



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

Paper 61/12

15 March 2012

NIAR 202-12

**Fiona O'Connell**

# Supplementary Briefing: Appointments to the Court of Appeal

## 1 Introduction

This paper has been prepared for the Committee for Justice's review of the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009. The Committee for Justice has requested further information on the process of appointments to the Court of Appeal in England and Wales, and how it differs from the process in Northern Ireland.

## 2 Appointments to the Court of Appeal in England and Wales

There are statutory requirements in England and Wales on recommendations for appointments to the Court of Appeal. These requirements are set out in sections 76-84 of the Constitutional Reform Act 2005. The legislation requires the Lord Chancellor to make a recommendation to fill any vacancy in the Court of Appeal.<sup>1</sup> The Lord Chancellor may make a request to the Judicial Appointments Commission to make a recommendation; however before making such a request, the Lord Chancellor must

<sup>1</sup> Sec 77 of the Constitutional Reform Act 2005

consult with the Lord Chief Justice.<sup>2</sup> The Judicial Appointments Commission determines the process it will follow in making a selection.<sup>3</sup> On receiving the request from the Lord Chancellor, the Commission must convene a panel to determine and apply the selection process and to make a selection.<sup>4</sup> The Constitutional Reform Act 2005 also makes provision for the composition of the membership of the selection panel convened by the Commission. The panel must include four members which include:<sup>5</sup>

- The Lord Chief Justice or his nominee who is chairman of the panel;
- A Head of Division or Lord Justice of Appeal designated by the Lord Chief Justice;
- The Chairman of the Judicial Appointments Commission or his nominee;
- A lay member of the Judicial Appointments Commission nominated by the third member.

The legislation requires that on any vote of the panel, the chairman of the panel has an additional, casting vote in the event of a tie.<sup>6</sup> The panel must subsequently submit a report to the Lord Chancellor, stating who has been selected and any other information required by the Lord Chancellor.<sup>7</sup> The Lord Chancellor can accept the selection, reject it or ask the Commission to reconsider.<sup>8</sup> However the power of the Lord Chancellor to reject a selection is only exercisable on the grounds that the Lord Chancellor is of the view that the selected person is not suitable for the office in question.<sup>9</sup> The power of the Lord Chancellor to ask the panel to reconsider its selection is exercisable only on the grounds that the Lord Chancellor is of the opinion that the selected candidate is not suitable for the office concerned or there is evidence that the selected person is not the best candidate on merit.<sup>10</sup>

A joint note on the Court of Appeal Selection Process has been agreed by Judicial Appointments Commission (JAC) and Judicial Executive Board (JEB). The note sets out the approaches and principles the JAC and JEB commend each selection panel to consider during the selection procedure.<sup>11</sup> This is contained in **Annex A** of this paper.

### 3 Appointments to the Court of Appeal in Northern Ireland

In Northern Ireland, there are no similar statutory provisions to those in the Constitutional Reform Act 2005 setting out the processes to be followed for the

---

<sup>2</sup> Section 78 of the Constitutional Reform Act 2005

<sup>3</sup> <http://jac.judiciary.gov.uk/about-jac/142.htm>

<sup>4</sup> Section 79 of the Constitutional Reform Act 2005

<sup>5</sup> Section 80 of the Constitutional Reform Act 2005

<sup>6</sup> Section 80 (13) of the Constitutional Reform Act 2005

<sup>7</sup> Section 81 of the Constitutional Reform Act 2005

<sup>8</sup> Section 82 of the Constitutional Reform Act 2005

<sup>9</sup> Section 83 (1) of the Constitutional Reform Act 2005

<sup>10</sup> Section 83 (2) of the Constitutional Reform Act 2005

<sup>11</sup> Process for Appointments to the Court of Appeal, available at

[http://jac.judiciary.gov.uk/static/documents/Process\\_for\\_Appointments\\_to\\_the\\_Court\\_of\\_Appeal.pdf](http://jac.judiciary.gov.uk/static/documents/Process_for_Appointments_to_the_Court_of_Appeal.pdf)

appointments of Justices of Appeal. The Northern Ireland Act 2009 provides that appointments of Justices of Appeal in Northern Ireland are made by the Queen on recommendation made by the Prime Minister. Before making the recommendation on appointment, the Prime Minister must consult with the Lord Chief Justice (or if that office is vacant or the Lord Chief Justice is not available, the Senior Lord Justice of Appeal who is available) and the Northern Ireland Judicial Appointments Commission (NIJAC).<sup>12</sup>

## 4 Conclusion

It will be seen that:

In England and Wales, the Constitutional Reform Act sets out more detail on the process for appointing Court of Appeal judges.

In England and Wales, it is the Lord Chancellor who makes the final recommendation rather than the Prime Minister

In England and Wales, the Judicial Appointments Commission makes a selection for recommendation; in Northern Ireland the legal duty is only for the Prime Minister to consult with the Lord Chief Justice and NIJAC.

---

<sup>12</sup> Schedule 2 of the Northern Ireland Act 2009

## Annex A: Practice Note Process for Appointments to the Court of Appeal in England and Wales<sup>13</sup>

### Process for Appointments to the Court of Appeal

#### Statutory requirements

Recommendations for appointment to the Court of Appeal are made in accordance with section 76 of the Constitutional Reform Act 2005 (the Act). Key aspects of this are set out below:

- Parliament specifies that the Lord Chancellor asks the Judicial Appointments Commission (JAC) to convene a selection panel for appointment
- The composition of that panel is also specified in the Act
- The panel must consist of four members:
  - The first member and panel chair is the Lord Chief Justice, or his nominee (who must be a Head of Division or a Lord Justice of Appeal)
  - The second member is a Head of Division or Lord Justice of Appeal designated by the Lord Chief Justice
  - The third member is the Chairman of the JAC, or nominee
  - The fourth member is a lay member of the JAC designated by the third member
- The panel determines the selection process to be followed, applies it and makes a selection
- On any vote by the panel, the chairman of the panel has an additional casting vote in the event of a tie
- The panel then advises the Lord Chancellor of the candidate it has selected
- Under the terms of the statutory process the Lord Chancellor will then accept the selection, or reject it, or require the panel to reconsider the selection

#### Purpose of this note

As required by the Act, it is for each panel to decide the selection process that shall apply to fill a particular vacancy. This note sets out some approaches and principles that the JAC and the Judicial Executive Board (JEB) commend each selection panel to consider applying in order to identify the candidate that they propose to recommend for appointment.

#### Selection procedure

##### 1. The Eligible Pool

Although statute allows the panel to consider the appointment of suitably qualified persons other than High Court Judges, to date the pool of candidates for appointment to the Court of Appeal (CA) has been limited to serving High Court Judges.

The JAC has a statutory duty to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'. This duty falls upon a selection panel for a senior appointment, as a committee of the Commission, just as it falls upon the Commission as a whole. The JAC carries out this duty vigorously, with the enthusiastic support of the Lord Chief Justice and JEB.

The judges of the High Court should normally form the pool for appointments to the Court of Appeal, for the following reasons:

1. **The nature of the work of the CA** - The role of the CA is to a significant extent to conduct an examination of the trial process. For this purpose it is

<sup>13</sup> [http://jac.judiciary.gov.uk/static/documents/Process\\_for\\_Appointments\\_to\\_the\\_Court\\_of\\_Appeal.pdf](http://jac.judiciary.gov.uk/static/documents/Process_for_Appointments_to_the_Court_of_Appeal.pdf)

essential for the members of the CA to have practical experience as a trial judge.

**2. The need to encourage the highest quality candidates for the High Court** – It is of critical importance to maintain the standards of the High Court bench. It is therefore important that the best candidates accept the responsibilities of a High Court Judge and do not simply wait to be appointed directly to the CA.

Although panels will no doubt from time to time consider whether this should continue to be the case; the best route to a more diverse Court of Appeal is through a more diverse High Court.

## 2. Selection Process

Each panel will consider using the following selection process:

- **The nature of the post** – The JEB will make it clear to the panel, the scope of the expertise required. This will include such matters as: specialist legal expertise, leadership and potential for appointment to the Supreme Court. The JEB's decision will be based on historic trends and future projections.
- **All serving High Court Judges will be deemed to have applied for a CoA vacancy** unless they have specifically informed the LCJ that they do not wish to be considered. This approach is to be taken to ensure that all suitably qualified High Court Judges may be considered regardless of seniority.
- **Criteria for appointment to the Court of Appeal**
  1. Outstanding success as a High Court Judge. In particular outstanding intellectual capacity and legal acumen; with the ability to demonstrate, at the highest level, the other characteristics to be expected of a High Court judge as set out in Annex A. *[Not attached here – it is the JAC's High Court set of Qualities and Abilities.]*
  2. A breadth of experience allowing the candidate to adapt easily to the work of the CA; as for example with an ability to: deal effectively with unfamiliar areas of law; work collaboratively; deal fairly with both counsel and litigants in person.
  3. The requirements of specialist expertise and /or experience as identified by the JEB.
- **The Master of the Rolls<sup>1</sup> will write to members of the CoA on behalf of the selection panel seeking views as to the most suitable candidates for appointment**

Members of the Court of Appeal will be invited to supply evidence on the suitability of High Court Judges for appointment to the CA. Comments will be supported by relevant evidence. In particular members of the Court of Appeal will

be invited to identify judgments and any other relevant material (such as summings up, articles and the like) which the panel may consider as part of the assessment process. In some circumstances, the panel may judge that others well placed to supply references should also be approached. Their names will be agreed at the beginning of the selection process.

- **The Master of the Rolls' Office, with the assistance of the JAC as appropriate, will prepare materials for consideration by panel members. These will include:**
  - i) A table summarising the evidence received from members of the CA and any others providing reference material.
  - ii) Copies of the full evidence submitted.
  - iii) CVs, copies of judgments and any other relevant evidence, for appropriately short listed candidates.
  - iv) The panel will specifically consult the Heads of Division in such a manner as appears appropriate.
  - v) The panel may decide to interview short listed candidates.

### **3. Conflict of Interest Declarations**

Panel members will formally declare and record knowledge of candidates known personally and professionally to the panel secretariat in advance of considering the applications; and identify any conflicts of interest in line with the JAC policy. This will ensure complete transparency of connections and allow panel members to be informed by that knowledge when weighing contributions.

### **4. Good Character**

Subsequent to the decision to select and prior to advising the Lord Chancellor of the candidate(s) the panel has selected, the JAC will carry out character checks in line with those conducted on all JAC recommended candidates. For full time judicial post holders this will be with the Office for Judicial Complaints. Additional checks, for example with the professional bodies, may be carried out if appropriate for particular candidates.

### **5. Confidentiality**

Procedures put in place will ensure the confidentiality and security of assessment material and decision making.

### **6. Secretariat Support**

Secretariat support will be provided by the JAC, assisted by the MR's Private Office as appropriate.