



**Law Association of Trinidad and Tobago**

**REPORT OF THE COMMITTEE ON  
JUDICIAL APPOINTMENTS**

**JUNE 2018**

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REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

## I. INTRODUCTION

### Terms of Reference

1.1 In June 2017 the Law Association of Trinidad and Tobago (“the Law Association”) appointed a Committee on Judicial Appointments (“Committee”) with the following Terms of Reference:

- (i) 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;
- (ii) To consult with stakeholders and members of the public and to receive and consider their written and oral submissions; and
- (iii) To report to the Council of the Law Association within three months or such further period as the Council may allow.

### Membership

1.2 The Committee comprised the following persons:

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|--|---|
| Madame Justice Désirée Bernard (Chair) | - Former Chancellor of the Judiciary of Guyana and former Judge of the Caribbean Court of Justice     |
| Dr. Terrence Farrell                   | - Economist and Attorney at Law and former Deputy Governor of the Central Bank of Trinidad and Tobago |
| Mr. David Abdulah                      | - Economist and former General Secretary of the Oilfields Workers’ Trade Union                        |

- |                     |   |
|---------------------|---|
| Mr. Rajiv Persad    | - Attorney at Law and Vice President of the Law Association of Trinidad and Tobago  |
| Ms. Tracy Robinson  | - Senior Lecturer in Constitutional Law, University of the West Indies, Mona Campus |
| Ms. Vanessa Gopaul  | - Attorney at Law   |
| Mr. Rishi P.A. Dass | - Attorney at Law   |

The Committee was assisted with secretarial services by Mrs. Renesha Abraham, Attorney at Law.

- 1.3 The Committee held 18 meetings between the period July 2017 and May 2018. All committee meetings were held at the offices of the Law Association. The minutes of the Committee's meetings do not form part of this Report.

### **Consultations**

- 1.4 In keeping with its Terms of Reference, the Committee invited present and past members of the Judiciary, including former Chief Justices and former members of the Judicial and Legal Service Commission ("the Commission") as well as members of civil society organisations and the public in general to submit opinions and/or give oral comments. In further pursuit of its mandate, the Committee visited five city/town centres across the country and held public meetings involving 83 participants, as follows:

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<b>Location</b>	<b>Date</b>	<b>No. of Attendees</b>
Port of Spain	November 21, 2017	26
Arima	November 23, 2017	9
Chaguanas	November 28, 2017	8
Tobago	November 30, 2017	10
San Fernando	December 5, 2017	30

1.5 Oral submissions were given by four (4) judges (three (3) current and one (1) former) and by three Senior Counsel who were former Presidents of the Law Association. Fourteen (14) written submissions were received. Among these were submissions from two (2) attorneys-at-law, five (5) former members of the Commission, one (1) judge of the Family Court and (2) civil society organisations. The list of persons who made oral and written submissions is provided in Appendix A.

1.6 The Committee met with the Chief Justice and other members of the Judicial and Legal Services Commission on July 17, 2017.

### **Material Consulted**

1.7 In addition to the consultations, the Committee accessed a wide range of reference material from Commonwealth and other sources on the question of judicial appointments. Some of these references are noted at various points in the Report. The Committee's review of this material indicated that while the appointment of the Committee was prompted by current events in this jurisdiction, the question of judicial appointments is a live and current issue in many other jurisdictions throughout the world<sup>1</sup>. In 2014 a report for the International Bar Association's Human Rights Institute<sup>2</sup> chronicled various instances of global failings of

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<sup>1</sup> J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), Commonwealth Secretariat, 2015

<sup>2</sup> Geoffrey Robertson QC, *Judicial Independence: Some Recent Problems*, International Bar Association's Human Rights Institute Thematic Papers No 4 (June 2014)

judicial independence and was able to conclude that the problems were in no way confined to small or poor countries.

### **Acknowledgments**

- 1.8 The Committee wishes to place on the record its thanks to the President, Council, and Ms. Alyson Myers and the staff of the Law Association for the excellent facilitation of the arrangements for the work of the Committee, as well as to all those persons who made oral and written submissions and who participated in the public meetings. The Committee also acknowledges with profound gratitude the excellent secretarial support provided to the Committee by Mrs. Renesha Abraham.



## II. FRAMING THE ISSUES

2.1 The questions of the recruitment, selection, and appointment of judges as well as their performance assessment, removal or termination, have significance far greater than most other jobs, arguably even other jobs in the higher levels of public service. This is so because of the critical roles of the Judiciary in a democratic society, which are: (1) Upholding the Rule of Law; (2) Dispensing Justice; and (3) Maintaining Confidence in the Administration of Justice.

### **Upholding the Rule of Law in a Democracy**

2.2 Upholding the rule of law in society is recognized as the most basic and the most important function of the Judiciary.

2.3 The concept of the ‘rule of law’ defies easy definition and our mandate does not require its exploration in this Report.<sup>3</sup> Restraint of state action to ensure state accountability is the core idea in Caribbean constitutional law that is associated with the rule of law.<sup>4</sup> In a case from Trinidad and Tobago, the Privy Council associated the concept with the principle that ‘those exercising public power should do so lawfully’ and in accordance with the constitution and other relevant laws.<sup>5</sup> Wit JCCJ in *Joseph v AG* explains that: ‘The law cannot rule if it cannot protect, so there must be protection against abuse and arbitrary exercise of power.’<sup>6</sup> Courts

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<sup>3</sup> See Tom Bingham, *The Rule of Law*, Penguin, 2010. The Rule of Law in the Caribbean context has been addressed most recently by Professor Rose-Marie Belle Antoine, *The Rule of Law v Ruling by Laws: Promoting Development in Caribbean Societies*, JEI 2017 Distinguished Jurist Lecture, and Adrian Saunders JCCJ, *The Rule of Law in the Caribbean*, March 2017.

<sup>4</sup> Albert Fiadjoe, *Commonwealth Caribbean Public Law* (3rd edn Routledge-Cavendish, 2008) 130. See also, Robinson, T, Bulkan A, and Saunders, A, *Foundations of Caribbean Constitutional Law*, Thomson Reuters, 2015, Chapter 6, The Rule of Law

<sup>5</sup> *Bobb v Manning* [2006] UKPC 22, [2006] 4 LRC 735 (PC TT) [14]. See also Endell Thomas, ‘The Rule of Law’ in Francis Alexis, P K Menon, Dorcas White (eds) *Commonwealth Caribbean Legal Essays* (Faculty of Law UWI, Barbados 1982) 269, 272.

<sup>6</sup> *AG v Joseph* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 (CCJ Bds) [20] (Wit J).

play a central role in securing the rule of law and protecting individuals against abuse of state power.

- 2.4 The World Justice Project proposes four (4) ‘universal’ principles underpinning the ‘rule of law’ – Accountability, Just Laws, Open Government, and Accessible and Impartial Dispute Resolution.<sup>7</sup> These four principles are used to derive eight (8) factors and forty-four (44) sub-factors which aggregated, weighted and indexed on a scale ranging from zero to one, allow for cross-country comparisons of the rule of law. Across all countries, those with scores of less than 0.60 are held to have “weaker adherence to the rule of law”.
- 2.5 Trinidad and Tobago emerges with a score of 0.56 and a ranking of 48 out of 113 countries. Of Caribbean countries, only Guyana (score 0.50; rank 73/113) is lower than Trinidad and Tobago. The score and ranking of Trinidad and Tobago is significantly impacted by the low scores achieved for Criminal Justice (0.39) and Absence of Corruption (0.50).<sup>8</sup>

### **Dispensing Justice**

- 2.6 By ‘Dispensing Justice’, we refer to the actual practice of judicial officers within the courtroom in relation to litigants, advocates, the media, and the general public, as well as the entire administrative structure outside the courtroom which supports the adjudication process within the courtroom. The processes for dispensing justice are governed by substantive law as well as procedural law. Both types of law, which are the province of attorneys, may be out of the reach and understanding of litigants, the media, and the public, and may cause outcomes to be questioned for fairness or reasonableness. This may be so because the process is adversarial with ‘winners’ and ‘losers’ and those who lose may be aggrieved and hold the view that the decision is unfair or unreasonable, blaming the judge or the system as a whole for the outcome.

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<sup>7</sup> The World Justice Project is an American-based non-profit organisation which partners with bar associations around the world. See World Justice Project 2017-2018, pp.190ff. The Trinidad and Tobago contributors to the WJP are listed on p.183.

<sup>8</sup> World Justice Project 2017-2018, p.141

2.7 Perhaps among the greatest irritants for litigants are the delays which seem to attend most processes in the judicial system. This problem is particularly acute in the case of the criminal justice system.

### **Maintaining Confidence in the Administration of Justice**

2.8 As Justice of Appeal Peter Jamadar has observed:

“The bedrock of an effective, impactful, and sustainable justice system is the public’s trust and confidence in the administration of justice.”<sup>9</sup>

2.9 In the period after Independence, the Judiciary has experienced its share of difficulties and conflict which became public and arguably impacted the public’s perception of the Judiciary and its confidence in the administration of justice. A non-exhaustive list of some of these difficulties would include:

- Delay in appointing a Chief Justice by the Prime Minister (Dr. Eric Williams) following the events of 1970 and the trial of Regiment soldiers for mutiny.
- The *de facto* suspension of Justice Crane by the Chief Justice and thereafter the flawed initiation of proceedings for his removal by the JLSC.<sup>10</sup>
- Conflict between the Attorney General and Chief Justice on accountability of the Judiciary, resulting in the Telford Georges Report initiated by the Law Association and the Report of the Mackay Commission of Enquiry initiated by the Government.
- Conflict over the implementation of the Civil Proceedings Rules, 1998.
- Initiation of Section 137 process for the impeachment of Chief Justice Satnarine Sharma.

Some of these incidents or conflicts have been discussed in academic and other reports.<sup>11</sup>

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<sup>9</sup> Justice Peter Jamadar, Foreword to *Reflections of an Interested Observer*, Judicial Education Institute of Trinidad and Tobago, May 2017 (page i)

<sup>10</sup> *Rees v Crane* [1994] 2 A.C. 173

<sup>11</sup> Selwyn Ryan, *The Judiciary and Governance in the Caribbean*, UWI SALISES, 2001 and Judicial Education Institute of Trinidad and Tobago, *Celebrating 50 Years of an Independent Court of Appeal of Trinidad and Tobago, 1962-2012*; See also PT Georges J, ‘Report of the Rt Hon Mr. Justice PT Georges on the Independence of the Judiciary, “The Georges Report”’ (2000) 5 Carib LB 28; Mackay Commission, ‘Report of the Commission appointed to enquire into and report and make recommendations on the Machinery for the Administration of Justice in the Republic of Trinidad and Tobago, “The Mackay Report”’ (2000) 5 Carib LB 55; Douglas Mendes, ‘The Role

- 2.10 Empirical data on public confidence in the Judiciary are not readily available. One useful source is the survey undertaken by a polling organisation, Solution by Simulation, on behalf of the *Trinidad Express* newspaper which solicits responses from a sample of the population on their confidence in public institutions. The 2016 survey report shows that the ‘Judicial System’ at 14% ranked lowest in public confidence compared to Parliament (25%), Health Institutions (24%), Police (22%) and Media (21%). Moreover, the approval rating had been declining over successive surveys from 2012 to 2016.<sup>12</sup>
- 2.11 A survey of business executives is used to compile the Global Competitiveness Index. Trinidad and Tobago is ranked overall 83/137 countries in the most recent survey (2017-2018). The Index is comprised of several ‘pillars’ including the ‘Institutions’ pillar. Within the Institutions pillar, respondents are asked to rate certain factors which bear on the Judiciary. These are: ‘Judicial Independence’, ‘Efficiency of Legal Framework in Settling Disputes’ and ‘Protection of Minority Shareholders’ Interests’. In the Global Competitiveness Report for 2017-2018, Trinidad and Tobago is ranked fairly high by respondents on ‘Judicial Independence’ (47/137), but is ranked rather lower on ‘Dispute Settlement’ (104/137) and ‘Minority Shareholder Protection’ (95/137).
- 2.12 Another source of empirical information is the interesting ethnographic research undertaken by the Judicial Education Institute entitled *Reflections of an Interested Observer: Ethnographic Musings on Court Users’ Experience in Trinidad and Tobago*, published in May 2017. This publication records the sentiments of about 80 members of the public who engaged the judicial system at various levels from rural magistrates’ courts to the High Court and the Court of Appeal. The sentiments expressed frustration with delays, lack of understanding by some judicial officers, and lack of respect for customers by court staff.

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of Lawyers and the Bar Association in the Protection of Independence of the Judiciary, Parts I & II’ (2000) 5 Carib LB 68, the Report of the Mustill Tribunal of 14 December 2007 into the question of the removing from office of the Chief Justice of Trinidad and Tobago

<sup>12</sup> While the survey distinguishes the ‘Police’ from the ‘Judiciary’ or ‘Judicial System’, it is not clear whether in the minds of the respondents the ‘Judiciary’ is understood to include offices such as the Director of Public Prosecutions, the Magistracy, and the Prisons system, as well as judges of the High Court and Court of Appeal.

## The Job of Judge and the Business of Judging in the 21<sup>st</sup> Century

2.13 Judges perform two main roles, both of which demand a reputation for judicial integrity: dispute resolution in individual cases and “social (normative) governance” that “demands the pursuit of responsive correctness, focusing on broader social interests and the generalized maintenance of legal norms.”<sup>13</sup> It would not be amiss to describe the job of judge as ‘*sui generis*’. The judge must be invested with certain personal qualities which enable him/her to perform the duties of finding the facts and applying the relevant law. Integrity, honesty, fairness are the attributes usually attributed to a judge, and judges must also possess what is described as ‘judicial temperament’ which touches how the judge approaches the dispute such that litigants perceive justice is being done.<sup>14</sup> In *Therrien v Canada (Ministry of Justice) and another* [2001] 2 SCR 3 Gonthier J noted the exceptionally high public expectations of judges:<sup>15</sup>

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

2.14 The judge must be independent of mind and courageous. What may not be fully appreciated is that this may limit the judge’s social activities and comportment and place a psychological burden on him/her and indeed his/her immediate family.

2.15 However, the recruitment, selection and appointment of judges goes beyond the personal qualities of the candidates and must also be tested against the current and prospective requirements and demands on the Judiciary as a whole. These relate to ‘Transparency’, ‘Accountability’ and ‘Diversity’.

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<sup>13</sup> McIntyre, Joe, Evaluating Judicial Performance Evaluation: A Conceptual Analysis (December 4, 2014). Oñati Socio-Legal Series, Vol. 4, No. 5, 2014 898, 906.

<sup>14</sup> See Bangalore Principles of Judicial Conduct (2002), Judiciary of England and Wales, Guide to Judicial Conduct, 2013 (amended 2016) and Judiciary of Trinidad and Tobago, Statements of Principle and Guidelines for Judicial Conduct, JEI, 2017.

<sup>15</sup> Approved by the Privy Council in the *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43 at [31]

2.16 Because the job of the judge is special or unique does not mean that it should not be subject to the canons of transparency and accountability which attend public office. Judicial independence and accountability are both fundamental aspects of the rule of law.<sup>16</sup> Transparency and accountability have gained prominence in recent decades in both the public and private spheres. The starting point must be that the public has a right to know how the decisions which affect their lives have come about, and decisions should not normally be made in secret, except say, in respect of matters of national security and the protection of children. Freedom of Information legislation, judicial review, and heightened parliamentary scrutiny in the public sphere have been matched by demands for greater disclosure and better corporate governance in the private sphere. The Privy Council’s oft-repeated statement in a 1930s appeal from Trinidad and Tobago is just as relevant today that: ‘Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.’<sup>17</sup> Joe McIntyre explains that judicial accountability “is an instrumental concept that operates for the limited purpose of promoting the excellent performance of the judicial function” and should not damage the characteristics of the judiciary.<sup>18</sup>

2.17 The 21<sup>st</sup> century has also brought the 24-hour news cycle and ubiquitous social media. The OJ Simpson trial was carried live on television and transmitted worldwide and American broadcasting stations carry running commentaries on trials ongoing before the court. In the British tradition which we follow, such transparency on the operation of the processes within courts has not been embraced, although the UK Supreme Court and Privy Council have allowed live transmission of trials in recent times. Social media has opened up judges and the judicial process to an entirely different level of scrutiny and criticism which certainly does not make the business of judging easier.<sup>19</sup>

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<sup>16</sup> K D Ewing, ‘A theory of democratic adjudication: towards a representative, accountable and independent judiciary’ (2000) 38 *Alta L Rev* 708, 709.

<sup>17</sup> *Ambard v AG* [1936] AC 322 (PC TT) 335.

<sup>18</sup> McIntyre, Joe, *Evaluating Judicial Performance Evaluation: A Conceptual Analysis* (December 4, 2014). *Oñati Socio-Legal Series*, Vol. 4, No. 5, 2014. Available at SSRN: <https://ssrn.com/abstract=2533854>,

<sup>19</sup> ‘Judges under “intolerable pressure” from social media, says new Lord Chief Justice’, *The Telegraph*, December 29, 2017

- 2.18 Contemporary thinking acknowledges that judges must be accountable. The Commonwealth Latimer House Principles indicate that: “Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.”<sup>20</sup>
- 2.19 While accountability to the Constitution and the law are obviously foremost, judges are arguably accountable for the outcomes in the judicial system, e.g. delay, over which they may have (some) control. Even in this regard, there are countervailing arguments. The Judiciary does not have control over the allocation of financial resources by the Executive, the number and condition of courthouses, and the discipline of staff attached to support functions, including customer-facing jobs. In those circumstances, the Judiciary may claim that it effectively has no control over administrative delays and inefficiencies.<sup>21</sup>
- 2.20 However, transparency and accountability are not unexceptionable and, apart from national security and the protection of children already cited, they may collide with other values of commensurate importance in a democratic society such as confidentiality, privacy and even judicial independence. While the importance of confidentiality and privacy are readily appreciated, for example in relation to third parties to ongoing proceedings, the tension between transparency and accountability and judicial independence may require some elaboration. The justice system is not a marketplace in which outcomes depend on who may have more money or influence. And while (most of the time) litigants want matters to be dealt with expeditiously, they do not want judges to be pressured by performance metrics on the speed of delivery of judgments if quality may be compromised. There is therefore a balancing act to be performed. Clearly taking many months or years to deliver a judgment is poor. On the other hand, ‘rushing to judgment’ in an effort to meet some arbitrary performance criteria may be just as bad.

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<sup>20</sup> Commonwealth Secretariat, Bingham Centre for the Rule of Law, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles*, Appendix 1, Commonwealth Latimer House Principles (2003) on the Accountability of and Relationship between the Three Branches of Government, p. 115

<sup>21</sup> The numerous speeches by Chief Justices over the years at the opening of the Law Term speak to continued frustration with these issues over which judges have no control but are held accountable in the public eye.

2.21 The final contextual factor to be considered which impinges on public confidence in the Judiciary and the recruitment, selection and appointment of judges is the plural nature of Trinidad and Tobago society and the need to address diversity, including gender diversity. This issue is not unique to Trinidad and Tobago. The 2015 Compendium and Analysis of Best Practice in the Commonwealth prepared by the Bingham Centre for the Rule of Law noted:

While there is considerable agreement among Commonwealth member states that intellectual abilities, moral qualities and practical skills are all relevant to the determination of merit, there are significant differences in how states have sought to address gender inequity and other historic factors of discrimination. The causes of these problems are often complex and specific to particular societies. Although some states have modified the criteria for judicial office in an attempt to enhance judicial diversity, it is not clear whether this is always an effective or desirable approach.<sup>22</sup>

2.22 That report adds that more comprehensive changes are required to strengthen diversity. It says that:

Alternative or additional measures may be needed to address wider causes of the problem, such as outreach programmes to attract a more diverse pool of candidates, improvements in the areas of legal education and judicial training, and changes to the working practices of the organised legal profession and the judiciary itself.<sup>23</sup>

2.23 If that publication was somewhat reticent or agnostic on the issue of diversity, the processes instituted in Canada are explicit in taking into account the various diversities – linguistic, ethnic, gender – in Canadian society in making selections for the Canada Supreme Court.<sup>24</sup>

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<sup>22</sup> J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law)*, (2015), xvi

<sup>23</sup> *Ibid.* 1.2.

<sup>24</sup> The Canadian ‘model’ is discussed below.



2.24 It would seem that a Judiciary that reflects the ethnic and gender composition of the society is likely to inspire more public confidence even though justice is for the most part, dispensed by individual judges and magistrates acting with complete authority within their courtrooms.

2.25 The Committee’s observations on the gender and ethnic composition of the higher judiciary are presented in the table below. (The Judiciary currently has its full complement of judges of the Court of Appeal (13) and the High Court (35)).

<b>Diversity on the Higher Judiciary, 2018</b>							
	<b>Sex</b>		<b>Ethnicity**</b>				
	<b>Male</b>	<b>Female</b>	<b>Indian</b>	<b>African</b>	<b>Syrian-Lebanese</b>	<b>Chinese</b>	<b>Mixed/Other</b>
Court of Appeal	10	3	6	6	0	0	1
High Court	15	20	15	18	1	1	0

Source: Committee Observations

Notes:  
 The relatively small number of incumbents who are all known to the members of the committee made it possible to assess how individuals might be classified by Sex and Ethnicity. The Committee hastens to point out that its identification of the sex and ethnicity of individual judges may not accord with their own self-identification.  
 \* ‘Gender’ is today defined more broadly; the Committee has retained the traditional ‘Male’ ‘Female’ distinction without prejudice to and acknowledging the other gender categories which are now recognised.  
 \*\* ‘Ethnicity’ is a complex concept and in the West Indian context incorporates Racial origin or ancestry, Religion, Class, Complexion and allows for a high degree of self-identification. The Committee uses ‘Racial Origin or Ancestry’ as the marker here.

2.26 The questions are: how should be recruitment, selection and appointment process be designed to give effect to the goal of diversity and how can one ensure that individual judges, irrespective of ethnicity, gender or ideological leanings act fairly, impartially and with sensitivity within the precincts of their courts so that the overarching goal is sustained and not undermined.

### **III. APPOINTING JUDGES**

- 3.1 This section of the Report describes the processes of recruitment, selection and appointment of judges. In some cases, the appointment of a judge is in fact a promotion, for example, from the High Court to the Court of Appeal.
- 3.2 The Committee, by letter dated July 13, 2017 sought information and data directly from the Chief Justice (CJ) in his capacity as chairman of the Judicial and Legal Service Commission (JLSC) through a detailed list of questions which are reproduced in Appendix B.
- 3.3 Members of the Committee met with the chairman (Chief Justice) and members of the JLSC on July 17<sup>th</sup>, 2017 at which meeting responses to some of the questions were obtained. However, though promised a written response to the questions, and despite follow-up communication with the CJ and the Director of Personnel Administration, the Committee has not received the written responses to the questions as requested. Nonetheless the Committee is of the view that the description of the processes of recruitment, selection and appointment in our Report is reasonably accurate as it is based not only on the record of the oral responses of the JLSC at the meeting on July 17<sup>th</sup>, 2017, but on information obtained from oral and written submissions of both successful and unsuccessful applicants.

#### **Judiciary and Judges**

- 3.4 The Judiciary is established by the Constitution (Chapter 7) which makes provision therein for the appointment, tenure, and removal of the Chief Justice and judges of the Supreme Court. The Chief Justice is appointed by the President after consultation with the Prime Minister and the Leader of the Opposition (s. 102). In appointing the Chief Justice, the President acts in her own discretion. Trinidad and Tobago is the only Commonwealth Caribbean country in which a Head of State selects and appoints a Chief Justice after relevant consultations, a reform introduced in the 1976 Republican Constitution. Prior to 1976, the Governor General appointed the Chief Justice on the advice of the Prime Minister who was

obliged to consult the Leader of the Opposition. The 1974 Wooding Constitution Commission had recommended that:

287. We propose a substantial reduction of the area of patronage at the disposal of the Prime Minister. The Chief Justice, the other members of the Judicial and Legal Service Commission, the Chairman and other members of the other Service Commissions, and the Chairman of the Boundaries Commission should all be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition ... The Prime Minister will quite properly have influence but he will not have the final say. This modification of the powers of the Prime Minister is in line with the overwhelming majority of views expressed to us. The diffusion of power seems to us desirable as a matter of principle. We recommend accordingly.

339. It is hoped that the method of appointment we recommend will remove the office from what appears to be the direct patronage of a purely political officeholder.

3.5 All other judges, including Judges of Appeal, are appointed by the President acting in accordance with the advice of the Judicial and Legal Service Commission. Section 104(1) provides:

104 (1) The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.

3.6 Therefore, in respect of judges other than the Chief Justice, it is effectively the JLSC and not the President who makes the selection, even though the President makes the formal appointment.

3.7 The Constitution of Trinidad and Tobago makes provision for acting or temporary judicial appointments to the High Court and Court of Appeal (s 104(2)). Such appointments are revoked by the President on the advice of the Judicial and Legal Service Commission and can be made:

104 (2) Where—

- (a) the office of any such Judge is vacant;
  - (b) any such Judge is for any reason unable to perform the functions of his office;
  - (c) any such Judge is acting as Chief Justice or a Puisne Judge is acting as a Justice of Appeal; or
  - (d) the Chief Justice advises the President that the state of business of the Court of Appeal or the High Court so requires,
- the President, acting in accordance with the advice of the Judicial and Legal Service Commission –

- (1) may appoint a person to act in the office of Justice of Appeal or Puisne Judge, as the case may require;
- (2) may, notwithstanding section 136, appoint a person who has held office as a Judge and who has attained the age of sixty-five to be temporarily a Puisne Judge for fixed periods of not more than two years.

### **Qualifications of Judges**

3.8 Section 105 of the Constitution states that:

105. A person shall not be appointed as a Judge or to act as a Judge unless he has such qualifications for appointment as may be prescribed.

3.9 The qualifications are prescribed in the Supreme Court of Judicature Act, Chap 4:01 as follows:

- 7. (1) A person shall not be appointed to be a Judge of the High Court unless he is a member of the Bar of England or is an Attorney-at-law within the meaning of the Legal Profession Act and is of not less than ten years standing.
- (2) A person shall not be appointed to be a Judge of the Court of Appeal unless—

(a) he has been a Judge of the former Supreme Court or of the High Court for not less than three years; or (b) he is a member of the Bar of England or is an Attorney-at-law within the meaning of the Legal Profession Act and is of not less than fifteen years standing.

3.10 By amendment from time to time, the Supreme Court of Judicature Act also makes provision for the number of puisne judges and appeal court judges on the establishment of the Judiciary. The current establishment of the Judiciary is 35 Puisne or High Court judges and 13 Court of Appeal judges.

### **The Judicial and Legal Service Commission**

3.11 The five-member JLSC is established by section 110 of the Constitution and comprises of a Chair who is the Chief Justice, the Chair of the Public Service Commission serving in an ex officio capacity and three other members appointed by the President. Section 110 reads:

110. (1) There shall be a Judicial and Legal Service Commission for Trinidad and Tobago.

(2) The members of the Judicial and Legal Service Commission shall be—

(a) the Chief Justice, who shall be Chairman;

(b) the Chairman of the Public Service Commission;

(c) such other members (hereinafter called “the appointed members”) as may be appointed in accordance with subsection (3).

(3) The appointed members shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition as follows:

(a) one from among persons who hold or have held office as a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeal from any such Court;

(b) two from among persons with legal qualifications at least one of whom is not in active practice as such, after the President has consulted with such organisations, if any, as he thinks fit.

(4) Subject to section 126(3)(a) an appointed member shall hold office in accordance with section 136.

3.12 The JLSC is dominated by legally trained persons—the Chief Justice, former or current superior court judge and two persons with legal qualifications. However, it should be noted that the persons with legal qualifications on the JLSC are not chosen directly or indirectly by the members of the legal profession. Section 110 provides, more generally, that the President may consult with such organisations as she or he see fits in appointing these two persons. In a recent decision, the Court of Appeal held that on a proper construction, the Constitution did not preclude the appointment of more than one retired judge to sit on the JLSC provided that the criteria for appointment prescribed by the Constitution were met.<sup>25</sup>

3.13 Parliamentarians and persons who held office within three years of their proposed appointment are ineligible to be appointed to the JSLC (s 126). The appointed members of the JLSC serve for a period of not less than three years and not more than five years. While in office, the members of the JLSC enjoy strong security of tenure, akin to a judge, and can only be removed for inability to discharge the functions of his or her office whether arising from infirmity of mind or body or any other cause, or for misbehaviour (s 136).

3.14 As mentioned at paragraph 3.5 above, the JLSC selects Judges for appointment by the President. It is also responsible for initiating proceedings for the removal of Judges under section 137 of the Constitution. Judges of the High Court and Court of Appeal enjoy strong constitutional protection of the security of tenure which makes, as the Mackay Report on the administration of justice in Trinidad and Tobago put it, ‘any lesser discipline’ than removal

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<sup>25</sup> *Attorney General of Trinidad and Tobago v Devant Maharaj*, 2 August 2017, Court of Appeal Trinidad and Tobago (CIV.S.161/2017), [http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2017/mendonca/CvA\\_17\\_S161DD02aug2017.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2017/mendonca/CvA_17_S161DD02aug2017.pdf)

from office ‘a delicate task’.<sup>26</sup> Superior court judges can only be removed from office for cause and, in general, judges can be suspended after the removal process has been initiated.

3.15 It should be noted that the JLSC exercises its powers in relation not only to judges but all judicial and legal officers in the Public Service. These officers are described in the Schedules to the Judicial and Legal Service Act (Chap. 6:01) and include the Director of Public Prosecutions and the Solicitor-General. The Committee was informed that there are now over 400 such officers in the Judicial and Legal Service for whose appointment, transfer, promotion and discipline the JLSC is responsible.<sup>27</sup> Magistrates, who are Judicial Officers by virtue of the Summary Courts Act, Chap. 4:20 and the Petty Civil Courts, Act Chap. 4:21, also fall under the purview of the JLSC.

3.16 The functions of the JLSC per section 111 of the Constitution in relation to officers other than judges are to make appointments, transfers, and promotions and to exercise disciplinary control:

111. (1) Subject to the provisions of this section, power to appoint persons to hold or act in the offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Judicial and Legal Service Commission.

3.17 Since independence, judicial service commissions and judicial and legal service commissions in the Commonwealth Caribbean have faced repeated legal challenges to the exercise of their powers, especially in relation to the discipline of magistrates. It is well established that service commissions must apply the principles of procedural fairness and

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<sup>26</sup> Mackay Commission, ‘Report of the Commission appointed to enquire into and report and make recommendations on the Machinery for the Administration of Justice in the Republic of Trinidad and Tobago’ ‘Mackay Report’ (Trinidad and Tobago, October 2000) 39.

<sup>27</sup> There is a relevant but for our purposes, academic issue here in that the Chief Justice as chairman of the JLSC becomes involved in the appointment, transfer and promotion of legal officers who are part of the Executive.

natural justice.<sup>28</sup> As part of its duty of fairness the JLSC is obligated to provide reasons for its decisions to adversely affected persons.<sup>29</sup> In addition the JLSC is subject to positive duties not to improperly discriminate imposed by virtue of both the Constitution<sup>30</sup> and the Equal Opportunity Act Chap 22:03.<sup>31</sup>

### **Recruitment of Judges**

3.18 Section 7 of the Supreme Court of Judicature Act references the Legal Profession Act (Chap. 90.03) which ‘fused’ the profession as between barristers and solicitors although in fact attorneys generally opt for one or other of these roles.

3.19 While section 7 of the Supreme Court of Judicature Act was not explicit, even after fusion, there was arguably, in the English tradition, an expectation that judges would be recruited from the somewhat smaller pool of barristers or advocate attorneys who would have had a successful litigation practice, rather than the pool of attorneys (barristers and solicitors) as a whole.<sup>32</sup>

#### *Before 2000: “Tapping on the Shoulder”*

3.20 Prior to the year 2000, advertisements for judgeships were sometimes placed, but apparently not consistently.<sup>33</sup> The sitting Chief Justice would make his own enquiries on suitable persons from the Bar or from the office of the Director of Public Prosecutions, ‘tap’ a suitable candidate on the shoulder, and thereby, directly or indirectly, invite that person to apply. There would have been some criteria guiding that process but these were not documented or

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<sup>28</sup> *Barnwell v AG* (1993) 49 WIR 88, [1994] 3 LRC 30 (CA Guy); *Rees v Crane* (1994) 43 WIR 444, [1994] 2 AC 173 (PC TT).

<sup>29</sup> Section 16 of the Judicial Review Act Chap 7:08, see also *Judicial Service Commission & another v Cape Bar Council & another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) paras 44-47

<sup>30</sup> Further to the rights enshrined under section 4 (b) and (d) of the Constitution.

<sup>31</sup> The non-discrimination obligations under the Equal Opportunity Act expressly bind the State (s. 57) which is expressly defined to include service commissions (s. 3).

<sup>32</sup> The distinction between advocates and solicitors or instructing attorneys has also been relevant to the debate on the award of silk (Senior Counsel) which the Law Association has attempted to address in its recent recommendations to the Attorney General.

<sup>33</sup> From submissions to the Committee, it appears that vacancies on the bench were advertised in the legal press from the mid-1990s.



explicit. It would appear, at least in some instances, that interviews were not even held and appointments could be effected in a matter of weeks.

*After 2000: Toward Greater Transparency*

3.21 In April 2000, the JLSC published in the Gazette a one page document on ‘Appointments to the Supreme Court’. That document which is reproduced as Appendix C, sought to elaborate the criteria for selection of Puisne Judges additional to the criterion specified in section 7 of the Supreme Court of Judicature Act. It also outlined briefly the criteria for the appointment of Judges of the Court of Appeal.

3.22 These criteria are:

1. Applicant must be between 40 and 57 years old;
2. The JLSC would consider the following factors:
  - a. Professional Competence
  - b. Integrity
  - c. Temperament, and
  - d. Experience
3. Applicants would be required to:
  - a. Apply in writing
  - b. Supply a resume
  - c. Provide references, and
  - d. Attend an interview.

3.23 The four key factors identified were further disaggregated as shown below, but without any explanation or elaboration of the meaning or content of the various sub-factors in relation to the job of a judge:

REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

<b>Professional Competence</b>	<b>Integrity</b>	<b>Temperament</b>	<b>Experience</b>
Legal Knowledge and Training	Honesty	Courtesy	Length and nature of law practice
Intellectual and analytical ability	Fairness	Humility	Length and nature of exposure to court practice and procedure
Mature and objective judgment	Ethical Standards	Emotional Balance	Understanding of people and society
Communication skills	Independence	Decisiveness	Public and community service
Organisational skills	Commitment to Public Service	Authority	Previous service in a judicial or quasi-judicial capacity
Interest in developing the law		Social awareness	Specialization
		Receptivity to ideas	Publications (if any)
		Ability to listen	
		Reliability	

Source: Appointments to the Office of Judge of the Supreme Court, Trinidad and Tobago Gazette, Vol. 39 No 68, April 13<sup>th</sup> 2000, 288 (reproduced as Appendix C)

3.24 The Notice indicates that ‘from time to time applications *may* be solicited by advertisements published in the daily newspaper’ (our emphasis). It is noteworthy that applications, though they had (at some stage) to be in writing, did not have to be submitted in response to an advertisement and the Notice makes it clear that such unsolicited applications would be considered in moving applicants to the interview stage.

*After 2009 or thereabouts*

3.25 Sometime after 2009, the JLSC implemented some additional elements to the process. Applicants were required to submit three pieces of written work and to do a written ‘exam’. The JLSC has indicated that the written ‘exam’ is intended to test logic and reasoning and

general knowledge of current affairs. In addition, shortlisted applicants were required to undergo a psychometric test administered by a third party provider.

## **Selection**

3.26 The actual process of selecting the persons to be offered judgeships is opaque. Based on submissions of recent applicants, the JLSC conducts an interview with the applicant which may last about one hour and which touches on their previous legal practice experience, awareness of current developments in the Judiciary, work habits and interests. The Committee was not able to ascertain whether the JLSC conducts formal scoring of applicants, the nature and extent of the discussion, or whether voting occurs. The JLSC will have before it the following documents:

1. Application
2. Resume
3. Referees Reports
4. Written submissions
5. Results of Exam
6. Results of Psychometric Test
7. Interview notes in respect of each candidate
8. Confidential Report from National Security agencies

It would appear that the confidential security report and the psychometric test are sought after the interview and the applicant has been short-listed for possible appointment.

## **Appointment**

3.27 Having made its selection(s), the JLSC notifies the successful and unsuccessful candidates. Successful candidates are informed by the Chief Justice when they are expected to be sworn in by the President. On assuming duties, such orientation as exists is apparently perfunctory and follows no set protocol.

*The Practice of Appointing Temporary Judges*

3.28 As noted above, the Constitution makes provision for the appointment of temporary and acting judges. It had been the practice for the Chief Justice to ask senior attorneys as well as retired judges to act as temporary judges for periods of six (6) months and longer in some instances. In other instances advertisements for positions of temporary judges were published in the newspaper. This practice afforded senior attorneys the opportunity to gain some experience in discharging the duties of a judge and presumably to assess for themselves whether they possessed the requisite judicial temperament and might consider a permanent appointment later on. Such temporary appointments were also apparently viewed as a stepping stone to taking silk. There is no indication that there was formal assessment of the performance of temporary judges by the JLSC and whether such stints were considered in making appointments later on.

**Some Observations on the Process**

3.29 Based on information from the JLSC, as well as persons who have passed through the process after 2009, the Committee can offer the following comments on the actual operation of the process which has generated some concerns:

- (1) There is no documented job description for a High Court judge. There appears to be a presumption that (a) applicants understand what the job entails including the impact on their personal lives; and (b) the members of the JLSC who are not judges have an appreciation for the demands of the job of a judge and the qualities needed for good performance. The Committee was informed that a job description for the Chief Justice was being developed as part of a project of the Salaries Review Commission (SRC).
- (2) It is only in recent years that a number of magistrates have been considered for judgeships. Prior to 2009, the Committee can identify only very few magistrates who were elevated to the High Court.
- (3) The JLSC has not adopted a practice of consulting confidentially sitting senior judges, the Law Association or senior members of the profession on applicants.

- (4) The JLSC relies on the staff of the Director of Personnel Administration who service all of the Service Commissions – Public, Teaching, Police, and Judicial and Legal. It appears that communication with applicants is carried out by junior clerical staff, sometimes by email; such communication may fail to accord applicants for judgeships the level of confidentiality and deference which the position requires.
- (5) There seems to be a presumption under the post-2009 process that the only applicants would be persons so junior that they would be prepared to subject themselves to an ‘exam’ and psychometric testing. It is unlikely that a senior attorney or Senior Counsel would subject herself to such a process. This suggests that the JLSC may have abandoned any efforts to attract such senior persons to the bench, at least at the level of the High Court..
- (6) 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.
- (7) The elapsed time between application and appointment may be very long, leaving applicants uncertain and disenchanted with the process.
- (8) 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.
- (9) Applicants did not know what the nature and content of the ‘exam’ would have been and also were unclear about the psychometric test.
- (10) Unsuccessful candidates were not clear on why they were not successful and useful feedback was not forthcoming.

#### IV. TENURE, TERMINATION, PROMOTION AND PERFORMANCE

4.1 The Committee's Terms of Reference do not extend explicitly to the removal of judges or promotions from the High Court to the Court of Appeal. However, the Committee considers that the tenure and termination of judges, performance management in the Judiciary, and the promotion of judges are integral to its proper consideration of the process of judicial appointments. It is also significant that in the public consultations, the questions of removal of judges and their job performance featured prominently, suggesting that this is a matter of some concern to the public. Our findings on these issues are documented here and certain of our recommendations touch on these issues.

##### **Tenure**

4.2 The tenure of judges is prescribed by the joint operation of sections 106(1) and 136(1) of the Constitution and requires judges to retire at age 65. The relevant sections state:

106. (1) Subject to section 104(3), a Judge shall hold office in accordance with sections 136 and 137.

136. (1) The holder of an office to which this subsection and subsections (3) to (11) apply (in this section referred to as "the officer") shall vacate his office on attaining the age of sixty-five years or such other age as may be prescribed.

(2) Notwithstanding that he has attained the age at which he is required by or under subsection (1) to vacate his office, a Judge may, with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

- 4.3 The Committee notes that the mandatory retirement age of judges in other Commonwealth jurisdictions is variable, ranging from 60 to as high as 75 for Canadian federal court judges. In Jamaica and Barbados, the retirement age is 70 years, while it is 65 years in Guyana and the OECS.
- 4.4 In effect, the tenure of a judge is permanent. In addition, a judge who leaves the bench is not permitted to re-enter private practice for 10 years.<sup>34</sup> This constitutes a powerful disincentive to leaving the bench. Yet what may be positive for the administration of justice may take a toll on the individual judge who may find herself in a stressful career with limited prospects for upward mobility and restrictions on her family and social life.

### **Termination**

- 4.5 Judges enjoy security of tenure combined with protection of their remuneration in order that the principle of judicial independence can be upheld. Removal from office is provided in section 137(1) to 137(4) of the Constitution. Sections 137(1) and (2) provide as follows:

137. (1) A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour

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<sup>34</sup> This stricture is provided in Clause 54 (1) of Part A of the Code of Ethics in the Legal Profession Act Chap. 90:03 and states: "A person who previously held a substantive appointment as a Judge of the Supreme Court shall not appear as an Attorney-at-law in any of the Courts of Trinidad and Tobago for a period of ten years commencing on the date of his retirement, resignation or other termination of such appointment." The stricture does not apply to temporary judges.

- 4.6 Prior to any reference to the Privy Council, the President must appoint a tribunal comprised of senior judges to investigate the matter and to recommend to the President whether it should be referred to the Privy Council. The judge may be suspended during this process.
- 4.7 It is significant however, that apart from infirmity, the only ground for termination is misbehaviour. Short of overtly criminal conduct such as bribery, the misconduct must be so serious as to undermine public trust in the Judiciary and the rule of law. The bar for removal is, understandably, quite high.<sup>35</sup> What this means is that issues such as persistent delays in delivering judgments or ethical breaches which might exercise the minds of the public are unlikely to lead to termination if the judge is in fact impeached on those grounds. Moreover, it is difficult to conceive of any sanctions which could effectively influence a judge's performance which do not trigger the Section 137 procedures.<sup>36</sup>

#### **Promotion and Direct Appointment to the Court of Appeal**

- 4.8 The Trinidad and Tobago Judiciary is arguably a career judiciary in the sense that there is a career path from the High Court to the Court of Appeal and the position of Chief Justice, although this is less true from the Magistracy to the High Court.
- 4.9 Appointments to the Court of Appeal are made by the President on the advice of the JLSC. The Notice of April 2000 in the Gazette refers to both Puisne Judges and Judges of the Court of Appeal and it states explicitly:

The same criteria used in appointing puisne judges are also applicable to appointment of judges of the Court of Appeal, though it is true to say that there is

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<sup>35</sup> The judgment of the Privy Council in *Re Chief Justice of Gibraltar* [2009] UKPC 43 sets the bar very high in noting that: "So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to *destroy* confidence in the judge's ability properly to perform the judicial function." (Emphasis added)

<sup>36</sup> The processes involved in triggering Section 137 procedures for removal have been extensively discussed in the recent Court of Appeal judgments by Mendonca, Jamadar, and Bereaux JJA in *Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie*, Civil Appeal No. P 075 of 2018, Claim No. CV 2018-00680.



some difference in the weighting given to some of the criteria....Professional competence assumes a greater importance in appointments to the Court of Appeal.

The Gazette Notice also indicated that seniority (length of service as a judge) is taken into account but is not the only or the governing factor in making appointments to the Court of Appeal. It appears that recent (2017) appointments to the Court of Appeal were made following advertisements. All the appointments in 2017 were made from judges on the High Court. The Committee was informed, but was unable to confirm with the JLSC, that applicants for the Court of Appeal positions were also subjected to psychometric tests and invited to submit some of their judgments to the JLSC for evaluation.

### **Performance**

- 4.10 Once appointed it is virtually impossible to remove a judge who is not guilty of misbehaviour even if he or she is not diligent in producing his or her judgments, thus prejudicing litigants, or if his judgments are weak, causing litigants the added cost and delay of appeals. Although the JLSC has adopted the Public Service Regulations for legal officers which require annual performance reports of public officers, it would appear that there is no ongoing, systematic performance appraisal system for judges and other judicial officers. There is an expectation that the Chief Justice will intervene with individual judges when performance issues are brought to his or her attention. However there are no sanctions that the Chief Justice can impose.
- 4.11 In the absence of a documented performance appraisal system and performance reports which are discussed with the judicial officer, disciplinary action or promotion decisions by the JLSC are open to charges of unfairness or bias.

### **Concluding Observations**

- 4.12 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, it means that the appointment of judges takes on heightened significance. There should be little room for error in selection since, if mistakes are made, they would be very difficult to correct.

## V. DISCUSSION, ANALYSIS AND RECOMMENDATIONS

### Guiding Principles

5.1 The Commonwealth Latimer House Principles address the relationship between and among the three branches of government.<sup>37</sup> One of the principles relates to the need for Judicial Independence which is in part enabled by the process and procedures for effecting judicial appointments, as well as the provisions relating to the tenure and removal of judges. The Latimer House Principles state that:

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

- 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;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

(e) Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

5.2 In 2015, the Commonwealth Secretariat and the Bingham Centre for the Rule of Law considered the question of the appointment, tenure and removal of judges in some detail and based on the Latimer House Principles and empirical study of practice across the

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<sup>37</sup> Commonwealth Secretariat, Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, 2003. (Latimer House Principles)

jurisdictions in the Commonwealth, developed an analysis of ‘best practice’ from a ‘rule of law perspective’.<sup>38</sup>

The key conclusions of the study are as follows:

- The appointments process must be perceived to be legitimate.
- Judicial appointments commissions should be independent.
- In order to ensure general transparency with regard to the appointment of judges, judicial appointments commissions should advertise judicial vacancies and conduct an open application process.
- Though not ideal, where the legislature may be involved in confirmation of judicial appointments, care must be taken to avoid politicisation and deadlock.
- While the executive is responsible for the formal aspects of appointment, the legal frameworks should ensure that the judicial appointments commission is empowered to present binding recommendations on the executive, and if the executive rejects the recommendation, it must give reasons for so doing.

5.3 These principles may be operationalised in different jurisdictions in different ways, using different procedures. For example, although it has no statutory basis, the New Zealand Judicial Protocol is largely consistent with the Latimer House Principles. The Protocol summarises the bases on which the key procedures applicable to the New Zealand jurisdiction are developed<sup>39</sup>. The guiding principles for the procedures in New Zealand are as follows:

1. Clear and publicly identified processes for selection and appointment;
2. Clear and publicly identified criteria against which persons considered are assessed;
3. Clear and publicly identified opportunities for expressing an interest in appointment;
4. A commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection;

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<sup>38</sup> J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), 2015.

<sup>39</sup> New Zealand Crown Law, Attorney General, *Judicial Protocol* April 2013 (Updated April 2014), <http://www.crownlaw.govt.nz/assets/Uploads/judicial-protocol.pdf>, accessed March 2018.

5. Advertising for expressions of interest, recognising that selection should not always be limited to those who have expressed interest;
6. Maintaining, on a confidential database, a register of persons interested in appointment.<sup>40</sup>

To these, the Committee would add a seventh:

7. Maintaining the confidentiality of applicants, subject only to necessary background security checks.

5.4 The Committee is of the view that these seven (7) procedural guidelines can be used together with the Latimer House Principles to guide the practice of appointment of judges in Trinidad and Tobago.

5.5 The Committee also took note of three interrelated elements that are essential to the appointment process:

- (a) the need to attract the best candidates having regard to the recruitment process, the terms and conditions of office and security of tenure;
- (b) the need to ensure procedures that are fair to all and select the best candidates having regard to all relevant criteria, including appropriate consultations;
- (c) the need to have regard to the uniqueness of a judicial officer and the demands for both judicial accountability and independence in the context of Trinidad and Tobago.

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<sup>40</sup> The New Zealand Judicial Protocol provides for details of all prospective candidates who meet the statutory requirements for appointment to be placed on the register. Information is held on the register for five years unless prospective candidates request otherwise and prospective candidates can request that their names be removed at any time. The information on the register is kept confidential and available only to those directly involved in the relevant appointment process. See New Zealand, Crown Law, Judicial Protocol, (updated April 2014).

## Selecting Body

- 5.6 It should be noted that in other Commonwealth jurisdictions the organisational arrangements for the appointment of judges have been reformed in recent times. For example, in the United Kingdom, by virtue of the Constitution Reform Act of 2005, the Judicial Appointments Commission recommends candidates for judicial appointments to the Lord Chancellor or the Lord Chief Justice, and the Lord Chancellor is no longer directly responsible for selecting judges although she may, with reasons given, require the JAC to reconsider a recommendation. Canada has implemented judicial advisory committees in all provinces as well as an independent judicial advisory committee for federal appointments. These committees are now constituted to include lay persons in addition to legally-trained persons.
- 5.7 Across the Commonwealth, the selecting body varies as does the process by which candidates are selected. In New Zealand, the Attorney General recommends the candidates to the Governor-General in his or her sole discretion, without reference to Cabinet, and his or her recommendation is binding on the Governor-General. In Canada, it is the Prime Minister who decides on the appointment of federal Supreme Court judges based on a short list provided by an independent advisory committee, who are appointed for three years. In Jamaica and in Barbados, the Prime Minister advises the Governor General on who to appoint as the Chief Justice after consulting the Leader of the Opposition.
- 5.8 In Trinidad and Tobago, the Judicial and Legal Service Commission (JLSC), the independent body responsible for the appointment and promotion of judges, was established in 1962 under the Independence Constitution and, apart from the change made in respect of the appointment of the Chief Justice by the President in the 1976 Republic Constitution, the JLSC has remained unchanged for over 50 years. This despite:
1. The significant increase in the number of both judges and legal officers whose appointments, promotions, transfers and discipline have to be addressed by the Judicial and Legal Service Commission;

2. Contemporary demand for transparency in the process of appointments to public office;
3. Contemporary demand for accountability of such persons for performance of their duties.

5.9 While the JLSC has not changed institutionally, there has been change in the *process* for appointment of judges, particularly after 2000 when open advertisement of vacancies and certain criteria to guide the JLSC in selection were instituted, and again after 2009 when the requirements of applicants were changed.<sup>41</sup> In addition the removal of the constitutional ouster clauses protecting the JLSC permitted more effective judicial oversight of the conduct of the JLSC.

#### *Composition and Tenure of the Selecting Authority*

5.10 In practice in the Caribbean, the Chief Justice as chair of the judicial service commission plays a disproportionate role in relation to the decision-making of the Commission because she or he is the head of the judiciary and most intimately involved in the day to day administration of the courts. The Dumas Task Force reported that stakeholders described the OECS Regional Judicial and Legal Services Tribunal as a ‘rubber stamp’ for the Chief Justice’s wishes and ‘a legal fiction representing the will of the Chief Justice’.<sup>42</sup> The privileging of judges as members of the service commissions has also faced the criticism that it allows judges to end up appointing their own successors, ‘a question of tweedle-dee and tweedle-dum’, as suggested by the former Barbados Prime Minister, Errol Barrow.<sup>43</sup>

#### *Governance and Scope of Functions*

5.11 The JLSC undertakes a range of appointments that expands the scope of their work to functionaries well beyond judicial officers and at the same time, broadens the liability of the Commission in respect of the appointment and discipline of those officials.<sup>44</sup>

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<sup>41</sup> See Section III above – Appointing Judges

<sup>42</sup> Reginald Dumas, ‘Report of the Task Force to examine the structure and function of the Judicial and Legal Services Commission in the OECS’ (9 February 2000 St Lucia) (Dumas Report), 6.

<sup>43</sup> Errol Barrow, Hansard HA 3792 (27 August 1974 Barbados).

<sup>44</sup> *Wildman v JLSC* 1 Mar 2007 GD 2007 CA 2 (CA Gren).

## **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 interests.
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.

## **Eligibility Requirements**

- 5.12 The criteria outlined in the April 2000 Gazette are not defined, are minimalist in terms of content, and provide no useful guidance to applicants on how the criteria stated therein matter and how they are weighted and applied by the JLSC. In the absence of definitions and explanations of the criteria, it is moot whether the JLSC itself is able to effectively and consistently apply the criteria.
- 5.13 In this regard the Committee endorses the approach of the Canadian and New Zealand jurisdictions where the criteria are elaborated and explained in a document and on websites



accessible to the public and to potential applicants.<sup>45</sup> The criteria adopted do not include the promotion of diversity – gender or ethnic – and there are no mechanisms in the processes of recruitment, selection and appointment which address the promotion of diversity on the bench.

### **Recommendation on Eligibility Criteria**

1. 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.

### **Process**

#### *Testing competence and suitability*

5.14 Among the changes instituted after about 2009 were a test of reasoning and a psychometric evaluation. The Committee's understanding of the nature of the test and the psychometric evaluation is based on the reports of successful and unsuccessful applicants. While the Committee has no objection in principle to qualifying tests and/or psychometric evaluation as part of the process for filtering or short-listing applicants, the following points should be observed:

- a. The test and/or psychometric evaluation should be appropriate to the job of Judge and, because tests may be culturally biased, they must be appropriate to our culture and society; the JLSC should therefore be advised by Human Resource experts and qualified psychologists on the tests which can and ought to be applied for the job of Judge in the specific context of Trinidad and Tobago having regard to the criteria for appointment as judges.

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<sup>45</sup> See New Zealand Attorney General, Judicial Protocol (See footnote 39 supra) and Office of the Commissioner for Federal Judicial Affairs Canada, Qualifications and Assessment Criteria, <http://www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html>, accessed March 2018.

- b. The tests should be designed so that certain applicants by virtue of their background, academic training or experience do not have an unfair advantage over other applicants. In Latin America, it has been noticed that written examinations tend to very academic and can exclude good candidates who are long removed from university examination practices.<sup>46</sup>
  - c. The tests should be administered in a way and in circumstances befitting the dignity of applicants for the bench and which protect their privacy; online tests might therefore be most appropriate and the results should be in the custody of the JAC.
  - d. Testing should not be done for applicants for the Court of Appeal because candidates for the appellate court would have already distinguished themselves at the level of the High Court or as very senior attorneys in practice.
- 5.15 The Committee has no objection to the requirement that applicants submit written samples of their work – opinions, submissions, publications in professional or academic journals, or judgments in the case of applicants for the Court of Appeal. However, advocates at the Criminal Bar may be disadvantaged in this regard and this would need to be taken into account.

*Communications with Candidates*

- 5.16 Contact and communication with applicants is handled by the office of the Director of Personnel Administration (Service Commissions Department) which lacks appreciation of the sensitivity of judicial appointments and an appreciation of why confidentiality is critically necessary in dealing with applicants at every stage of the process.

*Consultation with Stakeholders*

- 5.17 The JLSC does not consult consistently with the Law Association or with sitting judges as a formal part of its process. The Committee formed the view that consultation with various stakeholders in the course of the appointment process is important. The stage in the process

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<sup>46</sup> Hammergren Linn, *Envisioning Reform: Improving Judicial Performance in Latin America* (University Park, PA: Pennsylvania State University Press, 2007) 104.

where this is best undertaken is where the candidates for possible appointment have been selected after the interview stage. At that point, the Commission should make discreet enquiries of the Law Association, sitting judges of the Court of Appeal and sitting senior judges on the candidates. Any feedback should be treated confidentially (as with all other communication during the process).

- 5.18 Essentially therefore, while on the face the current process followed by the JLSC conforms to the principle of transparency, the procedures which operationalise the principle are deficient and compromise the realization of the objective of engendering public confidence in the process and protecting the professional reputation of applicants.

*Improving the Pool of Candidates and Addressing Diversity*

- 5.19 The Committee does not share the view that candidates for the bench should be drawn exclusively from advocate attorneys with many years of practice in the courts, either from private practice or from the Office of Director of Public Prosecutions. We acknowledge, as do the criteria currently adopted by the JLSC since 2000, that such experience would be highly desirable. Excellent judges can be sourced from among those who practice as solicitors or instructing attorneys but who would have to learn or re-learn courtroom etiquette and practice to be effective on the bench. Temporary judgeships can be a useful mechanism to acquire the skills needed. In addition, all judges who are appointed should be exposed to an orientation programme, the scope of which would depend on their previous experience, but might include shadowing an experienced judge, mentoring by a retired judge, as well as instruction in the management of people and resources.

- 5.20 Contemporary concerns about diversity in employment in the public and private sector are valid and apply as well to the higher Judiciary. To the greatest extent possible, the face of the Judiciary should reflect the face of the national community in terms of gender and ethnicity. The process of appointment therefore bears directly on this issue. The question of how to operationalise the promotion of diversity is however, fraught since selection based foremost on promoting diversity could result in a dilution of the quality of the Judiciary. The

Committee formed the view that promoting diversity was a highly desirable goal and its operationalization must begin with a careful documentation of the historical and current state of diversity within the Judiciary. The promotion of diversity should also be embraced as an explicit goal and included among the criteria for selection. However, the first principle guiding selection must be merit and only where candidates are deemed to be equally meritorious would secondary considerations such as the promotion of diversity influence eventual selection and recommendation for appointment.

### **Recommendations on Process**

1. 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.
2. 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.
3. 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.
4. The JAC should ensure that where qualifying tests are administered, these are designed for relevance to the job of a judge.
5. The JAC should be prepared to give confidential feedback to applicants on their test scores.
6. Qualifying and psychometric tests should not be given to applicants for appointment to the Court of Appeal.
7. 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.
8. 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.
9. 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.

## **Tenure, Terms and Conditions of Service**

### *Retirement Age, Return to Private Practice*

- 5.21 The Committee considered the question of the retirement age of judges which is currently 65 years and formed the view that there is a persuasive case for increasing the mandatory retirement age to 70 years. Apart from the fact that a judge may be at his best just when he is required to demit and may be in good health, and then would be debarred from practice for 10 years, a higher retirement age is likely to facilitate senior attorneys or even Senior Counsel in their mid-fifties to accept appointment after they have enjoyed a financially successful private practice and could then serve 10 to 15 years on the bench.
- 5.22 Relatedly, the Law Association should give consideration to reducing the period of debarment for return to private practice. A judge may have only 15 to 20 years on the bench depending on the age at which he/she enters. This affects pension benefits. If retired judges are able to return to private practice sooner, their post-retirement incomes could be enhanced.

### *Temporary Judgeships and Acting Appointments*

- 5.23 The Committee is of the view that greater use should be made of the system of appointing temporary judges from the ranks of practicing attorneys. Temporary judgeships would allow senior attorneys to experience what it would be like serving as a judge and could serve as encouragement for its consideration later in their careers. In addition they permit informed performance feedback from the Bar and general public which can significantly improve the quality of decision making by the JAC in relation to any subsequent permanent appointment. Acting appointments are similarly useful. The Committee notes however, that extended acting appointments for judges or a chief justice are highly undesirable as this leaves the acting appointee vulnerable and insecure and hence compromises the principle of judicial independence.
- 5.24 Newly-appointed judges (except of course those with prior judicial experience at the level of the High Court) are expected to hit the ground running even where previous judicial or even litigation experience is limited. The Committee endorses the view expressed by several

interlocutors and in written submissions that an orientation programme for newly-appointed judges is necessary.

### *Performance Appraisals*

5.25 Notwithstanding the fact that it is difficult to remove a sitting judge, the Committee considers that there should be some regular performance appraisal of judges by the Chief Justice on at least an annual basis and an appraisal of the Judiciary's performance as a whole by the Judicial Appointments Commission. This will serve to strengthen judicial accountability and promote public confidence in the administration of justice. Any system of performance appraisal must be carefully designed to strengthen professional self-improvement and as an aid to judicial promotions, while not undermining judicial independence and impartiality.

### **Recommendations on Tenure and Performance**

1. 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.<sup>47</sup>
2. 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.
3. 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.
4. 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.
5. 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.

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<sup>47</sup> For example, the retirement for judges now between 60 and 65 could be increased to 68 and for those currently under 60, the retirement age could be set at 70.

## **Appointment of the Chief Justice**

5.26 In cases where there is an executive-only mechanism for appointment, as with the Chief Justice, the Commonwealth best practice is to ensure such appointments are made “on the basis of clearly defined criteria and by a publicly declared process” as called for by the Latimer House Principles.

5.27 Although Trinidad and Tobago in 1976 shifted the decision-making on who becomes Chief Justice from the Prime Minister to the President to reduce politicization, the absence of clearly defined criteria and a publicly declared process present risks to judicial independence. The Commonwealth Best Practices suggest that:

Executive-only appointment systems, in summary, require a combination of legal safeguards and settled political conventions in order to be a reliable and legitimate means of appointing judges. The precise mix may differ between jurisdictions, but should include at least transparency regarding the criteria for appointment and the procedures followed, a requirement of consultation with senior judges and possibly also opposition politicians, and ideally the existence of an independent body to provide oversight and deal with complaints.... The constitutional role of the highest court and leadership and administrative responsibilities of the Chief Justice make it particularly important to ensure political neutrality in the process by which they are selected.<sup>48</sup>

## **Recommendation on the Appointment of Chief Justice**

1. 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

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<sup>48</sup> *Commonwealth Best Practices* 1.4.26

convention in this regard which might include advertisement and/or an independent advisory committee to shortlist candidates for her consideration.

### **Is ‘Tapping on the Shoulder’ Inconsistent with Transparency?**

5.28 The Committee draws attention to the principle -- ‘Advertising for expressions of interest, *recognising that selection should not always be limited to those who have expressed interest*’. The Committee endorses this approach in the Trinidad and Tobago context. Some excellent candidates may not see the advertisements or if they do, may not initially be attracted to serious consideration of judicial office. ‘Tapping on the shoulder’ produced very able judges in the period up to 2000 who might not otherwise have responded to an advertisement. The independent advisory committee in its report to the Prime Minister of Canada on the appointment of the new Chief Justice noted in respect of its consultation and outreach:

Early in the process, letters were sent to a wide range of Canadian legal and judicial organizations, asking them to use their networks and knowledge of the judiciary and legal community in their jurisdictions to identify qualified candidates, and *urge them to submit an application*. (Our emphasis)

5.29 The fact is that wholly meritorious persons may be persuaded to consider the opportunity for public service on the bench if approached directly and discreetly. ‘Head-hunting’ or ‘tapping on the shoulder’ is not necessarily inconsistent with transparency provided it occurs alongside or subsequent to open advertisement and the objective is to find the most able and meritorious candidates and not to favor a particular person.

5.30 The Committee acknowledges that that bias may creep into the process if the Chair of the Judicial Appointments Commission, or other members, directly encourage persons to make themselves available for selection as judicial officers. This may also lead to the perception that the advertisement process is merely a façade for selection of a strongly preferred candidate. Equally, knowledge among the candidates that one of them has been ‘tapped’ by a member of the selecting body could generate strong feelings that the process is unfair. Ideally, as in the Canadian process, the selecting body should encourage *others*, including



the legal profession, to identify qualify candidates and encourage them to submit an application.

- 5.31 In the case of appointments to the Court of Appeal, while applications or ‘expressions of interest’ may be invited, the selection process should involve much more consultation and much more careful assessment of their written submissions, which would be judgments delivered in the High Court and perhaps academic or conference papers, and for senior attorneys documentation of their contribution in leading cases which developed the law.

### **Is There a Case for Parliamentary Involvement?**

- 5.32 The Committee notes that in Commonwealth countries the involvement of the legislature in the appointment of judges, usually limited to confirmation proceedings, is the exception rather than the rule.<sup>49</sup> Only 21 per cent of Commonwealth jurisdictions have legislative involvement. The authors of the Commonwealth Secretariat study opined:

While legislative confirmation proceedings offer the possibility of enhancing the legitimacy of the courts, which is particularly relevant at the highest level, good practice requires that the dangers of politicization and deadlock be managed through a combination of carefully designed legislative procedures and a respectful and constructive attitude on the part of politicians to the constitutional role of the judiciary.<sup>50</sup>

- 5.33 It should be noted that Canada has recently (2016) instituted a process whereby *after* the Prime Minister has selected the nominee for Chief Justice, the Minister of Justice and the chairman of the Advisory Board appear before the standing committee of the House of Commons on Justice and Human Rights to explain how the nominee meets the statutory requirements and the criteria, and the nominee takes part in a moderated question and answer session with the members of the standing committee of the House and the Senate.

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<sup>49</sup> See J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), 2015, Section 1.5, The role of the legislature.

<sup>50</sup> *Ibid.* para 1.5, page xvii

By contrast, the UK House of Lords was clear and adamant that there should be no parliamentary involvement, stating:

Parliamentarians should not hold pre- or post-appointment hearings of judicial candidates, nor should they sit on selection panels. Political considerations would undoubtedly inform both the selection of parliamentarians to sit on the relevant committees or panels and the choice of questions to be asked.<sup>51</sup>

5.34 The Committee is of the view that there ought to be no parliamentary involvement in the process of judicial appointments in Trinidad and Tobago as obtains, for example, for federal judges in the United States of America for the following reasons:

1. Any parliamentary involvement imports partisan political and perhaps ideological considerations into the process which is likely to taint the administration of justice;
2. There will be no privacy and confidentiality for applicants which could be harmful to them personally or professionally.
3. The effect of these negatives will serve to discourage meritorious candidates from applying for judicial office;

These disabilities apply even where the confirmation requires only a simple majority as the very process of public hearing creates the possibility for these disabilities to emerge. In the course of its public consultations as well as submission from judges, attorneys and others, the Committee notes that there was little or no support for parliamentary involvement in judicial appointments.

The Committee does not support any Parliamentary involvement in the appointment process.

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<sup>51</sup> HOUSE OF LORDS, Select Committee on the Constitution, 25th Report of Session 2010–12, Judicial Appointments, Report, March 2012.

## VI. IMPLEMENTATION: GETTING FROM HERE TO THERE

- 6.1 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.
- 6.2 The Committee is seized of this and recognised the importance of the task which it undertook. While recent events may have prompted its formation by the Law Association, the Committee understood that it needed to take a wider perspective on the issue of judicial appointments. It also recognised that a great deal of societal change had taken place in Trinidad and Tobago since Independence and that the institutions and processes which had been set up then and after the Republican Constitution in 1976 were not necessarily appropriate to the demands of the society in the 21<sup>st</sup> Century.
- 6.3 The Committee has distilled the following key principles which have informed its assessment and its recommendations:
- 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 body responsible for the recruitment, selection and appointment of judges must be so structured that the Chief Justice does not have disproportionate influence, and strong voices outside of the legal profession and the Judiciary must be represented and be heard.

## Summary of Recommendations

6.4 The recommendations of the Committee are summarised below:

### *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:
  - (g) Chief Justice, Chairman
  - (h) Retired Judge of the Court of Appeal
  - (i) Senior Attorney of not less than 15 years call who is a practicing member nominated by the Council of the Law Association
  - (j) Attorney of not less than 10 years call not in active practice appointed by the President
  - (k) Human Resources professional
  - (l) 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.
10. 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.
9. The JAC should ensure that where qualifying tests are administered, these are designed by senior judges for relevance to the job of a judge.
10. The JAC should be prepared to give confidential feedback to applicants on their test scores.
11. 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.<sup>52</sup>
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

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<sup>52</sup> For example, the retirement for judges now between 60 and 65 could be increased to 68 and for those currently under 60, the retirement age could be set at 70.

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.

### **Constitution Reform**

- 6.5 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.
- 6.6 On the other hand, several of the recommendations can be implemented, even by the JLSC in its current form without legislative or constitutional change, e.g. orientation programme for newly-appointed judges, documentation of the application process, re-design of the tests for applicants, and dispensing with tests for applicants to the Court of Appeal. The President

too, can institute a procedure for appointment of the Chief Justice which in time could set a precedent and harden into convention which all future Presidents would follow.

**APPENDIX A: LIST OF PERSONS WHO MADE SUBMISSIONS**



**APPENDIX A**

**List of Persons Who Made Submissions**

Written

Michael de la Bastide	Former Chief Justice
Jean Angela Permanand	Former Justice of Appeal
Paula Mae Weekes	Former Justice of Appeal
Lionel Jones	Former Judge
Ronnie Boodoosingh	Judge
Carol Gobin	Judge
Kevin Ramcharan	Judge
Eleanor Donaldson-Honeywell	Judge
Allyson Ramkerrysingh	Judge
Kenneth Lalla	Former Chairman of Public Service Commission and former Member of JLSC
Constitution Reform Forum	Civil Society Organisation
Association of Caribbean Students for Equal Access to the Legal Profession	Civil Society Organisation
Ria Mohammed Richardson	Attorney at Law
Darrell P. Allahar	Attorney at Law

REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

Oral

Paula Mae Weekes	Former Justice of Appeal
Carol Gobin	Judge
Andrea Smart	Judge
Jacqueline Wilson	Judge
Martin Daly	Attorney at Law/Senior Counsel/Former President of the Law Association
Russell Martineau	Attorney at Law/Senior Counsel/Former President of the Law Association
Seenath Jairam	Attorney at Law/Senior Counsel/Former President of the Law Association

**APPENDIX B: QUESTIONS TO THE JLSC**

**[LAW ASSOCIATION LETTERHEAD]**

**Law Association Committee on Judicial Appointments**

The Honourable the Chief Justice  
of Trinidad and Tobago  
Mr. Justice Ivor Archie  
The Judiciary  
Hall of Justice  
Knox Street,  
Port of Spain.

Dear Chief Justice,

**Re: Law Association Committee on Judicial Appointments (“Committee”)**

I note our earlier discussion in which I advised of the appointment of the Committee by the Law Association of Trinidad and Tobago (“the Association”) and acknowledge my gratitude in your offer of arranging a meeting of the Committee with the members of the Judicial and Legal Service Commission (“the JLSC”).

I wish to confirm our willingness to attend a meeting with you and the other members of the JLSC on the proposed date of 17 July 2017 at 2:30 pm.

The members of the Committee are:

- |                                    |   |  |
|------------------------------------|---|--|
| Justice Désirée Bernard<br>(Chair) | - | Former Judge of the Caribbean Court of Justice and<br>Chancellor of the Court of Appeal of Guyana      |
| Dr. Terrence Farrell               | - | Economist and Attorney at Law and former Deputy Governor of the<br>Central Bank of Trinidad and Tobago |
| Mr. David Abdullah                 | - | Economist and former Vice President of the Oilfields<br>Workers’ Trade Union                           |
| Mr. Rajiv Persad                   | - | Attorney at Law and Vice President of the Law Association of<br>Trinidad and Tobago                    |
| Ms. Tracy Robinson                 | - | Senior Lecturer in Constitutional Law, University of the<br>West Indies, Mona Campus                   |
| Ms. Vanessa Gopaul                 | - | Attorney at Law  |
| Mr. Rishi P.A. Dass                | - | Attorney at Law  |

The Terms of Reference of this Committee are as follows:

## REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

- 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.
- To consult with stakeholders and members of public and to receive and consider their written and oral submissions.
- To report to the Council of the Law Association within three months or such further period as the Council may allow.

In the interest of advancing discussions at our meeting, we hereby attach an appendix of suggested topics of discussion and not by way of limitation on the breadth of matters we may discuss, I note that the Committee will be interested in the input of the members of the JLSC into, inter alia, the matters addressed in the appendix attached hereto.

The suggested topics are not intended to limit our discussion in any way and the Committee will be interested in any general comments which the members of the JLSC will consider relevant to our discussions.

Yours respectfully,

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Justice Désirée Bernard  
Committee on Judicial Appointments  
Chair

## Appendix

### Recruitment

1. How is the judicial appointment process initiated?
  - a. Who advises when vacancies are relevant?
  - b. Is there a seniority list that is kept updated?
  - c. Are there criteria to determine whether an advertisement will be issued?
2. Who receives applications for appointment to the High Court/Court of Appeal?
  - a. Is there a vetting or sifting process or are all applications viewed by the JLSC?
  - b. If so who vets and sifts? What are the criteria for this process and is a record kept?
  - c. Are prospective candidates invited to submit applications for appointment to the High Court/Court of Appeal?
  - d. How many applications are processed annually for appointment to the High Court/Court of Appeal?
3. Who undertakes criminal investigation/clearance? Who determines the parameters of the process? Are candidates advised of or able to respond to a failed security clearance?
4. Who prepares the standard form issued to referees?

### Selection

1. The interview process:
  - a. What questions are asked and is there a record of these questions and/or answers?
  - b. Are the same questions asked to all candidates?
  - c. Who determines the questions which are asked?
2. Is the Law Association or other stakeholders invited to give input informally or formally? How is this done? Are records kept of this? Ought this to be formalized?
3. Evaluation:
  - a. How are applicants or interview responses weighted or scored?
  - b. Are there parameters for evaluation other than the Gazette criteria?
  - c. What happens if there are differences between the members in evaluation?
  - d. Is there a casting vote?
  - e. Is there a record of voting?
  - f. Is there a written policy for appraisal?

- g. Is there a seniority list and/or a merit list of High Court Judges for promotion to the Court of Appeal?
- 4. Who determines third party or Psychometric testing/content parameters thereof?
- 5. Are reasons provided to unsuccessful applicants?

### **Appointment**

- 1. What is the role of the Director of Personnel Administration (“DPA”) in the appointment process? Is there a need to delink this process from the office of the DPA?
- 2. Other matters (composition of the JLSC, additional factors to be taken into account by the JLSC in the recruitment process, historical information):
  - a. Constitution of the JLSC: is there a need for other categories of persons on the commission?
    - i. Should there be a representative of the Law Association?
    - ii. Should there be a representative of Civil Society?
    - iii. Should there be a human resource specialist?
    - iv. Should sitting Judges be appointed?
  - b. Is the office the Chief Justice able to manage the work of the JLSC in addition to other functions?
    - i. Should someone else head the JLSC?
    - ii. Should an additional administrative office be created?
  - c. Should there be oversight of the appointment process by Parliament?
    - i. What should the parameters of this be?
    - ii. Should some other body have oversight?
    - iii. Should there be some accountability for persons who are aggrieved by the appointment process?
  - d. Should there be requirements in respect of diversity:
    - i. Gender
    - ii. Ethnicity
    - iii. Religion
- 3. Should there be new or different criteria for appointment?
  - a. Service as a temporary judge or recorder to permit feedback upon performance?
  - b. Specialization in particular fields in respect of perceived needs on the Bench?

REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS

4. Can the court's statistical officer give gender, age or other composition of the Judiciary?
5. Is there a need to change the appointment mechanism for members of the JLSC?



**APPENDIX C: GAZETTE NOTICE APRIL 2000**

**APPOINTMENTS TO THE OFFICE OF JUDGE OF THE SUPREME COURT**

THE JUDICIAL AND LEGAL SERVICE COMMISSION wishes to advise that the matters hereunder constitute its general policies and procedures relating to the above.

**Puisne Judges— Qualification for Appointment**

Puisne Judges are appointed by the President acting in accordance with the advice of the Judicial and Legal Service Commission. They are selected from suitably qualified persons who have been admitted to practice as Attorneys-at-law in Trinidad and Tobago, or called to the Bar of England and are of not less than ten years standing.

**Nature of the Post**

Puisne Judges exercise the jurisdiction prescribed by the relevant statutes and are under the administrative direction of the Chief Justice.

**Appointment Process**

The Commission in making an appointment will normally consider for selection individuals who are aged between 40 and 57 years. Though not exhaustive, the criteria to which the Commission has regard in selecting individuals for appointment are listed hereunder.

<i>Professional Competence</i>	<i>Integrity</i>	<i>Temperament</i>	<i>Experience</i>
Legal knowledge and training	Honesty	Courtesy	Length and nature of law practice
	Fairness	Humility	
Intellectual and analytical ability	Ethical standards	Emotional Balance	Length and nature of exposure to court practice and procedure
	Independence	Decisiveness	
Mature and Objective Judgment	Commitment to Public Service	Authority	Understanding of people and society
Communication skills		Social awareness	Public and community service
Organisational skills		Receptivity to ideas	Previous service in a judicial or quasi-judicial capacity
Interest in developing the law		Ability to listen	Specialization
		Reliability	Publications (if any)

Appointments of Puisne Judges are made by the Commission after consideration applications made to it by suitably qualified individuals. Applicants are required to—

- (a) Apply in writing
- (b) Supply an up-to-date resumé
- (c) Provide references
- (d) Attend an interview

Applications are directed to the Secretary of the Judicial and Legal Service Commission.

From time to time, applications may be solicited by advertisement published in daily newspapers. All applications however, whether or not made in response to such advertisements are considered by the Commission who decide whether or not the credentials of the applicant justify calling him/her for an interview. If after interview an applicant is deemed suitable for appointment but there is no vacancy at the time, his/her name is kept on file pending the occurrence of a vacancy.

#### Judges of the Court of Appeal

The qualifications required by law for appointment to be a judge of the Court of Appeal are—

- (a) service as a judge the High Court for not less than three years; or
- (b) not less than 15 years standing as an attorney admitted to practice in Trinidad and Tobago or as a member of the Bar of England.

The same criteria used in appointing puisne judges are also applicable to the appointment of judges of the Court of Appeal, though it is true to say that there is a difference in the weighting given to some of the criteria. This is a reflection of the difference in the demands made on an appellate judge as compared with a judge of first instance. Integrity is of prime and equal importance in both cases but of the other criteria, Professional Competence assumes a greater importance in the case of appointments to the Court of Appeal.

Normally appointments to the Court of Appeal are made from the High Court Bench but the Commission may appoint an outstanding candidate from outside the Judiciary. As between High Court judges, seniority i.e., length of service as a judge is taken into account, but is not the only or the governing factor.

**B PHILLIPS**

Secretary, Judicial and Legal Service Commission