

Clerk of the Select Committee on the Constitution
House of Lords
London
SW1A 0PW

29 June 2011

Judicial Appointments Process: Call for Evidence

1. I am writing in response to the recent call for evidence on the judicial appointments process.

The AJTC's interest in appointments issues

2. The AJTC was established by the Tribunals, Courts and Enforcement Act 2007. It has a statutory role to keep the overall administrative justice system under review, and is the successor body to the Council on Tribunals (CoT), established in 1958. In November 2002, the CoT published a *Framework of Standards for Tribunals*, containing a section relating to judicial appointments (enclosed). In November 2010, the AJTC published its *Principles for Administrative Justice*, setting out the principles against which it would consider the administrative justice system. Given the wider remit of the AJTC, these are cast in more general terms than the CoT Standards, but the AJTC and its statutory Scottish and Welsh Committees have continued to provide advice to Government from time to time on appointments-related issues, with a particular focus on independence, openness and appropriateness of procedures for the matter involved.

Tribunal appointments

3. We wish to emphasise the significance of tribunal appointments. In each of the last three years, the Judicial Appointments Commission (JAC) has made more recommendations for tribunal appointments than it has for the courts. We understand that in 2010-11 there were 163 appointment recommendations for courts compared to 510 appointment recommendations for tribunals (in respect of both legal and non- legal members).
4. In view of this, we consider it unhelpful that there is only one member of the JAC with a direct 'tribunals' remit. We suggest that consideration be given to adjusting the membership of the Commission, better reflecting the balance of work and allowing the JAC to have greater insight into the practical needs of tribunals and their judges.

5. In addition, we would like to note the inconsistency of arrangements for tribunal appointments. Many, but not all, appointments are made by the JAC. Notable exceptions include the Parking Adjudicators and Traffic Commissioners. We do not necessarily suggest that all appointments to tribunals must be made by the JAC, but we think that there should be some mechanism for ensuring that all arrangements meet consistent standards.

Non-legal members

6. We would also like to raise the issue of non-legal members of tribunals. Non-legal members help to ensure that tribunals remain a specialised, representative and, where possible, relatively informal forum for delivering justice. Non-legal members in some jurisdictions are appointed by the JAC – 195 non-legal member recommendations were made in 2010-11 and 236 in 2009-10. In other jurisdictions, such as Employment Tribunals, a different process is used. As noted above, we do not suggest that the JAC should be involved in all tribunal appointments, but we must emphasise the need for consistent standards, with this consistency extending to the appointment of non-legal members.
7. In particular, we have long-standing concerns about the lack of proper arrangements for the appointment of panel members in school admission and exclusion hearings. The reform proposals for exclusion appeals presently before Parliament in the Education Bill have not allayed our concerns, which are described more fully in the JCHR legislative scrutiny report published on 13 June 2011.

Professional regulation

8. The Committee may also wish to consider appointments to tribunals or panels concerned with professional regulation. A current example arises from the Government's intention to abolish the Office of the Health Professions Adjudicator. The GMC has recently consulted on a consequential proposal to create a new tribunal, the Medical Practitioners Tribunal Service, within the GMC and is presently considering arrangements for the appointment of the Chair and members. In its response to the consultation the AJTC suggested that the GMC look to the JAC for guidance on setting up a transparent and independent appointments system.

Scotland & Wales

9. The AJTC has statutory Scottish and Welsh Committees but no remit in Northern Ireland.
10. The AJTC's Scottish Committee has pointed out in a recent report the potential constitutional difficulties for the tribunal system in Scotland arising from the Lord Chancellor's announcement on 16 September 2010 of proposals to bring the tribunal judiciary in England and Wales under the overall leadership of the Lord Chief Justice. The announcement recognised that issues would arise in relation to the fact that a number of tribunal jurisdictions extend to both Scotland and Northern Ireland, and cross-border sittings are a normal part of the judicial work of many tribunal judges. The AJTC wrote to the Lord Chancellor in March to highlight some of the cross-border issues that arise from unification of the judiciary and any further devolution of tribunals to Scotland. We emphasised the need for any new arrangements to ensure the coherence of UK-wide tribunal jurisdictions. The office and functions of the Senior President of Tribunals presently provide cohesion, and if that office is to be lost as part of the proposed reforms, we believe that specific

structures and arrangements need to be put in place to facilitate and encourage cooperation and dialogue between the territorial jurisdictions of the UK. We proposed a cross-border forum, convened by a Supreme Court justice and comprising the chief justices of each UK jurisdiction, as a possible model for cooperation and envisaged that appointments and cross-border 'ticketing' would be among the issues it might address.

11. In its recent *Review of Tribunals Operating in Wales*, the Welsh Committee of the AJTC considered the existing appointment processes for all tribunal members in Wales, and made recommendations for change. Since then, the Committee has continued to advise the Welsh Government on appointments issues, in particular with reference to the new Welsh Language Tribunal, the first tribunal to be created by the National Assembly for Wales. It has been recommended by others that appointments to the Tribunal be made by the JAC, and our Committee seeks to ensure that any new arrangements put in place in Wales satisfy requirements for transparency, independence and security of tenure.

Diversity

12. The AJTC is represented on the JAC's Diversity Committee and we agree with the proposition that diversity is a legitimate factor to bear in mind as part of the appointments process. As noted in the report of the *Advisory Panel on Judicial Diversity 2010*, increased diversity does not necessarily lead to better decision-making, but it does improve the 'texture' of the judiciary. At present, the tribunal judiciary generally reflects the community better than the senior judiciary in the courts, but there remains much that can be done and a proactive approach is required. A particular concern is that the percentage of appointments of female and BAME fee-paid judges in tribunals does not currently reflect the eligible pool.

Richard Thomas

Chairman

Extract from Council on Tribunals Framework of Standards for Tribunals 2002

Standard 1: Tribunals should be independent and provide open, fair and impartial hearings

a) Tribunals should be free to reach decisions according to law without influence (actual or perceived) from the body or person whose decision is being challenged or appealed, or from anyone else

b) Judicial officers should be independent

- i. Procedures for the selection and appointment of Tribunal members should be fair and independent of related departments of government and other interested parties^[1]
- ii. Appointees must have appropriate security of tenure, subject to procedures for re-training or removal from office in case of poor performance, misbehaviour, incapacity or persistent failure to comply with sitting requirements
- iii. Procedures should be in place to ensure conflicts of interest are identified and avoided

c) Appointments to judicial office should take account of the diversity of our society, and the composition of tribunals should be monitored to inform those making appointments