

Judicial Appointments Commission – response to the Review of the operation of Statutory Consultation conducted by Work Psychology Group

The Commission is committed to continuously improving our processes, ensuring we select the most meritorious candidates, whilst encouraging a diverse range of candidates to apply for judicial appointment across England and Wales and in some jurisdictions across the United Kingdom. With the publication of this review, every aspect of the judicial appointment process used by the Commission has now been independently reviewed by external experts. WPG reviewed the JAC selection process in 2013 and reviewed the shortlisting tools used by the Commission in 2015 and in 2018. This review of the operation of statutory consultation follows the WPG-supported evaluation in 2021 of remote assessment at Selection Day during the pandemic. The Commission has implemented all improvements recommended as part of those reviews.

The Commission is grateful to WPG for conducting a thorough and comprehensive review of the operation of statutory consultation. The methodology included an in-depth review of a range of exercises run by the Commission, and a number of interviews with Commissioners, Judges, and members of the Judicial Diversity Forum (JDF) including the Law Society, the Bar Council, and CILEX. The Commission is particularly grateful to those interviewees who took the time to gather views and provide their thoughts on statutory consultation. The report, which includes details on the full methodology applied by WPG, can be found [here](#).

Our external partners within the JDF have been invaluable in encouraging this review and in June 2021, our Chairman, Lord Kakkar announced to the Justice Select Committee that a review of the approach to statutory consultation would be independently conducted by an expert external organisation, WPG. More detail on the announcement of the review can be found [here](#).

The requirement on the Commission to undertake statutory consultation is laid out in regulation. Before making a selection for appointment the Commission must consult a named statutory consultee who will have ‘...held the office for which a selection is to be made or has other relevant experience’. The law is clear that consultation must be sought on individual candidates for individual posts before making an individual selection. The requirement to undertake statutory consultation can only be waived (on a case-by-case) basis with the agreement of the Appointing Authority. To date this has been done only on a case-by-case basis for exercises for the selection of candidates for non-legal judicial roles on the basis that

statutory consultees are unlikely to have relevant information to assist the Commission in the selection of candidates for these roles.

This specific legal requirement to conduct such consultations, and provided for by Parliament, reflects the special nature of judicial appointments. Judges are independent, there is no traditional employer/employee relationship and are therefore not accountable in the same manner as other types of employment. They are instead appointed office holders and salaried judicial office holders are prohibited from other types of employment for life. Statutory consultation therefore forms part of the specific legal process that has been put in place by Parliament to ensure the public retain confidence in the judiciary. This means that the Commission is able to draw on the widest range of evidence available to ensure that only the most meritorious candidates of good character are recommended.

WPG have highlighted a number of important positive findings on how the process of statutory consultation is currently undertaken, including that:

- overall, the process of arranging and conducting statutory consultation is consistent for all candidates involved in a particular exercise.
- there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group
- recognition of the notable importance placed on the need for statutory consultation comments to be evidence-based and evidence of efforts by the JAC and the judiciary to improve the evidence base of the statutory consultation
- statutory consultation comments received before a selection day can support the selection panel when assessing candidates.

WPG have also made some important findings about how the approach taken to statutory consultation can be improved, including:

- addressing the absence of (or very limited) statutory consultation information on some candidates [in some exercises]
- dealing with inconsistency in the approach used by statutory consultees in collating information on candidates
- further improve the objectivity and evidence-base of statutory consultation feedback across exercises

- allow statutory consultees to have sufficient time to provide comments
- providing specific guidance and communication to candidates on how evidence is collated, weighted, and used in the process
- reviewing the need for confidentiality of comments.

The Commission has carefully considered these findings and agrees with the WPG recommendations that a revised approach to the operation of statutory consultation within the existing statutory framework should be introduced going forward. The Commission believes that this will further develop the process and practice of statutory consultation to secure fairness, practicality and transparency whilst maintaining the important role that statutory consultation can play in supporting selection panels and the Commission in making recommendations about candidates for certain judicial roles with clear, objective, and well-evidenced information on candidates' suitability. Some aspects of this revised approach lie outside of the Commission's direct responsibility and will require action by others. The Commission therefore welcomes the positive response it has so far received that those actions can be taken forward by others.

A revised approach to statutory consultation

The Commission will adopt a revised approach to statutory consultation for exercises launching from September 2022. The Commission will keep the approach under review and will evaluate its operation after a full two-year cycle of exercises in the judicial recruitment rolling programme. The key elements of the revised approach will be:

1. Request to dispense with statutory consultation in certain circumstances.

The Commission acknowledges WPG's findings that the current approach to seeking statutory consultation in large fee-paid exercises where consultees are unlikely to have relevant information on a substantial proportion of candidates and where comments can only be sought after selection day interviews and assessment, risks perceived unfairness and lack of consistency. In future the Commission will request that the relevant Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) dispense with statutory consultation in such cases. This will be done on a case-by-case basis within the existing regulations (section 30(4) of the Judicial Appointments Regulations). Where the requirement for statutory consultation is waived, and a candidate for the fee-paid legal exercise is already a judicial office holder, the Commission will request that one of the candidate's independent

assessors is their leadership judge, or someone who can comment on the candidates' abilities in their current fee-paid judicial post.

The Commission will therefore consider the application of statutory consultation on a case-by-case basis and in consultation with the relevant Appropriate Authority. The basis for the Commission's consideration of a request to dispense with the requirement for statutory consultation comments in an exercise will therefore include:

- the size and nature (fee-paid or salaried) of the exercise
- the likelihood that consultees will have relevant information on the suitability of candidates for the role and for a significant proportion of the candidate pool
- the timing of when any statutory consultation could be sought.

The Commission will clearly publish details where statutory consultation is retained or waived for each exercise on the exercise information page, so all candidates are aware of the process and the purpose of statutory consultation within the exercise.

2. Improvements to the process where the requirement for statutory consultation is retained.

(i) Timing of consultation

The Commission agrees with WPG's findings that statutory consultation comments received before a selection day can support the selection panel as an additional source of evidence when assessing the candidates. Under the revised approach, where the requirement for statutory consultation is retained, comments will always be sought before selection day interview and assessment and the Commission will ensure that statutory consultees have sufficient time to provide comments. The information received on candidates then forms a single part of a wide suite of evidence that selection panels use to assess the suitability of candidates applying for judicial appointment and to guide areas to be probed at interview. Other evidence includes the candidates' own self assessments, their nominated independent assessments, and their performance on selection day (which could include a roleplay or situational questioning in addition to a competency or Skills and Abilities based interview). The Commission Board, sitting as the Selection and Character Committee, then can consider all this evidence alongside the panel's assessment before making recommendations for appointment.

(ii) Candidates applying for a salaried position can request a conversation with their leadership judge around their application

Under the revised approach the Commission would expect to want to retain statutory consultation for exercises for salaried roles. Here there is usually a requirement for previous judicial experience and the majority of candidates will be existing judicial officer-holders (either fee-paid or salaried). Consultees do therefore have relevant information on the suitability of candidates for the role and based upon their performance in their current judicial role and that adds to the broad evidence base available to the panels to probe at interview and support them in their assessment of the candidate. The Commission will work with Judicial Office so that it can be made clear to any candidate applying for a salaried position that they can request a conversation with their leadership judge around their application and their suitability for the role.

(iii) To publish the guidance the JAC gives to statutory consultees on how to provide statutory consultation

The Commission agrees that that it will be important to provide specific guidance and communication to candidates on how evidence is collated, weighted, and used in the process, where statutory consultation is retained. The Commission also acknowledges WPG's finding that there are areas for further improvement in the objectivity and evidence-base of statutory consultation feedback across exercises.

The Commission will revise, strengthen and publish the guidance the JAC gives to statutory consultees on how to provide statutory consultation responses. The revised guidance will include exercise specific examples, tailored to the requirements of the specific role, that will assist in further improving the quality of objective and evidence-based comments. WPG have highlighted in their report the best practice use of a proforma template for responses in the High Court exercise; the Commission will produce exercise specific templates to support the providing of statutory consultation comments and publish the templates that are given to statutory consultees to use when compiling comments on each exercise.

In all cases, the published information page for an exercise will clearly explain the process which will be used – whether statutory consultation will be used or has been waived – as well as the exercise specific templates and guidance if statutory consultation is to be used and the weighting that will be given to statutory consultation comments as an additional source of evidence to support the selection panel when assessing the candidates.

(iv) The Commission will request that Judicial Office provides a centralised support to statutory consultees

The Commission notes WPG's finding of some inconsistencies in the approach used by statutory consultees in collating information on candidates. In response to this, the Commission will request that Judicial Office provide a centralised support function to statutory consultees to commission, collate, and review statutory consultation comments against the new guidance and the exercise-specific templates, to ensure that comments are objective and evidence-based, before submission to the JAC. The Commission will also request that this centralised support function in Judicial Office ensures that all sub-consultees also receive and follow the revised guidance.

The Commission notes the WPG finding that the background information about candidates included in the commissioning pen portraits is important to ensure consistency and enable a high quality of response and will work with Judicial Office to ensure that this is provided.

The Commission will also request that consideration should be given for statutory consultees to undertake relevant equality training if they have not already done so.

(v) Confidentiality of consultation comments

The Commission notes the mixed views found by WPG about the confidentiality of statutory consultation comments and has carefully reviewed its approach, in particular the extent to which candidates may be aware of any concerns raised and any opportunity for these to be put to a candidate as part of the selection process. The revised approach to statutory consultation described above will ensure that any areas of raised concern can be probed by panels at interview; any candidate applying for a salaried position can request a conversation with their leadership judge around their application and their suitability for the role; and guidance and templates given to consultees will be made public. With these improvements, the Commission continues to believe that the purpose and value of statutory consultation requires selection panels having well-evidenced comments on suitability based on good knowledge of the candidate's abilities that can be frank, straightforward, and provided in confidence.

3. Impact on any particular group of applicants

The Commission welcomes the important finding from WPG that, on the basis of the data in the exercises examined, there is no direct evidence that the statutory consultation process

impacts disproportionately on recommendations for appointment for any of the Commission's four target groups (gender, ethnicity, disability and professional background). The Commission believes that the improvements to the process identified by WPG and set out in the revised approach will further mitigate any risks of unfairness or discrimination. This will be reviewed again as part of the formal evaluation of its operation after a full two-year cycle of exercises. The Commission will continue to review, and publish, the number of individuals from each demographic sub-group at all stages of the selection process to identify any significant change in proportions.

The most senior judicial appointments

WPG also considered the operation of statutory consultation in exercises to appoint the most senior judiciary (all exercises from Court of Appeal and above). WPG explain in their report that recruitment for these senior exercises is not the responsibility of the JAC, but rather the individually constituted selection panels [in consultation with the Lord Chancellor] as described in the Judicial Appointments Regulations 2013, for which the JAC provides the secretariat.

The Commission notes that WPG report that, following their desk review, the Commission's role in providing the secretariat for these exercises and the process and support offered by the Commission to the panels was consistent, with the decisions on the process for each exercise being decided by the panel.

It is not for the Commission to determine the approach taken to such exercises. There may, however, be points based upon the broader findings made by WPG in relation to statutory consultation for High Court and below, that it may be helpful for the panels, in consultation with the Lord Chancellor, to consider for future exercises, for example:

- whether consultation should be before interview – consistent with the principle that any comments by consultees can be probed with candidates as part of the interview process.
- to ensure sufficient time is given for consultees to comment.
- transparency to candidates about who will be consulted, at what stage and how the panel will use any information.
- that consultees receive clear instructions/guidance on how to make evidence-based, objective comments related to the requirement for the role.