

THE SOCIETY OF CONSERVATIVE LAWYERS

**CONSTITUTIONAL UPHEAVAL**

THE RESPONSE OF A WORKING PARTY TO  
THE GOVERNMENT'S CONSULTATION PAPERS

ON

A NEW WAY OF APPOINTING JUDGES,

A SUPREME COURT FOR THE UNITED

KINGDOM, AND

THE FUTURE OF QUEENS' COUNSEL

NOVEMBER 2003

FOREWORD BY EDWARD GARNIER QC MP

## **The Society of Conservative Lawyers**

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Its aims and objectives are to:

- Support the Conservative and Unionist Party
- Uphold the principle of justice and democracy
- Consider and promote reforms in the law
- Act as a centre for discussion of Conservative ideas
- Provide speakers and assist in finding candidates
- Promote and assist in the publication of literature

This paper has been produced by a working party of the Society under the Chairmanship of Jonathan Hirst QC. It represents the views of the working party.

### **Contributors**

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## **FOREWORD**

It gives me great pleasure to welcome, and to give my support to, this paper written by Jonathan Hirst, Anthony Speight, Oliver Sells and Nicholas Vineall in response to the Government's Consultation Documents on judicial appointments, the final court of appeal and silks. Combining their respective experiences and expertise as barristers in different areas of the law they make a coherent and effective case having considered the issues thrown up by the Consultation Documents and the evidence relevant to them - which, if I may respectfully say so, is rather more than the Government did when they announced the abolition of the office of Lord Chancellor this summer.

From the Prime Minister's ill-considered cabinet reshuffle flowed further government proposals to make fundamental changes to the judicial system which will have profound constitutional implications for the country and its citizens.

In the House of Commons nowadays discussions about this aspect of public policy excite little interest and arguments in favour of justice, an independent judiciary and legal profession are frequently described as the pleas of a vested interest or, less politely, as lawyers' whinging. But these are big and important issues.

The arguments against the Government's proposals need to be well argued, and in this paper they are, but they also need to be taken seriously by the Government before our courts and justice system, which have protected the rights and liberties of the citizen against the over-mighty executive for decades, are irreparably damaged. There is a feeling amongst those who think about these issues that the expression "Government Consultation" is but a cruel oxymoron. The writers of this paper have, however, taken the Government seriously and at their word. The views they express, although their own, are, I am sure, likely to be shared by many lawyers and non-lawyers, Conservatives and non-Conservatives.

I commend this paper and all that it says to all who have an interest in the liberty of the subject and justice under the law.

**Edward Garnier QC MP**

**Chairman of the Executive Committee, Society of Conservative Lawyers**

**Shadow Attorney General 1999-2001**

# SOCIETY OF CONSERVATIVE LAWYERS

## CONSTITUTIONAL UPHEAVAL

### Part 1: INTRODUCTION

1. The three Consultation Papers in Constitutional Reform<sup>1</sup> issued by the Department for Constitutional Affairs raise issues of profound importance for the constitution of this country. They were preceded by a unilateral attempt to abolish instantly the office of Lord Chancellor by appointing Lord Falconer of Thoroton as Secretary of State for Constitutional Affairs. This proved a step too far for the Prime Minister when it was discovered that he had no power simply to abolish that ancient office. So, like it or not, Lord Falconer is Lord Chancellor and may remain so for some time pending the passing of legislation to abolish the office.
2. Why is this reform necessary, save on the basis that for New Labour change is worth making just for change's sake? Will the proposed changes really improve justice? Are the changes worth the substantial extra costs and bureaucracy that will inevitably occur? If there is to be radical change, are the changes proposed by the Government the right ones? Is the proposed abolition of the rank of Queen's Counsel really in the national interest?

### The strengths of the current system

#### The system of appointment

3. Judges below the Court of Appeal are appointed by the Queen on the recommendation of the Lord Chancellor. For the Court of Appeal and above and for the senior office holders<sup>2</sup>, appointments are by the Queen on the recommendation of the Prime Minister in consultation with the Lord Chancellor. They are chosen on merit.
4. Under the last three Lord Chancellors<sup>3</sup> (Lords Hailsham, Mackay of Clashfern and Irvine of Lairg) the appointments to the bench have been of high quality. There have

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<sup>1</sup> "a new way of appointing judges", "a Supreme Court for the United Kingdom" and "the future of Queen's Counsel." – *sic* the new Department eschews capital letters.

<sup>2</sup> Lord Chief Justice, Master of the Rolls, Vice-Chancellor and President of the Family Division.

<sup>3</sup> We omit Michael Havers only because his stewardship of the office was cut short very early by illness.

not been complaints that appointments have been affected by party politics and the reality is that the current Bench represents at all levels a wide political cross-section of the degree that would be found in most professions. It also represents a wider social background than is often acknowledged. Inevitably the top judges are likely to have been to top universities; it by no means follows that they were born to wealthy parents. The last complaint of political interference, of which we are aware, was under the final Wilson Government when the then Mr Justice Donaldson was plainly held back from deserved promotion to the Court of Appeal because he had been the Judge of National Industrial Relations Court, much resented by the Unions and Labour. That injustice was put right under the next Conservative administration.

5. The Lord Chancellor, although not a member of the House of Commons, is to a real degree answerable to Parliament if his appointments<sup>4</sup> are to be criticised. So, of course, is the Prime Minister<sup>5</sup>. In most cases, the Prime Minister must rely heavily on what the Lord Chancellor advises.
6. In the USA, perhaps the country with the strongest tradition of the separation of powers, the federal judges, including the Supreme Court, are appointed by the President, subject to the approval by the Senate<sup>6</sup>.
7. The Lord Chancellor, as a distinguished practising lawyer, has real personal knowledge, and an ability to judge the qualities, of the candidates for higher judicial office. Although a member of the cabinet, he is also the head of the judiciary. Successive Lord Chancellors have managed to distinguish between their political roles (some greater than others) and their judicial roles.
8. Whatever other criticisms may be levelled at him, Lord Irvine took immense trouble to consult widely in the appointment of Recorders<sup>7</sup> and Circuit/High Court Judges. These consultations have been derided by some as “secret soundings”, but it is difficult to see how any appointer can get reliable references, except on a confidential basis. Any shortage of female, solicitor and ethnic minority judges is not due to any lack of commitment by the Lord Chancellor or his Department to make such appointments when appropriate. The reality (as far as female and ethnic minorities are concerned) is that too few have risen to the top of the practising profession (yet). It takes probably 25

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<sup>4</sup> Strictly the appointments to the High Court are by the Queen on the advice of the Lord Chancellor but the reality is that the Lord Chancellor makes the appointments.

<sup>5</sup> Famously the office of Master of the Rolls became vacant when Margaret Thatcher was PM. She wanted to appoint Donaldson; Hailsham did not agree. She asked Hailsham to remind her whose appointment it was, and on being told it was hers, she chose Donaldson.

<sup>6</sup> Where the confirmation hearings at least for the Supreme Court are often not very edifying.

<sup>7</sup> Part time judges doing c.4 weeks a year. To be eligible for full time office as a Circuit or High Court Judge a candidate has to have sat as a Recorder.

years to do so. The position is changing and will accelerate, because the intake of women and ethnic minorities into the legal profession has grown exponentially.

9. Most important of all, our senior judges are of very high quality. They are fiercely independent; they are honest (not a boast that can be made in all jurisdictions). This is widely recognised, worldwide, as the Consultation Paper recognises<sup>8</sup>. The Lord Chancellor has himself described them as “excellent”. Any reduction of quality, in order to achieve other ends, would be very damaging. Being a senior judge is a very public job. It becomes very apparent to the profession and to the media if a judge is not up to it.
10. So, the starting point with any proposed reform of the judicial appointments system must be this: will it be a substantial improvement on the current system? Given the creation of a new bureaucracy and the inevitable costs and delays associated with it, will all be worthwhile? Unless the answers to these questions are clearly in the affirmative, there is much to be said for retaining the current system, which has served the country well.

#### **The House of Lords as the highest Court**

11. The highest Court in the United Kingdom is the Judicial Committee of the House of Lords, which sits normally in two chambers on the House of Lords’ corridor in the Palace of Westminster. The judicial members of the appellate committee are peers in their own right entitled to speak and vote in debates in the House of Lords.
12. The driving force behind the creation of a Supreme Court is a purist approach to a separation of powers. Judges, it is said, should be entirely separate from the legislature and the executive, and be seen to be so; it is anomalous that the highest court of appeal is situated within one of the chambers of Parliament<sup>9</sup>. Yet the British constitution is not purist. It has developed incrementally in an intensely practical fashion.
13. It would be obviously unacceptable if judges became involved in party politics, and they have not done so. However, the ability of senior judges to represent the views of the judges – most recently Lord Woolf CJ on the latest Criminal Justice Bill – to the Upper Chamber is valuable. All the more so when some Ministers adopt an increasingly antagonistic (and often unfair) attitude to the justice system.

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<sup>8</sup> §30.  
<sup>9</sup> §2

14. Equally it is no bad thing for the senior judiciary to have some exposure to party political opinion. They do so by being members of the House of Lords and because they are physically based in Parliament.
15. The current system represents very good value for money for the taxpayer. The House of Lords, unlike most other Supreme Courts, costs little more than the Judge's salaries (which are modest by comparison to the earnings of those at the top of the Bar and the Solicitors' profession). There is little administrative back up. The Judges do not have assistants<sup>10</sup> or advocates general and référendaires<sup>11</sup>. So there is no cost of a separate building, let alone a separate secretariat. Perhaps above all, the House of Lords judges write their own judgments, so they truly reflect their own reasoning and conclusions, as opposed to their assistants'. A Supreme Court will be much more expensive. A senior Law Lord<sup>12</sup> is already calling for the Government "to ensure that the new court will be able to discharge its functions effectively". First there has to be a "dignified building, fit for a co-ordinate branch of government". Then there must be "sufficient resources for the Supreme Court". This may be justified, but it sounds expensive. That expense will not produce much benefit, tangible or intangible, in attracting business from abroad. By contrast, a new Commercial Court, a project strongly demanded by the City of London, would bring real commercial benefit to the country.
16. The quality of the judgments of a Supreme Court will not be better than those delivered by the current House of Lords' Judicial Committee. They may be worse if a new appointments system substitutes political correctness for merit as the basis for appointment.
17. So again the starting point with the proposed creation of a Supreme Court must be this: will it be a substantial improvement on the current system? Given the cost of providing new premises and the creation of a new bureaucracy, will it all be worthwhile? Given the other demands in the legal field on a limited budget, for instance for a new Commercial Court, is this the best use of those resources? Unless the answers to these questions are clearly in the affirmative, there is much to be said for retaining the Judicial Committee of the House of Lords as our highest court.

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<sup>10</sup> of the US Supreme Court where each Justice has many assistants.

<sup>11</sup> as in the European Court of Justice. The Advocate General always writes the first judgment. The court produces its judgment later; it is not bound by the A-G's judgment but it usually follows it. The judgments of the Judges of the ECJ are frequently not of high quality; many are too dependent on their référendaires to write the judgment.

<sup>12</sup> Lord Steyn in *Counsel Magazine*: October 2003.

### **The abolition of Queen's Counsel**

18. This proposed change is of less constitutional significance than the others. It is nevertheless of importance to the profession and to those who use its services. The Government says that the burden is on those who seek to maintain the current system to justify it. That is an arrogant and unacceptable position. In most Commonwealth countries there exists a rank of senior counsel. It is a system that is widely respected especially abroad – an important consideration given the increasing international competition in the supply of legal services. It must be for those who seek to abolish the *status quo* to justify the change.

### **The approach in this paper**

19. Adopting the general approach we have set out above, we ask whether the changes proposed by the Government meet the criteria and, in particular whether they will result in a substantial improvement. If there is to be reform, we suggest how this might be better achieved.



## Part 2: CONSTITUTIONAL REFORM

20. The government's justification for its planned constitutional upheaval is "modernisation":-

*This is part of its continuing drive to modernise the constitution and public services ....*<sup>13</sup>

The announcement continues:-

*The intention is that the new [Supreme] Court will put the relationship between the executive, the legislature and the judiciary on a modern footing ....*<sup>14</sup>

21. Modernisation is a mantra often used by this government as a justification for initiatives of varying kinds. For instance, a consultation paper entitled Modernising the Civil Courts issued in 2001 combined proposals for spending £43m on information technology - which were correctly described as modernisation, even if the £43m was withdrawn before it had been spent - with plans to close many county court hearing centres - where the word "modernisation" was an abuse of language.
22. The true *leitmotif* of the constitutional proposals is the separation of powers. Thus, the highest court is to cease to bear the name of a part of the legislature, and the judges of the highest court are to cease to be members of the legislature. The post of Lord Chancellor, who has had a role in all three branches of government, is to disappear. Finally, the government seriously questions whether the executive should identify the leading members of the legal profession by conferring the rank of QC.
23. The theory of separation of powers has a distinguished history. But one thing which cannot be said of it is that it is new. It originated with Baron Charles-Louis Montesquieu's "*Esprit des Lois*" published in 1748. Montesquieu advocated separating the executive, legislative and judicial powers. This heavily influenced the founding fathers of the United States of America, leading to the rigid separation manifested by the fact that neither the President nor the cabinet ministers sit in Congress. Montesquieu has also had an influence in some continental European countries. In Britain, on the other hand, the notion of a rigid separation of powers, despite debate over the years, has not until now been considered to be an improvement on our own checks and balances.

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<sup>13</sup> "Constitutional reform: a Supreme Court for the United Kingdom" para 1

<sup>14</sup> "Constitutional reform: a Supreme Court for the United Kingdom" para 1

24. One wonders, therefore, what new circumstances have led the government to turn to an 18<sup>th</sup> century doctrine for its 21<sup>st</sup> century policy.

25. That something very recent has caused the government to change its mind is surely evident from a comparison between the new policy and statements in the recent past. The Labour Manifesto of 2001 was silent on these matters. In the House of Commons on 4 December 2001 the Parliamentary Secretary to the Lord Chancellor's Department, Mr Michael Wills MP announced:-

*As we made clear in our White Paper on reform of the House of Lords, published last month, the Government have no plans to alter the current arrangements under which the Law Lords are members of the House of Lords<sup>15</sup>*

26. Urged by a questioner to consider the merits of a Supreme Court clearly separate from the legislature, the Minister replied:-

*We have considered those questions exhaustively and extremely carefully, and we are content with the proposals that we have made; otherwise, we would not have made them.*

*The hon. Gentleman rightly refers to the separation of powers. That is important, which is why we have that arrangement in this country, and we are keeping it because we believe that it works.*

27. The Minister offered an equally robust defence of the position of the Lord Chancellor:-

*... the office is unusual in the way that it combines different roles, but it is also unusually helpful, because through it the judiciary has a representative in the Cabinet and the Cabinet also has a representative in the judiciary*

28. So one is entitled to ask: what is the justification for the sudden change? There is a half-hearted attempt to rely on calls from other people, of whom two are mentioned<sup>16</sup>.

29. The first is the present Senior Law Lord, Lord Bingham of Cornhill. However, we cannot trace Lord Bingham having made any public call for the radical changes which the Government propose. Rather the contrary. Lord Bingham gave evidence to the Wakeham Royal Commission on Reform of the House of Lords expressly urging that the Law Lords should continue to have ex officio membership of any reformed upper house. The Royal Commission broadly accepted that approach, suggesting only that the Law Lords should publish a statement setting out the bases on which they would

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<sup>15</sup> Hansard House of Commons 4<sup>th</sup> December 2001, col 153

<sup>16</sup> "Constitutional reform: a Supreme Court for the United Kingdom" para 1

decide when to speak, and when they would consider any of their number ineligible to sit on an appeal. On 22 June 2000, speaking on behalf of all the Law Lords, Lord Bingham made just such a statement. The Government itself interpreted this statement as showing how an adequate separation of powers was attainable under the present structures<sup>17</sup>.

30. The other voice cited in the consultation paper is that of the present Chairman of the Bar in an article in "The Times". We would welcome any sign of genuine respect for the views of the practising legal profession. But when one notes the Government's disregard for the Bar Council's views on retaining the rank of QC, on the level of public funding for legal aid, on jury trial, on double jeopardy, and on almost every other legal issue of the day, it is hard to suppress the suspicion that this may be little more than a case of casting around for somebody who has happened to advocate the same policy.
31. The only real explanation of new circumstances to be found in the consultation papers is the European Convention of Human Rights:-

*The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now require a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.*

The relevant wording of article 6(1) of the Convention is:

*... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal...*

32. The principle enshrined in this article is one which has been fundamental to English law for centuries. The principle "*Nemo iudex in causa sua*" can be traced from canon law, through English ecclesiastical courts<sup>18</sup>, through the writings of Bracton<sup>19</sup>, through Coke<sup>20</sup>, through Lord Hewart CJ<sup>21</sup> to a major House of Lords decision in 1993<sup>22</sup>. This is not some new principle which entered our law for the first time with the Human Rights Act 1998. If the Judicial Committee of the House of Lords and the position of the Lord Chancellor flout this fundamental principle one may enquire why this has never been noticed previously.
33. The short answer is that there is a real distinction between:

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<sup>17</sup> House of Commons Hansard 4 December 2001 col 155

<sup>18</sup> F W Maitland "Roman Canon Law in the Church of England" (1898) 114

<sup>19</sup> See De Smith, Woolf and Jowell "Judicial Review of Administrative Action" (1995) 5<sup>th</sup> ed. 522

<sup>20</sup> *Dr Bonham's case* (1610) 8 Co Rep 113b,118.

<sup>21</sup> "... Justice should not only be done, but should manifestly and undoubtedly be seen to be done" : *R v Sussex JJ ex p McCarthy* [1924] 1 KB 256, 259

<sup>22</sup> *R v Gough* [1993] AC 646

- (1) The principle that there should be an independent and impartial tribunal
- (2) The principle that there ought to be a separation between the three powers of executive, legislative and judiciary.

34. Principle (1) is long established in English law. Principle (2) is the Montesquieu theory, which has never been any part of the British constitution.

35. There can be occasions when something would infringe both principles. This would occur if the Lord Chancellor were to sit on an appeal in the House of Lords to which the government of the day was a party. But there is no occasion in recent times when this has occurred: every Lord Chancellor for many years has made it clear that he would not sit on such a case. Outside of that scenario things which infringe principle (2), such as the Judicial Committee, do not infringe principle (1).

36. This distinction was recognised by the great theorist of the British constitution, A V Dicey. He wrote of the French notion of "*separation des pouvoirs*":

*It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the "independence of the judges", or the like expressions. As interpreted by French history, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts.*<sup>23</sup>

37. The consultation papers rightly stop short of suggesting that there have been recent developments in the jurisprudence of the European Court of Human Rights which would compel the United Kingdom to alter its constitution. The recent case which has led some observers to claim that the UK could not maintain the Judicial Committee or the position of Lord Chancellor is *McGonnell v United Kingdom*<sup>24</sup>. *McGonnell* concerned a challenge to a planning decision in Guernsey. The appeal was presided over by a Guernsey official known as the Bailiff, who had also presided over the passage of the island's development plan. The Court held that there had not been an independent hearing. But the Court expressly rejected any suggestion that the Convention required a member state to adopt a separation of powers in its constitution:-

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<sup>23</sup> "Introduction to the Study of the Law of the Constitution" A V Dicey (1885)

<sup>24</sup> Application 00028488/95, judgment 8 February 2000

47. *The [UK] Government recalled that the Convention does not require compliance with any particular doctrine of separation of powers.*

51. *The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with the question whether the Bailiff had the required "appearance" of independence, or the required "objective" impartiality.*

38. Therefore, there are no new circumstances to cause Britain to adopt an 18<sup>th</sup> century theory of separation of powers as a blueprint for a 21<sup>st</sup> century constitution. It is, quite simply, false for the consultation papers to say that the Human Rights Act "requires a stricter view" to be taken towards independence or impartiality. It is hard to imagine a firmer or more determined line being taken by a supreme court anywhere in the world than that taken by the House of Lords in respect of Lord Hoffmann's failure to declare his Amnesty involvement – yet the decision to hold a re-hearing of the *Pinochet* case was taken in January 1999<sup>25</sup>, that is before the Human Rights Act was in force.
39. There are, moreover, powerful reasons why in modern circumstances the existing British arrangements should be maintained. A feature of many contemporary societies is loss of public confidence in the courts and the politicisation of the judiciary. In France, there is a degree of public cynicism at the uneven treatment of public officials arraigned on charges of impropriety in public life. In Italy, one has the spectacle of the Prime Minister openly lambasting his judges as politically motivated. In the Republic of Ireland there have been complaints for years at party political influence on judicial appointments. Even in a country with so high a respect for its courts as the USA, there has been the jolt to public confidence caused by the appearance in the Florida election cases of the decision of every judge at every level, up to and including the US Supreme Courts, going according to political adherence.
40. Against such a gloomy canvass the British judiciary shines out as an unqualified success. Nobody believes, or even suggests, that judicial appointments at any level in Britain have been influenced by party political considerations. Not only are appointments to the higher levels of the judiciary of uniformly high quality, but they are also free of partisan bias. Lord Mackay of Clashfern promoted people of known left wing views; and Lord Irvine of Lairg promoted people of known conservative disposition. The world-wide reputation of the House of Lords as a judicial tribunal has never been higher. Its judgments are cited as persuasive authority internationally.

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<sup>25</sup> *R v Bow Street Magistrate ex p Pinochet* [1999] 2 WLR 272

41. The consultation papers themselves admit that there is not a shred of evidence of any of the supposed problems:-

*... no criticism is intended of the way in which the members of [the House of Lords] have discharged their functions. Nor have there been any accusations of actual bias in either the appointments to either body or their judgments arising from their membership of the legislature. The arrangements have served us well in the past<sup>26</sup>.*

Yet, in a striking *non sequitur*, the very next sentence reads:-

*Nonetheless, the Government has come to the conclusion that the present position is no longer sustainable.*

42. The constitutional upheaval, which the Government has so precipitately announced, will destroy two institutions of proven worth – the Judicial Committee and the Lord Chancellorship – of whose actual work there has not been a whiff of criticism, but which, on the contrary, stand at the head of a judicial system commanding unparalleled respect. The plan has nothing to do with any real contemporary requirement. It is born, instead, of the spurious glamour which is still held for members of the Labour Party by the outdated theories of long dead writers from very different cultures.

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<sup>26</sup> "Constitutional Reform: a Supreme Court for the United Kingdom" para 5

### Part 3: JUDICIAL APPOINTMENTS

43. The present system of judicial appointments is in substance, if not in form, apolitical. Judicial appointments in general command the respect of the legal profession and of society at large. Inevitably there is occasional debate within parts of the profession of individual appointments, and there is occasional ridicule (sometimes fair) in the media when a judge appears to be “out of touch”. But there is no recent instance where there has been criticism of a judicial appointment on the basis that it was politically motivated. Successive Lord Chancellors have made appointments from across the political spectrum and on merit. At High Court level and above the track record of appointing able candidates able to do an important job well has been good. There has been the odd disappointment where the candidate has not fulfilled the promise he/she seemed to show, but no appointments system is perfect. At Circuit Judge and District judge level there has been a huge improvement in quality in our professional lifetime, probably because the number of candidates now greatly exceeds the number of posts.
44. Since the only possible justification for abolishing the traditional role of the Lord Chancellor is to create a clearer separation of powers, it would be nonsensical to replace the present system of judicial appointments with a system in which there were greater political involvement or politicisation of the process, or with a system which failed to choose the most able candidate.
45. The sole criterion for judicial appointment should be merit, irrespective of gender, race, sexual orientation, religion or political affiliation. It is regrettable that there are not more women or ethnic minority judges, particularly in senior positions. But this is changing - for instance Dame Brenda Hale has just been appointed the first female Law Lord - and we think that the pace of change is likely to increase. Being a judge is a very public position – nothing could be more damaging to the cause of equal opportunities than the appointment of candidates who were perceived by the profession to have been appointed *because of* their gender or ethnicity, rather than solely on merit.
46. Whatever system is adopted should encourage applicants from the widest range of backgrounds: but no one should be given preferential treatment in an attempt to engineer a judiciary which meets preconceived notions of how “representative” the judiciary should be.
47. Accordingly there should be a judicial appointments system which satisfies the following criteria:
  - 47.1. it appoints judges solely and strictly on merit;
  - 47.2. it is free from political interference or political bias;
  - 47.3. it has the confidence of society at large and of the legal profession.

48. Merit has many aspects which combine in the ability to deal with cases justly and in accordance with the law, but chief amongst them are good judgment, legal expertise, authority, independence, and impartiality.

#### **MODEL FOR A JUDICIAL APPOINTMENTS COMMISSION (“JAC”)**

49. Beyond those pre-requisites, the critical questions are:
- 49.1. whether to have an appointing or recommending commission
  - 49.2. who should be commission members
  - 49.3. how should commission members be appointed
  - 49.4. to whom should the commission be responsible.
50. There is a difficulty which any new structure must meet which is that the task of the JAC will vary greatly between different types of appointment. Each year, there is a small number of very senior appointments, and a very large number of more junior appointments to be made<sup>27</sup>. The practicalities at play for the two extremes are very different.
51. We now deal with the four critical questions in turn.

#### **An appointing or a recommending commission?**

52. If the current system of appointments is to go, we strongly favour an appointing commission as the replacement.
53. We believe that the commission should appoint (in the sense of making recommendations directly to the Queen), not recommend since:
- 53.1. merely to recommend will leave the responsible minister (PM or Secretary of State of Constitutional Affairs) with at least as much scope for politically based judgments as the present system allows the Lord Chancellor, and without the countervailing constitutional “brake” of the Lord Chancellor being also a member of the judiciary;
  - 53.2. merely to recommend will downgrade the significance of the JAC and reduce its authority and legitimacy.
54. Our most serious area of disagreement with the Government’s proposals for the appointment of judges is that, under those proposals, the degree of political ministerial involvement in appointments would be *increased* rather than decreased. The suggested arrangements provide to the Secretary of State for Constitutional Affairs (at the least) a power of veto over all appointments; and at the highest level of

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<sup>27</sup> In 2001/02 there were 915 appointments, excluding lay magistrates. We doubt that there were more than 20 to the High Court and above.



appointment (to the “Supreme Court”) the suggested arrangements provide the Minister for Constitutional Affairs with a short-list of names amongst which to choose.

55. The consultation papers acknowledge that the Secretary of State for Constitutional Affairs will be “free[d] up to be a more normal Cabinet minister”<sup>28</sup>. “Normal” cabinet minister are political ministers with a clear party allegiance. Presumably the holder of that office need not have any legal qualification at all. The suggestion is made in the Consultation paper that there might be imposed on the Secretary of State for Constitutional Affairs a statutorily defined responsibility for protecting judicial independence. We do not believe that would overcome a perception that there was a serious risk of political bias.
56. This aspect of the Government’s proposed arrangements is wholly unsatisfactory. The whole premise of the government’s reforms is that it is unsatisfactory for the Lord Chancellor (with a “foot in all three camps”) to take ultimate responsibility for judicial appointments and judicial independence. It is a retrograde and irrational step to give those same responsibilities to a “more normal” Cabinet minister (with both feet firmly in one, political, camp).
57. There are two topical examples which show how critical it is that judicial appointments are, and are seen to be, free from political interference.
58. Lord Hutton is presently engaged on the final stages of an enquiry into the death of Dr Kelly. Much of his enquiry has focused on the actions of elected politicians. Lord Hutton was appointed as a Law Lord under the existing arrangements. There has been not the slightest suggestion from any quarter that he will be anything but truly independent. Under the Government’s proposed arrangements his appointment would have been made by a cabinet minister choosing between two suggested names. We do not believe that his independence would have been so widely recognized and accepted had he been appointed under a system where a “political” cabinet minister had had the right to veto his appointment, still less had such a minister chosen him from a short list of two.
59. A similar point arises in connection with the Bloody Sunday Enquiry chaired by Lord Saville. There has been a great deal of criticism of the length and cost of that enquiry, but we are aware of no criticism directed to the impartiality or independence of its Chairman, Lord Saville. Again, if it could have been said of Lord Saville that he had been appointed “by the Prime Minister” or “by the Secretary of State for Constitutional Affairs”, we believe that the perception of complete impartiality would have been severely compromised.
60. We are not impressed by the supposed constitutional difficulties with a directly appointing commission set out in the Consultation paper at paragraphs 37 to 41.

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<sup>28</sup> Paragraph 114 of the Consultation paper.

However, if they were thought to be insuperable, it would be possible to institute an arrangement which was formally one of recommendation by the JAC to the Prime Minister and thence to the Queen, but in which only one recommendation were made to the Prime Minister and, as matter of constitutional convention, he invariably repeated the same recommendation to the Queen.

### **Who should be members?**

61. We agree that a balance needs to be struck between judicial, legal (ie lawyers who are not judges) and non-legal members.
62. The government's proposal is for 5 judicial members, 5 lawyers, and 5 lay members. We believe that this proposal gives insufficient weight to judicial members.
63. We have noted with interest the European Charter on the Statute for Judges, adopted by the Council of Europe in July 1998. Paragraph 1.3 of the Charter says this:

*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.*

64. We agree. We think that judicial members of the JAC are critical to its success since they will be best placed to understand the demands of the posts to which appointments will be made, and best placed to decide those best able to meet those demands.
65. We agree too that lay members are important. They will be able to bring to the commission expertise and experience gained outside the legal world, and to reflect the interests of those whom the justice system is intended to serve. They need to be people of high calibre and real independence.
66. There is also a role for non-judicial legal members. We think that there should be representation for the solicitors' and barristers' professions, and a non-practising academic lawyer.
67. Our proposal is as follows  
seven judges, as follows:
  - the Lord Chief Justice, as President of the JAC
  - a Court of Appeal Judge as full-time Chairman
  - a "Supreme Court" Judge
  - 2 High Court Judges, one with predominantly civil and one with predominantly criminal experience
  - a Circuit Judge

- a District Judge

three non-judicial legally-qualified members, as follows

- a representative of the Solicitors' profession

- a representative of the Bar

- a non-practising academic lawyer

four lay people

- including a (lay) magistrate elected through the Magistrates' Association.

68. The Lord Chief Justice should be the non-executive President since he is likely to be the senior judge with the widest experience of judicial business both civil and criminal. We would not expect him to be involved in the detail of the less senior appointments,
69. We believe that the commission would need a full time chairman and that role should be taken by a Court of Appeal Judge in the five years leading to retirement. We think it important that there is no question of the Chairman returning to the Bench after his term at the JAC.
70. It is beyond the scope of this paper to suggest details of how the JAC would work in practice, but it seems to us that there needs to be sufficient flexibility to adopt different approaches for different levels of appointment.
71. A sitting judicial member of the JAC would be ineligible for promotion during, and for 12 months after, his term of office.
72. In relation to the Law Lords (or "Supreme Court" Judges) we are undecided about how the Scottish Law Lords (conventionally 2) and any Northern Irish candidate<sup>29</sup> should be chosen. One possibility is for the Scottish Appointments Commission to choose the Scottish members. We are not enthused by the Government's proposal of yet another commission to choose law lords, albeit drawn from the English and Scots commissions.

#### **How should JAC members be appointed?**

73. Apart from the ex-officio role of the Lord Chief Justice, the judicial members should be appointed, by their peers, by election. Such a method of appointment
- 73.1. would tend to ensure that the members represented the views of those who elected them, and held their confidence.
- 73.2. would ensure the impossibility of political interference
- 73.3. would meet the recommendation of the European Charter on the statute for judges.

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<sup>29</sup> There has not invariably been a Law Lord from the Province. Currently Lord Hutton, a former Lord Chief Justice of Northern Ireland, is a Law Lord.

74. The three non-judicial legal members should also be elected, respectively by Law Society Council members, Bar Council members, and by legal academics, perhaps by the English and Welsh members of the Council of the Society of Legal Scholars (formerly the SPTL, Society of Public Teachers of Law).
75. Appointment of the lay members is more problematic. The lay Magistrate should be elected by the Magistrates' Association. For the other three lay members, direct appointment by special interest groups is unworkable since it would be impossible fairly to choose only 3 such groups. We think the best approach would be for the Parliamentary Select Committee responsible for the JAC (see below) to select from names submitted in response to public advertisement, taking into account views expressed by the existing JAC lay members.

#### **To whom should the JAC be responsible?**

76. The JAC should be independent but should report annually to Parliament.
77. We believe it is more appropriate to make the JAC answerable to a select committee than to the Government directly. If the constitution needs rebalancing at all, the direction should be towards giving greater weight to the legislature and less to the executive.

#### **Other issues raised by the Government's proposals**

##### **The Magistracy, Coroners, and Tribunals**

78. Although we have recommended that there be a Magistrate member of the JAC, we do not believe that, at least in the short term, the JAC should have any role in the appointment of Magistrates. We would prefer for the time being to maintain the present system of local Advisory Committees. We think that system works sufficiently well for there to be no pressing need to change it. There will be quite sufficient constitutional upheaval to tax those involved in the new arrangements, and further unnecessary change should be avoided.
79. We agree that Coroners - whose important role in the administration of justice seems to us to be undervalued - should be assimilated into the new JAC system.
80. We agree that tribunal appointments should also come under the umbrella of the JAC.

##### **Role and Status of the JAC**

81. We agree that the JAC should have no role in the authorisation and administrative responsibilities described at paragraphs 70 to 73 of the Consultation paper.
82. We do not believe that there should, in addition to the new JAC, be an independent ombudsman. We believe that the creation of the new JAC, combined with its oversight by Select Committee, should be sufficient. Obviously the JAC would need to develop

its own review and complaints procedures. Yet another layer of bureaucracy and interference is unnecessary and undesirable.

83. It seems to us that the best status for the JAC is a Non-Departmental Public Body, responsible for recruiting its own staff. We also believe it should be housed in its own building distinct from the DCA or any other Government department. It is vital that the JAC and its staff are independent of Government, and that independence will be assisted by some degree of physical separation.

### **Increasing Diversity**

84. We have touched on this issue above. We would welcome any steps that could be taken to encourage candidates from less traditional backgrounds to apply for judicial appointments.
85. We are cautious about the suggestion that there might be changes made to the pattern of judicial careers in an attempt to encourage diversity amongst those who are appointed. Our judiciary is world renowned for its administration of justice. It seems to us unwise to change a system which works well in the hope that that will change the people who are judges. The better approach is to support and encourage those from non-traditional backgrounds who wish to be judges. It also seems to us that the changes which are envisaged would be likely to encourage more younger people to take judicial appointments at earlier stages in their careers. We believe that, generally speaking, the wisdom – or judgment - which a judge requires, perhaps above all else, tends to develop with time and with experience.
86. We do, however, believe that urgent consideration should be given to;
  - 86.1. the more widespread availability of part-time appointments;
  - 86.2. a re-evaluation of whether full-time appointments ought to be for life, or whether it might be (for those who preferred it) for a fixed term, allowing them to return to private practice afterwards.
87. The more widespread availability of part-time appointments, which could be but need not be combined with private practice, might attract those (perhaps women - or men - with young children) who would be unwilling to take on a full time appointment. We also believe that the present impossibility of returning to practice after a period as a full-time judge is unattractive to some, otherwise eminently suitable, candidates.

## Part 4: SUPREME COURT

88. The highest domestic court<sup>30</sup> in the United Kingdom is the Appellate Committee of the House of Lords on which the Lords of Appeal in Ordinary, the so-called Law Lords, sit. It is an idiosyncrasy of the British constitution that the final court of appeal sits technically as a committee of Parliament. However it is a court has a high international reputation, perhaps rather dented by the *Pinochet* case,<sup>31</sup> but restored under the distinguished leadership of Lord Bingham of Cornhill.
89. There was perhaps the opportunity in the early 1950's to create in the Privy Council (which still hears appeals from some Commonwealth countries and the remaining colonies) a Commonwealth final court of appeal with judges drawn internationally. That might have been a remarkable international institution but it never took off and it is now inconceivable.
90. The Law Lords not only act as the final court of appeal. Such is their distinction and independence that successive governments have asked individual law lords to chair major public enquiries of real political significance – currently the Bloody Sunday enquiry is chaired by Lord Saville of Newdigate and Lord Hutton is investigating the circumstances surrounding the death of Dr Kelly.
91. There is no need for a Supreme Court. The Human Rights Act 1998 does not require it. The Human Rights arguments effectively hinged on the ambivalent position of the Lord Chancellor. That argument never affected the position of the Judges. Views expressed by the Law Lords in debate in the House of Lords are no different from views expressed in writing on the same subject – no-one suggests that they should adopt a monastic vow of silence.
92. The Law Lords are very good value for money indeed. The total expenditure of the Appellate Committee in 2001-02 was £623,548 (excluding judicial salaries), before fees charged on civil appeals and for assessments of lawyers' fees of £499,715<sup>32</sup>. No doubt

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<sup>30</sup> In cases within its jurisdiction, the European Court of Justice is supreme.

<sup>31</sup> It should be said that a Supreme Court would not have prevented a debacle caused by a bad misjudgement of an otherwise exceptionally able judge.

<sup>32</sup> Consultation Paper §63

there are some costs to be added to reflect their use of two large committee rooms on the House of Lords' corridor and the small offices allocated to the Law Lords but the overheads remain low. The administrative support, whilst efficient and effective, is lean. The Law Lords write their own judgments – a great strength in itself. They do not have legally qualified assistants or référendaires; by contrast each member of the European Court of Justice has three assistants and a secretary. The judgments of the European Court are of poor quality by comparison, reflecting frequently the reality that the judgment has been prepared by the staff rather than the Judges. Too often they are written in opaque language, even allowing for difficulties caused by translation.

93. It is inevitable that a Supreme Court will be much more expensive. Freed from the physical restraints of Westminster, expense will shoot up. Lord Steyn has argued<sup>33</sup> that the Supreme Court must be “accommodated in a dignified building fit for a co-ordinate branch of government” (*sic*). “The new building must have sufficient space for the members of the court, secretaries, judicial assistants, law reporters, an information bureau to serve the public, a press office to serve the media, as well as accommodation for the Registrar and staff answerable to the Court. It is also an indispensable requirement that the new Supreme Court must be properly equipped and resourced *in every way*<sup>34</sup>. Its budget must be an independent one, structured so that any suspicion of political pressure is avoided”.
94. This all sounds very expensive indeed. But it will not produce better justice. It will not bring in new business to the United Kingdom. International business is satisfied with the House of Lords as a final court of appeal. It is striking that the Hong Kong Final Court of Appeal has two Law Lords as members. This is to give legitimacy to that Court.
95. Resources are scarce. If big money is to be spent on a Supreme Court, it will not be available for other important legal projects. The City of London sees a new Commercial Court as an important priority, as do the commercial law firms in the City and the commercial bar, which directly and indirectly bring in so much business to the United Kingdom. The Commercial Court is a real magnet for international legal business. It is the apex of the system for the resolution of commercial disputes. The City believes that an efficient system for the resolution of commercial disputes is an essential foundation for the services that the City offers internationally. It is a matter of great concern that a new Supreme Court will be likely to deny resources for a new

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<sup>33</sup> Counsel Magazine October 2003.

<sup>34</sup> Our emphasis.

Commercial Court, which is of far more importance to the development of international business in the UK.

96. For many years the Law Lords have not participated in party politics. The fact that the Law Lords are member of the upper house has had four important advantages.
97. First, it has enabled the senior judges, particularly the Lord Chief Justice, to have a voice in the legislature on important issues of legal policy, especially in the area of criminal justice. That voice has been exercised with restraint but it has been a valuable input. Judges have real experience of the practical consequence of changes in the law, which politicians may not appreciate. The Government's proposal is that retired members of the Supreme Court might be appointed as members of the House of Lords instead. Retired judges will be in their mid-seventies. They will not represent the current generation of judges and can too easily be depicted as the old guard and out of touch, perhaps with some justice.
98. They will not carry anything like the same weight that, for instance, the Lord Chief Justice brings to the debate, speaking on criminal justice.
99. Second, the independence of those appointed to the upper house after retirement will always be open to question – is it a reward for reliable service in the eyes of the Government?
100. Third, the Law Lords have provided a unique and valuable service by participating in committees of the House of Lords considering European legislation. Their involvement has ensured that Community legislation has undergone a thorough legal review of a quality and intensity (and effectiveness) unsurpassed by any other legislature in the EU. Using ex-Supreme Court justices, who have retired on the grounds of old age, is no substitute. The involvement of the Law Lords has consistently ensured better legislation and that UK interests are better protected. The House of Commons, Secretaries of State and the Civil Service have not fulfilled this important role.
101. Last, although not involved in party politics, the Law Lords have been able to promote law reform which has tended to be low down on any Government agenda. Most recently the Arbitration Act 1996, an important reform of arbitral law designed to bring international arbitration to the City of London, was promoted by Lord Saville. The earlier Arbitration Act 1979 was similarly promoted. So, a Supreme Court would have to offer very considerable advantages for the administration of justice if it were to be worthwhile. The Government's proposals amount to little more than moving the current law lords out of Parliament – both physically and as members of the upper legislature – and giving them a new name which already exists to describe the higher courts – see the Supreme Court Act 1981.
102. So, a Supreme Court would have to offer very considerable advantages for the administration of justice if it were to be worthwhile. The Government's proposals



amount to little more than moving the current Law Lords out of Parliament – both physically and as members of the upper legislature – and giving them a new name which already exists to describe the higher courts – see the Supreme Court Act 1981.

103. We question the name “Supreme Court”. In other jurisdictions – especially the United States – the Supreme Court has immense powers under the Constitution to strike down primary legislation. In this country, we have no similar constitution, and no-one suggests the Supreme Court should have conferred on it powers to override Parliament. So the title Supreme Court carries with it an extremely powerful connotation - that the new court has power to override parliament and to pronounce on the lawfulness of legislation. But it is not a Supreme Court. Parliament will remain supreme. We can see no point in giving a confusing title to a new Court. And we can see dangers in using a misleading title: it would greatly assist those who in the future might attempt to give the “Supreme Court” the powers which that title suggests it ought to have. We would prefer “Court of Final Appeal”<sup>35</sup>, a name that accurately reflects the role and status of the Court.

104. If the new Court is to be created:

104.1. It needs to be properly, but not extravagantly resourced. The Court would be best housed close to the Royal Courts of Justice.

104.2. It should cease to sit as a committee of the House of Lords, and become a proper Court. The judges should be robed.

104.3. The Court should sit in chambers, normally of 5, which would vary from term to term so that there can be no question of the membership of the Court being “fixed” to meet the requirements of the particular case.

104.4. The president, who might be called the Lord Chancellor, should be elected by the members of the Court.

104.5. The members of the Court should be members of the upper house.

104.6. Retired members of the court should not come back part time. This might mean that there needed to be 15 members of the Court. That may be no bad thing if 2 members from Scotland and 1 each from Wales and Northern Ireland are to be included, as we think would be right.

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<sup>35</sup> The name chosen for the highest court in Hong Kong.

## Part 5: SILK

105. As with the other proposals to “reform” the legal system announced this year, there is little evidence of considered thought having been applied to the topic of Queen’s Counsel. Apart from the sudden announcement of the suspension of the selection process on the occasion of the New Silks Ceremony in April, and the Consultation Paper now produced, there is no evidence-based research to form the conclusion that the present system is either anti-competitive or inappropriate in any other way.
106. The report of the Director General of Fair Trading (2001) was both narrow in ambit and negative in tone. It focussed on the perceived distortion of competition: its view failed to take account of the wider public interest in there being a category of advocate whose expertise was recognised and marked in a tangible way.
107. The principal criticisms of the present system appear to be:
- (1) the Government should play no part in the conferring of such a mark of distinction on a private profession;
  - (2) the title distorts competition.
108. As to the first, this misses the point that QCs and other advocates form a vital part in the administration of public justice: they are not merely private professionals: their rules and codes are much more onerous and demanding than those of other professions for the good reason that the effective running of the courts require adherence to a special set of rules. In the more serious and complex cases, the public has a direct interest in the outcome: the Government already has a pro-active role in the profession in many ways. A Government Minister is ex-officio member of the Bar Council: the LCD regulates the education of barristers and changes to the Bar’s constitution require to be approved by a Government body. The suggestion at paragraph 24 that the profession is “independent” of the Government is sadly untrue. But if there is any substance to this point, let the appointments be made by the Judges under the supervision of the Lord Chief Justice.
109. As to the second, the argument that the title of QC distorts competition is a narrow view that avoids the central role of the title. The title QC enables the courts, the public and the user to recognise the seriousness of the matter under review, it has the tendency to raise standards, and it promotes competition in an already fiercely competitive profession.
110. The OFT appears to have little understanding of the legal profession and seems to regard it in the same way as any other provider of services. These are crucial

differences, which deserve attention. Not least, the legal profession is huge invisible exporter of legal services. Foreign lawyers and clients find the system of real value in identifying specialists in the UK and the system gives a real advantage to this country when seeking to attract overseas work. Further it is noteworthy that such a system exists in almost all other Commonwealth countries. Is it really to be the case that there will be QC's in other competing professions abroad, but not in the United Kingdom?

111. If the Government is, despite the arguments to the contrary, determined to change the system, there is no reason why another body should not fulfil the function. The most obvious would be the profession itself through the Bar Council and the Inns of Court. They would be able to set up a higher qualification such as Senior Counsel and award such a distinction to those whose practice had developed in a particular area of expertise. It would mirror the title of Consultant or Fellow presently awarded in the medical and academic fields. Further value to the public could be added by the inclusion of additional information about those upon whom the title was preferred. Paragraph 29 of the paper again reveals that the agenda is not reform as such, but a desire to retain the power in the executive's hands and it is revealing to see that it regards the removal of ministerial involvement as a "major innovation".
112. The suggestion that those now holders of the Letters Patent could be somehow deprived of the title is both unattractive and potentially liable to challenge. Equally the present hiatus is unsatisfactory to those who may have applied or were about to do so.
113. The case for change has manifestly not been made. We do not accept that the onus for maintaining the present system rests on those who seek its retention; those who urge change should bear that burden.

## **Part 6: Conclusions**

114. We summarise our conclusions and recommendations.

### **The Position of Lord Chancellor**

115. There are no practical reasons to abolish the position of Lord Chancellor, which, in practice, continues to work well.

116. The theoretical objection to the Lord Chancellorship is based on a particular application of the theory of separation of powers. The theory in this form has no place in the British Constitution. There is no domestic, ECJ or ECHR jurisprudence which requires the abolition of the Lord Chancellorship.

117. Since the institution of the Lord Chancellor works well in practice, and is not objectionable in principle, it should not be changed. Until at least 2001 this was the position of the Labour Government.

### **The Judicial Committee of the House of Lords or a “Supreme Court”**

118. The present arrangements of the House of Lords judicial committee work well. There are no compelling reasons to create a Supreme Court.

119. If a new court is to be created it should not be called the Supreme Court for that name gives the plain, but false, impression that the Court is “supreme”: it will not be and should not be. The supreme constitutional body in this country is Parliament.

120. The upper chamber will be impoverished if Judges of the country’s highest court are unable to contribute to its debates.

### **The Appointment of Judges**

121. The current system for appointing judges has worked well. If it is to be replaced, the new system must be seen to be a substantial improvement which has the confidence of society at large and of the legal profession.

122. If there is to be a new system, we propose as follows.

123. There should be an appointing commission free of political interference or bias, appointing solely on merit.

124. There should be lay members on the appointing commission.

125. Half the members of the appointing commission should be judges, elected by their peers.

126. The Appointing Commission should be a Non-Departmental Public Body, reporting to a select committee of the House of Commons.

127. Urgent consideration should be given to the nature of judicial appointments in order to ensure that applications for a wide range of candidates are encouraged.

128. The Government's proposals, for a recommending commission in which a political cabinet minister has a right of veto, are a retrograde step. They are wholly inconsistent with the justification advanced in support of the constitutional reforms. The Government's proposals will increase the perception of political interference in the appointment of judges.

### **The Silk System**

129. There are no practical or sound theoretical reasons to abolish the silk system. It is not anti-competitive but on the contrary encourages a healthily competitive profession. It represents a quality mark which attracts work from overseas and improves confidence in the justice system.