposed in this paper to address the arguments, but instead to concentrate on the practical implications of the creation of a new Supreme Court.
141. It is necessary at the outset to recognise that the reputation of the Appellate Committee as a final court of appeal has been, and is, a deservedly high one, domestically and internationally. That reputation is, of course, mainly attributable to the quality of the judgments produced by Law Lords, past and present. It is also attributable, however, to the perception that the Law Lords, like the judiciary as a whole, are independent of the executive and are not susceptible to political pressure from any direction. It is plainly essential that the creation of the new Supreme Court and the translation of the Law Lords from being members of the House of Lords to being members of the new Court should not detract from the quality of the court or its independence, actual and perceived, from the executive.
142. A further preliminary point to be made concerns the location of the new Supreme Court. The House of Lords in the Palace of Westminster constitutes an appropriately dignified and prestigious setting for a national final Court of Appeal, although it has serious drawbacks as to the accommodation available for the Law Lords, their secretaries and other support staff. It is essential that the new Supreme Court be located in a building which is not only adequate in the accommodation it will afford, but is also suitable as a building to constitute the final court of appeal for the United Kingdom. No attention has been given in the consultation paper to this problem. It is a serious oversight. The new Supreme Court cannot become operative, with appeal hearings transferred from the Palace

of Westminster, unless and until a suitable new building has been established as the new United Kingdom Supreme Court. The Government's proposals about this are awaited.

143. It is clear that the proposed changes will require the enactment of primary legislation. A number of existing statutes will require substantial amendment. It is desirable, in our view, that consideration should be given to remedying, by the same legislation, other oddities and quirks of the United Kingdom court systems. The opportunity will probably not recur for a generation or two.

JURISDICTION OF THE NEW SUPREME COURT

144. We agree that all domestic appeals (i.e. appeals from United Kingdom courts) should cease to be heard either by the Appellate Committee of the House of Lords or by the Judicial Committee of the Privy Council. Appeals from orders made at disciplinary hearings before professional tribunals should all be brought by case stated to the High Court, with appeal thereafter, by permission, to the Court of Appeal, or by corresponding procedure in Scotland and Northern Ireland.
145. All other domestic appeals at present heard by the Judicial Committee should be brought before the new Supreme Court. This would include the devolution cases at present heard by the Judicial Committee.
146. The opportunity should be taken to re-direct those appeals from the Queen's Bench Divisional Court in criminal matters which at present go direct to the Appellate Committee. These should in future go to the Court of Appeal (Criminal Division) and not to the new Supreme Court. Consideration should be given to whether appeals by way of case stated from magistrates' courts should go straight to the Court of Appeal (Criminal Division) rather than to the Divisional Court.
147. It seems clear that the new Supreme Court will take over the Appellate Committee's jurisdiction as the final court of appeal for civil cases from Scotland. If criminal appeals from Scotland which raise devolution issues are in future to go to the new Supreme Court, it might be a matter for consideration whether the new Supreme Court should be the final court of appeal for all criminal cases from

Scotland. This is however, a matter for the Scottish Parliament and the Scottish Executive.

148. The new Supreme Court will find itself dealing with cases involving European Community and European Union law. The proposed new Constitution for the European Union contains an Article declaring that European Union law has primacy over the national laws of member states. Other Articles deal with the respective legislative competences of the European Union and member states. If the Constitution in its present form is adopted, cases will inevitably arise in which questions are raised as to the competence of member states to legislate in particular areas, and as to the validity of legislation in those areas enacted by member states. Cases of this sort in the United Kingdom will raise the issue of whether the courts of the United Kingdom, and, in particular, the new Supreme Court, have jurisdiction in the area of European law to declare Acts of Parliament invalid on lack of competence grounds. The issue should, in our opinion, be faced. The Act establishing the new Supreme Court should make the courts' jurisdiction in this respect clear and explicit.

MEMBERSHIP OF THE NEW SUPREME COURT

149. We agree that the number of full-time members of the new Supreme Court should be 12, with power for Government by statutory instrument (subject to affirmative resolution procedure) to increase the number. We think that, in addition, the Lord Chief Justice and the Master of the Rolls, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland should be *ex officio* members of the new Supreme Court.
150. There should be provision for retired members of the Supreme Court (or retired Lords of Appeal in Ordinary) and any retired Judge or Advocate-General of the European Court of Justice who had been nominated for office by the United Kingdom, willing to sit and still under 75 years of age, to be co-opted to sit. Consideration should be given to whether there should be a power to co-opt any retired member of the Court of Appeal, or of the Inner House of the Court of Session or of the Court of Appeal of Northern Ireland to sit in the new Supreme

Court provided he or she was willing to sit and under 75 years of age. On the whole we do not recommend this.

151. The retirement age of some members of the senior judiciary, depending on the date of their appointment, is 70 not 75. But, for sake of consistency, we would retain 75 years of age as the age up to which retired judges of the courts mentioned would be eligible to be co-opted to sit in the new Supreme Court. We do not recommend extending to 80 years of age the age up to which these retired judges could be co-opted to sit.
152. Decisions as to when or on what cases individuals would be co-opted to sit, and who should be co-opted, should be taken by the President of the Supreme Court or his deputy.
153. The Act establishing the new Supreme Court should specify a quorum of three full-time members of the Court for any hearing. The number of members (full-time or co-opted) to sit at any particular hearing should be fixed by the President of the Supreme Court or his deputy. We have set out our view as to the membership of the Court as a whole at paragraph 149.
154. We agree with the suggestion that one of the 12 full-time members of the new Supreme Court should be appointed senior judge of the Court. The consultation paper has suggested that the senior judge be styled 'the President' of the Court. We agree. The style might, however, lead to confusion with the President of the Family Division. The office of President, should be institutionalised in the Act establishing the new Supreme Court.
155. We think the Act should provide also for the appointment of one of the other full-time judges of the Court to be Deputy President. The Act should empower the Deputy President to act in the place of the President in the event of the President's absence or temporary incapacity, and also to carry out any functions relating to the administration of the Court delegated to him by the President.

APPOINTMENT OF THE PRESIDENT AND DEPUTY PRESIDENT

156. In our opinion, these appointments should be by The Queen on the advice of the Prime Minister. The Prime Minister should first consult the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, the current or outgoing President and Deputy President, as well, no doubt, as the Secretary of State for Constitutional Affairs and the chief executives of the devolved administrations.
157. We find it difficult to envisage any useful or sensible role that the Judicial Appointments Commission, or any specially constituted Commission, would have in identifying the person to be appointed President or Deputy President. The reason for this is the nature of the offices. Each must be a person who can command respect among the colleagues he is to lead both, as a lawyer and as an individual. He must also, because of the extensive administrative functions that he must discharge, be a person in whom the executive can have confidence. Each will already be a member of the Supreme Court and some part in his appointment to that role may have been played by an Appointments Commission.

RELATIONSHIP WITH THE HOUSE OF LORDS

158. What, if any, relationship the judges of the new Supreme Court should retain with the House of Lords must depend on the eventual composition of the House. If the House were to become a wholly elected body, there would be no place for unelected judges. But if, as seems likely, the members of the House are to be either wholly or mainly appointed, there seems to us to be a very strong case for the appointees always to include the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland and the President of the Supreme Court (the most senior judges). If not already peers they should be appointed to be members of the House on appointment to their respective offices.
159. The reason why these very senior judges should be members of the House is that they will be in a position to contribute to debates in the House on matters affecting the justice system or the judiciary. The justification for having a

legislative chamber composed of, or containing a large number of, appointees is to try and ensure that there will be members of the House with expertise in the various matters of public concern with which the House has to deal. The justice system and the judiciary are of very high importance to any democratic country which conducts its affairs under the rule of law, and it would be unsatisfactory and anomalous to exclude from the House those in a pre-eminent position to speak on such matters and with a responsibility to do so. To insist on their exclusion on the ground that otherwise the constitutional principle of separation of powers would be infringed would be an unhealthy genuflection to constitutional fundamentalism. We think a mature democracy should show greater flexibility.

160. If our recommendation that the senior judges referred to in paragraph 158 should be members of the House is accepted, then plainly they should be free to sit, speak and vote. We agree that, apart from them, members of the Supreme Court who are members of the House should, while they remain members of the Supreme Court, cease to exercise their rights to speak and vote in the House. Whether they should retain their right to sit in the House and listen to debates and discussions and to use the facilities of the House is a matter which should be left to the House to decide.
161. Retired judges under the age of 75 who are peers and who wish to remain eligible to sit in the Supreme Court when co-opted to do so, should be subject to the same restriction on speaking and voting as full time members of the Supreme Court. In effect, a retired judge who already is or is then appointed a member of the House, should be required to elect whether to take part in the House's legislative functions or to hold himself available for co-option to sit in the Supreme Court.
162. It has been the practice for many years for one of the Law Lords to chair Sub-Committee E of the House's European Union Select Committee. Sub-Committee E is responsible for subjecting to a scrutiny process proposals from Brussels for European Union legislation and for preparing reports to the House on proposals of particular interest or importance. We believe this function of successive Law Lords to have been a valuable one and of service to the House. In other ways, too, current and retired Law Lords have provided valuable contributions to the House in the discharge of its legislative responsibilities. In order to enable the provision

of these services to the House to continue we would support the suggestion that, as a general practice, members of the Supreme Court should, on retirement, be appointed members of the House. This should ensure an ample reservoir of members of the House able to take on the chairmanship of Sub-Committee E.

APPOINTMENT TO THE NEW SUPREME COURT

163. The Judicial Appointments Commission proposed to be established for the purpose of judicial appointments to the Court of Appeal, the High Court, the circuit bench, the district bench and to various tribunals would not, in our view, be suitable for the purpose of appointment to the new Supreme Court. In relation to these appointments the number of potential appointees will always be very limited. The qualities of every one of the possible candidates for appointment will be known to those senior colleagues with whom he or she has been working. The particular attributes that the appointee should possess will be known to the senior colleagues with whom the appointee will in future be working. We can see little of value that the proposed Judicial Appointments Commission could add to the selection process leading to the identification of the individual to be appointed. In our opinion, appointments to the Supreme Court should be made by The Queen on the advice of the Prime Minister. The name put forward by the Prime Minister should be a name recommended by a Supreme Court Appointments Commission.
164. The Supreme Court Appointments Commission should be a small and select body. Its members should not include any individual who might be a candidate for appointment. The members should include the President and Deputy President of the Supreme Court, and might include also one or two other Supreme Court members. The President should chair the Commission. The Commission, after consulting, among others, the Secretary of State for Constitutional Affairs, the chief executives of the devolved administrations and all the current members of the Supreme Court, should submit a name to the Prime Minister. It should be open to the Prime Minister to reject, with reasons, the name submitted and to request another name to be submitted.
165. We are in no doubt that confirmation hearings before Parliament would be inappropriate. As the consultation paper (para 45) rightly notes, confirmation

hearings before Parliament would tend to politicise the appointment process. We are similarly in no doubt that the process of identifying candidates for appointment should not include open applications.

QUALIFICATION FOR MEMBERSHIP

166. We agree that there is no reason to change the present qualification for appointment as a Law Lord, namely, two years' holding of high judicial office or fifteen years' practice as a barrister, advocate or solicitor.
167. We do not see any strong case for changing the present qualifications for appointment so as to make it easier for distinguished academics to be appointed. A number of academics are qualified under the present rules. Some have already stepped on to the judicial ladder. A number of practising lawyers can be described as distinguished academics. There is no clear dividing line, and the case for a change in the qualification rules has not been made out.

GUIDELINES

168. There is no need for guidelines, nor for a Code of Practice relating to the selection of members of the Supreme Court. Indeed, guidelines or a Code of Practice supplied by the Secretary of State might tend to promote doubts about the independence of the Supreme Court from the executive.

REPRESENTATION OF THE DIFFERENT JURISDICTIONS

169. The Act establishing the Supreme Court should, we think, provide that at least two of the full-time members of the Court should be appointed from the legal profession or judiciary of Scotland and at least one from Northern Ireland.

RETIREMENT

170. We favour 75 as the age for compulsory retirement from the Supreme Court. Members who retire under that age should, until they reach that age, be eligible for co-option to sit.

PANELS

171. Subject to the statutory quorum of three, the number of members of the Court to sit on a particular case should be a matter for decision by the President and Deputy President.

PERMISSION TO APPEAL

172. In general, in our opinion, an appeal to the Supreme Court should require the permission of that Court. The existing (and sparingly-used) discretion of the lower courts in England and Wales and Northern Ireland to grant leave to appeal to the House of Lords, can prevent unnecessary delay in cases of obvious urgency and importance. This discretion should be retained.
173. The rule that appeals in civil cases from Scotland are as of right is anomalous and difficult to justify. We think the rule needs to be reconsidered.

STYLE

174. We recommend that the new Court be called the Supreme Court of the United Kingdom, and that members of the Court be styled Justices of the Supreme Court. An individual member would be Justice of the Supreme Court Smith, or Smith JSC. Members would be addressed during hearings as ‘My Lord’ or ‘My Lady’ (as the case might be).
175. To avoid confusion, the Act should provide that the Court of Appeal, the High Court and the Crown Court should cease to constitute “the Supreme Court”. This will not prevent the Law Courts in the Strand continuing to be known as “the Royal Courts of Justice for England and Wales”.

ADMINISTRATION

176. We agree that the administration of and resources for the new Supreme Court should, in its relationship with Government, be the responsibility of the Department for Constitutional Affairs.

177. But it is important that the administration of the new Court should be under the control of the President. A Registrar approved by the President should be appointed by the Secretary of State. The Registrar would be responsible to the President and Deputy President for the efficient functioning of the administration of the Court. In addition, a Judicial Office, headed by the Registrar, discharging the function at present discharged by the House of Lords Judicial Office, must be established. The Registrar and the Judicial Office of the Supreme Court would be responsible, among other things, for the listing of appeals and the composition of the appellate panels. They would carry out their work subject to the directions of the President or Deputy President.
178. The Supreme Court should have its own annual budget. The annual budget for the Supreme Court should be submitted, before it is finalised, to the President for approval.
179. We would stress that the control exercisable by the President over the work done by the Registrar and the Judicial Office, and the role of the President in the preparation and agreement of the annual budget of the Supreme Court, are important for the purpose of ensuring that the Supreme Court will be and remain independent of the executive and will be seen to be so. That independence should be expressly guaranteed in the Act establishing the Court.

PART V THE FUTURE OF QUEEN'S COUNSEL

INTRODUCTION

180. In this section of the Judges' Council response, we address the issues raised by the consultation paper, *The Future of Queen's Counsel*.
181. The paper summarises the purpose of Silk "*as a mark of quality and distinction in relation to legal expertise and experience, including advocacy, signalling to the public and to users the leaders of the profession in this respect. It is a mark of quality which identifies the top specialists in the field.*" The paper simultaneously identifies concerns expressed by the Director General of Fair Trading. These are:
- a) That the system operates as a restriction, not based on professional rules.
 - b) The absence of continuous quality appraisal.
 - c) The absence of professional examination.
 - d) Inadequate peer review on selection, and the responsibility granted to Government to confer "on selected practitioners a title that enhances their earning power and competitive position relative to others".
 - e) The value of the system to consumers.
182. This latest paper "*asks questions about the current role of Queen's Counsel, whether it is objectively in the public interest, and whether it commands public confidence*". It is seeking evidence in order to inform policy development.
183. The 'provisional view' expressed by the Government in the paper presently under consideration is that the system in its current form can only be justified "*if it serves a helpful purpose for users of legal services*", which outweighs any potential problems and cannot be secured in other ways. One reading of this text is that the administration of justice is not expressly included. If so, that is a significant flaw. The fundamental and principal question is whether the administration of justice benefits from the continued existence of a publicly

acknowledged mark of distinction in the legal profession. If so, it should continue: otherwise not.

184. In July 2002, the Government's consultation paper, *In the public interest?*, was published. Chapter 5 was concerned with the QC system. The responses to the consultation paper are set out in paragraphs 238-311. The majority of respondents saw benefits in a QC system (although for varying reasons) and supported the view that appointments should be made independently of Government.
185. As part of its response to this consultation paper, the judiciary, through a representative working group chaired by Carnwath LJ, addressed the merits or otherwise of the QC system. The response reflected the views of the judiciary as a whole, and was endorsed by the Heads of Division.

"12. We comment in more detail on this issue, which directly affects the functioning of the courts...We strongly support the Government's view that the maintenance of the QC system is in the public interest, not simply as 'a quality mark in the market'...but as an important part of the machinery of justice.

13. As judges, we attach importance to the identification of a body of advocates who are the leaders in their profession, not only as being excellent lawyers and advocates, but, above all, as having complete integrity. Under the established system, the courts rely heavily on advocates to perform their role properly and honestly; they could not function effectively without that support. The importance of this role is heightened in cases of special difficulty or complexity, or those subject to particular public or political interest, in which QCs are most likely to be involved. The QC system also plays a useful part in identifying future candidates for appointment to senior full-time judges.

14. Those who wish to be a QC have to show that they have reached those high standards. The temptation to 'bend the rules', given the pressure to win from clients and solicitors, is never far away...

15. *We also consider that the system of appointment as QC provides a focus for the profession which operates in the public interest. Provided those who are broadly regarded by their peers as having attained that level of excellence which justifies the accolade of Silk are seen ultimately to achieve the distinction of Silk, which we believe is normally the case, the institution of Leading Counsel is a goal, as well as a gold standard, to which the junior members of the profession can legitimately aspire.”*

186. This analysis continues accurately to reflect the view of the large majority of the judges in the High Court and Court of Appeal. We note a number of further relevant considerations. The question for decision is whether the Silk system is of value to the community at large, and is not confined to those who live and practise in London. One of the advantages of the Silk system is that solicitors up and down the country, even those in relatively modest practices, can, if and when the need arises, start their search for the most senior counsel in any specialised field through the Silk system. Another benefit is that the public itself understands that it is a mark of distinction. When a public inquiry is thought appropriate (for example, the Kings Cross and Clapham disasters) the fact that the inquiry is conducted by a QC adds weight to its conclusions and to the public’s perception of the quality and fairness of the inquiry, as well as the value of the conclusions themselves. Again, the public perception of the role of Counsel to the Inquiry currently being conducted by Lord Hutton was enhanced by the fact that his ability and judgment were acknowledged in his appointment as a QC. QC clauses provide another example of the way in which this distinction has public value. This is not limited to the public of this country, but operates as a source of substantial invisible earnings as a result of its inclusion in a multitude of international contracts, particularly in the world of insurance. The QC system is perceived internationally to be a hallmark of the British legal system, and contributes to its high international standing. It would be unfortunate to lose advantages like these.
187. Our belief is that the Silk system enhances the administration of justice, and assists in the maintenance of proper standards for the preparation and conduct of litigation. We note that the Silk system continues in Scotland and that systems for

acknowledging outstanding quality continue, although under different names, throughout the common law world (with the exception of the United States) including Canada, Australia, New Zealand and South Africa. In short, the Silk system is not simply an ancient, traditional emanation of the British system: its value to the administration of justice is widely recognised and continues to be adopted throughout the common law world.

188. We must emphasise that, from the judiciary's point of view, the benefits of the system are court based, and specifically concerned with advocacy, and the presentation of argument, oral or written, in court, by advocates in whose quality and integrity confidence can be assumed. We are not directly concerned with merit and quality in non-contentious matters, nor with significant, but generalised contributions to either profession by its members. Our concern is the better public administration of justice, and on this basis, the essential criteria underlining the system of Queen's Counsel should continue unchanged.
189. We immediately recognise that the current Silk system confers more than a pleasing accolade gratifying to the recipient, but producing no practical advantage to him or her. Although we all know of examples of successful applicants whose practices have collapsed under the weight of "Silk", the stark reality is that the grant of Silk carries with it the opportunity for, and in most cases produces increased earnings. Superficially, that appears to conflict with the public interest that legal fees should be kept to a minimum. Inevitably, where legal fees are high, or perceived to be likely to increase, the system is exposed to criticism. In our view, however, the abolition of the Silk system would be unlikely to achieve any reduction in fees charged by advocates. The most successful advocates would continue to maintain a dominant position, greatly in demand, and capable, because of the demand for their services, of seeking, and obtaining, the highest level of fees. Indeed, it is not impossible that there would be something of a generalised increase in the fees charged to clients. In the event of abolition, the heaviest litigation would be conducted by the most experienced and distinguished advocates: again, rightly receiving fees according to the weight and difficulty of, and responsibility involved in such litigation.

190. We must address the common misapprehension, that a client is ever under an obligation to instruct a QC. Even if the litigation in which he is involved would justify the use of a QC, he can elect to use the services of a junior counsel, just as he can elect to act in person. In rare cases, a QC may also be used where, on objective analysis, there is nothing in the case which justifies the use of a QC. That is the client's choice, but if he makes it in such circumstances, he should expect to pay fees appropriate to the individual whose services he is demanding. Experience shows that QCs tend to earn more than juniors: that usually reflects the burdens of their cases. They do not, however, "command" higher fees, unless either the case is complex or burdensome, and the use of a QC is justified, or, where it is not, because the client insists on his solicitor briefing a particular QC when the case does not really need it. The effect on the fees paid to a junior, where a QC is employed, and any automatic link between the two, is now much less rigid than formerly (a QC may, and frequently does, appear in court without a junior). Further suggestions for increased flexibility would be welcome.
191. We accept that the present selection system is not perfect. We recognise that from time to time a candidate for Silk is unsuccessful when he or she should have succeeded, and equally, that a candidate whose application should have failed, is sometimes granted Silk. However, examples of the occasional fallibility in the selection process should not condemn the system as a whole. Any system for identifying distinction, and any selection process, however devised, is bound from time to time to be mistaken. The alternative would be self-appointment, without objective input. If nothing else, such a system would enhance rather than reduce the risk of error. Another area of concern, the risk of declining powers among some of those rightly appointed to Silk, does not provide a valid argument for doing away with a system which is otherwise thought to be in the public interest. In reality, the market place, which includes both solicitors and junior counsel, is well able to make its own judgment, and that is why from time to time the practices of QCs do gradually decline.
192. We must address the question whether a QC who fails to provide the requisite standard of excellence, should be permitted to retain appointment as a Silk. Valuable as it is, it may not be quite enough to rely on solicitors exercising their

own judgment by ceasing to brief that individual. While the Silk continues to practise, some solicitors, ignorant of declining powers, may continue to assume that “QC” represents its own quality mark. If the system of QC is retained, it should be possible to organise an additional element, by which, following complaint, sub-standard performances should lead to re-examination of the appointment itself: and if justified, its removal, or alternatively, retirement from practice.

193. The formal privileges of robes and accommodation in court are irrelevant to the survival of the Silk system. Effectively, these are no more than courtesies, and their removal would not impinge on the administration of justice.
194. We recognise, of course, that, if they wish to do so, barristers and solicitors may organise their own systems for acknowledging distinction in their professions, and those who have made contributions to it. Internally to the professions, this mark need not be confined to distinction in advocacy. It might be granted to those who have served either profession, for example, the Chairman of the Bar, or the President of the Law Society, and others who have made significant contributions to the welfare and standing of the professions. If they wish, therefore, the professions can organise their own system for conferring their own accolades. However, these would not have any public significance, and however else they might be described, the recipients could not be described as “Queen’s Counsel”. Although in theory there is no reason why two separate systems for marking distinction – one public, and one internal to the professions – should not co-exist, in practice, if they did, the result would be utter confusion. If this analysis is correct, there will therefore inevitably continue to be practitioners of considerable distinction within either profession, whose areas of expertise, or whose contribution to their own profession, although distinguished, lacks the public element necessary to justify the public distinction.
195. We understand the belief among solicitor advocates that they are disadvantaged in the present system of selection, not least because their advocacy skills are insufficiently observed. If unpersuaded that there is a level playing field for advocates from either profession, sceptical views expressed by the Law Society would be understandable. The arrangements must address those concerns, but as

before, we emphasise that they reflect on the operation of the selection system, rather than the value of the system in principle.

196. We repeat that the essential principle is clear. Does the system enhance the administration of justice? If not, it should go. If it does, as we believe that it does, then it should be retained, subject to any necessary reforms relating to the process of selection, and to further questions, such as accountability, transparency and fairness.
197. Assuming that the QC system is confined to the skills and qualities required of advocacy, no formal examination could identify those with the necessary qualities. You cannot examine for probity and integrity; nor for independence of mind; nor for judgment; nor, ultimately, for forensic skills. Exactly the same piece of litigation can be conducted equally effectively in different ways: and, equally, even a viva examination could not expose a tendency to ruin good forensic work by an additional but unnecessary question, perhaps because of tension and pressure at the hearing.
198. In reality, the necessary skills, or their absence, are constantly under scrutiny, in public. Reputation is the basis on which a young advocate builds, or fails to build a practice. Solicitors may accept the services of counsel who is new to them, from chambers they trust. They do not continue to brief counsel who are not up to the expected standard. And so the process continues, with the better counsel trusted with increasingly heavy or sensitive work. At the same time, advocates come under constant observation from the Bench, and from other advocates. In one sense, every individual judgment, whether by solicitor, or fellow advocate, or judge, has a subjective element, but reputation, and quality of practice, speak for themselves. There is no reason why the best advocates should not receive a mark of distinction.
199. We must now draw a number of threads together. By definition, “Queen’s” Counsel signifies that the appointment is made by the Crown. Until now, the Lord Chancellor has acted both as the Head of the Judiciary, and the relevant Minister providing the necessary “advice” to the Crown. However, that is to change, and the source of such advice in the future will have to be re-examined. The public

nature and advantage of the system mean that the process of appointment simply cannot be self-selection, and although we anticipate a much greater involvement by the professions in the process, given that Silk is a public appointment, the system cannot be within the exclusive control of the professions. Consideration should be given to lists of approved candidates produced from the professions, and, to ensure evenness of quality, to final lists submitted by the professions jointly.

200. The judiciary will continue to be involved. We have responsibilities for the administration of public justice, but in addition, we have day-to-day experience of the qualities, or otherwise, of potential candidates. Transparency in the process is achieved, and indeed would be enhanced by continuing involvement of either the Commission for Judicial Appointments, or the Judicial Appointments Commission, probably in a supervisory capacity, to ensure the fairness of the process, but possibly with a consultative role as the system continues to evolve, and perhaps with a separate and specific branch responsible for the Silk system.
201. We should say at once that we do not think it would be practicable to carry out a simple transfer of the current arrangements for selection from the Department of Constitutional Affairs, either into the hands of the Judicial Appointments Commission (when it is created) or to the Lord Chief Justice and his office. This is already sufficiently burdened. The role of the judiciary, whether by way of veto of any particular candidate, or as consultees, or in the direct arrangements for appointment, can readily be adapted from some of the existing common law models, after their own systems have been reformed. The role assumed by the Judge President of the High Court of South Africa, or the Chief Justice of New South Wales, provide valuable examples of how this may be achieved.
202. Advice to Her Majesty could become the responsibility of the Attorney General, as head of the legal professions, but in principle there is no reason why statute should not, consistent with other common law jurisdictions, attach this responsibility to the Lord Chief Justice. If the Secretary of State is to have any continuing role, his power to decline to put a name forward for appointment should be subject to reasons: he should have no power to advance a name on his own initiative.

ANNEX A

A New Way Of Appointing Judges: Responses to questions posed by the Consultation Paper

Question 1: Do you prefer:

- i. An appointing commission?**
- ii. A recommending commission? Or**
- iii. A hybrid commission?**

What are your reasons?

The model put forward in this response differs in important respects from all three models set out in the consultation paper. For appointments below the Court of Appeal, it is proposed that the Commission act as the decision-making body, making the appointments direct or recommending names to The Queen as appropriate. It is suggested that, given the scope of the constitutional change envisaged, it should prove possible to relax the convention that nominations must be conveyed to The Queen by a Minister.

In relation to the appointment of the Heads of Division and to the Court of Appeal, it is suggested that the primary decision-making body should be a Promotions Panel operating under the auspices of the Commission. Under one of the two alternatives put forward to the judiciary, the executive would be able to exercise a limited discretion in relation, at least, to the appointment of Heads of Division.

Question 2/3: If you favour a Recommending Commission, what degree of discretion do you think should be exercised by the Secretary of State or Prime Minister?

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?

It may be decided that, notwithstanding our response to Question 1, the Commission's nominations in respect of appointments made by The Queen must be conveyed to Her Majesty by a Minister of the Crown. If that is the case, we would argue that, in relation to appointments to the Court of Appeal and below, the Secretary of State should be expected simply to pass on the nomination with such advice as he considers appropriate.

If it is felt that the Executive must play a greater role in relation to the appointment of the Heads of Division in particular, then that role should involve no more than the power to reject a nominated candidate, giving reasons for so doing, and to call for a second candidate to be nominated. The Appointments Commission should also be able (but not required) to put forward two candidates at the outset if it wished to do so.

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?

Appointments of the Heads of Division and to the Court of Appeal should be made on the recommendation of a Promotion Panel consisting of the Chairperson of the Commission (who would chair the panel), the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and two lay members of the Commission. The Panel could also include the Senior Law Lord (or President of the new Supreme Court) or his deputy (if the President is not a former member of the English and Welsh judiciary) if this was thought necessary.

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?

Agreed.

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?

The Commission should be responsible for the appointment of magistrates. Local Advisory Committees should be retained, but should make recommendations to, and be overseen by, the Commission.

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

Agreed. Coroners should be subject to the same appointment process as members of the junior judiciary.

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?

Agreed. The processes used to appoint lay tribunal members should be similar to those used for magistrates.

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

Agreed. However, where the Lord Chancellor has statutory responsibility for such an appointment, the new legislation should transfer that responsibility to the Lord Chief Justice or an appropriate judicial office-holder.

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?

The Commission for Judicial Appointments (Ombudsman) should retain its existing responsibilities and be given additional responsibilities in relation to complaints as to judicial conduct (see Q15).

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

- i. a 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?**

The Commission should be a Non-Departmental Public Body with its own staff and budget.

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.

We agree that the Commission should take on the functions described in paragraph 88, but do not agree that the Government should retain responsibility for policy relating to appointments; this would amount to the Government being able to dictate to the new Commission how it performs its role. Criteria for making appointments should be included in the legislation creating the Commission. If this does not happen, responsibility for determining the criteria should rest with the Commission and not the Government.

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?

Agreed, subject to the overriding requirement that candidates be appointed on merit.

Question 14: What other steps could be taken by the Commission to encourage diversity?

This question should be left to the Commission.

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?

Complaints as to judicial conduct should be handled by an office working under the direction of the Lord Chief Justice, with a transfer to the Lord Chief Justice of the functions presently exercised by the Lord Chancellor as Head of the Judiciary. The Ombudsman should have a reviewing function in relation to the revised complaints process.

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

No, but the Ombudsman could appropriately play a role in this procedure.

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

No, it is unnecessary for the Lord Chancellor's role as protector of the judiciary to be inherited by the Secretary of State. Rather, a general guarantee of continued independence for the judiciary should be enshrined in statute and a duty to uphold this independence should be extended to all Ministers.

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

A small body should be established to take responsibility for those places on the Commission which are to be filled by open competition (nominations can be dealt with directly by the Chairperson of the Commission and the Lord Chief Justice/appropriate nominating body). The appointing body should be chaired by the Lord Chief Justice and its members should comprise the First Civil Service Commissioner, the Commissioner for Government Appointments and the Chairman of the Committee for Standards in Public Life or similar individual office holders of undoubted integrity and independence.

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

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

If not, how should the Commission be constituted?

We would argue that members of the Commission should be drawn from four distinct groups: the professional judiciary, the lay judiciary, lawyers and lay members. We believe the proposed membership of 15 to be too large and propose instead a Commission consisting of a Chairperson and 11 members. We agree that five members of the Commission should be drawn from the ranks of the professional judiciary and believe that the remaining three groups should each be represented by two Commission members. There should therefore be two members of the lay or part-time judiciary (a magistrate and a lay tribunal member), two lawyers (a solicitor and a barrister) and two lay members.

Question 20: Who should chair the Commission?

We have reluctantly concluded that the Chairperson's weighty responsibilities mean that it would not be practical for the role to be undertaken by a serving judge. There is no reason, however, why a lawyer or a former judge might not be a perfectly appropriate candidate. What is critical is that the best-qualified candidate should be appointed, irrespective of his or her background.

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

If not, should some members be nominated?

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?

The Chairperson and lay members of the Commission should be appointed by open competition with judicial and professional members being nominated by the Lord Chief Justice, Bar Council or Law Society as appropriate.

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

The Commission would have to operate through a series of sub-committees. As to tenure, except for any members who are ex-officio, we do not dissent from what appears in the consultation paper.

ANNEX B

A Supreme Court for the United Kingdom: Responses to questions posed by the Consultation Paper

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?

Yes

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

At the discretion of the Court authorities acting under the direction of the President or Deputy President.

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

The number of full time members of the Court and the quorum for the Court should be fixed by statute.

Question 5: Should there be a Deputy President?

Yes

Question 6: 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 any Judicial Appointments Commission?

No. Appointment of the President and Deputy President should be made on the advice of the Prime Minister after consultation.

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?

Yes

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

The bar should not extend to the Lord Chief Justice of England and Wales, the President of the Supreme Court, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland.

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

The four senior judges referred to in the answer to Question 8 should receive peerages (if not already peers).

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?

Appointments should be made by The Queen on the advice of the Prime Minister. The name submitted should be a name recommended by the Supreme Court Appointments Commission.

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?

The normal Judicial Appointments Commission should play no part in these appointments.

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 Appointments Commission for Supreme Court appointments should be specially constituted and be small.

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

No

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?

First sentence – No; second sentence – No.

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?

Guidelines are unnecessary and undesirable. So is a Code of Practice.

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

The Act should provide for at least two Supreme Court members from Scotland and one from Northern Ireland.

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

75

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

75 should be the age limit also for co-opted members.

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

Panels

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?

As a general rule the Court should select the cases it wants to hear.

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

This should be considered.

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

The existing Courts in England and Wales should be called the Law Courts of England and Wales, or, more shortly, the Law Courts.

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

Justices of the Supreme Court.

ANNEX C

The Future of Queen's Counsel: Responses to questions posed by the Consultation Paper

The following answers to the set questions must be examined in the context of the response as a whole which is in strong support of the retention of the rank of QC. They are insufficiently broad to provide a comprehensive answer.

Question 1: Do you consider it appropriate for the state to be awarding a promotional rank in a profession? What are your reasons?

We question whether this is possible in practice.

Question 2: Do you consider that the public interest would suffer if the Government were not directly responsible for the selection process for any quality mark scheme? What are your reasons?

No

Question 3: If you do not consider that the state should continue to be involved in the award of QC, can a change to the current constitutional arrangements which prevent The Queen from acting other than on the advice of ministers be justified? What form should that change take (including adequate measures for accountability to Parliament)? What are your reasons?

A solution is offered in the text (see paragraphs 199 to 202).

Question 4: Can an arrangement under which the relevant minister makes recommendations, having been guided by another body, be justified? To what extent should the minister be bound to accept the advice of that body? What form should that arrangement take (including adequate measures for accountability to Parliament)? What are your reasons?

No

Question 5: If you support the option in Question 4, as the Government will be establishing a judicial appointments commission, should this be the advising body? What are your reasons?

Yes, but it must be properly resourced.

Question 6: If it were to be decided that the rank of QC should be discontinued, do you consider that the Government should have an ongoing role in overseeing the framework of any new quality mark scheme that the Bar Council and/or the Law Society (or any other body) might decide to introduce, ? What are your reasons?

No

Question 7: Do you consider that the rank of QC in its current form benefits the public? What are the reasons for your view?

Yes

Question 8: In the light of the arguments set out in this section, do you think the current system should be abolished or changed? What are the reasons for your view?

The rank should be retained, but the system changed.

Question 9: Do you consider that the legal services market is sufficiently sophisticated to allow solicitors to choose appropriate barristers without the need of the QC mark? What are your reasons?

Doubtful. In any event, this is not the sole issue.

Question 10: If the rank should continue, should it also continue to enjoy its traditional formal privileges of dress, position and precedence?

Not essential. Of trivial importance.

Question 11: If you consider that the QC rank should be abolished, do you consider that it should be replaced by another form of quality mark (whether it be granted by the state, the professions, an independent body or the proposed Judicial

Appointments Commission)? What are your reasons? (see also the sections on state involvement and the key elements of a quality mark)

If abolished and replaced by “another form of quality mark” based on different criteria, the selection process depends on the new criteria.

Question 12: What do you consider would be the impact (positive or negative) on customers of legal services if the rank of QC were to be removed? Do you consider there would be any increase or decrease in legal costs? What are your reasons?

The answer depends on whether, on removal of the “rank”, a different system for quality were created. In very general terms, legal costs would not increase, although there would be individual cases where they might.

Question 13: What do you consider would be the impact on advocates' fees (QCs and juniors) if the rank were to be removed?

The marketplace would continue to decide the level of advocacy fees.

Question 14: For those clients who qualify to use the Bar Council's current Direct Access scheme, what would be the impact (if any) of the removal of the QC rank?

They would be unable to identify those who had achieved public recognition for their quality as advocates.

Question 15: What changes, or other kind of scheme, might better help non-specialist solicitors or non-lawyers to choose the right advocate for their case?

Changes to the QC system would not assist non-specialist solicitors or non-lawyers. The present scheme advantages them.

Question 16: If a different approach had to be taken in matters where QCs are currently regularly used, what ways would you suggest for identifying practitioners with a suitable level of expertise or case-management skills, and what sources of information would you use?

This question tends to demonstrate one of the advantages of the QC system.

Question 17: What other implications do you consider there would be, positive or negative, including on price, for the legal services market if the rank of QC were to be removed?

Again, the answer depends on what, if anything, replaces the QC system.

Question 18: What measures are needed to deal with circumstances where the use of a QC has been stipulated as a contractual condition?

The need for such measures tends to demonstrate the value of the QC system.

Question 19: If the Government decided that it was no longer appropriate for the state to provide a guide to the quality of advocacy services through appointment by The Queen to a rank, which of the options given for transitional arrangements, referred to in paragraphs 68 to 71, (if any) should be preferred, and why?

The question begs a number of other questions. But if it were decided to abolish the rank of QC, then the current appointments should continue indefinitely as a honorific title, without any current privileges, or responsibilities.

Question 20: If you do not support these options, what other approach would you suggest and why?

At present, unanswerable.

Question 21: Should the quality mark be granted only after, for example, examination, or interview? Why?

No. Impracticable, and misdirected.

Question 22: Should it include regular re-appraisal or re-accreditation? How might this be achieved?

No. Impracticable, and misdirected. (See answer to Question 23)

Question 23: Should it include appeals and complaints mechanisms? How would you envisage them working?

A system for removal of the rank of QC for declining standards or indifferent services should be examined.

Question 24: Do you think some new form of quality mark is desirable? By whom should it be run, and how? What would be the impact on the market for legal services?

No, unless the rank of QC became “Senior Counsel” or “Special Counsel”.

Question 25: If some form of quality mark is necessary, should it continue to focus primarily on advocacy?

Yes

Question 26: If you consider that any criteria should reflect a broader range of skills and experience, how do you think this might be achieved? What other skills do you consider should be recognised and tested?

Question 27: If you consider that the criteria should focus on advocacy, should there also be a parallel mark for solicitors and barristers who undertake the many other types of legal work (including the issuing of proceedings, the preparation of instructions for advocates, and many matters which do not usually involve the court, such as conveyancing)? What differences would you envisage there being between the two schemes?

These questions expose one of the major flaws in this paper. None of the previous questions direct attention to the public administration of justice, and the involvement in and contribution made by the QC system to it. The judiciary is not really concerned with any other aspect of the ways in which the legal professions are organised, or organise themselves. Using “advocacy” as a form of shorthand for the public administration of justice, then the answers to these questions are:

Answer 26: No.

Answer 27: If thought necessary by the professions, no objection. But the “parallel mark” should not be “Queen’s Counsel” or “Senior Counsel” or “Special Counsel”.

ANNEX D

MEMBERSHIP OF THE JUDGES' COUNCIL

Lord Chief Justice	The Rt. Hon. The Lord Woolf of Barnes
Master of the Rolls	The Rt. Hon. The Lord Phillips of Worth Matravers
President of the Family Division	The Rt. Hon. Dame Elizabeth Butler-Sloss
Vice Chancellor	The Rt. Hon. Sir Andrew Morritt
House of Lords representative	The Rt. Hon. The Lord Scott of Foscote
Vice President of the Court of Appeal Criminal Division	The Rt. Hon. Lord Justice Rose
Vice President of the Court of Appeal Civil Division	The Rt. Hon. Lord Justice Brooke
The Deputy Chief Justice	The Rt. Hon. Lord Justice Judge
Senior Presiding Judge	The Rt. Hon. Lord Justice Thomas
Chairman of the Judicial Studies Board	The Rt. Hon. Lord Justice Keene
Deputy Head of Civil Justice	The Rt. Hon. Lord Justice Dyson
Presiding Judges of Wales & Chester Circuit	The Hon. Mr Justice Richards The Hon. Mr Justice Pitchford
Judge in Charge of the Administrative Court	The Hon Mr Justice Maurice Kay
Representatives of the other specialist Courts within the RCJ	The Hon. Mr Justice Forbes The Hon. Mr Justice Tomlinson
President of the Council of HM Circuit Judges	His Hon Judge Brodrick
Honorary Secretary of the Council of HM Circuit Judges	His Hon Judge Lyons
President of the Association of District Judges	District Judge Cochrane
Honorary Secretary of the Association of District Judges	District Judge Walker
Representative of the London High Court Group	The Senior Master (Master Turner)
District Judge (Chief Magistrate)	District Judge Workman

ANNEX E

PROGRESS TOWARDS ACHIEVING DIVERSITY

Judicial Appointments Annual Report 2002-2003 – Key Extracts

Paragraph 2.45 of the Report suggests that Paragraph 2.45 of the Report suggests that, by 2005, 38% of both deputy District Judge and District Judge appointments will be female; the figures for Recorders and Circuit Judges are both estimated to be 20%.

The latest report also provides projected figures for minority ethnic appointments, and suggests that by 2010 they will make up 10% of deputy District Judge appointments and 8% of Recorder appointments.

PERCENTAGES OF FEMALE APPOINTMENTS

	Deputy District Judge	Recorder	District Judge	Circuit Judge	Queen's Counsel
Performance in 2002/03	38%	13%	7%	-	7%
Projections for 2005	38%	20%	38%	20%	17%
Projections for 2010	42%	24%	45%	25%	20%

PERCENTAGES OF MINORITY ETHNIC APPOINTMENTS

	Deputy District Judge	Recorder	Queen's Counsel
Performance in 2002/03	9.5%*	6.5%*	5.8%
Projections for 2005	6%	5%	6.5%
Projections for 2010	10%	8%	7%

* both these figures for 2002-03 already exceed the Department's projections for 2005.

Table 10 at paragraph 6.6 of the Annual Report 2002/03 sets out more detailed information in relation to the deputy District Judge competition. Of 349 applicants for the deputy District Judge competition, 115 (33%) were female and at least 34 (9.7%) were from ethnic minorities. The average age of applicants was 43 with an average

time in practice of 16 years. Of 42 recommended for appointment, 16 (38%) were female and at least 4 (9.5%) were from ethnic minorities.

In April 2002, the Lord Chancellor removed the lower age limit for judicial appointment, so the only qualification now is the statutory requirement of (in the case of District Judges) 7 years general qualification.

More recently, and since Lord Falconer became Lord Chancellor, impetus has been given to the proposal for a salaried part-time working scheme which would enable serving judges to opt for part-time working. Even before the introduction of that scheme, Lord Chancellors have been appointing permanent salaried, part-time, judges; at least three District Judges (all female) and 18 immigration adjudicators have been appointed with obligations to sit less than the normal 215 sitting days required of those appointed full-time to such posts.

The magistracy

As at 30 October 2003 there were:

12,462 male (50.45%) and 12,241 female (49.55%) magistrates.

23,179 white (93.8%) and 1524 minority ethnic (6.2%) magistrates.

ANNEX F

DISCIPLINE AND COMPLAINTS

This annex must be read in conjunction with the main body of the response(in particular paragraphs 83 to 88)

THE ROLE OF THE MINISTER

1. Changes to the present disciplinary procedures will be required in relation to complaints about the conduct of a judicial office-holder that are not manifestly without foundation. A Minister should no longer be directly involved in determining the outcome of such a complaint. However, we recognise that the Government has an interest in the disciplinary process on behalf of the public. For this reason, while we consider the responsibility will be that of the judiciary itself to discipline its own members, we accept that there should still be Ministerial involvement. While the majority of the complaints will no doubt be made by members of the public, the Secretary of State should also be able to make a complaint if he or she considers this is necessary.

THE ROLE OF THE LORD CHIEF JUSTICE

2. As explained in the main response, the Lord Chief Justice should have overall control of complaints and discipline involving the judiciary. A unit (which we will refer to as ‘the Office’) independent of the Department will therefore have to be established and staffed for this purpose. The Office should be given similar status to the new Appointments Commission. There should be the necessary legislation to achieve this or a new protocol which recognises the primary responsibility of the Lord Chief Justice.

THE SUMMARY DISPOSAL OF COMPLAINTS

3. As presently occurs under the Judicial Complaints Protocol (LCD, April 2003), it is envisaged that only a minority of complaints will be taken forward for investigation. Where a complaint is taken forward, the Office shall contact the

judge concerned and, after appropriate enquiries, prepare a report for the Lord Chief Justice. If the Lord Chief Justice decides that no further action should be taken or that the complaint is not well founded, his decision shall be notified to both the complainant and the judge.

4. Where a complaint is upheld, the Lord Chief Justice should be in a position to dispose of it by causing a warning or reprimand to be administered to the judicial office-holder. Before action is taken, the judicial office holder, the complainant and the Secretary of State will be informed of the decision and the action that is proposed to be taken. Both the judicial office-holder and the Secretary of State should be entitled to seek a review of the Lord Chief Justice's provisional decision according to the procedure set out below. The complainant should be given the opportunity to ask the Ombudsman to consider the way in which the complaint has been handled. If the Ombudsman feels it necessary, he too will have the right to ask for the Lord Chief Justice's provisional decision to be reconsidered.

MORE SERIOUS COMPLAINTS

5. In the case of more serious complaints, the Lord Chief Justice should continue to appoint a judge to report as at present as to whether the complaint is established and (if the complaint warrants it) the appropriate disciplinary action that should be taken.
6. After the report is received, the Lord Chief Justice should make a provisional decision as to whether to accept the report. The judge who is to be the subject of the proposed disciplinary action should have the right to ask for the provisional decision to be reconsidered by way of a review. As in paragraph 4, the Secretary of State and the complainant should also be informed of the decision and the Secretary of State and the Ombudsman should have the right to seek a review.

REVIEW

7. The Lord Chief Justice would, on the request for a review, appoint at least two judges and a member of the lay judiciary to review the earlier decision. One of the judges should be an equal office-holder to the judge seeking the review; the

other judge shall be a more senior judge. The recommendations of the reviewing judges should be final and implemented by the Lord Chief Justice. Where action other than dismissal is called for (for example, a reprimand) the Lord Chief Justice should be responsible for ensuring that the necessary action is taken. Requests for a review will have to be made within a prescribed period.

8. The introduction of an appeal is a desirable innovation to protect a judge from an erroneous adverse decision.

DISMISSAL

9. If the Lord Chief Justice reaches a final decision to seek the dismissal of a member of the Higher Judiciary this requires a two-thirds majority in both Houses of Parliament under the Bill of Rights 1689. In such cases, the Secretary of State, who would have the conduct of the impeachment proceedings, should have a discretion not to initiate such proceedings if he does not consider it right to do so. If the Secretary of State is to be given this discretion, it might be thought right that he or she should also be given a discretion to veto the dismissal of a less senior judge.
10. The role of the Ombudsman will be to keep under review and report on the disciplinary proceedings so as to ensure that investigations are carried out thoroughly and fairly. It will not be his role to question the correctness of a decision unless he is satisfied no proper investigation has been made. He will have, on behalf of a complainant, a discretion to seek a review if he considers the complainant's request for a review is reasonable. He may also seek a review if he is of the opinion that a review is desirable because there has been no proper investigation.
11. The Ombudsman should make an annual report to the Constitutional Affairs Select Committee on the handling of complaints and discipline.
12. It is suggested that the Secretary of State should have the right to seek a review because of his responsibilities to Parliament in relation to the administration of justice. If this is considered unnecessary in view of the involvement of the Ombudsman, then so be it.

