



**Department for
Constitutional Affairs**

Constitutional reform: a Supreme Court for the United Kingdom

CP 11/03 July 2003



Consultation Paper

Constitutional Reform:
A Supreme Court for the
United Kingdom

July 2003

A consultation paper produced by the Department for Constitutional
Affairs

This information is also available on the DCA website: www.dca.gov.uk
at www.dca.gov.uk/consult/supremecourt

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Foreword

By Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs and Lord Chancellor

This consultation paper constitutes part of the Government's continuing drive to modernise the constitution and the legal system. The paper seeks views on the form and responsibilities of a new Supreme Court.

A further paper seeks views on a new independent Judicial Appointments Commission. Separately and together they deal with issues of great constitutional importance because they focus on changes to the Judiciary's relationship with the executive and the legislature.

In recent years there have been mounting calls for the creation of a new free-standing Supreme Court separating the highest appeal court from the second house of Parliament and removing the Lords of Appeal in Ordinary from the legislature. On 12 June 2003 the Government announced its intention to do so.

The Government believes that in so doing they will reflect and enhance the independence of the Judiciary from both the legislature and the executive.

The decision does not imply any dissatisfaction with the performance of the House of Lords as our highest Court of Law. On the contrary its judges have conducted themselves with the utmost integrity and independence. They are widely and rightly admired, nationally and internationally. The Government believes, however, that the time has come to establish a new court regulated by statute as a body separate from Parliament.

The proposed new Court will be a United Kingdom body legally separate from the England and Wales courts since it will also be the Supreme Court of both Scotland and Northern Ireland.

Accordingly it is important that during the consultation period the Government works closely with the Scottish Executive and Judiciary as well as with the Northern Ireland Office and Judiciary in respect of the position in Northern Ireland.

Although I have responsibility for the courts in Wales I am conscious that the National Assembly will also have a particular interest in any devolution functions that may become the responsibility of the new Court.

This paper raises questions on the jurisdiction of the new Supreme Court particularly over the question of the transfer to it of the jurisdiction of the Judicial Committee of the Privy Council over devolution issues; on the membership of the Supreme Court in the short and longer term; on the method and criteria for selection of its members; on its relationship with the House of Lords; on its method of operation and its relationship with the rest of the Judiciary; and finally it looks at how to ensure that there is a proper representation from the Scottish and Northern Ireland jurisdictions.

Where appropriate, the Government gives, in this paper, its provisional views on many of the matters raised subject of course to considering the responses to this consultation paper.

I hope it will provide a basis for widespread discussion and debate among the legal profession and the public, securing as a result as wide a range of views as possible.

The image shows a handwritten signature in black ink. The signature is written in a cursive style and consists of two lines. The top line reads 'Charlie' and the bottom line reads 'Falconer'. The signature is positioned centrally on the page.

Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs and Lord Chancellor

Introduction

This paper seeks views on an issue of constitutional importance: the proposals for establishing a new Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords.

This consultation is aimed at as wide a range of people as possible, and is being conducted in line with the Code of Practice on Written Consultation issued by the Cabinet Office. It falls within the scope of the Code. The Code criteria set out in Annex C have been followed.

An initial analysis of the potential changes to the Supreme Court structure discussed in this paper did not indicate any impact on businesses, charities or the voluntary sector. Consequently, no formal Regulatory Impact Assessment is attached to the current consultation document but the position will be reviewed in the light of responses to it.

A list of consultees can be found at Annex B. Those being consulted include the Judiciary, legal professional bodies, other professional bodies, Government departments and public bodies.

How to Respond

Please send your response by **7 November 2003** to:

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Representative groups are asked to give a summary of the people and organisations they represent when they respond.

The Department may wish to publish responses to this consultation paper in due course. **Please ensure your response is marked clearly if you wish your response or name to be kept confidential.** Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

Further copies of this consultation paper can be obtained from **Judith Simpson** at the above address or by phoning **0207 210 1501**

Welsh language copies of this consultation paper are also available on request.

Executive Summary

The consultation paper sets out proposals for establishing a new Supreme Court, involving restructuring of the highest level of the judicial system and appointments procedures for that level.

The paper sets out the Government's proposal to remove the jurisdiction of the Appellate Committee of the House of Lords and transfer it to a new Supreme Court. This would be a Supreme Court for the United Kingdom, and would be quite separate from the England and Wales or Scottish or Northern Ireland courts. The present Lords of Appeal in Ordinary (the 12 full-time Law Lords) would form the initial members of the new Court. They would cease, while members of the Court, to be able to sit and vote in the House of Lords. There is no proposal to create a Supreme Court on the US model with the power to overturn legislation. Nor is there any proposal to create a specific constitutional court, or one whose primary role would be to give preliminary rulings on difficult points of law.

The paper examines whether the jurisdiction of the Judicial Committee of the Privy Council over issues which raise questions about the powers of the devolved administrations should be transferred to the new Court. On balance, the Government favours that move. Apart from this change, it does not propose any alteration in the functions of either the House of Lords Appellate Committee or of the Judicial Committee. The Judicial Committee would continue to exist and to undertake its work for various Commonwealth and overseas and dependent territory jurisdictions.

The paper particularly seeks views on

- the size of the full-time Court, and whether it should be able to call, as now, on a pool of experienced part-time judges (paragraphs 29-33);

- the options for making appointments to the Court. It suggests that for appointments at this level, the options are either appointment on the advice of Ministers alone, but following consultation with the senior Judiciary; or a recommending commission. Such a commission would have to be constituted from all three jurisdictions. If Ministers handled appointments without involving a commission, there would be rules to ensure that Ministers consulted within all three jurisdictions (paragraphs 38-43);
- the detailed handling of the appointments process, for example whether there is scope for applications, and what the criteria for appointment should be (paragraphs 44-47);
- how to ensure that there is proper representation from the Scottish and Northern Ireland jurisdictions (paragraph 48); and
- a title for the members of the new Court, bearing in mind that they will no longer automatically become peers (paragraph 59).

The paper proposes that the Court should be administered through the Department for Constitutional Affairs.

1 Setting up a new Supreme Court for the United Kingdom

1. The Government announced on 12 June that it intended to consult on the establishment of a new Supreme Court for the United Kingdom. This is part of its continuing drive to modernise the constitution and public services. The intention is that the new Court will put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system. There have been a number of calls for such a change in recent years, for example by the Senior Law Lord, Lord Bingham of Cornhill, in his Constitution Unit Lecture in May 2002, in which he said "Our object is plain enough: to ensure that our supreme court is so structured and equipped as best to fulfil its functions and to command the confidence of the country in the changed world in which we live". The Chairman of the Bar Council, in an article in *The Times* on 2 April 2003, said "Judges should have no part of the legislature It is very difficult to understand why our Supreme Court (the law lords) should be a committee of the second house of Parliament".

Why change?

2. The functions of the highest courts in the land are presently divided between two bodies. The Appellate Committee of the House of Lords receives appeals from the courts in England and Wales and Northern Ireland, and in civil cases from Scotland. The Judicial Committee of the Privy Council, in addition to its overseas and ecclesiastical jurisdiction, considers questions as to whether the

devolved administrations, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly are acting within their legal powers. Both sets of functions raise questions about whether there is any longer sufficient transparency of independence from the executive and the legislature to give people the assurance to which they are entitled about the independence of the Judiciary. The considerable growth of judicial review in recent years has inevitably brought the judges more into the political eye. It is essential that our systems do all that they can to minimise the danger that judges' decisions could be perceived to be politically motivated. The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues and more aware of the anomaly of the position whereby the highest court of appeal is situated within one of the chambers of Parliament.

3. It is not always understood that the decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and that non-judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated. The fact that the Lord Chancellor, as the Head of the Judiciary, was entitled to sit in the Appellate and Judicial Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires 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. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature. Looking at it from the other way round, the requirement for the

appearance of impartiality and independence also increasingly limits the ability of the Law Lords to contribute to the work of the House of Lords, thus reducing the value to both them and the House of their membership.

4. The position of the Appellate Committee as part of the House of Lords has inevitably limited the resources that can be made available to it. Space within the Palace of Westminster is at a premium, especially at the House of Lords end of the building. Although the facilities for hearings in Committee rooms 1 and 2 are good, the Law Lords' administration works in cramped conditions: one Law Lord does not even have a room. The position in the Palace cannot be improved without asking other peers to give up their desks. A separately constituted Supreme Court suitably accommodated could ensure that these issues were properly addressed.
5. In proposing that the time has come to change these arrangements, no criticism is intended of the way in which the members of either Committee 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. Nonetheless, the Government has come to the conclusion that the present position is no longer sustainable. The time has come for the UK's highest court to move out from under the shadow of the legislature.
6. The Lord Chancellor has had an important role in preserving judicial independence. The Secretary of State for Constitutional Affairs will have a continuing responsibility for this vital safeguard. He will, both within Government and publicly, be responsible for defending judicial independence from any attack. As noted in the consultation paper *Constitutional Reform: A New Way of Appointing Judges*, consideration should be given to whether that responsibility should

be embodied in statute setting up the proposed new Judicial Appointments Commission.

7. The Government believes that the establishment of a separate Supreme Court will be an important part of a package of measures which will redraw the relationship between the Judiciary, the Government, and Parliament to preserve and increase our judges' independence.

2. The present position: The Appellate Committee and the Judicial Committee of the Privy Council

The Law Lords

8. The judicial business of the House of Lords is carried out by the Lords of Appeal in Ordinary, commonly known as the Law Lords. Their number is fixed by statute, amendable by Order, and is presently set at a maximum of 12. In addition to these 12, any holder of high judicial office who is a member of the House under the age of 75 is also eligible to sit: there are presently 14 members of the House so entitled (excluding Lord Falconer of Thoroton, who has said that he will not do so).
9. The 12 Law Lords have been specifically appointed under the Appellate Jurisdiction Act of 1876 to conduct the judicial business of the House. "In Ordinary" means that the lords receive a salary for their judicial work, paid from the Consolidated Fund not the budget of the House of Lords. All Law Lords are full members of the House and are holders of life peerages. Although the Law Lords sometimes conduct judicial work sitting as the House itself, they usually hear appeals as a Committee of the House called the Appellate Committee.
10. The role of the House of Lords in the judicial process had its origins in the development of both Parliament and the courts from the *curia regis*, the Royal Council of English early mediaeval monarchs. Advice to the King whether about matters of state or responses to petitions for justice was offered by a council containing the great officers of state and the judges who also sat with the lords spiritual and temporal to form the Court of Parliament. In about the fourteenth century, the Lords took the appellate jurisdiction into their

own hands, using the judges and others only as assistants. The function has not been a permanent fixture. It fell into abeyance altogether in the sixteenth century and was revived as part of Parliament's general asserting of its authority in the seventeenth century. By the mid-nineteenth century, the inadequacies of the House were such that the Crown attempted to introduce as life peers judges specifically to undertake the judicial functions of the House. In the 1870s, several attempts were made formally to abolish the jurisdiction and set up a separate final court of appeal outside the House. An Act to achieve this was passed in 1873, but was never brought into effect. In the end, the Appellate Jurisdiction Act 1876 confirmed the jurisdiction and made the necessary provision to allow judicially qualified life peers to be appointed to enable the House to perform its judicial functions. The right of appeal from the Court of Session to the Scottish Parliament in civil cases was established by the (Scottish) Claim of Right in 1689. That right translated into a right of appeal to the House of Lords following the Treaty of Union in 1707. It has remained largely unchanged since then, and is now set out in the Court of Session Act 1988.

11. The House of Lords hears appeals from the Courts of Appeal in England and Wales and Northern Ireland in both civil and criminal matters and from the Court of Session in Scotland on civil matters. In addition, it hears criminal appeals from the High Court in England and Wales and from the High Court in Northern Ireland. The House may also hear appeals from the Courts-Martial Appeal Court. In rare circumstances, certain types of civil cases may be brought direct from the High Courts in England and Wales and Northern Ireland, bypassing the Courts of Appeal in what is known as the 'leapfrog' procedure.
12. Broadly speaking, the House chooses its own cases, in that nearly all appeals require the permission of the court below (rarely granted) or of the House (the majority of cases) before an appeal may be lodged. Paragraph 27 below explains the position in relation

to appeals in Scottish civil cases from the Court of Session. All appeals have to raise a point of law of general public importance and in criminal cases the point usually has to be certified by the court appealed from. Each type of appeal is governed to some extent by statute, for example by setting the time limit for lodging an appeal. Statutes also set the quorum of Law Lords required to hear an appeal (three), but otherwise the Law Lords are self-regulating, which they do through their Standing Orders and practice directions.

13. Cases are normally heard by a panel of five Law Lords who sit Monday-Thursday throughout the law terms whether or not the House of Lords is sitting in its legislative capacity (including prorogation and dissolution). The appointment of 12 Law Lords means that each week, a panel of 5 can sit in the House of Lords and a panel of 5 in the Judicial Committee of the Privy Council, leaving 2 Lords with time for writing judgments and other commitments. Decisions as to which Lord sits on which case are made by the Senior Law Lord and Second Senior Law Lord (currently Lords Bingham of Cornhill and Nicholls of Birkenhead). The process was described by Lord Bingham in his Constitution Unit lecture referred to above. Hearings last on average 2½ days. Judgments are delivered in the Chamber of the House and are formally a report from the Committee to the House, to which the House has to agree. Only members of the Committee who are giving judgment speak and vote at sittings of the House for this purpose.
14. Applications for leave to appeal are determined by an Appeal Committee, usually comprised of three Law Lords. In practice, a number of such committees are in existence at any one time. These Committees are also responsible for considering interlocutory matters (such as time extensions and applications for leave to intervene) and any other matter relating to an appeal other than the hearing itself.

The Judicial Committee of the Privy Council

15. The Judicial Committee of the Privy Council was established under the Judicial Committee Act of 1833. Its origins lie in the mediaeval rights of appeal to the sovereign which used to be adjudicated on by the King's Council. The judicial powers of the Privy Council in respect of the realm (at that time England and Wales) were abolished in 1641. However, the right to receive appeals from outside the realm was retained and business from overseas grew substantially during the next two centuries. The Privy Council dealt with such matters in an ad hoc fashion until the 1833 Act was passed. The right of appeal to the Head of State to which it gives substance can be taken away only by a competent legislature.
16. The membership of the Judicial Committee is wider than that of the Appellate Committee. All members of the Appellate Committee, including retired Law Lords under the age of 75, are members and in practice do the bulk of the work. Other Privy Counsellors who are or have been senior judges of courts within the United Kingdom are also members; this includes past and present members of the Courts of Appeal of England and Wales and Northern Ireland and of the Inner House of the Court of Session in Scotland. The final category of members is Privy Counsellors who are judges of certain superior courts in other Commonwealth countries: at present there are 15 of these overseas members.
17. The main functions of the Judicial Committee are threefold. First, it is the final court of appeal for a number of Commonwealth jurisdictions and for the Crown Dependencies of Jersey, Guernsey and the Isle of Man. Second, it hears devolution cases which are referred to it either from the courts in Scotland, Northern Ireland or England and Wales or directly by the UK Government or one or other of the devolved administrations. Its function is to determine issues relating to the legal competence of the devolved

administrations, Parliament or Assemblies having regard to the relevant devolution legislation. Its judgments in such matters are binding even on the House of Lords. Third, it has a number of more technical jurisdictions e.g. dealing with appeals against pastoral schemes in the Church of England. Most of the previous jurisdiction over appeals from the decisions of various governing bodies in the healthcare professions has, since 1 April 2003, been passed down to the High Court and the Court of Session.

3. The Government's proposals for a new Supreme Court

The establishment of a new Supreme Court

18. The Government will legislate to abolish the jurisdiction of the House of Lords within the UK's judicial system. The functions currently performed by the Appellate Committee will be vested instead in a new Supreme Court, quite separate from Parliament.

Jurisdiction

19. The separation of the Supreme Court from the UK Parliament raises the question of whether to transfer to it the jurisdiction of the Judicial Committee of the Privy Council over devolution issues. The decision to refer devolution cases to the Judicial Committee was deliberately taken at the time of the devolution Acts. The present arrangements have not been in existence for very long and are working well. They have the advantage that the panel of available judges for the Judicial Committee is wider than for the Appellate Committee and therefore there are more opportunities to have Scottish and Northern Ireland judges sitting on devolution cases.
20. The argument in favour of this transfer is that there would no longer be any perceived conflict of interest in which a party with an interest in a dispute about jurisdiction – the UK Parliament – was apparently sitting in judgment over the case. The new Supreme Court represents a very material change in circumstances. It will in no way

be connected to the UK Parliament. The establishment of the new Court accordingly gives us the opportunity to restore a single apex to the UK's judicial system where all the constitutional issues can be considered. It would ensure that there is no longer a danger of conflicting judgments arising, for example on human rights cases which might have come to the Judicial Committee as devolution issues and to the House of Lords as ordinary appeal cases. It should be remembered that the judgment of the Judicial Committee in these matters is binding on all courts. Arrangements can and would be made to provide for additional judges to be involved where that appeared to be appropriate, although the composition of the panel for a particular case would be a matter for the President of the Court.

21. On balance, the Government believes that it would be right to transfer the jurisdiction on devolution cases from the Judicial Committee to the new Supreme Court with arrangements which enable additional Scottish and Northern Ireland judges to sit in cases raising devolution issues where that is appropriate.

Question 1: Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?

22. Apart from this, the Government does not propose any further changes in the role of the new Supreme Court.
23. A Supreme Court along the United States model, or a Constitutional Court on the lines of some other European countries would be a departure from the UK's constitutional traditions. In the United States, the Supreme Court has the power to strike down and annul congressional legislation, and to assert the primacy of the constitution. In other countries, for example Germany, there is a

federal constitutional court whose function is to protect the written constitution. In our democracy, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law. The constitution is made up of the whole body of the laws and settled practice and convention, all of which can be amended or repealed by Parliament. Neither membership of the European Union nor devolution nor the Human Rights Act has changed the fundamental position. Such amendment or repeal would certainly be very difficult in practice and Parliament and the executive regard themselves as bound by the obligations they have taken on through that legislation, but the principle remains intact.

24. Many of the same arguments apply in relation to the proposal that the UK should have a Supreme Court on the lines of the European Court of Justice – that is, one to which questions as to the meaning of the law could be referred for a definitive ruling. UK courts traditionally work by applying the law to the facts of a particular case. Any arrangement which required the new Court to consider issues in the abstract would sit very uneasily with our judicial traditions. As soon as a Court looked at an issue on the facts of a case, however, it would effectively become a court of appeal rather than of reference. The situation in the European Union, where a common meaning of EU legislation across the different member states is needed, is quite different.
25. There is therefore no need to extend the jurisdiction of the Court into areas which have not previously been covered.
26. As noted above, there are differences in the treatment of Scottish cases compared to those from England and Wales and Northern Ireland. There is no appeal from the High Court of Justiciary in criminal cases to the House of Lords. This is for historic and practical reasons; there are considerable differences between the two systems, described by Lord Hope of Craighead as ‘as distinct

from each other as if they were two foreign countries'.¹ There is no evidence that the Scottish criminal appeal system requires change. To the extent that a further appeal may be required after the first tier of appeal has been exhausted, there is the possibility of a reference back at any time to the court of appeal by the Scottish Criminal Cases Review Commission. Where a devolution issue may be involved, there is currently recourse to the Judicial Committee of the Privy Council and there will in future be the possibility of a reference to the new Supreme Court.

27. Scottish civil appeals can however go to the House of Lords at present. The organisation of the judicial system in Scotland is largely devolved. The Scottish Executive has indicated that it has no plans at present to alter the current arrangements and is in principle content for civil appeals to the new Court to be on the same basis as currently operates in relation to the House of Lords. There are benefits to the Scottish justice system in having important cases reviewed by judges with a different background, and indeed advantages to the larger jurisdiction also in drawing on the resources of a different legal tradition at the highest level. A particular feature of the Scottish system is that in the great majority of cases there is no requirement to seek leave to appeal either from the Court of Session or the House of Lords. On the other hand, there is a requirement for two Counsel to certify the reasonableness of the appeal. The effect is that only a small number of cases reach the House of Lords and there is no reason to assume that this would change under the new arrangements. Paragraph 56 below looks in more detail at the question of leave arrangements, including those for Scottish civil appeals.

¹ (*R. v Manchester Stipendiary Magistrate, ex parte Granada Television Ltd* [2000] 2W.L.R.1,5)

Non-devolution functions of the Judicial Committee

28. It has also been suggested that the Judicial Committee of the Privy Council should be merged altogether with the Appellate Committee. As noted above, the Judicial Committee also has responsibility as the final court of appeal for a number of Commonwealth and overseas territory jurisdictions, as well as for the Crown Dependencies. In that capacity, it is acting as a court of appeal for independent jurisdictions. It does not belong to the UK alone. Whatever the outcome on devolution cases, the Government proposes to keep the Judicial Committee in being to continue to provide this important function. Instead of the Lords of Appeal in Ordinary being appointed to the Judicial Committee, the members of the Supreme Court would be so appointed. The right of other senior judges who are Privy Counsellors to sit on the Judicial Committee would remain untouched. The administrative and support arrangements for the Judicial Committee would therefore remain unchanged.

The membership of the new Supreme Court

29. The initial members of the new Supreme Court will be the existing Lords of Appeal in Ordinary.
30. There are presently 12 such Lords of Appeal. They do the bulk of the work of the Appellate Committee. However, it is presently open to them to call upon other members of the House of Lords qualified to sit, including retired Law Lords, if there are particular demands on their time, or a need for expertise in a particular area which one of those lords can supply.
31. The Government would welcome views on whether a fixed membership of 12 will be sufficient for the work of the Court in the future. A slightly larger number would allow for more cases to be

dealt with simultaneously, or allow for the continued release of members of the Court to undertake other functions such as the chairing of public enquiries. On the other hand, the larger the number of members of the court, the greater the scope for potential problems over the selection of which judges are to sit on which cases (see paragraphs 50-53 below for further discussion on this). On balance, the Government thinks that the present number of 12 full-time members of the Court is right, but that the Court should continue to be able to supplement its full-time membership. This option will be particularly important when hearing devolution issues to reflect the particular expertise in devolution issues in the same way as now the composition of the Judicial Committee of the Privy Council may reflect the nature of the case before it. However, there may also be other circumstances where it would be appropriate to call on additional judges to sit with full-time members, where, for example, they had acknowledged expertise in a particular area of law.

32. The membership of the Appellate Committee is presently set out in statute. Apart from the Lords of Appeal in Ordinary, of whom there are now a maximum of 12 (that number can be amended by Order), other holders of high judicial office are allowed to sit (s.5 of the Appellate Jurisdiction Act). 'High judicial office' for these purpose is defined as the Lord Chancellor, or a judge of one of the 'superior courts', that is the High Court and the Court of Appeal (in both England and Wales and Northern Ireland) and the Court of Session in Scotland. The limiting factor is that they must also be members of the House of Lords. Without that limiting factor, the pool of potential additional members of the Court would be very wide unless it were defined more narrowly in some way. It might be that the qualification for sitting alongside the full-time members would, as at present with the Judicial Committee, be to have held high judicial office and be a member of the Privy Council.

Question 2: Do you agree that the number of full-time members of the Court should remain at 12 but that the Court should have access to a panel of additional members?

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

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

The Presidency of the Court

33. The position of Senior Law Lord will be converted into that of President of the Court. The Government would welcome views on whether, after the retirement of the present holder of the office, the arrangements to select the President should be the same as those to select the members of the Court. That is, either through the advice of the Prime Minister to the Queen on the basis of consultation, or on the recommendation of a specially constituted Appointments Commission, either directly or through the Prime Minister. The Government proposes that there should be, as now, a recognised Deputy, who would be selected by the same means. (see paragraphs 38-43 below).

Question 5: Should there be a Deputy President?

Question 6: Should the posts of President and Deputy President be filled by the same process as membership generally, or should these appointments always be made on the advice of the Prime Minister after consultation, without involving any Judicial Appointments Commission?

Relationship with the House of Lords

34. The primary objective of the new arrangements is to establish the Court as a body separate from Parliament. However, for the time being, all the members of the Court are in a personal capacity also members of the House of Lords. There will therefore continue to be at least some potential for alleged conflicts of interest where a member of the Court has previously taken part in debates which are relevant to a case which he is hearing. That has already been recognised in practice; the current members have decided to reduce very significantly the extent to which they take part in the general proceedings of the House since the passage of the Human Rights Act. They have made a formal statement to the House confirming that 'first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly, the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House' (*House of Lords Hansard, 22 June 2000, col 419*). This might point to providing that members of the Court should not be eligible to be members of the House.
35. On the other hand, it is suggested that there are benefits to the Law Lords themselves in being able to hear at first hand the

deliberations in Parliament. The Law Lords also make a valuable contribution to the work of the House more generally, for example in the chairmanship of select committees. Set against this, there is a strong argument that the possibility of conflict between judge and legislator should be removed, which may be reinforced by the judges' decisions that they should now only rarely speak or vote in debate.

36. On balance, the Government believes that it would be better to sever completely any connection between the Court and the House of Lords. It therefore proposes that members of the Court should lose the right to sit and vote in the House while they are members of the Court. Any one who is a member of the House before joining the Court will retain the peerage and title, and will be free to return to the House when he or she ceases to sit on the Court. This will give the House the continued benefit, which it very much values, of the experience of the retired Law Lords. There are presently 14 such retired Law Lords in the House, so such a cohort would still be able to make a significant contribution. In time, of course, on this basis there will be no retired Law Lords in the House. Subject to any other reforms of the House of Lords that may by then be in place, should appointment of former members of the Supreme Court to the House become the presumption?
37. The Government would welcome views on whether the provision to exclude active members of the Supreme Court from the House should extend to the other holders of high judicial office who presently sit in the House of Lords, and to any potential members of a reserve panel for the Court, should one be set up. On the one hand, there is the logic which says that active members of the judiciary should no longer be members of the legislature. On the other hand, it is much easier for those office holders to avoid sitting on any case where there might be a perceived conflict of interest because there is a larger pool of judges to choose from in each case. In any case, the Government would want to re-examine the

present presumption that the holders of certain judicial offices should be granted peerages and thus be made members of the House of Lords. It might appear anomalous to continue to award peerages to those who would then be unable to make a full contribution for a number of years.

Question 7: Should the link with the House of Lords and the Law Lords be kept by appointing retired members of the Supreme Court to the House?

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

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

Selection of members in the future

38. The Government would welcome views on two broad methods of approach to selecting future members of the Court. Obviously this has to take into account the establishment of a Judicial Appointments Commission for England and Wales as well as the arrangements for appointments in Scotland and Northern Ireland. The Government does not, however, favour allowing the Appointments Commission or Board in each jurisdiction to nominate members for their own jurisdiction. The Court will sit as a single UK court and it is important that it is seen to be a collegiate body.

39. The first alternative is, as in the case of Lords of Appeal in Ordinary, to have membership of the Court as an appointment made by the Queen on the advice of her ministers. The judges are independent servants of the Crown. That should be recognised by the appointment of at least the most senior members of the profession by the Queen rather than by a panel. The constitutional convention is that the Queen acts on the advice of ministers. This would mean recommendations being put to her by the Prime Minister following consultation with the First Minister in Scotland and the First and Deputy First Ministers in Northern Ireland. It could be argued that for appointments of this seniority, there should continue to be the political accountability presented by senior ministers' involvement. That is the case for the posts of Lord President of the Court of Session, for example, and for the Lord Chief Justice of England and Wales. On that approach, as now, there would be a process of consultation with the senior members of the Judiciary also in each jurisdiction about suitable candidates. That consultation is, however, presently carried out by the Lord Chancellor. A Secretary of State would be in rather a different position. On the other hand, it is the First Minister in Scotland who recommends to the Prime Minister the appointment of the Lord President of the Court of Session. Such involvement of a non-judicial minister would not therefore be unprecedented. The alternative would have to be consultation by the Prime Minister and the First Minister in Scotland or the First and Deputy First Ministers in Northern Ireland with the heads of the Judiciary in each of the three jurisdictions.
40. Alternatively, it could be argued that the whole climate of opinion now requires that there is some transparent process which leads to the identification of names, even if the final recommendations are still made by the Prime Minister following consultation with the First Minister or First and Deputy First Ministers as appropriate. That is the whole thrust of the reforms to the judicial appointments system discussed in the paper *Constitutional Reform: A New Way of*

Appointing Judges which was also published on 14 July. The question is whether such a process is suitable for appointments at this level, where intimate knowledge of performance by a defined group is the best evidence that is likely to be available.

41. Three models of Commission are discussed in *Constitutional Reform: A New Way of Appointing Judges*. These are:
- a Commission which would take over the Lord Chancellor's role in directly making appointments up to the level of Circuit Judge² and in advising The Queen on appointments at that level and above; or
 - a Commission which would make recommendations to a Minister as to whom he or she should appoint (or recommend that The Queen appoint).
 - a Commission which combines the functions above by directly making more junior appointments (for example, part-time judicial and tribunal appointments) and by recommending more senior appointments.

Of the three models discussed above, the Government considers that the proposal for a Commission which recommended a limited number of names to the Prime Minister (i.e. the middle one) would be the best for appointments to the Supreme Court. Given the small number of appointments, and the likely limited field of candidates, it would be sufficient for the Commission to present the names of only one or two candidates. The Prime Minister should then consult the First Minister for Scotland and the First and Deputy First Ministers in Northern Ireland.

² With the exception of District Judges (Magistrates' Courts) who are appointed by The Queen.

42. On the whole, the Government thinks that the model which would entrust selection to an independent panel directly advising The Queen is less suitable for appointments at this level.
43. Whichever model were adopted, the Commission would have to be separate from the judicial appointments commissions which will exist in the separate jurisdictions once the England and Wales body is set up. As the Court will be the Supreme Court for the whole United Kingdom, it is important that its membership is also selected by those who are representative of all three of the legal jurisdictions within the country. However, rather than set up another new body to deal especially with the very small number of appointments there will be each year, a Commission to advise on appointments to the Supreme Court could be drawn from all three commissions and boards.

Question 10: Should appointments to the new Supreme Court continue to be made on the direct advice of the Prime Minister, after consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland and with the profession?

Question 11: If not, should an Appointments Commission recommend a short-list of names to the Prime Minister on which to advise The Queen following consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland? Or should it be statutorily empowered to advise The Queen directly?

Question 12: If there is to be an Appointments Commission for Supreme Court appointments, how should it be constituted? Should it comprise members drawn from the existing Appointments bodies in each jurisdiction?

44. Whichever method of appointment is adopted, should this be on the basis of open applications rather than simply of consultation among the senior members of the profession? The Government is aware that there is sometimes reluctance among those who already hold very senior positions to put themselves forward through an open application process. It may be argued that the pool of candidates will be sufficiently well known for the Commission or Ministers to act without formal applications. Those who are likely to be the strongest candidates will have their performance consistently evaluated by the courts above them, including the existing members of the Supreme Court. Given the size of the pool and the specialist nature of the post, this could seem an artificial procedure whose added-value is not clear. The present members of the Court will also have views on the particular needs of the Supreme Court and whether expertise in any particular area of law is required. The Commission or Ministers would in any case be required to seek comments from a defined group of those who would be expected to be aware of the qualities of both the candidates and the requirements of the position. As against this, the Government is seeking generally to make the whole judicial appointments process open and transparent. Such a process might also contribute to enhancing the diversity of the Court, while respecting the overwhelming criterion of appointment on merit. These objectives can be argued to apply equally to the most senior appointments as to the more junior.

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

45. It has been suggested that one way of enhancing the status of the members of the Court would be for them to be subject to confirmation hearings before one or other of the Houses of Parliament. This could, it is argued, help ensure that Parliament has confidence in the Judiciary. The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills. If the intention was to assess their more general approach to issues of public importance, this would be inconsistent with the move to take the Supreme Court out of the potential political arena. One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be the members of the Court would cut right across that objective.

Qualifications for membership

46. The present qualification for appointment as a Law Lord is either two years' holding of high judicial office or 15 years' standing as a barrister, advocate or solicitor in England and Wales or Scotland, or as a barrister or a solicitor in Northern Ireland. The Government is not minded to change this. It has been suggested that changes should be made to make it easier for distinguished academics to be appointed, because, for example, this would make it easier to enhance the diversity of the Court. In those circumstances, a more open appointment process would be desirable. It could, however, be argued that this is not the level for opening up the field in this way, and it is at lower levels of the Judiciary that the criteria might need to be re-examined. It might be felt that some experience of judicial

work should be gained before joining the highest court of appeal and such aspirant members should at least sit part-time in one of the lower courts. It is likely that the 15-year qualification would make most of these technically eligible in any event. However, the Government would be interested in views on whether that is the case, or whether specific criteria for those who are not active in the courts should be drawn up.

Question 14: Should there be any change in the qualifications for appointment, for example to make it easier to appoint distinguished academics? Or should this be a change limited to appointment to lower levels of the Judiciary, if it is appropriate at all?

Criteria for selection

47. The criteria for selection for members of the Court must be consistent with those for selection to the lower courts. The principles will be that selection must be made from a pool of properly qualified candidates on merit alone. The impartiality of the Judiciary must be maintained, and appointments must be free from improper influence. Merit will be judged by assessment against a number of defined qualities. For the present system, these are qualities such as legal knowledge and experience; intellectual and analytical ability; sound judgement; decisiveness; communication and listening skills; authority and case management skills; integrity and independence; fairness and impartiality; understanding of people and society; maturity and sound judgement; courtesy; and commitment, conscientiousness and diligence.
48. Because the Court will be the Supreme Court for the whole of the United Kingdom, it is important that it should include persons of knowledge and experience in the law in the different jurisdictions.

There is a long-standing convention that there should be two Scottish Law Lords. In recent years there has also been a Northern Ireland Law Lord. Such arrangements should certainly continue. The Government would be interested in views on whether they should be expressed as a formal quota. If the Court is to take on responsibility for devolution issues, some regard should also be had to ensuring that the Welsh dimension of the England and Wales judicial system is respected. Ensuring adequate representation from each jurisdiction will in any case be a guideline to those responsible for selecting members. There are various ways of setting such guidelines: the Government can do so purely administratively; they can be set out in a Code of Practice which is subject to parliamentary approval; or they can be set out in the legislation.

Question 15: Should the guidelines which apply to the selection of members of the new Court be set out administratively, or through a Code of Practice subject to Parliamentary approval, or in legislation?

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

Tenure

49. The members of the Court will be appointed on the same basis as senior judges now are. That is, they will be appointed during good behaviour, but may be removed by Her Majesty on the address of both Houses of Parliament. The retirement age of a Law Lord is governed by the terms on which he was originally appointed. Currently, some Law Lords will have to retire at 75 and some at 72 and this will progressively reduce to 70. It has been suggested that,

because members are likely to reach the Court comparatively late in life, the statutory retirement age should be fixed at 75, so that each member can be assured of comparatively long tenure and the Court enjoys some stability. Earlier, this paper has asked for views on whether the Court should have access to additional judges who are not full-time members of the Court. One source for those additional judges could be recently retired members of the Court, who might be eligible to serve for a further five years after the statutory retirement age. Having such a panel of experienced judges available could be very useful to the management of the Court's business. In combination with a retirement age of 75, however, this would lead to judges being able to sit until they were 80.

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

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

How should the Court operate?

50. It might be felt that the issues in this and the next section are ones which are best left to the Court itself to determine. However, because they have implications for the overall size of the Court, and may have implications for the legislation, the Government is seeking views on them here.
51. The present Appellate Committee usually sits in a panel of five members and provides a panel for the Judicial Committee and, if

numbers permit, a second panel for the Appellate Committee. For some very important cases, seven or even nine members sit. The statutory minimum is 3. Other comparable courts have other arrangements. For example, the United States Supreme Court always sits *en banc*, that is every member of the Court sits on every case unless indisposed or unavailable for some other reason. The reason for this is to prevent the possibility that the composition of the panel will affect the outcome of the case.

52. This is clearly an important consideration. However, in every other court, the selection of the judge to hear the case may at least in theory affect the outcome. It is impossible to tell after the event whether it has done so or not. It is not a unique or over-riding consideration in relation to the Supreme Court. Enabling the Court to sit in panels will enable it to deal with more cases. It will also enable panels to be constituted with regard to their expertise and background, thus getting the best qualified panel in each case. If all the members of the Supreme Court sat *en banc*, this would also mean that none would be available to sit in the Judicial Committee at the same time. In the United States, appointments to the Supreme Court are more political, and therefore there is a stronger possibility that the composition of the court might affect the outcome. This is not the case in the United Kingdom.

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

A leave filter

53. At present, cases can reach the Appellate Committee by two routes: by leave to appeal from the lower court or by petition to the House

of Lords itself. UK cases reach the Judicial Committee on devolution issues as described above.

54. The Government would welcome views on whether this system should be altered, so that the presumption was that the Court itself decided which cases it would hear.
55. The advantage of switching to a system whereby the Court itself decided which cases it should hear, subject only to the special exception of rulings on competence under the Scotland, Northern Ireland and Government of Wales Acts 1998, is that such a general rule would give the Supreme Court the control it needs over its own caseload, and would enable it to develop its own policies and approach about the categories and importance of the cases on which it should rule. It would enable it to work out where it sees its greatest added value and concentrate on developing jurisprudence in the areas which most need it. It would also bring the Court broadly into line with other English-speaking Supreme Courts. It would, however, mean a change in relation to Scottish civil appeals.
56. It could be argued in response that it is an unjustified anomaly that citizens in different parts of the Kingdom have different rights of access to its highest court. The disadvantages of changing this are threefold. First, in respect of Scotland, the arrangement whereby Scottish civil cases currently lie to the House of Lords as of right is long established; there is no evidence that change is needed; and there are strong arguments for leaving the position unchanged. The second disadvantage, in all respects, is that it would mean that more of the work of the Court would be absorbed in deciding what cases to hear, rather than hearing them. It would lead, in practice, to fewer cases being heard or to cases taking longer to come before the Court. The third disadvantage is that it would mean that all those seeking the judgment of the Court would have to incur the cost of petitioning for the right to appeal.

Question 20: Should the Court decide for itself all cases which it hears, rather than allowing some lower courts to give leave to appeal or allowing some appeals as of right?

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

Other responsibilities of the Law Lords

57. The Law Lords presently carry out a number of functions within the House of Lords, in their capacity as members of the House. For example, the legal sub-Committee of the European Committee is traditionally chaired by one of the Law Lords. They have also chaired ad hoc select committees. That has been a valuable service to the House. However, it is not a specific professional function which cannot be fulfilled by others. There are many qualified lawyers in the House of Lords, some with judicial experience. How the House responds to the absence of the Law Lords in this context is of course a matter for it. The Government does not see any need to make special arrangements to preserve any interest of the Law Lords in this work, beyond what is discussed in paragraphs 34-37 above.

Titles

58. This paper has spoken of the creation of a new Supreme Court. The new body will indeed be the supreme court of the United Kingdom, in that it will be the highest court in all three of the jurisdictions in the realm. There is, however, already a legal entity known as the

Supreme Court of England and Wales, which consists of the Court of Appeal, the High Court and the Crown Court³. It is used to give jurisdiction to judges and to route work between the courts. This title is not in common usage. In Scotland, the term Supreme Court has also been used on an administrative basis to refer to the Court of Session and the High Court of Justiciary collectively. There is also a Supreme Court of Northern Ireland. However, to avoid confusion, in the future the title of Supreme Court will be reserved for the Court to be created as a result of this consultation. The new Court cannot become part of any of the existing Supreme Courts because its jurisdiction will extend to all three jurisdictions.

59. In the absence of specific provision, members of the Court will no longer have any specific title, since they will not automatically become peers. The Government would welcome suggestions as to what to call them instead. For example, one option would be to put the letters JSC 'Justice of the Supreme Court' after their names and give them no title beforehand. As against this, however, Court of Appeal judges are already called Lord Justices of Appeal and Scottish High Court judges are called Lords. It would be misleading to leave the members of the Supreme Court with titles which appeared to accord them a lower rank. That might point to retaining the title of Lord of Appeal. At the same time, it would equally be misleading to give the judges of the Supreme Court a title that could continue to confuse the public about their relationship with the House of Lords. A further possibility might therefore be Lord Justice of the Supreme Court as a title.

3 That is done in the Supreme Court Act 1981, and apart from changes to the Act following the establishment of a United Kingdom body called the Supreme Court it may need technical amendment (as may the legislation relating to appeals in other parts of the United Kingdom) to reflect the fact that appeals will now go to a separate court rather than to the House of Lords.

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

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

Relationship with the rest of the Judiciary

60. As referred to above, consideration will be given to what, if any, formal changes might be needed in the separate legal systems in England and Wales, Scotland and Northern Ireland as a result of the establishment of the new Supreme Court, rather than the House of Lords, as the highest court in the United Kingdom in order to link it in as the final court of appeal for each jurisdiction. Those links will not affect the separateness of the three jurisdictions (which in Scotland's case is guaranteed by the Act of Union), or the functions of the other courts or the judges in each.
61. It follows that the President of the Court will not usurp the authority of what will be the most senior judge⁴ in the three contributing jurisdictions (although it will probably be necessary to recognise the new Court's role in terms of the judicial precedence for the President and the other Supreme Court judges in each jurisdiction). His or her role will be a United Kingdom one, to guide the Supreme Court in the development of the law in each jurisdiction and across the United Kingdom. The interests of the Judiciary as a profession can properly be looked after only within the separate jurisdictions.

⁴ The Lord Chief Justice of England and Wales (following the abolition of the role of Lord Chancellor), the Lord President of the Court of Session (and Lord Justice-General) in Scotland and the Lord Chief Justice of Northern Ireland.

62. It is of course possible that the President's newly defined role in relation to the other courts in each of the jurisdictions of the United Kingdom means that, over time, he or she will come to act as the spokesman for all the senior judges in relation to common issues, or where there are judicial matters which involve two or more jurisdictions. But this will be a matter for the judges.

Administration, funding and support

63. At present, the Appellate Committee is funded through the House of Lords and its administrative support is provided by the House's administration under the Clerk of the Parliaments. The cash budget for the Office in 2001-02 was £168,300, compared to £141,484 in 2000-01; £112,610 in 1999-2000; and £122,950 in 1998-99. Total expenditure in 2001-02 was £623,548 (£590,988 in 2000-01; £605,060 in 1999-2000; and £607,737 in 1998-99). These figures include staff salaries but do not include common services in the Palace such as library, security and accommodation costs. Nor do they include the Law Lords' salaries. Total receipts from fees charged on civil but not criminal judicial business and on assessment of lawyers' bills of costs were £499,715 (£443,220 in 2000-01; £496,708 in 1999-2000; and £494,435 in 1998-99). The Judicial Committee is funded through the Privy Council office. Revised arrangements will therefore have to be made for the new Court.
64. The Government proposes that the administration and resources for the new Court should come within the responsibility of the Department for Constitutional Affairs. Although the bulk of the Lord Chancellor's Department's responsibilities for the courts system traditionally did not extend outside England and Wales, it already has some responsibilities for tribunals which go beyond England and Wales. Like most other departments, it can fulfil both a UK jurisdiction where the law requires it, and an England/Wales one

(only) where the law requires that. Its responsibility for the constitutional settlement is already a UK-wide function and responsibility for the Supreme Court would be consistent with that. The new Court will have jurisdiction throughout the UK which will be defined in statute. In the Government's view, therefore, this will be a sufficient guarantee of separation from the judicial system in England and Wales to be compliant with the terms of the Act of Union with Scotland. That statute will also require the Secretary of State to provide administrative support and resources to the new Court in similar terms to the requirements presently set out in the Courts Act 1971 or their successors in the Bill currently before Parliament.

65. The Department for Constitutional Affairs would therefore take responsibility for bidding for and providing the resources for the Court. The Permanent Secretary to the Department would be the Accounting Officer. It would provide the administrative staff for the Court, and would also provide the central services (financial, IT, premises management and HR). The relatively small size of the Court and its administrative requirements makes separate administrative arrangements uneconomic. For example, it would need to provide its own expert and technical advice on such matters as procurement, IT and premises management. Those staff would have no access to a proper career structure. There might be a need for as many as 6-8 such staff whose functions could be more effectively fulfilled as part of a larger organisation.
66. Salaries for the members of the Court itself would continue to fall on the Consolidated Fund. They would continue to receive the same pension arrangements as before.

Accommodation

67. The new Court will obviously need accommodation outside the House of Lords. The Department will consult the existing Law Lords to identify their precise accommodation needs. There are a number of options which might be suitable, and a detailed business case will need to be drawn up and costed before any firm proposals can be made. This work will be undertaken in parallel with this consultation exercise.

Annex A: Summary of consultation questions

Below is a summary of the questions set out in the consultation paper to which we would specifically like answers. **Please ensure that you include the number of the question/s to which you are responding.** However, when replying, please feel free to make any additional comments or raise other points which you consider relevant.

Question 1: Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?

Question 2: Do you agree that the number of full-time members of the Court should remain at 12 but that the Court should have access to a panel of additional members?

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

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

Question 5: Should there be a Deputy President?

Question 6: Should the posts of President and Deputy President be filled by the same process as membership generally, or should these appointments always be made on the advice of the Prime Minister after consultation, without involving any Judicial Appointments Commission?

- Question 7:** Should the link with the House of Lords and the Law Lords be kept by appointing retired members of the Supreme Court to the House?
- Question 8:** Should the bar on sitting and voting in the House of Lords be extended to all holders of high judicial office?
- Question 9:** Should there be an end to the presumption that holders of high judicial office receive peerages?
- Question 10:** Should appointments to the new Supreme Court continue to be made on the direct advice of the Prime Minister, after consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland and with the profession?
- Question 11:** If not, should an Appointments Commission recommend a short-list of names to the Prime Minister on which to advise The Queen following consultation with the First Minister of Scotland and First and Deputy First Ministers in Northern Ireland? Or should it be statutorily empowered to advise The Queen directly?
- Question 12:** If there is to be an Appointments Commission for Supreme Court appointments, how should it be constituted? Should it comprise members drawn from the existing Appointments bodies in each jurisdiction?
- Question 13:** Should the process of identifying candidates for the new Court include open applications?

Question 14: Should there be any change in the qualifications for appointment, for example to make it easier to appoint distinguished academics? Or should this be a change limited to appointment to lower levels of the Judiciary, if it is appropriate at all?

Question 15: Should the guidelines which apply to the selection of members of the new Court be set out administratively, or through a Code of Practice subject to Parliamentary approval, or in legislation?

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

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

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

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

Question 20: Should the Court decide for itself all cases which it hears, rather than allowing some lower courts to give leave to appeal or allowing some appeals as of right?

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

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

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

Name:

Organisation:

Address:

If you are a representative group please give a summary of the people and organisations you represent:

Please send your response by **7 November 2003** to:

Simon Parsons

Department for Constitutional Affairs

Legal and Judicial Services Group

5th Floor

30 Millbank

London

SW1P 4XB

Tel: 020 7217 4876

Fax: 020 7217 4882

Email: simon.parsons@dca.gsi.gov.uk

Annex B: List of Consultees

Copies of the consultation paper have been sent to the following organisations. Please note the list is not exhaustive and comments are welcomed from any group or individual who hold a view on the issues in this paper:

• Judiciary

The Lord Chief Justice of England and Wales
 The Lord President of the Court of Session.
 The Master of the Rolls
 The Vice Chancellor, Chancery Division
 The President of the Family Division of the High Court
 Judges of the Court of Session
 High Court Judges
 Circuit Judges
 District Judges
 District Judges (Magistrates Court)
 Recorders
 Her Majesty's Council of Circuit Judges
 Association of District Judges
 Magistrates' Association
 Magistrates' Courts Consultative Council.

• The Legal Professions

Administrative Law Bar Association
 Association of Personal Injury Lawyers
 Association of Women Barristers
 Bar Council
 Chancery Bar Association
 Commercial Bar Association
 Faculty of Advocates
 Family Bar Association
 Institute of Barristers' Clerks
 Institute of Legal Executives
 Justices' Clerks' Society
 Law Society
 Law Society of Scotland
 Legal Aid Practitioners' Group
 Magistrates' Association
 Society for Black Lawyers

Solicitors' Association of Higher Court Advocates
 Solicitors' Criminal Law Association
 Solicitors' Family Law Association
 Young Barristers' Committee
 Young Solicitors' Committee

• Government Departments, Public Bodies and Agencies

Advocate General for Scotland
 Attorney General's Chambers
 Cabinet Secretary's Office
 Chief Medical Officers
 Civil Justice Council
 Commission for Judicial Appointments
 Commission for Racial Equality
 Council on Tribunals
 Crown Dependencies
 Crown Prosecution Service
 Department for Work and Pensions
 Environment Agency
 Equal Opportunities Commission
 European Commission
 Health and Safety Executive
 HM Customs & Excise
 HM Treasury
 Home Office
 Inland Revenue
 Judicial Studies Board
 Law Commission
 Legal Services Commission
 Legal Services Consultative Panel
 Legal Services Ombudsman
 Lord Advocate
 National Assembly for Wales
 National Audit Office
 Northern Ireland Office

Probation Service
Serious Fraud Office
Solicitor General
Treasury Solicitor's Department
Wales Office

• Police and Probation Interest Groups

Association of Chief Officers of Probation
Association of Chief Police Officers of
England, Wales and Northern Ireland
Association of Police Authorities
Police Federation
Police Superintendents' Association of
England and Wales

• Main Representative Groups

Advice Services Association
British Bankers Association
British Building Societies Association
CASIA (Complaints Against Solicitors
Action for Independent Adjudication)
Civil Courts Users' Association
CBI (Confederation of British Industry)
Consumers' Association
Crimewatch
Crime Concern
Crime Stoppers
Disability Alliance
Federation of Law Centres
Gingerbread
Howard League for Penal Reform
IPPR(Institute for Public Policy Research)
Jill Dando Institute
Justice
Legal Action Group
Liberty
Local Government Association
Litigants in Person Society
NACRO
National Association of Citizen's Advice
Bureaux
National Consumer Council
National Council for Civil Liberties
NCH
National Society for the Prevention of
Cruelty to Children
Rape Crisis Federation Wales and
England
Rights of Women Victim Support
Women's National Commission

Scotland

• Judiciary

The Lord President
The Lord Justice Clerk
The Judges of the Court of Session
The Sheriffs Principal
The Sheriffs Association
The Scottish Land Court
Lord Lyon King of Arms
District Courts Association

• The Legal Professions

Law Society of Scotland and Faculty of
Advocates
Society of Solicitor Advocates
Scottish Law Agents Society
The Society of Writers to Her Majesty's
Signet
Scottish Law Commission
Scottish Committee of the Council of
Tribunals
Scottish Young Lawyers Association

• Government Departments, Public Bodies and Others

Judicial Appointments Board for Scotland
Judicial Studies Committee for Scotland
Justice Committees of the Scottish
Parliament
Members of the Scottish Parliament
Scottish Criminal Case Review
Commission
Scottish Executive Departments
Scottish Legal Aid Board

• Main Representative Groups

Age Concern Scotland
Amnesty International Scotland
Association of Directors of Social Work
British Medical Association CBI Scotland
CBI (Scotland)
Chartered Institute of Housing
Church and Nation Committee- Church of
Scotland
Commission for Racial Equality Scotland
Consortium on Crime and Criminal
Justice
Convention of Scottish Local Authorities

Disability Rights Commission
 Equal Opportunities Commission
 Equality Network
 Family Law Association
 Federation of Small Businesses
 Keepers of the Registers of Scotland
 Procurators Fiscal Society
 Scottish Association of Law Centres
 Scottish Council for Voluntary
 Organisations
 Scottish Human Rights Centre
 Scottish Legal Action Group
 Scottish Legal Aid Board
 Scottish Rape Crisis Network
 Scottish Women's Aid
 Scottish Trade Union Congress
 Shelter Scotland
 Victim Support Scotland

• Police and Probation Interest Groups

Association of Chief Police Officers in
 Scotland
 Association of Scottish Police
 Superintendents
 Scottish Police Federation
 Scottish Police Authorities Forum
 Scottish Drug Enforcement Agency

Northern Ireland

• Judiciary

The Lord Chief Justice of Northern Ireland
 All Northern Ireland Judiciary
 Association of District Judges (NI)
 Council of Her Majesty's County Court
 Judges (NI)
 Resident Magistrates Association (NI)
 Society of Masters (NI)

• The Legal Professions

Belfast Solicitors Association
 General Council of the Bar in Northern
 Ireland
 Law Society of Northern Ireland

• Government Departments, Public Bodies and Agencies

Age Concern Northern Ireland

Coalition on Sexual Orientation
 Commissioner for Judicial Appointments
 for Northern Ireland
 Committee on the Administration of
 Justice
 Crown Solicitor for Northern Ireland
 Northern Ireland Government
 Departments
 DFP Departmental Solicitor
 Disability Action
 Employers Forum on Disability
 European Commission Office in Northern
 Ireland
 Guardian *ad Litem* Agency
 Help the Aged (NI)
 Institute of Professional and Legal
 Studies (NI)
 Judicial Studies Board (NI)
 Land Registers of Northern Ireland
 Law Reform Advisory Committee
 Legal Aid Committee
 NI Council for Ethnic Minorities
 NI Economic Council
 NI Ombudsman
 NICVA
 Northern Ireland Local Government
 Association
 Northern Ireland Political Parties
 Northern Ireland Prison Service
 Northern Ireland Women's Aid Federation
 Office of Law Reform, Northern Ireland
 Office of the First Minister and Deputy
 First Minister
 Official Solicitor's Office (NI)
 Police Ombudsman (NI)
 Policing Board for Northern Ireland
 Probation Board for Northern Ireland
 QUB Law School
 The Chief Constable of the Police
 Service of Northern Ireland
 The Compensation Agency
 Training for Women Network
 University of Ulster
 Youth Council for NI

• Main Representative Groups

Equality Commission for Northern Ireland
 Human Rights Commission for Northern
 Ireland
 Northern Ireland Law Centre
 Northern Ireland Chamber of Commerce
 and Industry
 Northern Ireland Citizens Advice Bureau

Northern Ireland Committee of the Irish
Congress of Trade Unions

Northern Ireland Federation of Small
Business

Annex C: Consultation Co-ordinator

If you have any complaints or comments about the consultation process, you should contact the Department for Constitutional Affairs consultation co-ordinator, Laurence Fiddler, on 020 7210 8516 or email him at laurence.fiddler@lcdhq.gsi.gov.uk. Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator,
Room 8.23
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

General principles of Consultation

The criteria in the Code of Practice on Written Consultation issued by the Cabinet Office is as follows:

- A Timing of consultation should be built into the planning process for a policy or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
- B It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
- C A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
- D Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
- E Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
- F Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
- G Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.