

EXECUTIVE SUMMARY

REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

The Committee's Terms of Reference were:

1. To examine the constitutional and other arrangements pertaining to the selection and appointment of judges of the High Court and the Court of Appeal and to make recommendations, including changes to the Constitution and/or current practices and/or procedures and/or selection criteria, with a view to ensuring due process, transparency and accountability whilst maintaining the dignity of judicial officers and the independence of the judiciary;
2. To consult with stakeholders and members of the public and to receive and consider their written and oral submissions; and
3. To report to the Council of the Law Association within three months or such further period as the Council may allow.

The Committee held public consultations, received written and oral submissions, and met with the Judicial and Legal Service Commission.

In approaching its work, the Committee was mindful of the following:

1. The Judiciary is, in some sense, the last bulwark in the defence of a democratic society. It has to be staffed by men and women of competence, courage and conviction who are determined that the Rule of Law prevails. It is for this reason that the question of the reform of the process of judicial appointments takes on such significance. We would not want as a society that when our fundamental values are challenged in whatever way, by crime and criminality or by executive abuse, we find that our Judiciary is unable to withstand the challenge or that the administration of justice has become so tainted that the public does not rally around the Judiciary in a time of crisis.
2. A great deal of societal change has taken place in Trinidad and Tobago since Independence and the institutions and processes which had been set up then and after the Republican Constitution in 1976 are not necessarily appropriate to the demands of the society in the 21st Century.

The Committee considered the job of the Judge and noted that this involved: (1) Upholding the Rule of Law; (2) Dispensing Justice; and (3) Maintaining Confidence in the Administration of Justice. All judges have to have certain personal qualities for the job, but the selection of judges also has to be influenced by the needs of the Judiciary at any given time. The Committee also noted that in today's world there are demands for judges and the Judiciary to be accountable, and for the work of adjudication as well as the processes of recruitment, selection and appointment to be transparent. However, there were other important principles – judicial independence and confidentiality and privacy – which also needed to be taken into account.

The Committee distilled the following key principles:

- The job of a Judge is *sui generis* and should not be treated like any other job in the public service;

- Judges today have to be accountable for their performance and their conduct on and off the bench;
- The process for the recruitment, selection and appointment of judges must be transparent, but must also be mindful of confidentiality of the applicants.

The Committee outlined and examined the processes and procedures for the appointment of judges in the pre- and post-2009 periods and considered the tenure, promotion and removal of judges. Some of the key findings were:

- (1) There is no documented job description for a High Court judge.
- (2) The JLSC has not adopted a practice of consulting sitting senior judges, the Law Association or senior members of the profession on applicants.
- (3) The JLSC relies on the staff of the Director of Personnel Administration and given its limited resources, the due diligence of the office of the Director of Personnel Administration may sometimes fall short of what is required for the position of judge.
- (4) The elapsed time between application and appointment may be very long, leaving applicants uncertain and disenchanted with the process.
- (5) Applicants who, for good reason, would wish their applications to be treated with the highest confidentiality, were surprised to find themselves placed in situations where their privacy could not be protected.
- (6) Applicants did not know what the nature and content of the ‘exam’ would have been and also were unclear about the psychometric test.
- (7) Given that (a) judicial appointments are for all intents and purposes, permanent; (b) it is virtually impossible to remove a judge; and (c) performance appraisal is hardly practiced in the Judiciary the appointment of judges takes on heightened significance and there should be little room for error in selection since, if mistakes are made, they would be very difficult to correct.

The Committee considered, endorsed and adopted the Latimer House Principles on Judicial Independence, as well as the principles on the appointment of judges adopted in the Commonwealth and in particular in New Zealand and in Canada. The Committee found these principles were mutually consistent and applied these in assessing the existing processes and procedures used by the JLSC to appoint judges.

On the basis of that assessment, the Committee made the following 21 recommendations:

Recommendations on the Reform of the JLSC

1. The Judicial and Legal Service Commission should be replaced by a Judicial Appointments Commission (JAC) established under the Constitution.
2. The JAC will have responsibility for the appointment, promotion, transfer and, in accordance with the provisions of Section 137 of the Constitution, the removal of Judges of the Court of Appeal. Puisne Judges, Masters, and Magistrates, those Legal Officers charged with responsibilities under the Constitution – the Director of Public Prosecutions and Solicitor General – as well as the Chairman of the Tax Appeal Board, the Chairman of the Environmental Commission, the President of the Industrial Court and the Chairman of the Equal Opportunity Tribunal.
3. The JAC should be comprised of seven (7) persons as follows:

- (a) Chief Justice, Chairman
 - (b) Retired Judge of the Court of Appeal
 - (c) Senior Attorney of not less than 15 years call who is a practicing member nominated by the Council of the Law Association
 - (d) Attorney of not less than 10 years call not in active practice appointed by the President
 - (e) Human Resources professional
 - (f) Two members drawn from outstanding persons from civil society, academia, or national organisations representative of business or community.
4. Except for the member nominated by the Council of the Law Association, the President should be required to consult with the Prime Minister and the Leader of the Opposition, and in the case of the HR professional and the members drawn from community organizations, the university and civil society, to consult with relevant professional associations, university, and civil society organisations.
 5. The JAC should promulgate a set of rules for its decision-making and for voting on candidates for appointment. It needs as well to publish to the Parliament annual reports outlining the work it has accomplished in the previous year relative to plan and its plans for the next year. The JAC needs to maintain its own website on which vacancies are advertised along with material for applicants to understand clearly the process they will undergo if they decide to apply.

Recommendation on Eligibility Criteria

6. The JAC should produce and publish a document in a booklet and on its website which outlines in detail the criteria used in the selection of candidates for appointment to the bench and the processes used, including a description of any tests, written submissions, etc. which the JAC requires for its evaluation of applicants. The document would also explain that candidates will be subject to investigation by the staff of the JAC as well as national security agencies prior to appointment. The Committee commends the New Zealand Judicial Protocol and the Qualifications and Assessment Criteria (August 2016) for appointments to the Canada Supreme Court as good examples which can be followed.

Recommendations on Process

7. The selection criteria for judges should state that prior judicial experience at the level of the High Court in the form of temporary judgeships or comparable experience in other Commonwealth jurisdictions would be considered favorably in the selection of candidates.
8. The JAC should produce job descriptions and performance criteria for judges (and all other jobs under its purview) and ensure that these are available to all applicants.
9. The JAC should ensure that where psychometric tests are administered, these should be designed with Human Resource professionals and expert psychologists to be culturally appropriate and relevant to the desired attributes of judges, and administered in a manner which preserves applicant confidentiality and privacy.
10. The JAC should ensure that where qualifying tests are administered, these are designed by senior judges for relevance to the job of a judge.
11. The JAC should be prepared to give confidential feedback to applicants on their test scores.
12. Qualifying and psychometric tests should not be given to applicants for appointment to the Court of Appeal.
13. The JAC should establish its own Personnel Administration unit to deal with the recruitment, selection and appointment of judicial officers under its purview as well as

coordinating any investigations and communication with the public in respect of appointments. The JAC should ensure that the staff of its Personnel Administration unit are trained to handle judges and applicants for judgeships respectfully and safeguard applicant data with the utmost confidentiality.

14. Where candidates are adjudged to be more or less equal in terms of merit, the JAC may select for appointment those candidates whose appointment would promote the diversity of the Judiciary. Under no circumstances should the principle of merit be compromised.
15. The JAC should canvas the views of the President of the Law Association, sitting senior judges of the High Court as well as judges of the Court of Appeal on the candidates as part of the further due diligence conducted.

Recommendations on Tenure and Performance

16. The retirement age of judges should be increased to 70 years on a phased basis over a five year period so as not to be inequitable. Phasing of the higher retirement age would be necessary in the interest of equity for incumbent judges who are closer to the existing retirement age.
17. The Law Association should review the length of the period for which judges are debarred from returning to private practice and consider reducing it from 10 years to 5 years.
18. The practice of appointing senior attorneys as Temporary Judges for a period of 6 months and up to one (1) year should be revived. These appointments would arise whenever there is a backlog of cases to be cleared. Appointments should be made by the Judicial Appointments Commission. The Commission should take care to ensure that temporary judges are not assigned complex Public Law matters or other matters which are likely to involve lengthy trials.
19. Newly-appointed judges should be required to participate in an orientation programme which covers, inter alia, (1) shadowing a senior judge for a period of time; (2) dealing with court administrative staff; (3) dealing with the media and the public in accordance with the Judiciary's Statements of Principle and Guidelines for Judicial Conduct; and (4) protocol and etiquette.
20. The Judicial Appointments Commission should develop a formal annual performance appraisal system for judges that would allow the Chief Justice to counsel judges on their performance and maintain a record of performance over time.

Recommendations on the Appointment of Chief Justice

21. While consideration of the appointment of the Chief Justice does not fall within the terms of reference of the Committee, the Committee formed the view that, given the critical role played by the Chief Justice in the recruitment and selection of judges, the Law Association should give consideration to examining Commonwealth practices for the appointment of Chief Justices where such appointments are made by the Executive. Specifically, consideration should be given to the Canadian model in which an independent advisory committee presents a short list of candidates to the Executive from which selection is made. The Committee notes that since the Constitution prescribes no specific process by which the President should proceed with the appointment of a Chief Justice, there is scope for the President to establish a convention in this regard which might include advertisement and/or an independent advisory committee to shortlist candidates for her consideration.

The Committee recognises that several of its recommendations will require legislative change and Constitutional change. In fact, a special majority will be required. It appreciates fully that securing a special majority would be challenging in the country's deeply fractured politics. However, all political parties and civil society organisations, including the Law Association, need to be persuaded that these reforms are necessary since otherwise the danger of institutional collapse and harm to our society is real.