

established pursuant to the *Financial Services Act 1986* and the *Banking Act 1987* is not fundamentally flawed. Most problems flow from the regulations and the interpretations put on them. If the Chancellor wishes to make financial regulation work it would be better advised to focus on this, and tinker as necessary with the regulatory structure. Instead they are committed to a vainglorious restructuring of the regulatory bodies,

which at best risks matters getting worse before any improvement takes place due to near inevitable teething problems. This is not a message to which the Chancellor seems receptive.

'Take care, your worship,' said Sancho; 'those things...are not giants but windmills, and what seem to be their arms are the sails, which are whirled round in the wind and make the millstones turn.'

'It is quite clear,' replied Don Quixote, 'that you are not experienced in this matter of adventures. They are giants, and if you are afraid, go away and say your prayers, whilst I advance and engage them in fierce and unequal battle.' 

Andrew Haynes

Head of Institute of Finance Law, University of Wolverhampton.

Legal Education & Practice

Assessing the strengths and weakness of a Judicial Appointments Commission

by Dr Kate Malleson



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The role of the judiciary in public life has expanded significantly in recent years. This change has come about partly as a result of the growth in size of the judicial system and partly because of the increased activism of the judiciary through the development of judicial

review. One consequence of this development has been to raise the level of interest in the judicial appointment process. As the size and political influence of the judiciary has increased, so have the demands for changes in the way judges are appointed. This link between the expansion of the judicial role and moves to reform the appointment process is not unique to England; it has also arisen in Canada, Australia, New Zealand and South Africa.

The Human Rights Bill incorporating the European Convention on Human Rights into English law, which is currently going through Parliament, will take this process one stage further and, as Lord Irvine has acknowledged, will significantly increase the power of the judges (interviewed in *New Statesman*, 6 December 1996). The pressure for reform is therefore very likely to grow after incorporation.

Before reviewing the possible effects which changes to the appointment process might have on the judiciary, it is worth examining more carefully the nature of the present system and the concerns which it has generated, in order to assess exactly what any reforms are intended to achieve. There are two aspects to the criticisms of the present system:

- the procedural failings of the system in terms of accountability, judicial independence and openness; and
- its failings in terms of the type of judge appointed.

THE APPOINTMENTS PROCESS

The Lord Chief Justice, Lord Bingham, argued in 1996 that the key to a successful appointment process lies in:

'... an assumption shared by appointer, appointee and the public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality.' (*Judicial Independence*, speech to the Judicial Studies Board, 5 November 1996, p. 5)

According to Lord Bingham, the principle of impartiality, though not synonymous with independence, is its 'close blood tie' and therefore lies at the heart of a good appointment process. Thus judicial independence and, crucially, public and judicial confidence in its existence, is a central concern. The principle of judicial independence demands that judges should be free from outside interference in their decision-making, in particular, from those in government. To avoid this danger it is often said that the judges should not owe their office to the executive. On the face of it, therefore, the current arrangements whereby the Lord Chancellor and, in the case of the senior judges, the Prime Minister, have control of the appointment process, risks contravening the principle of judicial independence.

The Home Affairs Select Committee which reviewed the appointment process in 1996 considered this problem in some detail. The concern of those witnesses heard by the Committee, who criticised

REFORMS ELSEWHERE

In Canada and South Africa significant changes in appointments processes have been introduced in recent years (see M Fitz-James, 'Free expression and the Judges', *New Law Journal*, 30 April 1993 and S Kentridge, 'Parliamentary Supremacy and the Judiciary under a Bill of Rights: Some Lessons from the Commonwealth' *Public Law*, Spring 1997).

In New Zealand and Australia the systems remain largely unchanged but there have been growing calls for structural reforms. See the speech of the New Zealand Attorney General, P East, to the New Zealand Bar Association, March 1995, p. 2.

this aspect of the system, was one of theory rather than practice. There was no suggestion that any Lord Chancellor in recent years had exercised his powers improperly and there was general praise, in particular, for the quality of appointments made by Lord Mackay when Lord Chancellor. Similarly, the Lord Chief Justice, Lord Bingham, has recently argued that there is virtually no evidence of appointments since 1945 made otherwise than on the basis of merit (*Judicial Independence*, p. 5). Nevertheless, it has been widely argued that the potential for the erosion of judicial independence exists under the current system, and that the growing power of the judiciary is increasing this risk:

'If courts are going to wade or be pulled into politically controversial areas, pressure will undoubtedly build to secure judges with 'acceptable' views, the definition of 'acceptable' varying widely, naturally, among MPs and various interest groups.'
(J Waltman, 'Judicial Activism in England' in *Judicial Activism in Comparative Perspective*, ed. K Holland (1991), p. 46)

Thus one reason for reforming the appointments process is to ensure that as the role of the judiciary expands, the tradition of judicial independence is not undermined.

At the same time as reinforcing judicial independence, any change must strengthen the degree of accountability in the appointments process. Although, theoretically, Parliament is entitled to scrutinise the appointments made by the Lord Chancellor, in practice, as Lord Mackay confirmed to the Home Affairs Select Committee, it does not do so for fear of impinging on judicial independence. Concern over the absence of such scrutiny is linked to criticism of the lack of openness in the process, both in relation to the extent of information provided to applicants for judicial posts and to the general public.

In response to these concerns, Lord Mackay instituted a number of reforms to the appointments system during his time as Lord Chancellor. Since 1986 advertisements, job descriptions and appointment criteria have gradually been introduced for all but the most senior judicial posts. The appointment of Assistant Recorders, Recorders and Circuit Judges now involves a formal interview before a panel made up of a

judge, a member of the Lord Chancellor's department and a lay person. These reforms have been built on by Lord Irvine. The number of lay interviewers has been increased to 50 and the role of the panels has been extended to allow them to participate in assessing the applications before interview.

These changes have received widespread support. Nevertheless, strong criticism remains about the system of consultations, whereby the views of senior members of the bench and bar are sought on the suitability of a candidate (see, for example, JUSTICE (1992), *The Judiciary in England and Wales*, p. 12). This process has been described as recalling the days of the 'rotten boroughs' (C Harlow, 'Refurbishing the Judicial Service', in *Public Law and Politics*, ed. C Harlow (1996), p. 191), the main concerns being that it is unstructured, disproportionately favours advocates, and relies on hearsay and impressionistic opinions, with the result that it encourages a self-perpetuating culture which hinders capable people from non-traditional backgrounds from reaching the bench.

TYPE OF JUDGE APPOINTED

There are two aspects to the question of what type of judges are appointed – their competence and their representativeness. The former has attracted less attention, as there is a widespread consensus that the standards of competence are generally high, particularly among senior judges. The Home Affairs Select Committee heard evidence from Lord Mackay, then Lord Chancellor, that he believed that the judges were of a high calibre and that he received 'very very little in the way of complaint about the appointment of particular judges' (Home Affairs Select Committee, *Judicial Appointments Procedures*, Session 1995–96, vol.1, p. vi, para. 5). The organisation JUSTICE similarly expressed general satisfaction with the competence of the bench in evidence to the Home Affairs Select Committee.

In contrast to these expressions of satisfaction, the background of the judges continues to be the subject of extensive criticism. The fact that the bench is still dominated by white male barristers aged over 50 years, who have been privately

educated and are graduates of Oxford or Cambridge, has repeatedly attracted attention. Although solicitors are now eligible for appointment to all levels of the judiciary it remains strongly advocacy based. Barristers with 'paper' practices as well as solicitors are currently significantly under-represented on the bench. Moreover there is still weighting in favour of those barristers with criminal experience and with generalist practices. In 1991 a leading solicitor, Geoffrey Bindman, went so far as to suggest that the current under-representation of women and black people being appointed judges might amount to a breach of the Race Relations Act and Sex Discrimination Act, which both prohibit unintended indirect discrimination.

USE OF AN APPOINTMENTS COMMISSION

Against this background, any changes must seek to ensure that the competence of the judiciary is maintained at the same time as the judges' backgrounds are widened and the appointment process is made more open and accountable, while also upholding judicial independence.

Since there is very little support for the introduction of popular elections for choosing judges, as in some US states, or a specially trained judiciary, as in many continental European countries, or appointment by the legislature, the only structural reform which is likely is the adoption of some form of commission. The proposal for the establishment of a judicial appointments commission was set out as Labour Party policy in 1995 and now has widespread support outside the judiciary (The Labour Party, *Access to Justice* (1995) p. 13. See also *The Judiciary in England and Wales*, p. 5). The Lord Chancellor, Lord Irvine, recently reviewed the possibility of establishing a commission. In October 1997, he announced that the pressure of other work on the department made such a change impracticable at the present time, although he stated that he had not ruled it out for the future. Although there is a growing interest in the establishment of a commission, this form of appointment system is something of an unknown quantity in England and Wales, and there is very little knowledge about what effects a commission might have. It is therefore useful to consider the experience of other countries where such a system is used. A useful source of information comes from

North America where commissions are a common method of appointment.

Use of commissions in the US and Canada

Commissions do not generally constitute a free-standing appointments system. It is rare for a commission to make the final appointment of the judges itself; more commonly, it recommends a list of appointees to the executive which then makes the appointment. (An example of a commission which appoints directly is Israel where judges are appointed by a committee of nine – made up of three judges, two lawyers, two members of parliament and two ministers.) Some commissions play a more limited advisory role. Their function is to vet those candidates whom the executive provides rather than to recruit or select candidates themselves (the Canadian and US committees and commissions at the federal level are advisory). In general, the more proactive

greater openness and wider participation, within the context of an existing executive appointment system.

One of the most informative Canadian committees is the Ontario Judicial Appointments Advisory Committee (JAAC). The Ontario system is now established as the one which Canadian commentators cite as the most successful example of the use of a committee in Canada, and is increasingly a model for other provinces. Despite being called an advisory committee it is a full commission, as it is the Committee which advertises vacancies, conducts interviews and sends a shortlist of candidates to the Attorney General for appointment.

EFFECTS OF THE COMMISSIONS

Gauging the likely effects of a commission on the basis of evidence of the US and Canadian experience is not an easy task since, as one US commentator put it:

‘... the debate over judicial appointment is so filled with value judgements and unsupported claims that it is hard to identify what is known from what is not.’ (A Champagne and J Haydel, *Judicial Reform in the US* (1993), p. 14, University Press of America, New York)

Nevertheless, some general conclusions can be reached.

Appointments process under a commission

Most North American commissions produce annual reports and actively seek to inform the public about their work and to respond openly to public enquiries. However, commissions do not generally operate on the basis of total openness. In the US, most commissions have confidentiality provisions, covering communications between the commissioners and third parties such as referees and other members of the bar and bench. In Ontario, the JAAC carries out so-called ‘discrete inquiries’ of senior members of the bench and bar, equivalent to the consultation process in England and Wales. Although the JAAC has expressed its concern about the lack of openness of this aspect of the process, it has concluded that the system needs to be retained, because much valuable information is obtained through this channel (Judicial Appointments Advisory Committee, *Final Report and Recommendations* (1992), p. 15, Ontario).

In this respect, therefore, the commission system does not provide an absolute solution to the secrecy surrounding the consultation process.

A stronger claim, which can be made by supporters of commissions, is that they encourage judicial independence by removing the executive from the recruitment and assessment process. In both the US and Canada the degree of political involvement in the judicial appointments process is considered to be lower at state than federal level and commissions are widely felt to be responsible for this difference. However, in some US states, particularly those in which the judges were directly elected in the past, criticisms have been expressed that the open politics of the ballot have simply been replaced by the closed manipulations of commission members. It has also been claimed that some Governors have used their powers of appointing commission members to ensure that it contains a majority of their political supporters. Such criticisms are less often heard in states where the level of political activity in the appointment process was low before the introduction of the commissions, and in Canada there is a far wider consensus that the committees, particularly at province level, have strengthened judicial independence.

Accountability

Similar problems arise in assessing the effect of commissions in terms of accountability. Criticisms have been expressed in both the US and Canada about the reduction of constitutional accountability which the move to a commission involves. Where once judges were directly elected or chosen by an elected and accountable politician, the creation of a commission is said to remove the appointments process one step further from the electorate, since lay members of commissions are usually appointed by the executive and lawyer members by their legal professional bodies. Similar concerns have been expressed in England and Wales. Lord Mackay argued against changing the appointments system before the Home Affairs Select Committee on the grounds that the present arrangements secured accountability because the Lord Chancellor was personally answerable to Parliament for the appointments made. However, since this accountability is as we have seen, more theoretical than real,

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type of commission is more common at state and provincial level but across the US and Canada there is a wide range of different models with different membership, powers and functions.

In the US since 1940, 33 states and the district of Columbia have created some form of commission and many of the remaining states seem likely to follow this pattern. In Canada, appointment commissions (more usually called committees) have only been widely used since the 1980s, which means that there is less data on their effects. However, the experience of Canada is a useful one, because its appointment system before the introduction of committees was very similar to that of England and Wales. Unlike the US, it has no history of appointment by election and has adopted committees in an attempt to provide

this disadvantage may be minimal in practice. Moreover, since the final appointment remains in the hands of the executive, it can be said that the chain of accountability is not, in fact, broken by the creation of a commission.

Type of judges appointed

Supporters of commissions argue strongly that they produce a more competent judge whereas their critics argue that they reduce the calibre of the bench. In the US the empirical evidence suggests that neither claim is well-founded. The conclusion reached by many observers is that the type of appointment process used makes very little difference to the quality of the judges appointed:

'There is no evidence to support the proposition that any one of these systems produces a "better judge" than do the others. Academic background and prior judicial experience tend to be approximately the same for judges selected under each system.' (M Volcansek and J Lafon, *Judicial Appointment: The Cross-Evaluation of French and American Practices* (1988), p. 139, Greenwood Press, New York)

PUBLIC CONFIDENCE

In one important respect, the use of a commission can be said to be a clear improvement on other methods of appointment. Public confidence in the use of commissions in the US and Canada is generally very high. This is evidenced by the fact that every state or province that has changed its appointment system has moved to a commission and none that has adopted a commission has abandoned it. Where commissions are used the appointments process appears to attract less criticism than either an elected system or exclusive appointment by the executive.

There is similarly no clear consensus among commentators in the US as to the effect of the commissions in terms of the representativeness of the bench. Some suggest that the selection method has no effect (P Webster, 'Selection and Retention of Judges: Is there one 'best' method?', *Florida State University Law Review* (1995)); some conclude that women and minority groups do better under a system of exclusive executive

appointment, and some suggest that commissions provide a better representative balance (American Judicature Society, *Merit Selection: The Best Way to Choose The Best Judges* (1995) Chicago).

In Ontario, however, there is stronger evidence to support the claim that the use of a commission can affect the make-up of the bench. At the time the JAAC was established in 1989, women made up a very small minority of the bench, equivalent to the current position in England and Wales. Between 1989 and 1995, the proportion of women judges appointed rose to 40%. During the same period there was some, though less, of an increase in the numbers of judges from ethnic minorities (Judicial Appointments Advisory Committee, *Annual Report 1994-95*, 1995, Ontario). An important factor in the success in increasing the numbers of women judges in Ontario was the approach of the commissioners and the Attorney General at the time, which resulted in a concerted effort to recruit women to the bench. In 1990, for example, the committee undertook an 'outreach' programme whereby it contacted associations representing women lawyers asking them to encourage outstanding lawyers within their association to consider applying to the bench. At the same time the Attorney General also wrote to 1,200 eligible women lawyers similarly asking them to consider applying. These positive efforts greatly increased the numbers of eligible women candidates.

These findings suggest that commissions per se do not inherently improve the quality of the appointment process, or the type of judge appointed, but that their creation can provide the necessary change in institutional culture to bring about a greater degree of openness and the active recruitment of under-represented groups.

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SUMMARY

The task of reforming the appointments system is a daunting one. Any changes must reconcile a number of different and potential conflicting requirements. In the past the judiciary was required to be professionally highly competent and strongly independent. Today, in addition to these attributes, it must be more representative and more accountable. These are demanding aims, but also ones which, if achieved, will produce a judiciary which can command public confidence. Such confidence is arguably a prerequisite for a body which affects the lives of more individuals than ever and will increasingly decide public policy matters of the greatest social importance.

As the judiciary grows in size and influence, the pressure for the introduction of a judicial appointments commission is likely to grow. The use of a commission is not a panacea nor will it transform the judiciary overnight. This will reassure the judges and dismay those with more radical visions. In its favour, a commission may provide a means to draw a broader range of candidates into the appointment process and has the potential to operate more open procedures. The fact that commissions appear to command general public support is also an increasingly important variable. As the judiciary is drawn into more controversial political areas, it will inevitably face greater public criticism, and the introduction of a reform that will strengthen public support should not be dismissed lightly by the judges. 

Dr Kate Malleson

Department of Law, London School of Economics.