EVIDENCE TO HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION INQUIRY INTO THE JUDICIAL APPOINTMENTS PROCESS

Submission on behalf of the Equal Justices Initiative (EJI)[1] by:

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SUMMARY

1. The EJI welcomes the Committee's inquiry into the judicial appointments process. The specific focus of this submission is judicial diversity. A diverse judiciary is crucial to ensure the democratic legitimacy of the judiciary as a whole. It is essential that judicial selection is open, transparent and accountable. Diversity must be at the heart of the process.
2. There are a number of measures that could be incorporated readily within current structures, which would quickly have a positive impact on judicial diversity. These, considered in detail below, include:
    a. Redrafting section 63 of the Constitutional Reform Act 2005 to ensure that the definition of 'merit' recognises the need for the judiciary broadly to reflect the diversity of the UK population, including traditionally un- or under-represented groups;
    b. More effective collation of statistical data to include monitoring and benchmarking at all levels of judicial appointment to track the representation of groups traditionally un- or under-represented in the judiciary;
    c. Removing artificial barriers, hurdles and dead-ends in current judicial career paths;
    d. Greater openness as to the profile and appointment of Deputy High Court judges;
    e. Increased use of direct or lateral appointments, particularly to the senior judiciary;
    f. A requirement of diverse shortlists for all judicial appointments;
    g. According fairer weight to equivalent skills and experience in judicial selections at all levels, however these have been either demonstrated or acquired.
    h. Readiness to use the 'tie-break' provision in section 159 of the Equality Act 2010.
3. The experiences of other jurisdictions which have significantly increased the diversity of their judiciaries provide further examples of measures that can be taken that have proved successful elsewhere. Overall, however, those experiences indicate that a strong political commitment to the importance of a diverse judiciary and to taking proactive steps is required in order to deliver judicial diversity.
4. We submit that the current system of appointments to the UK Supreme Court is not working well and requires urgent revision. We also recommend revisions to the balance of membership of the JAC and its selection panels.

[1] The Equal Justices Initiative (EJI) is a collective of academics, practitioners, judges and policy-makers committed to working towards gender parity on the bench. The aim of the EJI is to promote the equal participation of men and women in the judiciary in England and Wales by 2015. For more information see: http://www.law.qmul.ac.uk/eji/.

Q7. What effect (if any) have the changes had upon the diversity of the judiciary?

5. The representation of women (of all ethnicities and group identities) in the judiciary has increased from 14.1% in 2001 to 20.6% in 2011.[2] The gains of BME candidates as a group have been even smaller (currently 4.8% of the judiciary overall).
6. These 'diversity statistics' and others reproduced in the Diversity Taskforce report present an inaccurate picture of the representation of women in the judiciary. In particular, the statistics do not distinguish between fee-paid and salaried judges. This is a crucial distinction as women are more likely to be found among the fee-paid (non-salaried, non-permanent) judges. The failure to distinguish between judicial appointments in this way gives an inflated impression of the presence of women within the salaried judiciary. As at 1 March 2010 (the latest figure available on the Judiciary's website), the percentage of women in the *salaried* judiciary was 18.2% and the percentage of judges from a BME background was 2.8%.
7. In addition, women and BME candidates are more likely to be found in the lower echelons of the judiciary. Evidence shows that the changes in the judicial appointment process since 2005 have been most effective in increasing the diversity of the judiciary *at entry level*, that is, at the level of deputy district judges, district judges (magistrates courts), deputy district judges (magistrates courts) and fee-paid tribunal judges and recorders. There have also been slight increases in the numbers of women at Circuit judge and High Court judge levels.[3]
8. By way of contrast, just 12.8% of the current senior judiciary (the High Court and above) are women. In fact, the number of women in the Court of Appeal is *the same* as it was ten years ago and their proportional representation has *decreased* from 7.5% to 7%.
9. Moreover, women continue to be disproportionately represented in the family courts and under-represented in the commercial courts.
10. In other respects, it is impossible to determine what effect the changes in the judicial appointment process have had upon the diversity of the judiciary since the 'diversity statistics' collated by the Judicial Office are limited to the sex and ethnicity of the judges. There is no attempt to collate information relating to other diversity characteristics or to characteristics protected under the Equality Act 2010, such as sexual orientation.
11. In order to track progress towards the achievement of a more diverse judiciary, there needs to be a far more robust collation of statistical data to include the monitoring and benchmarking, at all levels of judicial appointment, of groups traditionally un- or under-represented in the judiciary. The data should distinguish between salaried and fee-paid judges.

Q7 (contd). Is diversity a legitimate factor to bear in mind as part of the appointments process?

12. It is essential that the achievement of a more diverse judiciary be an explicit factor in the judicial appointment process at all levels. First, it is essential for the legitimacy of the judiciary that it fairly reflects the public whom it serves and who are affected by its decisions. This is a matter of even greater importance given the recent constitutional developments discussed below and the enhanced role of the judiciary within the UK's constitutional arrangements. Secondly, in accordance with human rights and equality principles, all members of the legal profession should have equal opportunities to aspire and be appointed to judicial office. The current profile of the judiciary sends a clear message that equal opportunities do not exist in particular for women,

[2] Figures taken from the Report of the Diversity Taskforce, published in May 2011.

[3] Ministry of Justice and Judicial Appointments Commission, Statistical Digest of Judicial Appointments of Women and BME Candidates from 1998-99 to 2008-09 and Statistical Digest of Appointments of Solicitors from 1998-99 to 2008-09 (July 2010).

those from BME backgrounds and solicitors. Thirdly, there is ample evidence that a more diverse judiciary results in a greater diversity of views and life experiences on the bench, leading to higher quality decision-making, particularly on collegial courts at appellate level.[4] For all of these reasons, the judiciary at all levels must become more diverse and cannot continue to be drawn exclusively from an elite minority.

13. Moreover, the apparent 'trickle up' theory operated by the JAC (that is, if entry level positions are diversified, the higher judiciary will eventually follow) is not an adequate solution or response to the problem of how to increase judicial diversity. It can take 20-30 years for someone to progress from recorder to Supreme Court judge, and for other entry level positions, there is a clear ceiling on progression. 'Trickle up' arguments have rightly been widely criticized and rejected, most recently by Lord McNally.[5]

Q7 (contd). If so, what should be done to help deliver greater diversity?

14. There are a significant number of measures available to help deliver greater diversity within a much more realistic timeframe. Many of these could be incorporated readily within the current structures and appointment processes.

Re-definition of merit

15. A more robust approach needs to be taken to giving statutory force to the goal of ensuring that the judicial family is diverse at all levels while retaining the commitment to appointment on merit. Diversity and merit are not mutually exclusive. Article 174 of the South African Constitution, for example, brings together merit and diversity as co-existing constitutional obligations. With that example in mind, and with the objective of giving due regard to the range of identity groups in society, we recommend that section 63 of the Constitutional Reform Act 2005 be redrafted to ensure that 'merit' incorporates recognition of the need for the judiciary broadly to reflect the diversity of the UK population, including traditionally un- or under-represented groups.

Removal of artificial barriers to progression

16. Artificial barriers, hurdles and dead-ends in current judicial career paths must be removed. For example, experienced tribunal judges and district judges should not have to complete the same selection exercise as someone without previous judicial experience to become a recorder; there should be a mechanism to facilitate transfer between these positions. (As for all newly-appointed recorders, the induction course is capable of equipping such appointees to sit in the criminal courts.) These judges should also be directly eligible for appointment as Deputy High Court judges.

Greater openness in relation to the appointment and profile of Deputy High Court judges

17. The anomalous position of Deputy High Court judges must be addressed. These appointments are not made through JAC selection exercises and no information is publicly available as to either the

4 See, e.g. Sir Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727 at 744-746, citing in particular social psychological evidence on judicial decision-making.

5 Reported in House of Lords Hansard, 17 March 2011.

identity or diversity of those holding appointments at this level. Yet having served as a Deputy High Court judge appears to be very important – possibly a necessary step – in securing salaried appointment to the senior judiciary. As such, this vital position should be actively used as a means of ensuring a more diverse pool of potential High Court candidates, in particular by enabling tribunal and district judges, qualified academics, recorders and Circuit judges to be appointed to this role.

18. To this end, the JAC should be given formal responsibility for the appointment of Deputy High Court judges. In addition, diversity statistics and statistics on appointments to the position of Deputy High Court judges should be published by the Ministry of Justice or Judicial Office.

Increased use of direct or 'lateral' appointments

19. At the current rate of promotion, existing High Court and Court of Appeal judges (who, as noted above, it is known include low proportions of women and BME judges) will have a monopoly on Supreme Court appointments until at least 2020-2025.
20. In order to increase the pace of change, diversity at the appellate level of the judiciary should be addressed by means of direct or 'lateral' appointments. Until the High Court bench is sufficiently diverse to provide a suitable pool for appointments to the Court of Appeal, and the same for the Court of Appeal in relation to appointments to the Supreme Court, appointments to these courts should be made from a much broader field, including those with judicial experience in other branches (although the most senior levels are also the least diverse), barristers (ditto) and academics (who offer a more diverse recruitment pool at senior levels). The nature of appellate decision-making requires intellectual skills above all, and lack of previous judicial experience can be overcome relatively readily. Under the current system judges appointed to the Court of Appeal or Supreme Court are required to decide cases in a wide range of areas of law well beyond their previous expertise, and the situation with direct appointments would be no different.

Recognition of key skills and judicial qualities however acquired

21. Fairer weight should be accorded to equivalent skills and experience in judicial selections at all levels, however these have been either demonstrated or acquired. In particular this should ensure that judicial qualities and potential that have been gained from particular social, educational and career paths are neither artificially devalued nor artificially overvalued.
22. There are, at least, two reasons for this. First, sheer intellectual skill can be demonstrated at least as much by educational achievement 'against the odds' in non-elite institutions as by strong performance in elite institutions after consistent social and educational advantage. Secondly, the broader qualities required for judicial work that does not primarily call on technical legal knowledge (such as fact-finding and the exercise of broad discretions) are at least equally demonstrable from 'non-standard' life and career paths towards eligibility for judicial office as from more traditional routes.

Greater use of the 'tie-break' provisions

23. There should be readiness to use the 'tie-break' provisions allowed for under section 159 of the Equality Act 2010. If candidates' different but commensurable judicial qualities and potential were fairly weighted, it may be anticipated that those from identity groups that are un- or under-represented in the judiciary would either more often win selection exercises or at least more often emerge as equally qualified. In the latter case, it would be appropriate, and consistent with EU

law, to make use of section 159 to break the tie in favour of candidates from under-represented groups.[6]

Diverse shortlists for all judicial appointments

24. It is clear that greater progress towards judicial diversity has been made in jurisdictions where there is clear political will and leadership on the issue of diversity (see below Q9). It is also apparent that courts which require a gender-balanced shortlist have a better representation of women.
25. All recommendations provided to the Lord Chancellor by the JAC or the commission responsible for Supreme Court appointments should be in the form of shortlists including a diversity of candidates. Ideally this would be achieved though an amendment to the Constitutional Reform Act to this effect. However, in the meantime, the Lord Chancellor should, in cases where recommendations lack diversity, make use of his ability under the Constitutional Reform Act 2005 to ask the JAC or selection commission to reconsider their recommendations.

Q8. What impact have recent constitutional developments (such as the enactment of the Human Rights Act 1998) had on the role of the judiciary within the UK's constitutional arrangements? What are the implications of such developments for the judicial appointments process?

26. As noted above, recent constitutional developments such as the enactment of the Human Rights Act 1998 have made it even more important that the judiciary in the UK reflects the diversity of the population affected by its decisions, and brings to bear the widest possible range of viewpoints and life experiences on decision-making about individual rights and the actions of public authorities.
27. A clear illustration of this point is seen in the recently-published volume *Feminist Judgments: From Theory to Practice*.[7] This volume contains 23 'alternative' judgments in leading cases, written from the perspective of an imagined feminist judge sitting on the original case or an appeal from it. Six of these judgments directly concern the interpretation of the Human Rights Act 1998 or the rights protected by the European Convention on Human Rights, while others deal with other important issues in family, commercial, criminal, public and equality law. These judgments powerfully demonstrate the potential effects of having a more diverse judiciary – sometimes in the results of cases, but always on the way judges from different backgrounds understand the factual and legal issues and employ different reasoning that enriches and deepens the judicial conversation. We urge Committee members to read for themselves this practical illustration of the value of greater diversity in the appellate judiciary.

Q9. Are there lessons that can be learnt from the appointments system in other jurisdictions?

28. Both at domestic and international levels the evidence from a number of other courts demonstrates that a proactive commitment to diversity can achieve meaningful change even where the traditional recruitment pools are unrepresentative. In particular the comparative evidence shows that a key variable in achieving greater diversity is (small p) political

6 For a more detailed analysis of EU law and the Equality Act 2010 provisions on positive action see L Barmes, 'Navigating Multi-Layered Uncertainty: EU, Member State and Organizational Perspectives on Positive Action' in G. Healy, G. Kirton & M. Noon (eds), *Equality, Inequalities and Diversity – From Global to Local* (Palgrave, 2011).

7 R Hunter, C McGlynn and E Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

commitment to change within government, the judicial appointments process, the judiciary and the legal profession.

29. The examples below demonstrate that a real political commitment to widening the judicial recruitment pool and seeking out talented candidates from non-traditional backgrounds can lead to greater diversity in a relatively short space of time, without any adverse impact on the quality of the judiciary. Conversely, without such a commitment, meaningful change rarely occurs.

International and transnational courts

30. At international level, courts which have formal composition requirements have achieved significant diversity. For example, the European Court of Human Rights requires each state to submit a three-person shortlist to the Parliamentary Assembly of the Council of Europe, which votes on the appointment. Where the court is made up of less than 40% of one sex the shortlist must include at least one candidate of the under-represented sex. The gender balance on the European Court of Human Rights (19/47 = 40%) is much better than that on the senior courts in the UK.
31. Similarly the International Criminal Court, which has a gender balance requirement in the nominations process, now has a majority of women on the court. In contrast, the International Court of Justice, which has no explicit commitment to diversity, has only ever had one woman judge in its long history.

France and Germany

32. In most European civilian systems, appointments are based entirely on merit as determined by performance in judicial training examinations. Women do well under this system. In France, for example, there is concern at the over-feminisation of the judiciary. However, even here the most senior positions and leadership roles in both France and Germany remain male dominated – attributable to factors such as women's child-related career interruptions, the family-unfriendliness of more senior/leadership positions, and gender bias in progression/promotion processes (through evaluations by senior colleagues, being invited to apply, and so forth).
33. This suggests a need to focus not only on the selection process for judicial appointments but also on judicial working conditions, the culture of the judiciary, and means of facilitating progression for non-traditional entrants.

Canada, Australia and Israel

34. In Canada the creation of an appointments commission in Ontario with an explicit commitment to gender equality led to an increase in the proportion of women appointed over five years from 18% to 43%. Likewise four of the nine Justices on the Supreme Court of Canada are women, one of whom is the Chief Justice.
35. In Australia the recent increasing commitment to greater gender balance has led, from a low base, to greater representation of women at senior levels of the judiciary (State Supreme Courts and Courts of Appeal, the Federal Court and the High Court of Australia) than in the UK, although there is some variability between jurisdictions. Three of the seven members of the current High Court are women. Australian jurisdictions have not adopted bureaucratized appointment processes along the lines of the JAC. Some States have instituted open application or formalized consultation processes, but in all cases appointments remain within the power of the relevant Attorney-General. This has enabled Attorneys-General with the political will to do so to transform the gender profile of the judiciary within their jurisdictions. High profile instances include Attorney-General Matt Foley in Queensland in 1998-2001 and Attorney-General Rob

Hulls in Victoria throughout the 2000s, although conservative governments have also recognized the importance of gender equity in appointments.

36. One other feature of the Australian system is the lack of a lengthy 'pipeline' into the senior judiciary. Fee-paid judicial positions are rare (and unconstitutional at federal level) and are consequently not a pre-requisite for salaried appointment. Senior barristers are appointed directly to Supreme Court, Federal Court (equivalent of UK High Court) and Court of Appeal levels. This calls into question the supposed necessity of first 'testing out' potential judges in fee paid positions. The concern that appointees might find judicial appointment uncongenial and wish to leave within a short period has not been born out in practice in Australia. This concern may also be addressed by making it possible to return to practice in some form following judicial appointment. Again, this option is available in Australia and has not proved problematic. Further, while in recent years all judges appointed to the High Court of Australia have previously been judges of a State Supreme Court or of the Federal Court, service on a Court of Appeal (which exist only in some States) is not a necessary intermediate stepping stone.
37. In Israel, where the diversity of its society has led to the view that a corresponding diversity in the composition of the courts is essential, the courts have achieved a wide religious, ethnic and gender mix.

Northern Ireland and South Africa

38. More recently in Northern Ireland the goal of transforming the Community composition of the courts following the Good Friday agreement was widely felt to be very difficult to achieve given the lack of senior experienced lawyers from Catholic backgrounds in the recruitment pool. However the commitment to seek out and find a wider range of talented candidates was such that the judiciary has undergone a very successful transformation without any suggestion that its quality has diminished.
39. Likewise in South Africa the judiciary has gradually moved from an all-white institution to one in which judges from a wide range of ethnic backgrounds are visible on the bench. In contrast, progress on the appointment of more women in South Africa, although formally an official goal, has fallen back as a result of the relatively weak political commitment to gender equality compared to race equality.

Appointments to the UK Supreme Court

Q10. Is the system for recommendations made to the Lord Chancellor by a five-member commission working well?

40. In the light of the increasingly powerful role of the senior judiciary, the democratic legitimacy of Supreme Court appointments requires an appointment process that can attract wide ranging support.
41. The current five-member commission is dominated by members of the senior judiciary and gives the impression of a process that facilitates judicial self-replication and has little legitimacy. It must be replaced with a commission that is diverse in its composition and whose decisions, particularly as regards diversity, are subject to a measure of political accountability.
42. In order to achieve this the President and Deputy President should not be a part of the selection process. The commission should have no more than one judicial member. A formal requirement of gender balance on the commission should be introduced. Some form of parliamentary involvement in the process should be devised, whether through membership of the commission or the review of recommendations. A gender-balanced short-list of names should be given to the Lord Chancellor from which the final selection should be made.

Q11. Is the process for consulting the senior judiciary and heads of the devolved administrations satisfactory?

43. As noted above (Q10), to the extent that the appointments process is dominated by the views of the current judiciary there is a danger of *the perception, at least,* of self-replication.
44. Robust appointment criteria and a diverse appointment commission remove the need for direct judicial and regional stakeholder participation in the selection process. In the alternative, if the senior judiciary and devolved administrations are to be given an acknowledged role in the process, then formal recognition should also be given to other stakeholders, such as the legal profession including legal academics, community groups, and civil society organisations.
45. We note, for example, that the Judicial Appointments Board for Scotland does not automatically consult members of the judiciary for their views on potential appointments.
46. Indeed, the convention that there must be Scottish and Northern Irish judges on the Supreme Court in itself makes the argument for broader representation of other major social groups. Adherence to these conventions has also proven that judicial diversity requirements are perfectly workable. Despite the relative smallness of the legal professions in those jurisdictions, there is never any suggestion that a suitable candidate cannot be found (nor indeed that unsuitable candidates have been appointed). In other words, we have long and honourable experience that appointment on merit is not diluted by requirements for judicial diversity.
47. There is no reason in these circumstances to think that a similar commitment in relation to other forms of judicial diversity would be problematic. Arguments relating to the importance of representation have already been made and accepted.

Q12. Should the compulsory retirement age for Justices first appointed to full-time judicial office be raised from 70 years?

48. No. Although experienced judges have much to contribute, progress towards greater diversity will be undermined if retirement ages are raised.

The role of the Judicial Appointments Commission (JAC) and JACO

Q15. What is the most appropriate size and balance of membership of the JAC?

49. The balance of members should be more heavily weighted to laypeople. The views of judicial members currently dominate the decision-making given their greater status and authority.
50. The composition of the JAC decision-making body should be gender diverse and appointments should be made having regard to an obligation that decision-making bodies reflect the diversity recognised by the Equality Act 2010.
51. Moreover the JAC must ensure that, in line with Recommendation 31 of the Advisory Panel on Judicial Diversity that there ‘should always be a gender and, wherever possible, an ethnic mix’ on selection panels.

Q16. … What is your assessment of the various proposals for reform set out by the Lord Chancellor in his letter to the Committee Chairman of 4 January 2011?

52. We are disappointed that the Lord Chancellor's letter to the Chairman of the JAC makes no mention of diversity issues. In our view, this reflects the low political priority which is currently being given to increasing diversity. As the examples set out in response to Q9 demonstrate, unless this changes it is unlikely that there will be substantial progress toward a more diverse judiciary.

The role of the Executive

19. Does the Lord Chancellor (and the executive more widely) play an appropriate role in the appointments process? How (if at all) should the executive's role be reformed?

53. We refer to our comments above regarding the importance of a political commitment to diversity. Without this the role of the Lord Chancellor, whether wide or narrow, will have little effect on the composition of the judiciary. By contrast, if the necessary political will were present, the Lord Chancellor's role would become vital to bringing about the judicial diversity that democratic legitimacy requires. Apart from anything else, the Lord Chancellor should take the lead in ensuring there is democratic accountability for the achievement (or failure to achieve) an appropriately diverse judiciary.