



JUDICIAL APPOINTMENTS COMMISSIONS:

A MODEL CLAUSE FOR CONSTITUTIONS

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On behalf of the CMJA, CLA and CLEA

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INTRODUCTION

In 2011 the Commonwealth Lawyers Association ("CLA"), the Commonwealth Legal Education Association ("CLEA") and Commonwealth Magistrates' and Judges' Association ("CMJA") came together to examine the appointments systems across the Commonwealth with a view to formulating a model clause for a Judicial Appointments Commission. The report below is the result of this examination.

Whilst the Associations recognise that there are already existing provisions in Commonwealth constitutions relating to judicial appointments, they identified the need to develop a model clause which might be used by Commonwealth countries in any reforms of written constitutions or statutes relating to judicial appointments.

The judiciary is one of the cornerstones of a modern democratic state and the way judicial officers are appointed has been an issue in many countries in the Commonwealth for a number of years.

Principle IV of the Commonwealth (Latimer House) Principles on the Accountability of and Relationship Between the Three Branches of Government - 2003 - ("CLHP") states: *'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.'*¹

A key element in assuring that independence is the appointment process. The "Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence" on which the CLHP were based, provided that:

*"Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission."*²

However, the mechanisms for making judicial appointments were a matter of controversy throughout the Latimer House process. In the "refined" version of the Guidelines it was agreed that a footnote should be added:

"The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general."

During the meeting of the Expert Group formulating the CLHP, it was agreed that:

"Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

¹ P11.

² II,1 p17.

- *equality of opportunity for all who are eligible for judicial office;*
- *appointment on merit; and*
- *that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;*"

The opening clause was designed to meet those cases where no formal process involving a commission existed, but where that process was in practice seen to be independent.

The CLHP have been considered at subsequent conferences and meetings. Plans of Action have been issued following these meetings. The Nairobi Plan of Action recommends Governments to: "*set in place clearly defined criteria and a publicly declared process for judicial appointments;*"⁶

The Edinburgh Plan of Action urges: "*Those responsible for recommending judicial appointments, should, through public information programmes, broad advertising of judicial vacancies, and by adapting judicial working conditions where, appropriate, encourage women and those from diverse backgrounds to apply for judicial appointments*"⁴.

The model clause has been formulated in an attempt to deal with practical problems which have been experienced in various Commonwealth jurisdictions with their own constitutional appointments clauses and to accord with provisions contained in CLHP "on the accountability of and relationship between the three branches of government". Those provisions in the CLHP form part of the Commonwealth fundamental values. The CLA, CLEA and CMJA have provided support and advice to their members in the Commonwealth for many years and have gathered evidence (much of which has been received on a confidential basis, for obvious reasons). That evidence provides the basis for some of the recommendations below.

It should be noted that this proposed clause deals with the issue of appointment at all levels of the judiciary. This includes the Chief Justice. Views have been expressed that a retiring Chief Justice should not participate in the selection of his successor. There are also precedents involving the Head of State in the selection process. However, we believe that it is most desirable to have the Judicial Appointments Commission as responsible for all appointments, and the Judicial Appointments Commission is chaired by the Chief Justice.

It is recognised that provisions relating to the appointment of judges at the High Court and above are included in most constitutional documents, but it is also recommended that the Judicial Appointments Commission should deal with judicial appointments *at all levels and any promotions* (emphasis added). Some jurisdictions have separate procedures for the selection of judicial officers of the lower courts, and it is recommended that in each jurisdiction (whether State or Federal) there should be only one Judicial Appointments Commission for each separate jurisdiction dealing with candidates for all judicial appointment. This saves resources and provides the Judicial Appointments Commission both with an overall view of the judiciary, and the ability to fill vacancies efficiently.

³ 2.4.2 of the Nairobi Plan of Action

⁴ Action under 1.4 of the EPoA

For those jurisdictions, such as England and Wales, where there are lay Magistrates, it is recognised that requiring the Judicial Appointments Commission to organise the selection and appointment of the Lay Magistrates would overwhelm the resources of the Judicial Appointments Commission. However, it is recommended that the Judicial Appointments Commission should retain responsibility for these appointments, but with an express power of delegation to a person or body reporting to the Judicial Appointments Commission.

This model clause does not deal with the numbers of Judges to be appointed, an issue which has created problems for example in Bangladesh. The model clause also does not deal with appeals or complaints by unsuccessful candidates seeking appointment to the judiciary, but there are many advantages in providing an avenue for complaints to an Ombudsman, such as the Appointments Ombudsman of Northern Ireland. The clause is intended (like most provisions in a written Constitution) to be enforceable in proceedings if necessary.

Although it is recognised that judicial appointments in some countries come under the remit of a Judicial Services Commission which is responsible not only for appointments but also discipline, this model clause does not deal with the disciplining and removal of Judges. The CLA, CLEA and CMJA feel that the discipline and removal of judges could be considered as a separate project in itself, as it has become more problematic in the modern world, see Chief Justice of Gibraltar [2009] UKPC 43, Levers (Judge of Grand Court of the Cayman Islands) [2010] UKPC 24, and the recent impeachment of the Chief Justice of Sri Lanka.

The model clause has been prepared so that it can be considered in states which have different forms of executive structure, and different members of the executive responsible for legal affairs. Therefore we have used the wording "[Head of State]" and "[Minister Responsible for legal administration]" where relevant, so that it can be adapted to local conditions. References to the senior judiciary should be taken to be references to Judges appointed to the High Court/Constitutional Court/Supreme Court level or any appellate Courts from such Courts.

One of the aims of this project is to stimulate discussion about the process for the appointment of the judiciary, and to share what we have considered to be evidence of best practice from around the Commonwealth. This clause is a start, but like most things, we do not doubt that it can be improved.

In addition the model clause is not intended to be prescriptive in nature. The particular resource problems of small states is recognised and an alternative model for such states which limits the numbers to 5 might be: the Chief Justice; the Chief Magistrate; the Head of the Public Services Commission; one representative of the Bar/Law Society; and one lay person. The model clause is also intended to be adaptable in countries based on the Federal system or where representation from the provinces will be required on a Federal level Judicial Appointments Commission.

It is also recognised that any constitutional clause of this nature is only useful if it is implemented by the Executive.

MODEL CLAUSE

For the detailed reasons set out in the rest of this paper the following model appointments clause is recommended:

1. ***There shall be a Judicial Appointments Commission.***
2. ***The members of the Judicial Appointments Commission shall be:***
 - a) ***A chairperson who shall be the Chief Justice (or Judicial Head of the Judiciary), or a member of the senior judiciary designated by the Chief Justice;***
 - b) ***The President of the Court of Appeal, or a member of the Court of Appeal designated by the President;***
 - c) ***2 other members of the senior judiciary designated by the Chief Justice [or if there is a body representing the judges such as the Judges' Council];***
 - d) ***A Chief Magistrate [or equivalent senior Judge of limited jurisdiction], or a Magistrate designated by the Chief Magistrate;***
 - e) ***2 practising members of the legal profession appointed in the manner set out in (3) below;***
 - f) ***2 practising members of the legal profession appointed in the manner set out in (3) below;***
 - g) ***a teacher of law appointed in the manner set out in (4) below;***
 - h) ***5 lay members, appointed in the manner set out in (4) below.***
3. ***The practising members of the legal profession shall be selected by the relevant professional bodies in accordance with a transparent and published procedure.***
4. ***The teacher of law and 5 lay members shall be appointed after advertisements have been placed in national media and shall be selected immediately after establishment of the Judicial Appointments Commission by [the Public Service Commission or equivalent body] and thereafter by the Judicial Appointments Commission.***
5. ***The criteria for selection of the Commissioners should be clearly set out and each Commissioner should be selected taking into account their knowledge, expertise and independence of mind. The lay members of the Judicial Appointments Commission should broadly reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.***
6. ***The members of the Judicial Appointments Commission, save for the Chief Justice and President themselves whose period of office as a Commissioner shall be co-extensive with their own office, shall hold office for period of no more than 4 years.***
7. ***If a vacancy should arise within the Commission due to a Commissioner leaving for any reason, the vacancy should be advertised in the case of vi and vii above within 30 days.***

8. ***If the office of Chairperson of the Judicial Appointments Commission is vacant or the office-holder thereof is for any reason unable to perform the functions of his office, then until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, they shall be performed by an interim Chairman elected by the Commissioners from among their number.***
9. ***The Commission shall meet at least 3 times per annum and in any event within 30 days of the occurrence of any relevant vacancy in the judiciary unless candidates have been preselected in accordance with the Commission's procedures. The Chairperson shall be responsible for calling the meeting.***
10. ***Meetings of the Commission shall be quorate if 7 Commissioners attend and at least 3 of these must be Judicial Officers (and must include the Chief Justice);***
11. ***There shall be a secretariat for the Commission which shall arrange for the advertisement and appointment of Commissioners; summon and organise the meetings; and transact the business of the Commission pursuant to the direction of the Commissioners.***
12. ***The Commission shall be independently funded and resourced by Parliamentary vote [or under the auspices of the Judicial budget].***
13. ***The Commission shall select candidates for judicial office, according to published criteria including: intellectual capacity; integrity and independence; judgement; objectivity; an ability to understand and deal fairly with all persons and communities served by the Courts; authority and communication skills; and efficiency. The Commission shall give appropriate consideration to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination. Once selected the Commission shall recommend the appointment of the selected Judges to the [Head of State] who shall accept the recommendation***
14. ***The Commission shall be responsible for the establishment of its own procedural rules and regulations which should include provision for the conduct of meetings, where necessary, by video or other teleconferencing means and for the transparency of selection processes,***
15. ***The Commission shall provide reports on its activities to Parliament either through annual reports or through the reports of the Chief Justice on the state of the judiciary.***

REASONS FOR CERTAIN PROVISIONS IN THE MODEL CLAUSE

"(1) There shall be a Judicial Appointments Commission"

The Guidelines provided that: "*where no independent system already exists, appointments should be made by a Judicial Services Commission (established by constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a Commission*". Although appointment by the Executive might have worked well as a matter of history, and may even continue to work in some jurisdictions, there is a growing international consensus in favour of independent judicial appointment commissions, as part appears from Chapter 1, "The growing International Consensus in Favour of Independent Judicial Appointments Commission", by Professor Jeffrey Jowell QC, set out in "Judicial Appointments, Balancing Independence Accountability and Legitimacy" (a collection of essays analysing changes to Judicial Appointments in England and Wales). It is essential that there is a transparent process for the appointment of Judges. A Judicial Appointments Commission gives judicial appointments legitimacy without exposing the judiciary to popular election. Selection should be made on the quality of the candidates about which an electorate can only have limited information. Whatever the system used, the criteria set out in the CLHP should be followed.

"(2) The members of the Judicial Appointments Commission shall be"

The membership of the Judicial Appointments Commission and the method of appointment of the Commission have led to differences around the Commonwealth. The suggested membership is set out below. There may be local matters, especially in small states, which affect numbers but the reasons for the suggestions in the model clause are explained below.

"(i) A chairperson who shall be the Chief Justice (or Judicial Head of the Judiciary), or a senior member of the judiciary designated by the Chief Justice;"

Some Judicial Appointments Commissions are chaired by lay persons (see for example England and Wales), and there is no doubt that a lay chairperson can bring an important and different perspective to a Commission, but there are concerns that chairpersons might be appointed because of a political outlook (whether that is in a party political sense or not). In some jurisdictions (such as Uganda) there has been a deliberate move away from having a Chief Justice or Deputy Chief Justice as chairperson. However, after careful consideration we consider that the Chief Justice (or Judicial Head of the Judiciary if that is different), or a person from the senior judiciary appointed by the Chief Justice, should be the chairperson. This is because the Chief Justice is responsible for the smooth running of the courts and should therefore be responsible for the appointment process.

"(ii) The President of the Court of Appeal, or a member of the Court of Appeal designated by the President;"

This is a provision which appears in a number of different clauses around the Commonwealth, and seems to ensure some balance to the influence of the Chief Justice. It is important if the Chief Justice is not acting in accordance with Latimer House principles, or is subject to political pressure. However, in small jurisdictions where the court of Appeal only sits occasionally and is not permanent, this provision may not be sensible.

"(iii) 2 other members of the judiciary designated by the Chief Justice [or if there is a body representing the judges such as the Judges' Council];

(iv) A Chief Magistrate, [or equivalent senior Judge of limited jurisdiction], or a Magistrate designated by the Chief Magistrate;"

This then gives a total of 5 members of the judiciary on the Commission, of which at least 2 will be members of the senior judiciary. The other 3 members of the judiciary should include the Chief Magistrate, or equivalent, and can include representatives of the judicial bodies in the jurisdiction concerned (which in England and Wales includes Tribunal Judges and District Judges sitting in Magistrates' Courts). The square bracketed proposal in (iii) might be considered where there is a Judges' Council.

"(v) 2 members of the legal profession appointed in the manner set out in (3) below;"

Members of the legal profession are represented in most Commissions around the Commonwealth. Some provide for the Chairperson of the Bar or Law Society to be selected, others provide for the profession itself to do the selecting, but these models have been criticised on the basis that the Commissioner should not be representing the profession, but acting as a person chosen from the profession. Other models have been criticised on the basis that legal professionals not nominated by the Law Society or Bar Association have been selected for their links to the Government. In the event we decided to recommend that the relevant profession should choose the legal professional, but in a fair and transparent manner. If there is a dispute about which body represents the profession, then it seems that there is no option but to choose the legal professionals in the same manner as the lay persons or on a rotational basis if required.

"(vi) 1 teacher of law appointed in the manner set out in (4) below;"

The South African appointments commission provides for a teacher of law, and there are many advantages in ensuring that the academic voice is properly heard on the Commission. In what we consider to be the best system, the selection process should be undertaken in the same way as for the practising members of the legal profession in (v) above, namely by the relevant association of law academics. If there is no association of law academics in the country then it should follow the selection for lay members in 4 below, and this is the default provision that we have employed in the draft.

"(vii) 5 lay members, appointed in the manner set out in (4) below;"

Most modern appointments commissions provide for lay membership. It gives the Commission a credibility and balance which a judicial membership cannot hope to achieve on its own. The system for fair appointment of the lay members is very important.

It might be noted that we have not recommended members of the Executive or the Legislature be appointed to the Commission. Reports from those jurisdictions where politicians are represented have not always proved encouraging. It has been said that Commissioners who are politicians have turned up to meetings with lists of names of Judges to be selected and unopened material about the candidates. Democratic accountability must not extend to permitting politics in the selection of the judiciary.

"(4) The teacher of law, and 5 lay members shall be appointed after advertisements have been placed in national media and shall be selected immediately after establishment of the Judicial Appointments Commission by [the Public Service Commission] and thereafter by the Judicial Appointments Commission itself."

The question of who should appoint the appointers cannot be ignored. The temptations on the Executive to influence the appointment of Judges are too well known and documented to require repetition in this paper. The South African Appointments Commission provides for a teacher of law, and there are many advantages in ensuring that the academic voice is properly heard on the Commission.

In what we consider to be the best system, the selection process should be undertaken in the same way as for the practising members of the legal profession in (v) above, namely by the relevant association(s) of law academics. If there is no association of law academics in the country then it should follow the selection for lay members in 4 below, and this is the default provision that we have employed in the draft.

"(5) The criteria for selection of the Commissioners should be clearly set out and each Commissioner should be selected taking into account their knowledge, expertise and independence of mind. The lay members of the Judicial Appointments Commission should broadly reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance."

The clause deals in the broadest terms with the criteria to be applied for the appointment of Commissioners. It also deals with attempts to ensure that the lay membership of the Commission should broadly reflect the composition of society.

"(6) The members of the Judicial Appointments Commission, save for the Chief Justice and President themselves whose period of office as a Commissioner shall be co-extensive with their own office, shall hold office for a period of no more than 4 years."

The period in office for a Commissioner varies across the Commonwealth, but there are some around the 3 year mark, and some around the 5 year mark. 4 years is considered to be sufficient time to become a very useful Commissioner, but not so long that the Commission itself becomes rigid and inflexible in approach.

(8) If the office of Chairperson of the Judicial Appointments Commission is vacant or the office-holder thereof is for any reason unable to perform the functions of his office, then until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, they shall be performed by an interim Chairman elected by the Commissioners from among their number."

This is quite a sophisticated provision, and is itself based loosely on a provision in the Constitution of the Commonwealth of the Bahamas. However experience has shown that it is essential to make provision for a chairperson to be appointed at all times. The Chairperson authorised must be from the existing Commissioners.

"(9) The Commission shall meet at least 3 times per annum and in any event within 30 days of the occurrence of any relevant vacancy in the judiciary unless candidates have been preselected in accordance with the Commission's procedures. The Chairperson shall be responsible for calling the meeting."

There are too many reports of cases where the relevant Commission has not been summoned to carry out its business. This provision is designed to avoid such problems. An exemption is provided for those cases where a Commission has, in order to meet vacancies in a timely manner, preselected candidates for appointment for the next year. Express provision is made for the chairperson to call the meeting.

"(10) Meetings of the Commission shall be quorate if 7 Commissioners attend. and at least 3 of these must be Judicial Officers (and must include the Chief Justice)."

Issues of inquorate meetings have caused problems in Commonwealth jurisdictions. A provision requiring only half to be present is considered to be the least worst compromise in this area. However it is essential that at least 3 of the Commissioners be from the Judiciary (and definitely the Chief Justice must be part of that quorate to avoid any repetition of the situation which arose in Fiji following the coup in 2006.

In small jurisdictions where the Commission is limited to five (see above), it is recommended that there should be a quorate of 3 (with again at least 2 of the Commissioners from the Judiciary)

"(11) There shall be a secretariat for the Commission which shall arrange for the advertisement and appointment of Commissioners; summon and organise the meetings; and transact the business of the Commission pursuant to the direction of the Commissioners."

One of the most frequent complaints from Commissioners is the lack of support for the tasks that they carry out. It is essential to provide for a secretariat and for adequate funding. Although there is not uniformity of practice in this respect, section IV (b) of the CLHP provides that: "*Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought*".

"(12) The Commission shall be independently funded and resourced by Parliamentary vote [or under the auspices of the Judicial budget]."

This provision follows from the provision relating to the Secretariat. Any Secretariat needs funding and provision is made for Parliamentary vote on this funding. It is important that the Executive does not have control over the resources (human or financial) so that independence can be maintained.

"(13) The Commission shall be responsible for timely advertising vacancies for judicial appointment in national and legal media."

This provision should ensure that judicial appointments are carried out on an open and transparent basis by requiring advertisements of vacancies.

"(14) The Commission shall select candidates for judicial office, according to published criteria including: intellectual capacity; integrity and independence; judgement; objectivity; an ability to understand and deal fairly with all persons and communities served by the Courts; authority and communication skills; and efficiency. The Commission shall give appropriate consideration to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination. Once selected the Commission shall recommend the appointment of the selected Judges to the [Head of State]who shall accept the recommendation."

There is a remarkable uniformity of view about what criteria make a person fit for judicial office, and we have attempted to summarise those provisions in this clause.

This provision requires the Commission to select candidates, and to make the recommendation to the Head of State, who is bound to accept the recommendation. Neither the power of veto, nor a rejection of the candidates proposed by the Judicial Appointments Commission is considered appropriate where there is an independent appointments process.

The use of the phrase "candidates for judicial office" is comprehensive of both the senior judiciary and other levels of the judiciary. This means that Registrars (where they are judicial officers) and judicial officers of the lower courts (such as Magistrates, who have extensive jurisdiction in many Commonwealth jurisdictions), are appointed by the Commission. It also means "acting", "ad hoc" or "part-time" members of the judiciary should be appointed by the Commission.

There may be a need to set up a special panel of Commissioners for the appointment of a Chief Justice.

"(15) The Commission shall be responsible for the establishment of its own procedural rules and regulations which should include provision for the conduct of meetings, where necessary, by video or other teleconferencing means and for the transparency of selection processes."

It is important that the selection process is seen to be transparent in the processes it uses to assess the qualifications of candidates for appointments. In some countries, such as

South Africa the deliberations are through public hearings. We do not recommend that, because reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large. Whatever the method, there should be an established, public system for the assessment of qualifications of candidates. This will also help in ensuring that any complaints about the procedures can be easily dealt with by the Appointments Ombudsman or through an appeal system.

"(16) The Commission shall provide reports on its activities to Parliament either through annual reports or through the reports of the Chief Justice on the state of the judiciary."

Part of the reason for a Judicial Appointment Commission is to provide transparency and fairness in a vital part of a modern democratic state. Providing reports to Parliament provides that transparency, and does not undermine the independence of the judiciary. Further in order to ensure continued resource funding, the Chairman of the Commission has to provide annual reports to Parliament. This may be done as part of the Chief Justice's report on the judiciary or as a separate report.

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