
**THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS**

# CONSTITUTIONAL REFORM:
# A SUPREME COURT FOR THE UNITED KINGDOM

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**NOVEMBER 2003**

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

| | |
|---|---|
| David Marshall | President, APIL |
| Colin Ettinger | Vice-President, APIL |
| Allan Gore QC | Treasurer, APIL |
| Francis Swaine | Executive committee member, APIL |
| Fred Tyler | Executive committee member (Scotland), APIL |


Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 924 3485

E-mail: miles.burger@apil.com

## A SUPREME COURT FOR THE UNITED KINGDOM

### Introduction

1. APIL welcomes this opportunity to comment on the Department for Constitutional Affairs (DCA) consultation into a Supreme Court for the United Kingdom. This paper combined with the further consultation on a new Independent Judicial Appointments Commission *(see separate APIL response)* deals with issues of great constitutional importance due to the focus on changes to the judiciary's relationship with the executive and the legislature.

2. It should be noted that whilst many of the questions detailed in the DCA consultation are not specifically aimed at claimant organisations such as APIL, we feel the impact which the possible introduction of a Supreme Court will have on litigation, including personal injury litigation, needs comment. As such, APIL's response should be taken as being guided by the claimant's perspective.

### The establishment of a new Supreme Court

3. APIL considers that the recent changes in the House of Lords (with the abolition of many hereditary peers) and the continuing influence of the European Convention on Human Rights (ECHR) and the corresponding Human Rights Act[1] (in particular Article six and the right to a fair hearing by 'an independent and impartial' court – see *McGonnell v United Kingdom*[2]) mean that the abolition of the legal jurisdiction of the House of Lords within the UK's judicial system is both timely and needed.

[1] Human Rights Act 1998
[2] McGonnell v United Kingdom (2000) 30 EHRR 289 – It was held that the applicant had legitimate grounds for fearing that the Bailiff of Guernsey (both a legislator and judge) might have been influenced by his participation in the adoption of a planning policy: that doubt, however slight its justification, was sufficient to vitiate the impartiality of the court (page 308, paragraph 57.)

To quote Lord Bingham:

*"To modern eyes, it was always anomalous that a legislative body should exercise judicial power, save in very restricted circumstances. This anomaly may not have mattered in the past. But if the House of Lords is to be reformed, and even if it is not, the opportunity should be taken to reflect in institutional terms what is undoubtedly true in functional terms, that the law lords are judges not legislators and do not belong in a House to whose business they can make no more than a slight contribution."*[3]

4. We fully support the creation of a new independent body to absorb the functions currently preformed by the appellate committee of the House of Lords and the judicial committee of the Privy Council. APIL agrees that the proposed establishment of a newly created Supreme Court (as detailed in the consultation paper) would fulfill this remit.

**Jurisdiction**

5. At present the judicial committee of the Privy Council has three main functions: it acts as final court of appeal for a number of Commonwealth countries and the Crown dependencies of Jersey, Guernsey and the Isle of Man; it hears devolution cases referred to it; and finally it has a number of other technical jurisdictions[4]. APIL endorses the DCA recommendation that only the legal devolution issues dealt with by the Privy Council should be incorporated into any new Supreme Court function. The remaining functions should be left with the Privy Council.

6. The combining of the two judicial bodies (the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords) would alleviate the problem of possible decision duplication. Indeed,

[3] As quoted in JUSTICE Policy Paper "A Supreme Court for the United Kingdom" November 2002
[4] Dealing with appeals against pastoral schemes in the Church of England.

recently the issue of decision duplication was raised in separate cases involving the same human rights points simultaneously passing through the Scottish and English & Welsh courts[5]. With the current separation of function between the two courts this could result in the House of Lords and Privy Council asked to decide on the same issue.

7. APIL agrees with the Government position that there is *"no need to extend the jurisdiction of the Court into areas which have not previously been covered"*[6]. Indeed the functions and powers of a new Supreme Court should not differ in reference to the powers that the appellate committee of the House of Lords and the judicial committee of the Privy Council currently employ.

8. Whilst APIL concurs that at present the functions of the Supreme Court should retain those duties as were held previously by the appellate committee of the House of Lords and the judicial committee of the Privy Council, there should be further consultation in regard to the applicability of the new court's jurisdiction in regard to the judicial appeals (as opposed to constitutional issues) of the devolved nations. The Scottish legal system has effectively developed its own judicial identity and there are also differences between the English and Welsh legal systems. The Scottish legal system has been described as *"as distinct from each other as if they were two foreign countries"*[7]. Within the present system, appeals are allowed from the Court of Session in civil cases but not from the High Court of Justiciary in relation to criminal cases. APIL would thus encourage discussion about the possibility of moving the final appeal court for civil cases to Scotland in a similar manner to criminal cases.

[5] County Properties Ltd v Scottish Ministers 200 S.L.T 965 and R (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23.
[6] DCA Consultation Paper – Constitutional Reform: A Supreme Court for the United Kingdom (July2003), page 10
[7] Lord Hope of Craighead in R. v Manchester Stipendiary Magistrate, *ex parte* Granda Television Ltd. [2000] 2W.L.R.1,5

This view has been endorsed by Nicola Sturgeon, Scottish National Party (SNP) justice spokesperson.

*"There's no reason why civil cases require to go south of the border any longer."*
*"We deal with criminal cases here in Scotland, perhaps it's time to get rid of the historical anomaly that sees us send civil appeals south of the border."*[8]

9. Dr James Chambers, an expert in constitutional law from Aberdeen University, has also spoken about any new Supreme Court's jurisdiction in Scotland.

*"Ideally, I would like to see the Supreme Court having very limited jurisdiction in Scottish cases because a UK-wide court may be less well-equipped to deal with issues of Scots Law than domestic Scottish Courts."*[9]

10. In addition to the further consultation needed in regards to the removal of Scottish civil appeals from the England-based Supreme Court to Scotland, APIL would like to see further consultation concerning the possibility of expanding the concept of a Supreme Court to each of the devolved nations. Admittedly, the current embryonic stage that the majority of the devolved nations are currently at would make such a move at the moment impractical. Yet it can be envisaged that the devolved nations will continue to develop to such a point where a final court of appeal would be appropriate for each jurisdiction. One possible demarcation of the competency of a particular court, that has been suggested in respect of the current Scottish situation, would be *"to allow appeals from both courts* [the Court of Session and the High Court of Justiciary] *on points of law where legislative competence is reserved to Westminster but not to allow it on points of law where*

[8] BBC News "Call for US-style court" Monday 14th July 2003
[9] The Scotsman "Scots law finds its own defenders" Mon 14th July 2003

*legislative competence is devolved. (Given the existing constitutional settlement, certain types of constitutional issue must always be appealable, from either court to the Privy Council or to a successor court).*[10]"

**The membership of the new Supreme Court**

11. APIL believes that the initial membership of the Supreme Court should be formed from the current Lords of Appeal in Ordinary ('the law lords') and that the 12 full-time positions which constitute the law lords should be retained in statute. We agree, however, that, as suggested by the DCA, the full-time membership should be supplemented by additional judges. For example, retired former members of the Supreme Court should be able to be called upon to sit on the reserve panel. In addition, due to the expanded role that the Supreme Court will be entrusted with, APIL considers that it is necessary to expand the criteria by which additional judges qualify to sit. As such we would combine the requirements of the current appellate committee and the judicial committee of the Privy Council, so that holders of 'high judicial office' (i.e. those who meet the qualifications for membership – see paragraph 24-25) would be deemed appropriate to sit as long as they sat in the House of Lords or were a Privy Council member. This expansion in the possible pool of available members would allow judges with acknowledged expertise in a specific area of law and, in particular, devolution matters to be selected.

12. Whilst the pool of supplemental judges that could be called upon to supplement the full-time membership can be increased as above, APIL feels that the resource of the 12 full-time members should not be depleted in the new Supreme Court by judges being 'borrowed' for judicial functions and other similar duties[11].

[10] George L Gretton 'Scotland and the Supreme Court' Scots Law Times: Issue 34 (31.10.2003) page 266
[11] See Report in Legal Week 'The road to reform' 18 September 2003, page 20

**The Presidency of the Court**

13. The president and vice-president of the newly formed Supreme Court should be appointed by the independent Supreme Court Judicial Appointments Commission. As with the present system the most senior law lord will become the newly appointed President of the Supreme Court.

**Relationship with the House of Lords**

14. APIL fully supports the decision by the Government to *"sever completely any connection between the Court and the House of Lords"*[12]. The members of the Court should lose the right to sit and vote in the House while they are members of the Court. Anyone 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 of the experience of these retired law lords.

15. The duty of Supreme Court judges not to sit in the House of Lords should be extended to holders of high judicial office elsewhere as well as members of the reserve panel for the Supreme Court. APIL considers that the role of the courts - in totality, not just in reference to the Supreme Court - should be governed by a clear separation of power from the executive.

16. In addition, APIL disagrees with any presumption that former members of the Supreme Court should automatically be appointed to the House of Lords. It is ultimately unjust to remove the presumption of title from one specified group of people (i.e. hereditary peers) and pass it onto another specified group of people (i.e. members of the Supreme Court).

[12] DCA Consultation Paper – Constitutional Reform: A Supreme Court for the United Kingdom (July2003), page 13

**Selection of members in the future**

17. The appointments process for future Supreme Court judges is the *"hottest issue at stake"*[13]. Indeed APIL's submission in this area must be considered hand-in-hand with our response to the DCA consultation paper 'A new way of appointing judges'. In the aforementioned consultation APIL has endorsed the formation of a completely independent appointing commission. APIL envisages a Judicial Appointments Commission (JAC) which is wholly responsible for the recruitment, selection and promotion of the judiciary. It would be independent from the Government and have its own budget and secretariat. The commissioners, serving for a fixed term, should be drawn from four groups as follows: the judiciary; qualified lawyers and legal academics; lay people with expertise in recruitment and training methods; and lay people representing the community as a whole. It should be ensured that no one group dominates the commission. To assist in this, the lay representatives ought to constitute at least half of the commissioners.

18. Rather than establish a completely new commission charged with the relatively small number of appointments which would be necessary to accommodate the Supreme Court, an appointing commission could be drawn from the three commissions and boards (servicing England and Wales, Scotland and Northern Ireland) who deal with other judicial appointments. This Supreme Court Judicial Appointments Commission would have the same basic structure as the other commissions, with the same general composition.

19. It should be noted that independence of the Supreme Court JAC should not allow for accountability to be dispensed with. There are issues of accountability within any system which allows for the original

[13] Legal Week 'Drawing the line' 2 October 2003, page 23

appointees to eventually become the next appointers. Due to the level of power and influence that appointment to the Supreme Court carries with it, both legally and constitutionally, it is vital that the decision-making process involved is open to additional scrutiny. Thus unlike the other JACs, the Supreme Court JAC should be answerable to an independent select committee (for example, the Electoral Commission is overseen by the Speaker's Committee). Lord Lester felt that it

*"may be desirable, for reasons of political legitimacy and parliamentary accountability, for a parliamentary Select Committee to be involved in some way.."*[14]

20. APIL believes, however, that it is only at the level of Supreme Court appointments that there should be scrutiny of the judicial appointments process by the Government, and that this scrutiny should only be via an independent select committee.

21. In order for there to be legitimacy to the appointment of Supreme Court judges there has to be an open and transparent selection process. The previous method of selection, that of secret consultation amongst high ranking members of the judiciary, current and former law lords and heads of the various legal divisions, is neither open nor transparent. It should be remembered that the Supreme Court will represent the highest court within many jurisdictions of the UK. Thus the correct selection of personnel must be highly transparent and open due to the importance of the appointments.

22. It has been suggested by the DCA in the consultation document that the traditional method of secret consultations should be retained. The appointment process should, however, incorporate standard good recruitment practice, including open competition for all judicial posts and also objective and transparent criteria. APIL believes strongly that

[14] House of Lords debate – 'Supreme Court' 8 Sept 2003: Column 114

informal consultations to assess suitability for appointment should not take place. In addition, the recruitment process should be conducted as quickly as practicable to reduce disruption for all applicants. The overwhelming criterion for appointment should be merit.

23. APIL strongly objects to the suggestion that members of the Supreme Court should be subject to confirmation hearings before one or both of the House of Parliament. As the DCA itself states:

*"One of the main intentions of the reform is to emphasise and enhance the independent of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be members of the Court would cut right across that objective."*[15]

**Qualification for membership**

24. APIL considers there is no reason why the current qualification prerequisites should not be adopted by the new Supreme Court. Thus in order to qualify to apply, the candidate should have experience of 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.

25. APIL does, however, feel that respected academics should also be considered for appointment to the Supreme Court. As with the above examples, qualification for academics should be 15 years standing as a legal academic within the United Kingdom. We believe that with the current drive to expand the composition of the judiciary, appointment of academics would greatly enhance the diversity of the Supreme Court

[15] DCA Consultation Paper – Constitutional Reform: A Supreme Court for the United Kingdom (July2003), page 16

**Criteria for selection**

26. In order for there to be consistency across all judicial appointments, the selection procedures and criteria deemed desirable to be a judge should extend to the selection of Supreme Court judges as well.

27. As long as a candidate has met the criteria for initial qualification to be considered, then all qualified lawyers should be equally eligible to apply for judicial posts whether in private practice, employed by a trade union, in government service, working in-house or as academics. Different kinds of legal experience should not carry different weight in recruitment.

28. The criteria for selection, which should be regularly reviewed, should not focus solely on advocacy skills but also on inter-personal skills and skills in the management of time, personnel and cases and proven legal skills. In addition the current criteria should still be considered, namely 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 judgment; courtesy; and commitment, conscientiousness and diligence.

29. The wide remit of the Supreme Court – the ability to hear devolution cases, in addition to legal appeals – means that it is vitally important that the appropriate level of constitutional skill and knowledge is included in the Supreme Court panel of judges. Whilst there is a long standing convention that there should be two Scottish law lords, and in recent years there has been a Northern Ireland law lord, APIL strongly believes that the number of judges from the different UK jurisdictions should be set down in statute. As such there should be two Scottish judges, one Northern Ireland judge and, because of this continuing devolution process, one Welsh judge sitting on the 12 full-time member

Supreme Court panel. This will allow for appropriate consideration to be given to devolution issues from each of the devolved national governments.

**Tenure**

30. APIL feels that all judicial appointments, including appointment to the highest court in the land, should be regularly reviewable. This process would allow for gaps in the skill and knowledge base to be identified by the Supreme Court JAC and recruited for accordingly. In addition, with the new independence of the court being established, the continual monitoring of standards will hopefully allow for an increase in standards, free from accusations of political interference.

31. In respect of the age of the Supreme Court judges and the age at which they should retire from the panel, this should be set at 70 years old. This relatively low age threshold (there are suggestions in the consultation paper of judges sitting until they are 80) will hopefully mean that judges sit on the Supreme Court during the height of their experience. Whilst many law lords have continued to make a valuable contribution in the House of Lords well into their late 70s, it is not desirable that this should be accepted as the norm. Indeed, one of the primary drivers behind the constitutional reforms taking place is to increase the level of diversity within the judiciary. It is hoped that the reforms will allow more diversity, including younger members of the legal profession, to enter the judiciary.

32. With the reduction of duties, as suggested in paragraph 12, in particular the chairing of tribunals, it is hoped that the reserve panel of judges will not be called upon with too much frequency. Thus while APIL supports the use of former members of the Supreme Court being eligible for the reserve panel, it is hoped that these retired members will not be called upon too regularly.

**How should the Court operate?**

33. With many of the basic functions of the Supreme Court being transferred directly from the current House of Lords, APIL sees no reason why this should not also be true of the way a case is heard. Currently the House of Lords sit in small panels, with the minimum number of judges being three, going up to as many as nine full-time members sitting. We consider this arrangement makes best use of the resources available and allows for more cases to be heard.

34. In turn, we reject the call for a full panel of Supreme Court judges to sit for each case (as in the United States Supreme Court). The immediate consequence of all 12 members sitting is that there would be a *"savage reduction in the number of cases heard, probably by well over half."*[16] Admittedly a suggested way of mitigating this problem would be to reduce oral hearing times and/or rely heavily on legal assistants. APIL, however, disagrees with this approach and concurs with Lord Bingham, that we should retain the current tradition of:

    *"full, but lean, oral argument (building on written arguments already supplied) and to the tradition that the eventual judgment, however poor a thing, is the judge's own."*[17]

35. The use of small panels would allow the selection of judges to be based on their particular experiences and specialties.

**A leave filter**

36. The current situation concerning the appeals process with the House of Lords results in the majority of appeals being granted via appeal to the House itself. Whilst there is recourse to be given permission to appeal by the court below, this is rarely granted. APIL believes, however, that

[16] UCL: The Constitutional Unit 'A Supreme Court for the United Kingdom' Spring Lecture 2002 by Lord Bingham of Cornhill 1 May 2002, page 12
[17] Ibid

it is essential that the right of appeal from lower courts should be retained within any new Supreme Court structure. In the interests of 'access to justice', the avenues through which appeals can be brought should not be restrained, as this may well lead to cases of injustice. Further, if the right to appeal from lower courts was abolished it is conceivable that more of the new Supreme Court's time would be taken deciding which cases to hear. We feel that it is essential that the Supreme Court's workload should be not be depleted by functions outside of their judicial decision-making role. Additionally all those seeking judgment of the court would have to incur the extra cost of petitioning the Supreme Court each time an appeal needed to be lodged.

37. APIL's support for the ability of the Supreme Court to continue to hear cases appealed from lower courts naturally extends to the right of appeal as practiced in Scottish Civil cases. As mentioned earlier, however, (paragraph 8, 9 and 10) APIL believes that there is a need for consultation to take place concerning, in the first instance, the relocation of Scottish civil case appeals to Scotland, and additionally the possible establishment of a final appeal court in each of the devolved nations. As such, in respect to this current consultation, it would be redundant to change the procedures involving Scottish civil appeals, with its associated administrative and structural changes, for these procedures to potentially be changed with the removal of civil appeals to Scotland.

**Other responsibilities of the law lords**

38. With the creation of a new Supreme Court, APIL feels this would be an ideal opportunity for the miscellaneous duties which the current law lords have to perform to be re-distributed to other members of the House or associated qualified individuals. We feel it is essential that the expanded role that the Supreme Court encompasses be given the full resources that it deserves; in particular this includes the attentions

of the 12 full-time members exclusively with Supreme Court business. This naturally fits in with our reservations concerning the use of Law Lords to head long-running inquiries.

**Titles**

39. Whilst the title concerned with a position is important, APIL feels this importance relates to how much information the title provide about a person's job responsibilities. With the removal of the presumption that peerages will accompany the appointment, APIL feels that the title 'Justice of the Supreme Court' would constitute a sufficient description of the Supreme Court judge's role and position. We reject the argument that there should be an inclusion of 'Lord' at the beginning of the title; in order for the newly formed Supreme Court to function effectively within the parameters described (i.e. outside of the legislature) there should be no connection with the upper house, real or figurative. The use of the title 'Lord' will invariably cause confusion as to the new Supreme Court relationship with the House of Lords.

**Relationship with the rest of the judiciary**

40. APIL agrees with the Government's position (as detailed in the consultation paper) that the establishment of the new Supreme Court should not affect the separateness of the three jurisdictions of England and Wales, Scotland and Northern Ireland. Indeed, as discussed, we would welcome a consultation concerning the removal of Scottish civil appeals from the Supreme Court to the Scottish jurisdiction. It is to be noted that any changes to the legislative framework regarding Scottish law would have to strictly adhere to the independence of Scotland as decreed by the Act of Union (1707). We would also welcome wider consideration of the possibility of a Supreme Court being established in each of the devolved nations.

**Administration, funding and support**

41. The inclusion of the new Supreme Court within the responsibilities of the Department of Constitutional Affairs (DCA) is fully supported by APIL. Whilst we may have had issues regarding this arrangement prior to the establishment of a Supreme Court, the aforementioned Judicial Appointment Commission for the Supreme Court and the use of a select committee ensure that any potential for Governmental interference is appropriately catered for; the only aspects of the new Supreme Court that should fall within the remit of the Government should be the administration and resources involved.

**Accommodation**

42. APIL agrees that there is a desperate need for appropriate accommodation for the members of the Supreme Court; the current arrangements within the Palace of Westminster are simply not sufficient. The exact nature of the new accommodation is outside of the remit of this organisations response. Yet we would like to emphasise the need for proportionality in the construction of the new Supreme Court; a multi-million pound building to house the relatively small group of Supreme Court judges and staff would cause considerable consternation given its disproportionate financial outlay.

**Questions in DCA Consultation Paper – Constitutional Reform: A Supreme Court for the United Kingdom**

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

43. APIL believes that the new Supreme Court should incorporate the judicial committee of the Privy Council, and as such hear devolution cases. *(See paragraph 5 - 10)*

**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?**

44. APIL agrees that the current stipulation that there should be 12 full-time members should be retained and that there should be an addition panel of members when there is a need. *(See paragraph 11)*

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

45. APIL would like to see the workload of the newly formed Supreme Court restricted to its new duties; the miscellaneous duties that have previously been associated with the position should be re-distributed to other equally competent individuals. With this provision, it is hoped that the need for the additional panel members to be called upon will be low. Naturally, however, if the matter being heard was outside of the specialism of any of the 12 full-time members, it would only be equitable to allow a reserve panel member to sit instead. *(See paragraphs 11 and 12)*

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

46. APIL proposes that the composition of the Supreme Court should be statute based; this will allow the new court to be founded on the firmest of legislative grounds. *(See paragraph 11)*

**Question 5: Should there be a Deputy President?**

47. The need for a deputy president of the Supreme Court should be dictated by operational needs (if the time of the president was heavily in demand). APIL feels that if such a role was needed, then the Supreme Court's Judicial Appointments Commission (JAC) should appoint the necessary individual out of the 12 full-time members using the same criteria needed for membership, with the position awarded on merit. *(See paragraph 13)*

**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?**

48. Please see APIL's response to question 5.

49. In addition, APIL proposes that the 'process' for membership should involve appointment of the appropriate judges by an independent Supreme Court Judicial Appointments Commission and that any involvement with the executive, as in the above example the Prime Minister, should be discontinued. *(See paragraph 17)*

**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?**

50. APIL opposes any move that provides one designated group the presumption of peerage. If members of the Supreme Court are already members of the House of Lords prior to their appointment to high judicial office, whilst they would be unable to sit in the House during this period, on retirement from the judiciary they would be able to return to the House. Outside of this example, APIL feels that the privilege of peerage should be awarded on pure merit, rather than due to the nature on one's job, regardless of that job. *(See paragraph 14-16)*

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

51. Please see APIL's response to question 7.

52. APIL feels that all current members of the judiciary that are appointed to high judicial office should be barred from sitting and voting in the House of Lords. Naturally this extends to all the members of the Supreme Court, either full time or part time. *(See paragraph 15)*

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

53. Please see APIL's response to question 7 and 8. *(See paragraph 16)*

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

54. APIL firmly believes that if the new Supreme Court is going to effectively achieve the separation of powers that the consultation document hopes for, then this separation needs to be total. As such we propose that a Supreme Court Judicial Appointments Commission should select and appoint the 12 full-time members of the court, as well as appoint the president and vice-president of the court. *(See paragraph 17)*

**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?**

55. The appointment of Supreme Court judges should conducted via a statutorily empowered Supreme Court Judicial Appointments Commission which advises the Queen directly. APIL believes that in respect of accountability, there is a need for appointments to the highest court in the UK (except for Scottish criminal cases) to be answerable to the legislature in some manner. We propose that there should be an independent select committee which scrutinises the appointment commission and answers back to Parliament. *(See paragraph 18 – 21)*

**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?**

56. APIL has always been strongly in favour of an independent body to appoint judges. In respect of appointments to the Supreme Court, these should be conducted via a Supreme Court judicial appointments commission. This commission should be composed in a similar manner to those proposed for general judicial appointments in the three UK jurisdictions. Indeed, it is members from these other judicial appointments commissions that should form the new Supreme Court judicial appointment commission. Each of the three judicial appointments commissions would vote (via a secret ballot) for members to sit on the Supreme Court JAC. Once decided, these members would sit and decide on the appointment of the Supreme Court judges. Due to the relatively infrequent nature of appointing judges to the Supreme Court, it is envisaged that the members of the Supreme Court JAC would not leave their positions within their respective jurisdictional JAC, but come together when necessary to decide on the Supreme Court appointments. *(See paragraph 18)*

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

57. Any appointments process should be as open and transparent as possible. APIL feels that in order to ensure that this occurs normal recruitment practices should be used in the selection of judges, including Supreme Court judges. Part of any application process should include open applications, and thus we fully support the use of this method of assessment. *(See paragraph 22)*

**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?**

58. APIL feels no need for there to be a change in the necessary qualifications for appointment. Once an individual has met the qualifications for membership, his application should be considered with equal weight and consideration as any other application. This will hopefully help increase the diversity in terms of legal background within the judiciary. APIL also proposes that there should be continual training in all parts of the judiciary. Thus the concern that academics will not have the necessary experience of judicial decision-making will be mitigated. *(See paragraph 24 and 25)*

**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?**

59. The guidelines that apply to the selection of members of the new court need to be as open and transparent as possible. They need to be objective standards that people applying can judge themselves against. Any such guidelines need to be fixed and static so that the level expected of applicants is kept high. APIL thus feels that the necessary selection criteria should be placed in legislation; this would enable full and detailed examination of the required attributes.

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

60. The arrangements for representing the different jurisdictions is particularly important in the new Supreme Court as this new Court will eventually take over judicial decision-making regarding devolution issues. As such APIL proposes that there should be a statutory set

number of judges from each of the jurisdictions. Thus there should be two Scottish judges, one Northern Irish judge, and one Welsh judge on the 12 full-time member panel of the Supreme Court. *(See paragraph 29)*

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

61. APIL hopes that the drive for diversity within the courts will help establish a younger judiciary, which in turn will filter through to a younger Supreme Court bench. This drive for a younger bench should be accompanied by the reduction of the retirement age of Supreme Court judges to 70 years old. *(See paragraph 31)*

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

62. As detailed in question 2 and 3, APIL believes that the need for a reserve panel, while necessary, should be used sparingly. In order for this to occur there has to be a cessation of the miscellaneous activities that law lords currently perform. A reduction of these additional duties will hopefully lead to more of the 12 full-time members' time being devoted to Supreme Court matters solely. Further in respect of question 17, we would like to see a younger judiciary being appointed. Thus where it was necessary to use the reserve panel there should be a presumption that it will is the younger members of the panel that will be called upon; once a Supreme Court judge has retired there should be little need for their continuing involvement with the active running of the court. *(See paragraph 32)*

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

63. Whilst there is a case for all members of the Supreme Court panel to sit to hear cases, APIL feels that the current system of panels

consisting of between three and nine members at a time is the most appropriate. These panels are, and will be, selected based on the various judges' experiences and specialalities. This will mean that every case gets heard by the most appropriate judge. *(See paragraph 33 – 35)*

**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?**

64. APIL firmly believes that the right to appeal from the lower court should be retained. It is essential that the avenues for appeal should not be constrained, thus making it more problematic for individual claimants to appeal. Such a constraint would inhibit a person's access to justice. In the instance of Scottish cases the ability to appeal civil cases as of right should continue to be retained until such time as a positive decision has been made concerning the possible relocation of the final civil appeal court to Scotland. A further consultation would help determine this. Additionally a further consultation would be helpful in assessing the possibility of establishing Supreme Court system in each of the devolved nation jurisdictions. *(See paragraph 36 – 37)*

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

65. Please see APIL's response to question 20.

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

66. APIL feels that the renaming of the Supreme Court should be left to that institution to propose a new title for itself; it is outside of APIL's remit to consider such a title change.

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

67. The title of the new members of the Supreme Court should be 'Justice of the Supreme Court'. APIL considers this title adequately describes the nature of the role that the judge has in relation to the Supreme Court. APIL would strongly resist the use of the word 'Lord' in any title awarded to members of the Supreme Court as it would falsely re-connect them with the members of the Upper House. If these reforms are to be effective there has to be a real and perceived distancing of the court from the legislature. *(See paragraph 39)*