HOUSE OF LORDS

SELECT COMMITTEE ON THE CONSTITUTION
Judicial Appointments Process
Written Evidence

Contents

Administrative Justice & Tribunals Council (ajtc)

1. I am writing in response to the recent call for evidence on the judicial appointments process.

The AJTC's interest in appointments issues

2. The AJTC was established by the Tribunals, Courts and Enforcement Act 2007. It has a statutory role to keep the overall administrative justice system under review, and is the successor body to the Council on Tribunals (CoT), established in 1958. In November 2002, the CoT published a *Framework of Standards for Tribunals,* containing a section relating to judicial appointments (enclosed). In November 2010, the AJTC published its *Principles for Administrative Justice*, setting out the principles against which it would consider the administrative justice system. Given the wider remit of the AJTC, these are cast in more general terms than the CoT Standards, but the AJTC and its statutory Scottish and Welsh Committees have continued to provide advice to Government from time to time on appointments-related issues, with a particular focus on independence, openness and appropriateness of procedures for the matter involved.

Tribunal appointments

3. We wish to emphasise the significance of tribunal appointments. In each of the last three years, the Judicial Appointments Commission (JAC) has made more recommendations for tribunal appointments than it has for the courts. We understand that in 2010-11 there were 163 appointment recommendations for courts compared to 510 appointment recommendations for tribunals (in respect of both legal and non- legal members).

4. In view of this, we consider it unhelpful that there is only one member of the JAC with a direct 'tribunals' remit. We suggest that consideration be given to adjusting the membership of the Commission, better reflecting the balance of work and allowing the JAC to have greater insight into the practical needs of tribunals and their judges.

5. In addition, we would like to note the inconsistency of arrangements for tribunal appointments. Many, but not all, appointments are made by the JAC. Notable exceptions include the Parking Adjudicators and Traffic Commissioners. We do not necessarily suggest that all appointments to tribunals must be made by the JAC, but we think that there should some mechanism for ensuring that all arrangements meet consistent standards.

Non-legal members

6. We would also like to raise the issue of non-legal members of tribunals. Non-legal members help to ensure that tribunals remain a specialised,

representative and, where possible, relatively informal forum for delivering justice. Non-legal members in some jurisdictions are appointed by the JAC – 195 non-legal member recommendations were made in 2010-11 and 236 in 2009-10. In other jurisdictions, such as Employment Tribunals, a different process is used. As noted above, we do not suggest that the JAC should be involved in all tribunal appointments, but we must emphasise the need for consistent standards, with this consistency extending to the appointment of non legal members.

7. In particular, we have long-standing concerns about the lack of proper arrangements for the appointment of panel members in school admission and exclusion hearings. The reform proposals for exclusion appeals presently before Parliament in the Education Bill have not allayed our concerns, which are described more fully in the JCHR legislative scrutiny report published on 13 June 2011.

Professional regulation

8. The Committee may also wish to consider appointments to tribunals or panels concerned with professional regulation. A current example arises from the Government's intention to abolish the Office of the Health Professions Adjudicator. The GMC has recently consulted on a consequential proposal to create a new tribunal, the Medical Practitioners Tribunal Service, within the GMC and is presently considering arrangements for the appointment of the Chair and members. In its response to the consultation the AJTC suggested that the GMC look to the JAC for guidance on setting up a transparent and independent appointments system.

Scotland & Wales

9. The AJTC has statutory Scottish and Welsh Committees but no remit in Northern Ireland.

10. The AJTC's Scottish Committee has pointed out in a recent report the potential constitutional difficulties for the tribunal system in Scotland arising from the Lord Chancellor's announcement on 16 September 2010 of proposals to bring the tribunal judiciary in England and Wales under the overall leadership of the Lord Chief Justice. The announcement recognised that issues would arise in relation to the fact that a number of tribunal jurisdictions extend to both Scotland and Northern Ireland, and cross-border sittings are a normal part of the judicial work of many tribunal judges. The AJTC wrote to the Lord Chancellor in March to highlight some of the cross-border issues that arise from unification of the judiciary and any further devolution of tribunals to Scotland. We emphasised the need for any new arrangements to ensure the coherence of UK-wide tribunal jurisdictions. The office and functions of the Senior President of Tribunals presently provide cohesion, and if that office is to be lost as part of the proposed reforms, we believe that specific structures and arrangements need to be put in place to facilitate and encourage cooperation and dialogue between the territorial

jurisdictions of the UK. We proposed a cross-border forum, convened by a Supreme Court justice and comprising the chief justices of each UK jurisdiction, as a possible model for cooperation and envisaged that appointments and cross-border 'ticketing' would be among the issues it might address.

11. In its recent *Review of Tribunals Operating in Wales*, the Welsh Committee of the AJTC considered the existing appointment processes for all tribunal members in Wales, and made recommendations for change. Since then, the Committee has continued to advise the Welsh Government on appointments issues, in particular with reference to the new Welsh Language Tribunal, the first tribunal to be created by the National Assembly for Wales. It has been recommended by others that appointments to the Tribunal be made by the JAC, and our Committee seeks to ensure that any new arrangements put in place in Wales satisfy requirements for transparency, independence and security of tenure.

Diversity

12. The AJTC is represented on the JAC's Diversity Committee and we agree with the proposition that diversity is a legitimate factor to bear in mind as part of the appointments process. As noted in the report of the *Advisory Panel on Judicial Diversity 2010*, increased diversity does not necessarily lead to better decision-making, but it does improve the 'texture' of the judiciary. At present, the tribunal judiciary generally reflects the community better than the senior judiciary in the courts, but there remains much that can be done and a proactive approach is required. A particular concern is that the percentage of appointments of female and BAME fee-paid judges in tribunals does not currently reflect the eligible pool.

29 June 2011

Rt Hon Lady Justice Arden DBE

1. I am grateful for the opportunity to respond to **Question 7**[1] in the Select Committee's call for evidence. I have for many years had an interest in increasing judicial diversity and in particular the number of women judges.[2]

OVERVIEW

2. While there has been a significant increase overall in the last ten years, the percentage of women judges is still much lower than in comparable courts

[1] Question 7: What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater responsibility?

[2] I would also disclose my interest as a past and future candidate for the Supreme Court.

elsewhere. It also tends to dwindle to single figures in the most senior courts, where there is a particular need for women judges to participate in decision-making. I would summarise the main points below as follows:

i. Diversity is important for the judiciary for the reasons explained below.
ii. The pace of change is too slow and that needs to be addressed as a matter of urgency.
iii. The Lord Chancellor has a constitutional responsibility to ensure that the composition of the judiciary is suitable for the society which it serves. This need not interfere with judicial independence, which of course is extremely important.

3. Many of the points made below are developed more fully in my recent lecture to mark the 796th anniversary in June 2011 of Magna Carta, ***Magna Carta and the Judges - Realising the Vision.***[3] In this lecture I discuss the significance of various provisions in Magna Carta which concern the judiciary and then discuss two particular judicial qualities, including social awareness. [4]

REASONS WHY JUDICIAL DIVERSITY IS IMPORTANT

4. *Legitimacy:* People may well have more confidence that their concerns have been taken into account if the judiciary reflects more of a cross-section of society.
5. *More perspectives are brought to bear in judicial deliberations :* The inclusion in the judiciary of judges with a wide range of backgrounds will result in different ideas being brought to bear in the development of the law, which will enrich its development.
6. Changes in society and other changes, including recent constitutional changes, have increased the complexity of judicial decision-making.
7. Judges must be able to demonstrate that they understand the context in which their decisions are being made.

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[3] I anticipate that the lecture will shortly be available on the Internet, and I am happy to provide a copy.
[4] The second quality which I discuss is the need for judges today to have an understanding of the case law of courts outside the United Kingdom, particularly within Europe.

8. Judicial decision-making is not simply a matter of intellect. Judges have to balance the theoretical and the practical in their decisions. There are many different ways of expressing effective legal reasoning.
9. All these factors make it more important today for social awareness to be treated as an aspect of merit. Social awareness is most likely to arise from the judges' backgrounds, thus increasing the need for diversity.
10. *Equality of opportunity and maximisation of talent:* it is difficult to believe that over 80% of the talent necessary for judging are held by only one group in society. The judiciary needs to make best use of all the talent among those qualified for office.
11. *International standing:* There is a real possibility that the continued failure of the system to increase judicial diversity will weaken our international standing among the leading judiciaries of the world, which now have significant numbers of women judges at the higher levels and in leadership positions. Increasing judicial diversity is regarded by some as a metaphor for an ability to move with the times.
12. *Increasing self-awareness of the judiciary:* Greater diversity will also help the judiciary be more aware of any subconscious bias they may have.
13. *Public confidence:* The public may well have more confidence in a judiciary that not only supports diversity in principle, but also achieves it in practice.

THE PACE OF CHANGE IS TOO SLOW AND SOMETHING NEEDS TO BE DONE URGENTLY ABOUT IT

14. The pace of change has been very slow. As at June 2011, the percentages of women and ethnic minority judges in post in the High Court and in the Court of Appeal of England and Wales as a percentage of the posts available were approximately as follows, with the figures in brackets showing the position as at 1 October 2000: *High Court* : Women – 15.5% (7.7 %); BAME[5] - 4.5% (0%); *Court of Appeal (excluding the Lord Chief Justice, and the Heads of Division (HoDs*)); Women - 7.9 % (8.6%) BAME - 0% (0%); *HoDs (excluding Lord Chief Justice):* Women – 0% (25%); BAME - 0% (0%). The welcome appointment of Rafferty J to the Court of Appeal with effect from 5 July 2011 will increase the percentage

[5] Black and minority ethnic.

of women judges in the Court of Appeal to 10.5%, thus showing a 2% increase approximately over the percentage at 1 October 2000.

15. Other leading common law courts have made much better progress in addressing the gender balance. For example, in the United States of America Supreme Court, the percentage of women judges is now 33% and in the case of the High Court of Australia it is now 42% and in the Supreme Court of Canada it is now 44%. The courts of England and Wales are falling behind these courts.

16. The understanding of diversity ought to be taken into account in the assessment of merit and it is a welcome development that this is now to happen in relation to selections made by the Judicial Appointments Commission. [6]

17. The lack of real progress in achieving a substantial increase in the percentage of women and BAME judges must inhibit recruitment from the under-represented groups. Moreover, it is likely to do so for many years to come since any woman planning a judicial career is likely to need to steer her professional career in that direction for many years before making an application.

18. It may be that the judiciary are not sufficiently trained in modern recruitment methods to make best use of the talents of the under-represented groups and that there is a need for training in selection procedures, and perhaps more outside expertise in the selection processes.

19. Recruitment procedures need to take account of the profile of the judiciary at the same level or in the same field as a whole. There is a need to consider the effect of an individual appointment on the relevant tier of the judiciary as a whole, rather than, as often now, to look simply at individual appointments in isolation, in order to ensure the complementarity of skills and experiences.

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[6] On 5 July 2011, the Judicial Appointments Commission issued a press release stating that it had amended the definition of merit applied by it so as to include an explicit reference to understanding diversity, and that this will apply by September 2011.

20. If a principal aim of judicial diversity is to achieve greater legitimacy, it is the number of women judges and other *visible* under-represented groups in the judiciary that needs to be increased, not the number of white male judges even if they come from non-conventional backgrounds.

21. In practice there is little that so few women judges can do to increase judicial diversity on their own. They need support from those outside the judiciary as well as those within it.

JUDICIAL INDEPENDENCE DOES NOT PREVENT APPROPRIATE INTERVENTION BY THE LORD CHANCELLOR

22. The Lord Chancellor has constitutional responsibility in relation to the judiciary with respect to its efficiency and other matters, and as part of this responsibility he has a general responsibility to ensure that the composition of the judiciary is suitable for the society which the judiciary serves. Judicial independence is of the greatest value. The Lord Chancellor's responsibility need not interfere with it.

23. This point must be borne in mind in considering the question of the role of the executive in judicial appointments.

CONCLUSIONS

24. In summary, in answer to Question 7:

a. The new appointments process has not had the effect of increasing diversity, or increasing it to any sufficient extent, in the higher courts or in the leadership roles in the judiciary.
b. Diversity is a legitimate factor to bear in mind as part of the appointments process. The inclusion of the visible under-represented groups may well increase public confidence in the courts for the reasons given. Diversity is conducive to greater self-awareness. It will result in a wider range of perspectives on legal

issues. It will help maintain the courts' international standing. It will show that there is equality of access to judicial appointments.

c. If it is decided that diversity is to be encouraged, structural changes may well be needed to achieve it.

6 July 2011

Anne Arnold, District Judge (Magistrates' Courts) and Recorder

1. The response below is made from a personal perspective and not in any representative capacity. It is made with the benefit of first-hand experience as –

i) a candidate appointed to hold judicial office as a result of three pre-2006 selection procedures which operated in respect of appointments to the office of –
   a) Acting Provincial Stipendiary Magistrate in 1996/7,
   b) Provincial Stipendiary Magistrate (now District Judge (Magistrates' Courts) in 1998/9, and
   c) Recorder in 2005;

ii) a candidate for appointment to the office of Circuit Judge in three post 2006 selection exercises;

iii) a Judicial College approved tutor judge and appraiser of Deputy District Judges (Magistrates' Courts); and

iv) a former Director of Legal Services responsible for recruiting solicitors and barristers to act as legal advisers to magistrates.

2. I would assess the current operation of the judicial appointments process up to the level of Circuit Judge (of which I have had first-hand experience) as poor for the following reasons:

a) there is no evidence that candidates recommended for appointment under the current JAC system are any better than those selected under previous systems and it is at the least questionable whether the JAC system has proved to be a reliable means of identifying the best candidates in terms of merit;

b) it has been costly in terms of resources expended in the course of selection exercises;

c) the approach of the JAC is unprofessional in that administrative staff appear not to be competent, confidentiality is not afforded to candidates and timetables are not adhered to;

d) it is inordinately slow given the time taken from the launch of a selection exercise to candidates being notified as to their success or failure in the process, and the time which elapses between a candidate being notified that they are to be recommended for appointment and their being assigned to a post.

3. As a means of identifying those with the essential knowledge and experience the self-assessment section of the Circuit Judge application form is unreliable as there is no independent means of verification of the content save to the extent that a referee

may allude to an example included in the candidate's "evidence". Notwithstanding use is made of a combination of both JAC and candidate nominated referees, references are an inadequate means of identifying those who may be able to present on paper and at interview – before a panel two-thirds of whom will not be holders judicial office - an unjustifiably impressive self-assessment of the qualities they possess. There is also, so far as references are concerned, a real disadvantage for those applying for appointment to judicial office who are not practising advocates. For example, the advocate practising in the Crown Court and seeking appointment to the office of Recorder or Circuit Judge will appear regularly in front of Circuit Judges whom the candidate can nominate as referees and who will have first-hand experience of the knowledge and expertise of the candidate. However, those such as myself, who already hold full-time judicial office are virtually "invisible" to Circuit Judges even if one sits as a Recorder in a part-time capacity since sittings are allocated across the breadth of one or more circuits and opportunities to sit on some of the circuits are very limited. A Recorder may, therefore, rarely see the same Judges or advocates when sitting in that capacity and will be hampered in identifying any as referees notwithstanding they may be best placed to comment as to whether the candidate possesses the necessary qualities for appointment to the Crown/County Court. Whilst the advocates who appear regularly before me may be able to attest to my ability as a judge of both fact and law in the magistrates' courts jurisdiction, they will have no first-hand knowledge of my performance in the Crown Court sitting with a jury.

4. One of the qualities a candidate for the office of Circuit Judge must demonstrate in their self-assessment is an appropriate knowledge of the law **or** an ability to acquire the same. Whilst holders of any judicial office must be expected to continue to develop their knowledge following appointment, a successful candidate must from the outset be capable of fulfilling the full range of responsibilities undertaken by the holder of the office for which they have applied. It is simply wrong to suggest, for example, that a lawyer with a proven track record in civil work is capable without considerable experience in the field of crime of sitting as a judge in a criminal court. A degree of specialist knowledge is required and it cannot be right for the judge presiding over the court to be the person with the least knowledge and experience in the field; such a system risks unnecessary and costly appeals.

5. The mock jurisdictional test papers used in Recorder and Circuit Judge selection exercises served a useful purpose in terms of testing a candidate's judicial approach on paper under exam conditions but I question whether they were an effective means of identifying anything more. There is no guarantee that those who demonstrate in a written test a sound judicial approach will, when confronted with the reality of the court room, be able to fulfil the actual role of a judge which requires much more in addition. Perhaps this point has somewhat latterly been recognized as the most recent Recorder selection exercise test papers have been founded upon the actual criminal and family jurisdictions respectively. That in turn, however, has led to disillusionment with the judicial appointments process on the part of at least one candidate known to me who is well-versed in one jurisdiction but who was persuaded to apply for a post in an alternative jurisdiction on the basis of there being a higher number of vacancies and the qualifying tests not being

jurisdiction specific, only later to discover that the tests would be jurisdiction specific.

6. The subsequent interviews – lacking as they have thus far any real test of a candidate's technical legal skills and expertise – can serve little purpose so far as identifying those with a sufficiently sound knowledge and wide experience of the jurisdiction into which they will ultimately be appointed and where they will daily be confronted with a range from the unrepresented defendant to advocates well-versed in that particular jurisdiction.

7. Selection exercises are costly in particular in terms of "judge time" taken up with drawing up materials for use in the test papers, marking of papers (given that all candidates whatever their ability are put through the test) and selection panel interviews. Given the cost of such exercises I was surprised to learn from the JAC website within a matter of weeks of receiving the letter at **Annex A** that a new Circuit Judge selection exercise would be launched in May, 2011. I questioned with the JAC the sense, in times of financial constraint, of recommending, in February, 2011, 30 instead of 49 candidates only then to launch another costly selection exercise some 3 months later; thereafter I was informed that the planned selection exercise was to be deferred. I have since received a further letter (**Annex B**) which can surely serve only to show a lack of proper communication between the JAC and Ministry of Justice.

8. In my dealings with the JAC I have been asked to provide confirmation of information that had already been provided in an application form because administrative staff lacked an understanding of the professional qualification process; I have received letters containing conflicting information resulting in time being wasted whilst clarification has been sought; I have been informed that I have not forwarded documents which I had delivered in person to the office of the JAC - such is my lack of confidence in their administration systems – only to have it confirmed that the documents had been received and that I should not have received the further request for them; I have received letters inappropriately addressed and restricted communications not double enveloped - the latter issue being one which I was assured had been addressed and yet has since been repeated. All of this points to a concerning level of incompetence amongst JAC staff.

9. An application for judicial appointment is one to be treated in confidence and yet numerous candidates are invited to attend the same venue on the same occasion to sit an initial written test. Whilst the JAC may point out to candidates the need for confidentiality in such situations, it does nothing to overcome the potential embarrassment that may be suffered by members of chambers who attend to sit the test each unaware that the other has applied; such encounters are not unknown and risk causing very real professional difficulties. Similarly, it can be highly embarrassing for holders of judicial office seeking to progress their judicial career to encounter at the test centre advocates who appear regularly in front of them. Such encounters never arose under the pre-2005 system of appointments when the utmost care was taken to ensure that candidates for interview did not encounter one another. It should be remembered that the opportunity to attend this initial test is one that is afforded to all applicants some of whom may not be equipped to hold judicial office

and will fail at this first hurdle. The issue of confidentiality becomes meaningless when candidates who are unsuccessful at any stage of the process are informed of that fact; they are not required to maintain confidence as to their failure. Yet those who have been successful, for whom "integrity" is a key quality if they are to be recommended for appointment, are reduced to being economical with the truth when, as inevitably is the case, they are asked by an unsuccessful candidate whether they have been successful.

10. When I applied for a full-time judicial appointment in 1998 the competition was launched in the summer and the then "sitting-in" process took place that winter, interviews in March the following year and recommendations for appointment to specific posts were made in May 1999. By contrast, the 2010 Circuit Judge selection exercise was launched last March, the written test procedure took place in June, interviews in September and the first recommendations for appointment were not made until almost a year after launch in February, 2011 with a further recommendation still now in process some 15 months after the launch of the exercise. A similar pattern of delay occurred with the 2008 Circuit Judge competition. Timetables appear almost routinely not to be adhered to and rather than the JAC taking the initiative and informing candidates that there may be a delay, the deadline expires before candidates hear anything; the letter at **Annex A** demonstrates the point. A number of candidates who were, I understand, informed that they were to be recommended for appointment as full-time District Judges (Magistrates' Courts) as a result of the 2008 selection exercise were not actually assigned to posts until 2011, after the launch in 2010 of a new selection exercise for further such full-time posts; these candidates who had been deemed suitable for appointment were, furthermore, advised to re-apply in the new selection exercise to protect their positions as they could not be guaranteed an appointment – albeit successful candidates for the office of Circuit Judge are guaranteed an appointment. This is quite frankly an outrageous way to treat professional people. Either a candidate is suitable for appointment or they are not. Once a candidate is deemed suitable for any judicial appointment and informed that the intention is that they should be recommended for appointment an offer of appointment should follow, particularly when one considers that such professionals have necessarily to inform senior partners/heads of chambers and the like that they are likely to be recommended for appointment so that proper planning for their departure can take place. Delays and uncertainty cause difficulties for the candidate and their business colleagues alike with neither knowing when or indeed if the candidate will be leaving. Certainly in this regard the current appointments process does not appear to me to compare favourably with the pre-2005 system.

11. I remain unconvinced that the current appointments process, administered by the JAC, is truly transparent and accountable. When commissioners have been afforded the opportunity at judicial training events to speak on the work of the JAC they have been unable to counter the impression which exists, be it rightly or wrongly, that the process is manipulated to allow certain candidates through to the next stage albeit on merit they would not have qualified; initial test results we have been told are "moderated" and there is no fixed pass or fail mark. If merit really is the determining factor for judicial appointments, then there must surely be a mark

below which a prospective candidate should not fall in the course of the initial test; otherwise this test is meaningless.

12. It is my view that the public lack any real awareness and understanding of the judicial appointments system nor the risk at which it places them. Advertisements such as the JAC have posted along the lines of "Ever thought of becoming a judge, here's how you can" might be said to have raised awareness and encouraged applications from a wider pool of candidates; in reality they simply reflect the dumbed down qualification criteria which allow Legal Executives to apply for certain judicial appointments and for some to be appointed to full-time office without having previously sat in a part-time capacity. What the public should be aware of is that in dumbing down the whole process we are placing at serious risk the high standard of our independent judiciary at a time when it perhaps most needs to be robust in combatting the excesses of the executive amongst others; we lower the standards at our peril. How many members of the public know, for example, that a District Judge (Magistrates' Courts) may now be appointed to hold full time office until age 70 without ever before having sat in any judicial capacity? Such office holders will routinely be expected to deal with unrepresented defendants who will be prosecuted by a non-legally qualified Associate Prosecutor; there will be no legally qualified court clerk/legal adviser to assist them, simply a court associate who will complete paperwork tasks; they may find themselves in the position of having to activate a 6 month suspended sentence of imprisonment and alongside to impose consecutive sentences of 6 months' imprisonment for a series of two or more offences triable either on indictment or summarily – a total of 18 months imprisonment. Is such a system likely to inspire public confidence?

13. The best means of judging the quality of applicants for part-time judicial office is through a written test of actual technical legal and procedural knowledge and role play. It is of the note that the current selection exercise for Recorders (Criminal and Family) has reverted to an initial test paper which deals specifically with the jurisdiction in which appointment is sought; perhaps, therefore, there has been a recognition that even candidates for part-time posts need to demonstrate competence in the jurisdiction in which they seek appointment. The argument that such a process discriminates against those unfamiliar with a jurisdiction and militates against the "widening of the pool" of candidates for judicial appointment is wholly justified by the fact that one simply cannot appoint those who do not demonstrate the required skill and experience to a role which demands a thorough knowledge of the law and procedure applicable in that jurisdiction. For full-time appointments observation/appraisal by one holding the full-time judicial office to which the candidate seeks appointment should play a vital part – necessarily this would mean the appointment criteria being amended to revert to the position where all candidates for full-time judicial office are required first to have sat in a part-time capacity. A formal appraisal system is costly in terms of judicial time; whilst it exists for the lower ranks of the judiciary, it appears little reliance is placed upon it by the JAC and if that position is maintained there can be no real justification for it, costly as it is in terms of judicial input. A less structured system of observation of potential candidates in the course of their part-time sittings would, I suggest, provide a reliable means of identifying those capable of demonstrating their competence in the courtroom and such observations should form a key part of the selection process.

14. There has been a singular failure to understand the need for there to be early communication between the JAC and the Judicial College when candidates are appointed to part-time or indeed full-time posts. With part-time posts there is much that has to be undertaken before the candidate is prepared even for an induction course. With the potential now for there to be candidates recommended for appointment to full-time office who have never previously sat in a judicial capacity the Judicial College will be bearing the cost of developing a completely new programme of training to equip such candidates to sit as full-time judges.

15. The manner in which successful candidates are assigned to posts appears to pay little regard to the fact that whilst the business needs of the courts must be the priority, one is dealing with people who often have children and working partners; they will perform all the better if they are afforded reasonable consideration in terms of the need to uproot from their home/travel long distances etc.

16. It is claimed that the JAC has had a positive effect in terms of the diversity of appointments to the judiciary. That is difficult to prove as those changes may well have occurred without the introduction of the JAC. For example when I was called to the Bar women were outnumbered approximately ten to one by men; there was a gradual change with women now making up more than half of those called to the Bar. Just as that change has been gradual so too the change to the make-up of the judiciary will be gradual and the latter change may be slower because of the fact that women are child-bearers and may, therefore, take enforced career breaks and come to judicial office later than their male counterparts. Regrettably, because of the emphasis that has been placed upon diversity, women, ethnic and other minority candidates who are appointed to hold judicial office are sometimes now viewed as only having been appointed because of their gender or ethnicity. Diversity is a legitimate factor to be borne in mind in terms of ensuring that all those with appropriate skills and experience are encouraged to put themselves forward for judicial appointment. To that end, whilst one might expect capable lawyers sufficiently interested in holding judicial office to find out how such appointments are made and to make enquiries themselves, the work undertaken by the JAC to advertise the judicial appointments process and encourage applications from groups who may be under-represented is important. Beyond that, however, diversity has no place in the appointments process where merit alone must be the determining factor and care must be taken not to raise unrealistically the expectations of those who may not be equipped for judicial office. What is, however, needed is for existing members of the judiciary - including, but not exclusively, the male, middle-class, white, barrister - to be educated and encouraged to promote capable candidates regardless of their gender, professional background, ethnicity etc.

17. In my opinion the Lord Chancellor does not play an appropriate role in the appointments process and his involvement presents a very real risk of interference with the independence of the judiciary. Appointments should in no way be reliant upon his recommendation.

18. Members of the judiciary do not have a sufficiently significant role and influence in the appointments process given that the interview panels of three comprise a lay

person, civil servant and but one judge. Of course judges have to deal with a range of lay people but that alone does not justify the involvement of lay people in the determination of who should be a judge; they are simply not equipped to do so.

29th June, 2011

ANNEX A

Extract from letter 26.1.11 from Joy Morning, then Assistant Director of Courts Appointments, JAC

Dear Judge

CIRCUIT JUDGE SELECTION EXERCISE

I am writing to let you know that the Judicial Appointments Commission has agreed to a request from the Ministry of Justice for a short delay in the timetable with regard to the selection exercise currently underway for vacancies on the Circuit Bench.

I am writing to you to let you know that the Judicial Appointments Commission has agreed to a request from the Ministry of Justice for a short delay in the timetable with regard to the selection exercise currently underway for vacancies on the Circuit Bench.

It had been our intention to make our recommendations to the Lord Chancellor in December 2010, which meant that we expected to be in a position to let you know the outcome with regard to your application early in the New Year. However, the Ministry of Justice notified us in December that there was uncertainty with regard to the level of need for the Circuit Bench across the HM Courts Service Circuits, and asked us to delay while that was finalised.

I am pleased to say that they have this week been able to confirm their final requirements. This is a reduction to their original expectation of 49 vacancies in specific locations. They have now asked us to recommend 30 candidates without specifying the Circuits in which those vacancies will be available. 18 of these vacancies are for candidates suitable to hear heavyweight crime and two vacancies for candidates suitable to be nominated for authorisation under section 9 of the Senior Courts Act 1981.

I would hope that we will now be in a position to let you know the outcome of the exercise by early March at the latest.

ANNEX B

Extract from letter 9.6.11 from Joy Morning, JAC

Dear Judge

CIRCUIT JUDGE (CJ) SELECTION EXERCISE 2010/2011

Further to my letter of 22 February 2011 I am writing to update you on future Circuit Judge (CJ) vacancies.

As you may recall, in 2010 the JAC was originally asked to recommend 49 candidates for appointment as a CJ. However, while the selection process was still underway, the Ministry of Justice (MoJ) reduced its requirement to 30 candidates. I now understand from the MoJ, that there is a fairly urgent need to fill an additional CJ vacancy, and we have been asked to make a further recommendation.

While it is open to the Commission to launch a new selection exercise, it is clear that there were many strong candidates in the 2010 CJ exercise that might otherwise have been selected for appointment, but who we could not put forward because of the MoJ's decision to reduce the number of posts it wanted to fill. Our recommendations were therefore limited to the 30 candidates who were rated as the most meritorious. However, the additional post which the MoJ now wants to fill provides us with an opportunity to revisit that list and to recommend a candidate for the current additional CJ vacancy and any others that may arise in the fairly immediate future. For this reason, I am writing to you as a candidate in the 2010 CJ exercise to say that JAC Commissioners will be reviewing the list of candidates to decide whether there are any from that list that they feel able to recommend to the Lord Chancellor.

Beyond that, I understand that the MoJ is also likely to ask the JAC to run a new separate Circuit Judge Selection Exercise later this year to meet expected vacancies in 2012. The exact launch date and the nature and location of any vacancies, remain to be determined by the MoJ, although we expect the launch of this exercise to be around October 2011. Once the arrangements for the 2011 exercise have been settled, the Commission will determine the selection process to be applied and we will write again to inform all candidates involved in the 2010 selection days, and who were not recommended, with details of the 2011 exercise.

Association of Her Majesty's District Judges

Introduction:

The Association of Her Majesty's District Judges represents all District Judges in the County Courts and District Registries of the High Court in England and Wales and is grateful for the opportunity to respond to this call for evidence and we do so in relation to those questions where we feel we have a legitimate view.

Because of the numbers involved District Judges, along with Circuit Judges, will perhaps have a greater exposure to the appointments process than other court based judiciary. The need for an accountable, transparent and open process to ensure the appointment of suitably qualified judges is clear; that process must have available candidates from the widest possible pool; it must be a process that remains

free from all interference; it must protect and maintain the independence of the judiciary; it must maintain public confidence in both the process itself and the judiciary generally. It must, without deflecting from these principles, ensure that the judiciary is properly diverse.

Such basic principles are unlikely to be in dispute. The administrative procedures which support those principles must not only reflect them but themselves ensure that the selection and appointment process is carried out efficiently, economically and speedily. To that end we consider that changes to the process are necessary and so welcome the decision to set up this inquiry.

1. How would you assess the current operation of the judicial appointment process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

There may be two strands to this question. Firstly the general method by which the function of judicial appointment is carried out and secondly the way in which those functions are currently exercised.

It is appropriate (and indeed there may be no other way) for the state to sponsor appointment but in a way that protects judicial independence. That requires the selection process to be free from interference and the appointment only to follow that selection process. It is right that the selection process involves the state, through lay members as well as the judiciary by membership of interviewing panels. To that extent the current process meets the required functions.

For reasons below we do not consider that the way in which those functions are carried out are appropriate.

It may also appropriate for there to be a "family tree" of criteria with those at the top applying to all judicial appointments eg appointing on merit, and then as appropriate branches and sub branches of criteria to reflect the varying demands, needs and requirements of the different levels of judicial appointment.

2. Is the appointments process sufficiently transparent and accountable?

We do not believe that it is. Whilst it is unlikely that the wider public would require an everyday knowledge of the process nevertheless that information should be readily available and it is not. We are concerned as to a lack of accountability. It is right that the JAC should ultimately be accountable the government but that should concern itself with the process not the appointment.

3. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

Our perception is that there is little if indeed any awareness. Any increase in awareness requires outreach and education both by the JAC and the judiciary.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

We do not believe that the current process has had any adverse impact on maintaining judicial independence.

5. Have reforms introduced in recent years had any discernable effect on the quality of judicial appointments? How best can the quality of applicants be judged?

It is our view that the quality of appointment remains as high as before and it is of course crucial that this continues although of course any process of appointment may permit appointments that on reflection, for all concerned, perhaps ought not to have been made. The quality of applicants is best judged by previous judicial (part time where appropriate) experience and peer appraisal.

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre 2005 system in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

There continues to be considerable delay in the whole process often even after notifying candidates that they have been successful. We are also concerned as to the continuing use of a "Section 94 list" as the process by which a successful candidate who is not given an appointment by the commencement of a new competition is then required to reapply. The time taken by the appointment process, often up to a year, can have serious affect upon the professional lives of clearly successful people as well as perhaps their personal lives. We also believe that once the JAC have completed the selection process they should have no involvement in the decision as to the (geographical) location to which a successful candidate is appointed which is a decision best left to those with relevant deployment responsibilities.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

Whilst there are concerns over the extent of the increase in diversity within the judiciary as a whole it is our view that at District Bench level there has been some improvement. We do not have evidence to confirm whether that is as a direct consequence of the changes to the selection process or as a result of work elsewhere to address diversity issues. In saying that however we do not seek to suggest that further work is not required on this issue.

Merit should remain the sole criteria for appointment. However we agree that it is appropriate to take account of diversity as a legitimate factor and note and support the recommendations set out in Report of the Advisory Panel on Judicial Diversity 2010.

Bearing in mind the need for the appointments process to be able to draw upon the widest possible pool of suitably qualified candidates it is right that there should be education and outreach to potential candidates so that they are aware of the opportunities open to them and that in assessing merit diversity issues are properly brought into account. This is an obligation that will fall upon professional bodies and will call for a change of attitude in the management particularly of solicitors firms. It will also require steps to be taken to ensure that those involved in the appointment process itself are properly equipped through appropriate training to address diversity issues.

8. 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?

Whilst we accept that recent legislative changes have had the result of thrusting judicial decisions into the limelight we are not of the view that legislation has brought about a "constitutional" development of the role of the judiciary that role remaining to give judgement on the basis of the law as enacted by parliament which remains sovereign in such matters. The increasing public awareness of such judicial decision making should not carry any implications for the appointment process and it would in our view be wrong to seek to politicise the process as a result of the increased awareness.

9. Are there lessons that could be learnt from the appointments system in other jurisdictions?

Whilst it must be right to look at systems in other jurisdictions we are unable to provide specific examples. It would however be inappropriate to adopt systems or practices that work well else where without being assured that the meet the requirements of the process in England and Wales and/or the UK.

13. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?

We consider that the principles by which the JAC fulfil their role have been appropriate. We have real concerns however as to the way in which those principles have been administratively carried as mentioned in our responses to Questions 1 and 6.

14. Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

The sole responsibility for the JAC should be to administer and conduct the selection for appointments process.

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

Whilst we have no view as to size we comment that it should be sufficient to cope with the demands of the remit yet not cumbersome and so be able to work flexibly and quickly. We respectfully agree that not every member need be involved in every competition.

16. How (if at all) should the JAC's process be reformed? What is your assessment of the various proposals for reform set out by the Lord Chancellor in his letter to the Committee Chairman of 4th January 2011?

We welcome and support the proposals that the Lord Chancellor has set out in his letter. In particular we support the proposals to simplify the process both before and after the JAC's selection exercise and particularly that the Judicial Office should take responsibility for the post-selection process along with the idea to consolidate outreach work across the JAC, Judicial Office and Courts.

17. How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

It would appear that within the scheme as a whole there is no fixed basis to ensure the accountability and transparency of process both within the responsibilities given to the Lord Chancellor not with the power vested in JACO that we have expressed to be vital.

We believe that JACO's remit could be expanded to ensure that by regular review and report those necessary requirements of accountability and transparency are met.

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?

Whilst the Lord Chancellor has a legitimate role in all judicial appointments we recognise that it is appropriate that his direct role should be limited to the appointment of the most senior judiciary and appointment to the senior judicial posts. The Lord Chancellor will however need to be reassured that the process of selection and appointment remains appropriate in principle and administration.

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsman and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

We have commented on the need to maintain judicial independence and we believe that such a proposal puts this at risk. We do not consider that the judiciary can be classed alongside ombudsmen and regulators. We believe that such a proposal would raise serious constitutional concerns.

22. Do members of the judiciary have an appropriate role in the appointments process?

We believe that there must be judicial involvement. That role should include representation on interview panels and an extended involvement may well be beneficial for appointments at junior judicial level.

30 June 2011

The Association of Women Barristers (AWB)

The Association of Women Barristers (AWB) was founded in 1991 to monitor and represent the interests of women at the Bar of England and Wales. Since its inception the AWB has campaigned tirelessly to ensure equality of opportunity on topics such as recruitment and retention at the Bar; judicial, standing counsel and Silk appointment processes; public funding of work; and professional practice. The AWB continues actively to support action on professional and work-related issues to assist not only its members but also women and men across the Bar to achieve their full potential in their careers.

The AWB welcomes the opportunity to respond to this Inquiry on paper and would be pleased to give further evidence if asked to do so.

This response is intended only to address those questions in relation to which we are able to comment. The responses are brief, as brief responses have been requested.

OVERVIEW

How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

1. The AWB considers that the JAC has made significant improvements to the Judicial Appointments process. It may be that improvements can be made and the system extended, in particular, to appointments for the role of Deputy High Court Judge, which still appears to depend on patronage. The system

Is the appointments process sufficiently transparent and accountable?

2. The current system is a great improvement on the system that it replaced. Transparency would be improved by more detailed feedback to those candidates that are unsuccessful in relation to their applications. We understand that there are implications as to cost. We see no reason why applicants requiring detailed feedback should not pay for such a service.

How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

3. The website explains the Appointments process quite clearly. The desire for public awareness of the Appointments process could be better explained by some form of documentary showing an example of how the system actually works, rather than just a narrative description which people may not understand. That documentary could be accessible from the JAC website and publicised more widely.

In addition, there may be scope for teaching pupils about the judicial appointments system as part of constitutional awareness and citizenship in the core national curriculum.

Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

4. The Appointments process currently gives greater regard than before to the constitutional principle of the independence of the Judiciary; however, as the Judges that really are in a position of power and influence are those above Circuit Judge level, it is absolutely vital that improvements are made in the 'apparent' appointments process for Deputy High Court Judge.

Following anecdotal reports that Deputy High Court Judges are still appointed outside an open and transparent appointments process, the Chairwoman of the AWB endeavoured to discover from the JAC's website how these particular appointments are made. Intrigued by the absence of any such information on the website, she then wrote to the JAC to ask them about the system for the appointments of Deputy High Court Judges and was informed by email that there was no information which could be given to her because there are no current plans to run a Selection Exercise for the role. There are already diversity issues in relation to the composition of Chambers from which the majority of High Court Judges are drawn, and that has led to a lack of diversity in the higher judiciary which has resisted change. If there is a real desire to improve diversity then the apparent position in relation to the appointment of Deputy High Court Judges must be remedied. Applications for the post of Deputy High Court Judge should be by open competition, and open to all. There must be a policy to improve diversity on the High Court Bench and measures taken to improve a situation which has been neglected for too long.

Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

5. Quality is a ultimately a subjective test. Inevitably there are candidates who would have been appointed under either system and others who may not even have had the courage to apply under the old system. One has to ask how quality was assessed under the old system? We consider that diversity itself is an indication of improved quality, so long as all those who are appointed to their role are able to fulfil the requirements of the position. We are unsure that the reduction in the age requirements for Recorder, for example, or years in practice is an improvement. There is concern that the system has extended too far and that those with inadequate experience will be appointed as part of an overall policy to appoint very young applicants. The role carries heavy responsibilities and it is important that the Public maintains confidence in it. There is concern that young and relatively inexperienced lawyers are appointed. We are also concerned at the over reliance on 'competencies'. Many women in particular have significant life experiences which are ignored under the current narrow competency based system. A separate part of any application allowing an Applicant to add relevant life experiences would be fairer and encourage many able women to apply. There is no substitute for wisdom and experience and such qualities are the foundations upon which the responsibilities of the Judicial role are carried.

What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

6. The system is now a much more expensive process than pre-2005, but is much fairer. It is generally easy to find out information from the website or from the JAC. The measures suggested by Sir Colin Campbell have been implemented and the result is a fairer system. There is now a huge number of applicants for judicial appointments. That should be seen partly as a recognition that the system is fairer. Those who would not have applied in the past now do so. That is a good thing and was the intention of the reform of the system.

What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

7. The diversity of the Judiciary has been improved under the current system. The JAC has worked hard to encourage applicants from all backgrounds, and from different legal backgrounds, including employed lawyers, to apply for appointment.

The AWB firmly believes that all appointments must be made on merit. Diversity is an important factor to bear in mind in the appointments process. Diversity is an integral part of quality. A diverse Judiciary will best represent the public, which will demonstrate a full understanding of the issues that affect our multicultural society. The fact that there have been significant improvements at the lower levels of Judicial Appointments, which will probably continue to improve further, is positive but there is currently a ceiling beyond which it is very difficult to progress. We have engaged in discussions with the JAC on this issue in the past and there is a desire to improve the situation, but there is a residual feeling that the Bar is not doing enough in terms of increasing diversity in Commercial and Chancery Chambers. The pool is therefore small. If one adds to that the patronage apparently involved in the appointment of Deputy High Court Judges, the situation will not improve.

In addition we have concerns in relation to District Judge (DJ) appointments in the Magistrates Court. There appears to be a policy to appoint Court Clerks to the role of DJ in preference to those Barristers and Solicitors who often have wide experience in private practice.

This may be part of a cost saving policy and an intention, in due course, to obviate the need for legally qualified Court Clerks, or significantly to reduce such appointments. If that is the policy, it should be stated publicly. The recent examination (November 2010) was widely criticised by applicants and indeed by experienced DJs who looked at the paper and indicated that they could not pass such an examination. It involved the ability to recite passages of the Criminal Procedure Rules. Barristers and Solicitors would know what the Rules contain and be able to look the matter up quickly; the examination therefore favoured those

who were Court Clerks. Appointments to the post of District Judge should be drawn fairly.

In addition, DJ appointments are particularly attractive to women with family commitments; these candidates are encouraged to apply to be met with a system which appears to have been tailored to reduce the appointments of those who would make the best DJs and who have been Deputies for many years. That is unfair and again not in the interests of the public, nor does it assist to increase the diversity of the judiciary.

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?

8. We have no comment to make.

Are there lessons that could be learnt from the appointments system in other jurisdictions?

9. We have no comment to make.

APPOINTMENTS TO THE UK SUPREME COURT

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

10. We have no comment to make.

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

11. We have no comment to make.

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

12. Yes, to 75 years.

THE ROLE OF THE JAC AND JACO

How would you assess the performance of the JAC since it was established in 2006?

13. We consider that the JAC has made great efforts to improve the system and to make the system fairer and transparent.

Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

14. The remit could be widened to include Deputy High Court Judge appointments.

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

15. The size and balance of the JAC appears appropriate, we are aware of the need to save costs and so long as the quality of the appointments process is not reduced, we would understand that aim.

How (if at all) should the JAC's process be reformed? 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?

16. Elements of the proposals for reform are, without more detail, difficult to assess – for example, the suggestion regarding "strategic sponsors". We believe that proposals to reduce cost and unnecessary use of resources must be welcome, but caution that any transfer of roles to external suppliers must remain a cost borne by Government rather than applicants. There is an inherent public interest in ensuring that the best and most meritorious candidates are appointed to judicial office, rather than a system based upon those candidates' ability to pay to attend selection exercises. We would make the suggestion that it is essential to retain the 'role play' aspect of the procedure. It may be expensive, but many applicants may perform well in exam conditions, but would not be able to deal effectively with situations that occur in Court. It is therefore essential that role play is maintained. The exam process could be improved, a single venue and time, during an evening may mean that larger and cheaper venues can be booked. It is gratifying that Applicants are given a choice but in these straightened times, it may no longer be possible.

How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

17. We have no comment to make.

NORTHERN IRELAND

How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

18. We have no comment to make.

THE ROLE OF THE EXECUTIVE

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?

19. We have no comment to make, save that the system should remain independent, fair and transparent.

What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

20. We have no comment to make.

THE ROLE OF PARLIAMENT

Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a policy?

21. We believe that no case has yet been made out for Parliament to scrutinise nominees for judicial appointment. It would be wholly undesirable for any element of political favour to be permitted to creep into the current system and which would likely compromise the independence of the judiciary both in public perception and in reality.

THE ROLE OF THE JUDICIARY

Do members of the judiciary have an appropriate role in the appointments process?

22. The Judiciary is involved in the process but potential appointments are not circulated in the way they once were. That system was subject to considerable criticism. It may well be that there should be greater involvement in the final selection process of the candidates shortlisted, but any involvement must be transparent and recorded so that an audit trail can be maintained and scrutinised.

30th June 2011

Association of Women Solicitors (AWS)

Referring to the February 2010 Report of the Advisory Panel on Judicial Diversity and the Call For Evidence we respond as invited on the issue on which we have special expertise, Question 7 concerning Diversity.

7.(i) What effect (if any) have the changes introduced by the Constitutional Reform Act 2005 had upon the diversity of the Judiciary?

Response
We are pleased to note that there has been some success. The last available statistics (published in December 2010) indicated that more women were successful across all judicial selection exercises, including two appointments to the High Court. Also we know that some members of our Association, inspired by the Candidate Seminars run our Association in conjunction with the Judicial Appointments Commission and the Law Society, have put in successful applications.

7.(ii)Is Diversity a legitimate factor to bear in mind as part of the judicial appointments process?

Response
Yes.
We agree with Recommendation 5 in the Report that there should not be specific quotas but instead, in appropriate cases, the powers given to take positive action under s. 158 Equality Act 2010 should be utilised in judicial recruitment and promotion selection exercises.

7.(iii)What should be done to deliver greater diversity?

Response
In our view the changes introduced in 2006 with qualifying tests, omission of current salary, and role play exercises were a huge improvement on the previous system. The Candidate Seminars are also better. However there remains a perception that women solicitors lack the confidence to apply and there is therefore a need to offer further inducements.

(a) In our view it is a great shame that there is no individual feedback to the "dry run" tests. These written examinations are, of necessity, hard and as with all exams the high scoring candidates often believe they have failed because they have in fact spotted the really difficult issues. This therefore may well put off less confident but otherwise suitable female candidates. Model Answers would be better than nothing but our view is that individual scores are necessary.

(b) We agree with Recommendation 15 that the Work Shadowing scheme also needs to be expanded with many more places available overall and to accommodate eg Flexible Working and other needs of diverse applicants. Candidates should have the opportunity to request a placement with an appropriate role model. A formal appraisal/exit interview would be helpful.

(c)Both the Dry run tests and the Work Shadow should be monitored as to diversity on both take up and outcome and the results published.

1. We are disappointed to see that of the 4 female Case Studies featured on the Judicial Appointments Commission website only one, Sarah Jane Lynch, is a

post 2006 appointment. In our view this gives the wrong impression and we would like to see more recent female appointments featured.

(e) We endorse the publication of statistics but note that there is no sub classification of female applicants into solicitors and barristers. Our view is that if such information was provided this would give further confidence to suitable women solicitors who may believe that "all the judicial jobs go to men and barristers". This is particularly important at the crucial entry stage of the Fee Paid appointment.

(f) There could also be more emphasis on all applications being open to all practising lawyers. There seems to be perception currently that "all Recorders are barristers", for example.

(g) We agree with Recommendation 29 that Candidates should not be required to provide references until after successful completion of the qualifying test.

(h) We endorse the recommendation that all judicial posts should be assumed to be compatible with flexible working with exceptions needing to be justified. The same should apply to parental, maternity, ante natal and adoption leave.

(i) Finally we note with some excitement the suggestion in Recommendation 48 that the Judicial Studies Board should evolve into a Judicial College, offering specialist courses and schemes at an early career stage and targeted at currently underrepresented groups.

June 2011

About the Association of Women Solicitors

The Association of Women Solicitors was established in 1923 a year after the first woman was admitted to the Solicitors' Roll. It is a recognised group of the Law Society. It has a current membership of around 18000. The Association's aim is to be an essential national network promoting the potential and success of every woman Solicitor at all stages of her career. It offers support and advice and represents the diverse interests of all women solicitors. It provides a range of educational and pastoral care services as well as an excellent opportunity for women to network with others both within and outside the profession.

Professor Lizzie Barmes, Queen Mary University of London

Please note that this is work in progress that forms part of a larger project to be undertaken with Professor Kate Malleson also from Queen Mary University of London My response addresses Question 7 and in particular the arguments that it is not only legitimate to take account of diversity in judicial appointments, but in fact constitutionally required.

ARGUMENTS FROM DEMOCRATIC LEGITIMACY FOR JUDICIAL DIVERSITY AND OPENNESS

LIMITS TO THE EXISTING CONSENSUS FOR A MORE DIVERSE JUDICIARY

1. There are two major arguments for a more diverse judiciary that have, with different nuances and emphases, been persuasive in the UK and beyond. The first is that basic considerations of equity and fairness require that judicial office be genuinely open to all.[7] This is important in many ways, calling for a thoroughgoing reappraisal of the stages up to judicial appointment with a view to ridding them of features that formally or informally exclude members of any social group in unjustifiable ways. There is no doubt that reversing such unfairness could be transformative.

2. But there are two limits to the argument. First it does not apply distinctively to judicial office. While it is a matter of deep concern if we have an unfair system for becoming a judge, this is of no different order to that regarding unfairness in obtaining other significant goods. Secondly, and more significantly, if a fundamental reappraisal were undertaken and nothing changed, equity based arguments of this kind for judicial diversity would have been satisfied. Unlikely as this outcome might be, it is revealing to think in this way. It demonstrates that equity arguments pass to one side of the strong, widely felt intuition that it is wrong in itself for a narrow social group to exercise the kind of power that judges have, irrespective of how justifiably they have competed for their position.[8]

3. This leads to the second major argument for judicial representativeness, that it is required by democratic principle. Baroness Hale in fact made this point as a justification for the above intuition:

4. In a democratic society, in which we are all equal citizens, it is wrong in principle for… [judicial] authority to be wielded by such a very unrepresentative section of the population…. This matters because democracy matters. The judiciary may or should be independent of government and Parliament but ultimately we are the link between them both and the people. We are the instrument by which the will of Parliament and government is enforced upon the people. We are also the instrument which keeps the other organs of the state, the police and those who administer the laws, under control.[9]

5. Malleson has developed this argument on the basis that the modern judiciary have, in effect, a political role. This involved translating to the judicial sphere

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7 See, for example, Rt. Hon. Dame Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges' [2001] P.L. 489, 489-496.

8 See K. Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Feminist Legal Studies 1, 17.

9 Rt. Hon. Dame Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges' [2001] P.L. 489, 502.

arguments for the presence in elected political institutions of individuals from groups who have been marginalized. This presence is needed, Malleson argued, for there to be public recognition of the equal value of different social groups. Since the notion of representation deployed was essentially symbolic, its implications remained consistent with the maintenance of judicial independence and impartiality. At the same time, observance of this theoretical requirement of democratic legitimacy was argued to be practically important to securing public confidence.[10]

6. Compelling as they are, arguments of this kind from democratic theory are haunted by, and must be developed to answer, what may be called the 'identity/impartiality critique'. In essence the argument behind this critique is that democratic theory cannot require greater judicial diversity because democracy requires exercises of judicial power to be free from any personal, private influences. On this basis it might be argued that the group identity of any judge must on principled grounds be treated as irrelevant and that our judiciary is democratically legitimate despite its narrow identity composition.

7. A radical version of this critique might indeed contend that the quest for (or indeed reality of) visible judicial representativeness must be a pretense or affectation, designed only to elicit trust from the objects of judicial power without doing anything substantive to justify this. Arguments from democracy for judicial representativeness, it might be suggested, collapse under this scrutiny into arguments for *legitimating* judicial power. They seek to render judicial governance more palatable to the modern citizen, to make it look less unaccountable and remote, in order that, under the surface, business can carry on as usual.

8. The conundrum adverted to here might be part of the explanation for a consensus having emerged in favour of a more diverse judiciary, but only to the extent of altering the identity composition of the judiciary while everything else remains the same. Some compositional change in the judiciary might appeal to those who hold to the idea that judges are democratically legitimate because they are, not only in principle but also in fact, unaffected in making their determinations by their personal background and predilections. It is evidently desirable from this point of view to have more judges from different group identities to reassure those to whom this matters while adjudication carries on as it is. Without this change, it might be feared, the clamour for reform might result in an increase in inclusiveness that had consequences on how justice is in fact delivered.

9. This might explain, for example, that the only proposition drawing on democratic ideals given any prominence in public debate is that public confidence requires a more diverse judiciary. Yet, as Baroness Hale had said 'Public confidence and democratic legitimacy are not… exactly the same thing.'[11] It is perfectly conceivable for public confidence to be enhanced

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10 K. Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Feminist Legal Studies 1, 18-21.

11 Rt. Hon. Dame Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges' [2001] P.L. 489, 502.

without legitimacy being increased. It is significant also that, from the point of view sketched here, it would not substantively matter if efforts to change the identity composition of the judiciary failed. Either way the UK would in substance have the kind of judiciary that the intention all along was to retain, with the appearance of striving for change in the group composition of our judges perhaps doing as much to enhance public confidence as actually achieving change.

TRANSCENDING THE LIMITS: THE DEMOCRATIC CASE FOR JUDICIAL DIVERSITY AND OPENNESS

10. The burning question is whether there are arguments from democratic legitimacy for judicial diversity that successfully evade this identity/impartiality critique. My contention here is that, subject to one caveat, the idea of democracy requires a judiciary, first, to which all major social groups have access and in which they in fact see themselves reflected but also, secondly, a judiciary whose behavioural norms, communicative practices and working processes are permeable and open to the full range of understandings, beliefs and life experiences, or, to put it alternatively, to different visions of the good. The one caveat is that openness, either to people or ideas, need not encompass attempts to subvert the democratic ideal itself (much as awareness of strains or movements in that direction is important). Both aspects of inclusiveness, in the person of judges and in their way of doing things, are necessary to construct a bridge between the individual and the collective that respects the ideal of impartiality. Through inclusiveness the group would reflect in its composition a broader section of society and its practices would thereby be subject to influence from more different ways of being. In turn, individual decisions, while impartial in the same way as currently, would reflect the presence in the collective of a broader range of perspectives and give concrete expression to any difference this turns out to make to judicial modes of exerting power. In this way judicial power would in truth be more democratically justifiable without any compromise of independence or impartiality.[12]

Historical homogeneity and the democratic case for judicial diversity

11. In developing this argument I draw on Loughlin's historical analysis of the relationship in Britain between law and politics. First, I draw on his work to demonstrate the historical roots of judicial homogeneity in Britain and that this was the product of a different age, responding to different beliefs and practical needs. A democratic order in a globalized world has quite other logics and imperatives.

12. Loughlin treated Aristotle's account, directed to the governing class and

[12] I read some of Lady Justice Arden's arguments as tending towards this position. See her speech of 12 January 2007 when she said: 'Of course, appointment must be solely on merit, but merit should take into account the different but equal kinds of contribution that women can make. They challenge the white male majority about their views and assumptions. The process of decision-making and thus the development of the law are thereby enriched…. What I have said about women applies equally to members of minority ethnic communities, to the financially disadvantaged and to all other minority groups in society.'

especially the judges, as expressing the ancient conception of the rule of law. As the rule of reason it required those in influential political positions 'to maintain a balanced disposition and also to possess the ability to persuade others to exercise self-restraint'.[13] Fundamentally it relied on virtue of character, shaped by education, training and experience. Through study of classical texts this conception entered into the British system and was consolidated in the period of aristocratic government, encapsulated in Bagehot's notion of 'club government'.[14] This ancient conception of the rule of law was inscribed also in the tradition of law, expressed particularly in a non-technocratic view of the judicial role:

13. Such senior advocates [appointed to the judiciary] are assumed to appreciate the honour of their commission, and willingly to sacrifice material rewards for the privilege of undertaking one of the highest and most virtuous forms of public service. On the character of this small, closely integrated body of mature practitioners rests the responsibilities of safeguarding and developing the common law tradition, thereby protecting the basic ethical standards of the State.[15]

14. Inevitably the shift from aristocratic to democratic government opened this system to principled critique. Democratic theory required a new account of the judicial law-making that occurred in the guise of common law development and legislative interpretation.

15. Loughlin, however, contended that this kind of questioning, at least until recently, was less acute in Britain than elsewhere. The extension of parliamentary democracy in the second half of the nineteenth century gave rise to a formalist account of adjudication, claiming deference to precedent[16] and legislative will. But this was deployed rhetorically to legitimate judicial process in the new political context. While retaining the intimacy and informality of a club, the English judiciary, in its distinctive institutional settings and according to law's idiosyncratic methodologies, in truth carried on exercising considerable power of a legislative nature while claiming not to.[17] The rise of the administrative state in the 1960s and the growing impact of constitutionalist ideologies in fact greatly increased, and continues to increase, this governance function of judges. Not least this occurred through the modern re-working of the idea of the rule of law such that legality, of which judges are the architects, has come to set the ground rules for the conduct of representative politics. The depth of the democratic critique of judges' role in our constitution has grown, and continues to grow, in proportion to these developments.[18]

16. Plainly no technical qualification can give judges, individually or collectively,

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[13] M.Loughlin, *Sword and Scales, An Examination of the Relationship Between Law and Politics* (Hart, 2000), 70.
[14] *ibid*, 71.
[15] *ibid*, 73.
[16] See *ibid*, 139 on the way that democracy and common law method could be formally (and pragmatically) reconciled in this framework.
[17] *ibid*, 81-93.
[18] *ibid*, on the administrative state, 95-108; on the impact of constitutionalism, 177-214.

democratic legitimacy in carrying out their law-making functions. Acquitting these tasks depends on belief or value systems regarding the moral and political ordering of society, to which such skills as are acquired from legal training and practice are not distinguishably relevant or even necessarily useful. If legal skills or qualifications do not qualify judges to exert this kind of power, what, in a democracy, absent the possibility of election, can? We know that other systems have developed various institutional arrangements that seek, without direct election, to enhance the consistency with democratic principle of judicial power, for example the classic US example of bipartisan scrutiny by the legislature of nominees to senior judicial appointments.

17. Yet an equivalent has not emerged in our system, by which the polity may be regarded as having invested its judges with authority to determine basic value questions. So long as this is the case, it is perfectly arguable that nothing that we currently do is capable of according democratic legitimacy to the judiciary. The notion of judges ethereally, inhumanly giving judgment as disembodied selves is, I would contend, a (consoling) fantasy that is unable to do the job. The point to be drawn in this system from the identity/impartiality critique, therefore, is not that any group of judges is as legitimate as any other, but that none is. As Loughlin said:

18. '[I]f judges have discretion arising from the different political theories they hold, then judicial review can scarcely be treated as an exercise of collective self-binding designed to promote democracy. Judicial review must actually be seen as the retention of a form of aristocratic rule. There may be special reasons for this limited form of aristocratic rule, but it must be recognised as such and not somehow justified as an aspect of democratic self-government.'

19. My argument becomes that, absent other structural changes in the design of our political system, the only device in this polity that could make judicial power more democratically defensible is the changes advocated above, namely greater representativeness within the judicial collective and an explicit stance of epistemological openness. This may still be insufficient ultimately to reconcile the part now played by judges with the democratic ideal. But it is the very least that has to be done, lest basic conditions of our communal life continue to be left to a version of aristocratic governorship.

Contemporary heterogeneity and the democratic case for openness

20. My second set of arguments have force independent of those above and also of whether structural, institutional means are introduced to enhance the democratic legitimacy to the judiciary. They derive from the fact that different world views exist and conflict without one thereby disproving the validity of the other. The consequence is that constructions of the world have meaning and utility while lacking the capacity to reveal ultimate truth. From this Loughlin extrapolated that 'the politico-legal world we inhabit is a world that we have made', and specifically that 'although lawyers generally located their normative world solely in the rules, practices and institutions of

law, these rest on a set of stories or traditions which invest them with meaning'. Law in this depiction is a world in which we live, through which 'we develop traditions… and a distinctive way of understanding the nature of the political relationship.'[19] Since judicial practice is one of the main sites in which this world is built, and therefore critically important to law's influence on political practice, the ideal of democracy should be built into law's operations all the way through. Evidently this encompasses the judiciary in both its composition and in its way of doing things. If judicial power is closed to different identities and world views, this will translate to influential processes and understandings being distant from the ideal of self-rule.

21. Attentiveness to the process of identity and belief formation is central to this aspect of my response to the identity/impartiality critique. At root the argument is that commitment to democratic ideals requires judicial power to be exercised in ways that are informed about, and responsive to, as broad as possible an array of competing (democratic) visions of the good. The most obvious way to make progress towards this goal is for the judiciary in its ranks better to reflect social groups along the major faultlines that divide society, lines that help distinguish dominant from non-dominant groups and the systematically advantaged from the systematically marginalized. It is true that this may require different compositional objectives for different times and places. But for now it at least requires proportionate representation according to gender and racial identity. Attention is also necessary to socio-economic status and to social mobility trends to ensure that the composition of the judiciary tracks the central divisions in society. Not only would this facilitate textured, subtle means of identifying what is happening regarding judicial diversity, it would make it easier to identify and address systematic exclusion (and inclusion) that crosses identity boundaries.

22. But, although necessary, this set of changes would be insufficient. It would not take enough account of the complex, varied and overlapping processes by which people form beliefs and acquire a sense of belonging. While individuals help to constitute belief systems, and such groups as beliefs are associated with, they are at the same time themselves constituted by their (developing) beliefs and the groups in which these are made. So it is quite normal for one individual to have multi-layered, intersecting, even contradictory beliefs and group affiliations. There is no simple or linear relationship between group membership and judicial decision-making, as the empirical evidence on gender explored by Malleson confirmed. The construction of identity and belief systems simply doesn't work that way. And incidentally, this is as true of members of dominant as of non-dominant groups.

23. This is another reason that the identity/impartiality critique is misguided, this time for its triviality. In a mature polity it is of no small moment that we may trust judges not directly, consciously to pursue a partisan agenda. There is no (defensible) reason to suggest this would alter if the identity composition of the judiciary altered. But wherever judges come from, they remain human. So the complex amalgam of their experiences and beliefs must indirectly shape

[19] *ibid*, 21-22 & 51

the decisions they make. The point is that this indirect influence, which it appears that contemporary Western democracy cannot find a way to do without, would be more consistent with democratic principle the more judges modes of deliberating required them to engage with alternative viewpoints. Perhaps the greatest challenge in enhancing democratic legitimacy in judging, then, is not the already formidable one of altering the composition of the judiciary, but that of making law's discursive practices more permeable to differing world views.

24. It is significant that the argument made here consequently avoids collapsing into a plea for judges who hold a range of substantive positions, with an attendant tendency to make undue space for extremists. The twin prescriptions for greater representativeness in the person of the judges, and more openness in judicial discourse, aim only for a system that is permeable to differing perspectives, not to ensure the presence of some finite set of viewpoints. It is also an important caveat that openness need not extend to people or ideas that aim to subvert democracy.

28 June 2011

Mrs Justice Baron DBE, Family Division Liason Judge for the South East

I am of the clear view that the system should be uniform and therefore there should be an open competition with allowance for the need for specialist Judges to replace retiring Lord Justices of Appeal. The same should apply to Supreme Court Appointments.

13 June 2011

Walter Bealby

About me:

I am aged 58 and a practising criminal barrister at No.5 Chambers, Fountain Court, Steelhouse Lane, Birmingham B4 6DR, the largest set of chambers in the country. I am a grade 4 prosecutor and my practice involves serious Crown Court crime and occasional forays down to the Court of Appeal (Criminal Division). Roughly 65% of my practice is prosecution work. I applied, unsuccessfully, to sit as a Recorder on the Midland Circuit in 2004 and 2008. I graduated in Philosophy from Bristol University in 1974.

Paragraphs 1 & 2.

The qualifying test used as an initial filter poses problems that are likely to crop up in a court setting and might therefore be thought of as a good test of how an applicant would deal with those problems in the real world. However, it is an examination and no more than x% can be allowed to pass it. Those with good examination skills, the ability to write quickly and recent knowledge of the problems posed are at a distinct advantage. I, for one, found there was insufficient time to complete the paper in 2008 and I found myself using bullet points towards the end which reduces the total marks. Decisions made by an applicant about which questions to answer may turn out to be crucial.

That said, the questions themselves are well constructed and relevant. I would prefer to see them put to an applicant in an interview context.

When I asked for feedback on my failure to pass the qualifying test in 2008 I was told there could not be any. That, coupled with the fact that any test paper was clearly referable to a particular applicant, does little to suggest accountability and transparency.

I can see no point in seeking a self-assessment from an applicant for a number of reasons:

a] It is hardly likely to be objective.

b] A good judge is not necessarily going to be a good self-publicist.

c] By paying certain (quite legitimate) organisations one can prepare a near perfect self- assessment.

d] Assessments by ones peers and/or judges are likely to be much more accurate.

During the three person interview I had in London in 2005 the lay assessor played a minimal part and only asked one question: 'What do you think of communication?' Upon my inquiring what she meant it turned out to be all about diversity issues – it was most confusing. My feedback letter referred to my 'inappropriate language' (which was 'not impressive') in referring to defendants as 'snooks'. I had, in fact, been asked what I would do in court if the defendant had done something such as

wink at a juror and I had said something like: "I would say: 'Stand up Snooks……" It was clear that the three panel members and the author of the feedback letter had never come across the use of 'Snooks' as a general purpose name and had assumed that it was a term of abuse. Overall, I am afraid, I was unimpressed with the quality of the panel.

Paragraphs 4 & 8

The current appointments process does not deal with political allegiance at any stage, and nor should it. I have not heard of a single case where a particular Judge or Recorder (who may be a former MP or Parliamentary candidate) has been thought to have been politically motivated in his/her rulings. In short, the answer to the question posed at paragraph 4 is: 'Yes'.

Paragraph 8 raises trickier questions as there is now a distinct whiff of garlic to our constitution following the enactment of the HRA 1998. I recently wrote to The Times in the following terms after the Ryan Giggs debacle:

Dear Sir,

It is most distressing to see Rachel Sylvester and the rest of the press standing in the playground egging on the fight between Parliament and 'the judges'. The judiciary has the unenviable task of interpreting Parliament-made legislation in cases where there are competing interests, for example (Article 8 of the ECHR) between national security on the one hand and the right to family life on the other. Parliamentarians surely cannot complain when a court decides a particular case in a certain way unless incompetence or bias are being alleged and not even the most self-important MP is saying that. In practice, the judiciary is faced with badly drafted and woolly legislation which it has to interpret and apply as best it can. Thus we find Court of Appeal judgments containing such phrases as: 'We have encountered some difficulty in interpreting the true intention of the draughtsman in relation to section.....'
(Translation: 'This act is unworkable tosh'.)

The remarkable edifice which is the British Constitution can only work and survive if each part respects the valuable and essential functions of the other parts. Thus, if Parliamentarians and the press gang up on the independent judiciary (guaranteed, incidentally, by Article 6 of the ECHR) the balance is disturbed and the whole thing may fall apart. We should never forget what happened in 1930's Germany when the judiciary was gradually stripped of its independence.

Yours faithfully,

Whatever are the problems facing the judiciary with the interpretation of the HRA and other legislation it is imperative that judicial independence remains. I do not

know a single lawyer or judge who thinks otherwise. The respect in which our judges are held by the public at large is one of the reasons for the relative stability of our society.

Paragraph 7

I have no statistics at hand to assess what effect (if any) the changes have had on judicial diversity but it seems to me that the overarching principle should be that the best candidates are appointed.

Paragraph 21

The Bench and Bar are implacably opposed to any Parliamentary scrutiny of judicial appointments for a number of reasons:

a] It runs counter to the general principle that the Judiciary and the Executive are separate and independent. As judges hold office under the Crown (as do cabinet ministers) the process would be constitutionally ambiguous, to say the least.

b] In a high profile Supreme Court case involving, say, a government department it might be said that Lord A had once managed to defeat an attempt to block his appointment by that same government. Where would that leave Lord A's reputation for impartiality?

c] The prospect of a judge-to-be being grilled by a Select Committee is unedifying to say the least.

d] It might lead to deals being made between political parties over the appointment (or blocking) of certain judges.

e] Political considerations generally have no bearing on a person's suitability for a judicial post.

f] There is a real possibility of improper motives being used to block an appointment; for example, judge-to-be A may have dated the Home Secretary's wife when she was an unmarried undergraduate.

1 June 2011

Equality and Diversity Committee of the Bar Council of England and Wales

Introduction

This is the response of the Equality and Diversity Committee of the Bar Council to the inquiry by the House of Lords Constitution Committee into the judicial appointments process. The Equality and Diversity Committee is one of a number of representative committees of the Bar council which is the governing body for all barristers in England and Wales. It represents and through the independent Bar Standards Board regulates over 15,000 barristers in self-employed and employed practice.

The promotion of diversity and inclusion across the bar is a key Bar Council objective. The Equality and Diversity Committee's main functions include working to widen access to and retain diversity within the profession; support the fulfilment of Bar Council statutory equality obligations; monitoring of diversity progress; and advice to the Bar Council on all equality and diversity matters affecting the profession. The Equality and Diversity Committee would be pleased to enlarge on its observations in this document in giving oral evidence to the Committee, if invited to do so.

We note the composition of the Constitutional Affairs Committee and wonder if there is a prospect of the being greater diversity in the future as that will facilitate both perceptions and the Committee's ability to evaluate the sorts of issues that this inquiry raises.

Inquiry Questions and draft response

1. How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

We seek a more independent judicial appointments process. It is of fundamental constitutional importance to our democracy governed by the rule of law that there are effective guarantees to the independence of the judiciary. We would be concerned if government, for reasons related to the current public expenditure crisis or because of criticisms of judicial decisions, seek to reclaim greater executive control over the process of judicial appointments. It has long been the Bar Council's opinion (see Bar Council response in 2003 to the Department of Constitutional Affairs' consultation on "A New Way of Appointing Judges") that there can be no justification for the executive retaining any residual role in the appointment of judges. It remains our view that there should be a fully independent Judicial Appointments Commission (JAC) that makes a decision upon whom to appoint, with no final veto by the Lord Chancellor or other ministers at any level of appointment.

The JAC has established a selection process and supporting outreach policies, to explain its processes and encourage and widen access to appointments, that the Bar Council broadly supports. The number of applications for appointments has increased significantly and, although there have been issues with the introduction of new shortlisting and selection methods, changes were made in response to criticisms. The JAC has recently appointed a new Chair and we do not consider significant changes to its role or functions at this stage are necessary or appropriate. We support the continuation of the JAC as it is presently constituted.

However, we do not think that the rate of increased diversity in judicial appointments is sufficient. Particularly we are concerned about the lack of progress in the number of women and BME appointees to the senior levels of the judiciary and consider the process for appointing the most senior judges to be opaque. We recommend that the JAC continue to review the effectiveness of its procedures and ensure that all those involved in making selection decisions are trained in fair selection methods and the avoidance of bias.

A large number of female and BME barristers practice in publicly funded fields that are under threat because of cuts to the legal aid budget. This may well have contributed to the increase in applications to junior fee paying judicial posts in recent years as publicly funded practitioners seek alternatives to practise.

Additional encouragement is required to persuade some established female and BME practitioners who were deterred from applying under the less transparent pre 2005 process or deterred by the JAC's qualifying test from re-applying.

2. Is the appointments process sufficiently transparent and accountable?

No, not in respect of the senior judiciary (see above). We do not consider there is sufficient transparency in the selection and appointment process for Court of Appeal and Supreme Court judges and Heads of Division. We support the view set out in recommendation 41 of the Advisory Panel on Judicial Diversity (February 2010) that the selection for vacancies should be open and transparent with decisions made on an evidence base provided by the applicant and their referees in response to published criteria. See also our answer to Q. 11.

The process put in place by the JAC is much improved with greater transparency and independence in comparison to earlier appointment procedures. Numbers of applicants are increasing and the JAC has replaced a paper shortlisting process by a qualifying test for many of the first rung appointments. It has made necessary improvements to the operation of this qualifying test by providing more guidance to candidates on the specific qualities and abilities being assessed, the time frame for the test, the allocation of marks between questions and the provision of practice papers. A frequent complaint from candidates concerns the lack of detailed feedback on those that do not achieve the pass mark. We acknowledge that there are costs associated with giving constructive feedback to all failed candidates that request it but this can be very important for candidates to improve their performance and make the right choice about re-application. It is of particular importance to candidates who may not have access to mentors with the experience to advise them. We welcome the JAC's recent decision to start publishing a qualifying test feedback report on its website but recommend, in

addition, candidates should be given their qualifying test score and the cut off score for shortlisting.

The open appointment process for which the JAC is responsible does not extend to appointments of Deputy High Court Judges (section 9 appointments). It should. Also, the "ticketing" process by which Presiding Judges allocate judicial positions is not open and transparent across the divisions and these positions can provide important career development opportunities to appointees.

3. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

   The public is not aware, in the main, of the judicial appointment process. It is important that judges are seen to be openly and fairly appointed on the basis of merit to strengthen public confidence in the judiciary. We do not support public/parliamentary hearings prior to appointing senior judges and consider that these would deter candidates and impact on the independence and impartiality of the judiciary. We suggest providing more information about the judicial appointment process through the media and educational bodies to a range of different audiences so that the public is more aware that the process is open and independent. A fully independent judicial appointments process would assist in this regard.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

   As stated above we think the appointment of all judges, and in particular the senior judiciary should be by an independent appointing body and that the Lord Chancellor or other government ministers should not make final decisions on candidates for appointment. The senior judiciary is called upon to spend increasing amounts of time making decisions in the name of the public and frequently adjudicating on the actions of Ministers and other public bodies. There is a particular need for constitutional safeguards from the risk, or even the appearance of a risk, that judicial independence is threatened by the Executive.

5. Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

   It is not possible to discern effects on the quality of the judiciary within this comparatively short time since the setting up of the JAC's selection processes at the end of 2006 but the worldwide reputation of the judiciary remains high. We believe, from anecdotal evidence, that overall within the profession there is greater confidence in the fairness and independence of the judicial appointments process since the 2005 Act, although concerns remain about the validity of the qualifying test. (See answer to Q.2) We support the introduction of appraisal of the judiciary and believe that constructive feedback to appointees will help to strengthen and maintain the high quality of the judiciary, help to open up career paths and encourage career development. It may provide a mechanism overtime to review the quality of appointments.

   Judicial references are required for most appointments and we recommend that the part they play in a candidate's success should be investigated. In many cases judges are well placed to know a candidate's strengths but there are candidates, for reasons related to practice area or caring responsibilities, who may have limited recent exposure to judges and will have to find alternative referees. We suggest the success rates of candidates who have and do not have references from their chosen judges are compared.

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

   It can take a year or more from advertisement of a judicial vacancy to appointment. Sometimes appointed candidates have to wait for a vacancy to become available. The speed of the process has improved marginally only since 2005. The referral of selected candidates to the Lord Chancellor lengthens this process.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

   There has been a small but perceptible increase in the percentage of female judicial appointees to the High Court Bench and below from 2007-10. BME appointments follow a similar pattern but it is not possible to say whether this improvement can be attributed to the JAC's changes to the selection process. In comparison, data on judicial appointees at all levels from 1998-2006 indicate a slightly larger rate of increase in the diversity of appointees. There has been no improvement in the gender or ethnic representation of the most senior judicial appointees over the same period and still no black or minority ethnic judge has been appointed ever to a senior position above the High Court Bench. This rate of improvement in the diversity of the judiciary is too slow to increase confidence that the judiciary is or soon will be reflective of society.

   (Judicial Diversity data http://www.judiciary.gov.uk/publications-and-reports/statistics/judges/annual-diversity-statistics)

   The view of the Bar Council expressed from 2003 (following the recommendations of an internal Working Group chaired by Lord Justice Glidewell) is that diversity is seen not only as making a contribution in its own right to the quality of justice but also as giving a greater legitimacy to the body of judges as a whole. It broadens the basis of public confidence in the judiciary and achieves a greater degree of fairness between actual and potential applicants for judicial office. Though drawn from the ranks of lawyers, the judiciary must be seen to reflect the diversity of our society if it is to have the confidence of society as a whole and in particular of those who use the courts. Progress towards increased diversity needs to be substantially accelerated. This remains our view.

   In response to a recent JAC consultation on its Qualities and Abilities framework against which judicial applicants are assessed, we argued for the adoption of an explicit reference to diversity in the framework. We support

the JAC's approach in seeking to integrate diversity as a fundamental part of the whole selection process but consider that diversity is sufficiently important to be isolated as a distinct criterion that is assessed in the selection process. Our reasons relate to the slow pace of change in the diversity make up of the senior judiciary and the importance of a diverse judiciary to the public acceptance of the judiciary and criminal justice system. We consider social awareness an important component of diversity awareness and have a strong commitment to widening access to the profession irrespective of socio economic background. We supported the JAC's proposed inclusion of social awareness within its merit criteria.

8. 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?

   See answers to Q. 1 and 4 above. The judiciary must be fiercely independent of political pressure, have high ability and integrity and be reflective of society.

   Whilst the Human Rights Act (HRA) has reinforced the role of the separation of powers in the UK Constitution via the requirement in Article 6 (1) for an 'independent and impartial tribunal' the Lord Chancellor still retains some control over the judiciary. Although since the Constitutional Reform Act 2005 the Lord Chancellor can no longer perform a judicial role as sitting as a judge, he retains responsibility for appointing the selected candidates.

   The Government has taken the view that appointment by the executive is permissible under Article 6 of the European Convention on Human Rights, provided the appointees are free from influence or pressure when carrying out their adjudicatory role (see Para. 4.3 of the 2007 paper: The Governance of Britain: Judicial Appointments at http://www.official-documents.gov.uk/document/cm72/7210/7210.pdf).

The Lord Chancellor retains powers over the appointment of judges. For the High Court and below he must appoint those selected under the Judicial Appointments Commission. The Commission produces a single name which the Lord Chancellor may reject or seek reconsideration from the Commission on specific grounds which are supported by reasons. The Commission is free to repeat the same name following its reconsideration. The Lord Chancellor retains a role in respect of senior appointees although these are not selected through JAC processes.

Whether this power of veto and requirement to select falls foul of Article 6 is as yet undecided and depends on the various interpretations of Article 6 – see ECJ cases such as *Procola v Luxembourg* (1996) 22 E.H.R.R. 193. For further analysis see Masterman, R. 2005. Determinative in the Abstract? Article 6(1) and the Separation of Powers. *European Human Rights Law Review* (6): 628-648.

However the Bar Council's Glidewell Report (Bar Council Working Party on Judicial Appointments and Silk, chaired by Sir Iain Glidewell, Mar 2003), concerning judicial appointments, made a number of recommendations, including removing the power of the Lord Chancellor over High Court appointments and this remains our view.

9. <u>Are there lessons that could be learnt from the appointments system in other jurisdictions?</u>
   Canada and South Africa have made some progress in increasing diversity in their judiciary and the factors contributing to this progress and their relevance and applicability to the UK should be examined.

10. <u>Is the system for recommendations made to the Lord Chancellor by a five-member selection commission working well?</u>
    No. See answers to Q.1, 2 and 4 above.

Appointments to the UK Supreme Court

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

    While we accept that members of the senior judiciary should rightly play a part in the selection of its members, we query whether judicial members should hold the balance in senior appointments. The senior judiciary lacks diversity in terms of gender, ethnicity, social background origins, age, disability and specialist field of practice with most members drawn from commercial practice. We recommend greater diversity of background and experience in the appointment panel and those consulted on appointments.

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

    Recent legislation has removed the default retirement age for most employees. Ability and not age should be the determining factor but, given the absence of appraisal at senior level, we acknowledge that long serving senior members of the judiciary may block the upward career route of others and slow the pace of change. We recommend that there are greater opportunities to work flexibly (reduced hours) at all levels of the judiciary with a corresponding increase in posts. We suggest that the absence of permanent part-time arrangements for the High Court bench deters applications from those with caring responsibilities and recommend that the legislative limit on the number of senior judges is lifted to enable more appointments on a less than full time contract.

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

13. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?

    See answers to Q. 1, 2 and 7 above.

14. Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

The JAC should become an independent appointing body. Its role is limited currently to selection and recommendation. See answers to questions above.

15. What is the most appropriate size and balance of membership of the JAC?
We recommend that the professional representation is increased to include junior as well as senior representation from barrister and solicitor sides of the profession.

16. How (if at all) should the JAC's process be reformed? What is your assessment of the various proposals for reform set out by the Lord Chancellor in his letter to the Committee Chairman of 4th January 2011.

17. How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

Northern Ireland

18. How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

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?
As stated in our answers above, we propose that the Lord Chancellor and government ministers should not have a final veto on the appointment of members of the judiciary.

20. What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

In the absence of full appraisal information and reliable reference evidence for all candidates a robust and fair selection process is required. The scope for making further savings is limited without risking the quality of the selection process.

The role of Parliament

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

No. See answer to Q. 3 above. The introduction of confirmation hearings by Parliament will risk damage to the independence and impartiality of the judiciary.

The role of the judiciary

22. Do members of the judiciary have an appropriate role in the appointments process?

30 June 2011

Sir John Brigstocke, Judicial Appointments and Conduct Ombudsman

This note provides my response to the Select Committee's call for evidence. It is based on 5 years experience as the Judicial Appointments and Conduct Ombudsman. I have not responded to those questions which are outside my remit, or where I have had insufficient visibility to inform a view.

Examples of the cases I have dealt over the last 5 years are included in my Annual Reports.

Overview

2. Is the appointments process sufficiently transparent and accountable? - The role of the Judicial Appointments and Conduct Ombudsman (JACO) provides effective independent scrutiny and assurance. The number of appointment related complaints which are referred to JACO is very small; this indicates that the JAC's complaint processes are, on the whole, working well. A little more transparency could usefully be introduced into the marking and moderation methodologies, and the workings of the JAC's Selection and Character Committee.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary? – I have seen no evidence of inappropriate interference.

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales? - I have not seen enough cases to provide a direct comparison. However, whilst the efficiency of the process appears sound, the time taken from "application to appointment" is excessive against public and private sector comparators. This is not, however, entirely the fault of the JAC.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity? - S64 CRA 2005 requires the JAC to have regard to the need to encourage diversity in the range of persons available for selection. The Qualities and Abilities do not refer to issues of diversity; this seems appropriate as the JAC is charged with appointment entirely on merit. It is, though, appropriate that the JAC should encourage a broader pool of applicants, although I understand the MoJ has taken on much of this work.

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

13. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006? – In the period to the end of March 2011, I concluded investigations into fifty seven complaints about the JAC. I upheld or partially upheld three (i.e. approximately 5%). When I first took office I considered a number of complaints about the pre-JAC appointments process (so-called "Transferred" cases). Some of these were inherited from the Commission for Judicial Appointments. I conducted investigations into forty transferred cases and upheld or partially upheld six (i.e. 15%).

	Transferred cases		**JAC cases**	
Year	**Upheld or partially upheld**	**Not upheld**	**Upheld or partially upheld**	**Not upheld**
2006/07	5	18	-	-
2007/08	1	16	-	11
2008/09			1	11
2009/10			-	16
2010/11			2	16

In brief, the reasons why I found maladministration in the few cases I have upheld were:

- Problems in recording a Panel decision which meant that I could not be certain that a Selection Panel had reached a decision that a candidate was not selectable by reference to the specified Qualities and Abilities.

- Inadequacy of the JAC's response to first tier complaint.

- Poor documentation of a decision by the JAC's Selection and Character Committee, to select a candidate who had been assessed as 'selectable' in favour of a complainant who had been assessed as 'good'.

I appreciate that my role in considering complaints about the pre-JAC arrangements is different to my role with regard to JAC matters (I conducted 'first tier' investigation into transferred appointment issues whereas people who complain to me about the JAC will already have complained to the JAC). Despite this, the proportion of complaints I have upheld concerning the JAC is significantly less than the proportion of those upheld under the previous arrangements. In addition, there has been only one case (referred to in the third bullet point) in which I have questioned the reliability of a JAC decision. This suggests that the JAC is performing well with regard to its selection and complaint investigation processes. I am also pleased that the JAC looks to improve its processes in the light of issues emerging from my investigations.

14. Is the role and remit of the JAC appropriate? How (if at all) should it be altered? - Yes; however, a more simplified, flexible and therefore quicker process could be considered for the selection of more junior judicial posts.

15. What is the most appropriate size and balance of membership of the JAC? - A much smaller number of Commissioners would make decision making quicker and more accountable. It would also result in a better audit trail of discussions and decisions made. A Sub-Commission of representatives from the whole Commission could form the Selection and Character Committee, representing the whole Commission.

16. How (if at all) should the JAC's process be reformed? 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? - I support many of the reforms already proposed: Commissioners acting as strategic sponsors; a more streamlined administration; more flexible selection options; increased use of IT; limiting references. I also support a collaborative approach in developing a more responsive service, whilst maintaining the JAC's independence.

I welcome the introduction of the Qualifying Test and more openness in providing Feedback to unsuccessful candidates.

I consider it essential that the JAC has a clear audit trail of decisions made, *and why*, which will stand up to external scrutiny.

I agree with the need for an Ombudsman as a valued independent body, who brings much openness to the way candidates are selected.

17. How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed? - JACO

provides essential safeguards, and reassurance that the process for handling recommendations for judicial appointments is open, transparent and stands up to independent scrutiny. This is important for maintaining the confidence of the public and the judiciary.

Whilst, in general, the JAC perform their functions well and fairly, on occasions the intervention of JACO has been necessary in terms of "fairness" and as a catalyst for change to the transparency and efficacy of their processes. It is essential for an independent body (JAC) to be held to account by a second tier Ombudsman, who is also independent of Government, the MoJ and the Judiciary. The role of JACO in "appointments" should not change.

However, the vast majority of complaints to JACO are about the handling of complaints involving judicial conduct, rather than appointments. This function, too, is very necessary to provide a catalyst for the improvement of first tier complaint handling. If abolished, judicial concerns would be the only area of Government business where members of the public had no recourse to the services of an Ombudsman (The Parliamentary and Health Service Ombudsman would not be able to review matters that currently fall within JACO's remit, as this would run counter to the separation of powers).

JACO is an efficient and cost effective organisation, managing an ever increasing number of (conduct) complaints with reduced resources.

Following the Judicial Appointments and Judicial Arms Length Bodies Review conducted last year, the Lord Chancellor, in his statement to Parliament in November, said that "…(JAC and) the Judicial Appointments and Conduct Ombudsman will remain in place as valued independent bodies, which do much to bring openness to the way candidates are selected for judicial appointments". I share this view.

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? - There is scope for the LC to have less of a role and the LCJ, as Head of the Judiciary, greater responsibility.

The role of Parliament

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal? - I believe that such an arrangement would be inappropriate and run counter to the principle of Judicial independence. There is no evidence, from the cases I have seen, that there is any need for such a formalised additional level of scrutiny. That said, it would seem sensible for the Prime Minister to have some input into the selection of a Lord Chief Justice (comparable to the appointment of a Chief of Defence Staff).

27 June 2011

Rt Hon Sir Robert Carnwath CVO, Senior President of Tribunals

Personal involvement with JAC

1. In July 2004 I was nominated as shadow Senior President of Tribunals, to provide judicial leadership for the reform of the tribunal system following the recommendations of the Leggatt report. In November 2007 I became statutory Senior President under the Tribunals Courts and Enforcement Act 2007 (TCEA).

2. The "Concordat", agreed between the Lord Chancellor and the Lord Chief Justice in early 2004, later given effect in the Constitutional Reform Act 2005 (CRA), dealt only partially with the tribunal judiciary. Most matters were left to be dealt with in due course as part of the tribunal reforms. However it appears to have been decided at an early stage (before my appointment as Shadow Senior President) that tribunal appointments should be subject to the JAC, but that there should be only one tribunal representative on the 15-strong Commission.

3. Since the establishment of the JAC I have been directly involved with the JAC at a number of levels. I and my office have had regular meetings with the successive Chairmen and with officers. I have been a statutory consultee for all tribunal appointments within the TCEA tribunals. I participated as a member of the panel for one competition (three First-tier Chamber Presidents). I have also been kept in close touch with Chamber Presidents who have led judicial contributions to other competitions.

4. From the outset I expressed the view that the proposed JAC structure was unnecessarily top-heavy and inflexible, and that the limited tribunal representation failed to reflect the expected proportion of tribunal appointments as compared to those in the courts. I was unable to persuade those responsible to make any changes at that stage. My view has not changed, but has been confirmed by subsequent experience.

5. This evidence is concerned solely with the judicial appointments process in relation to tribunals. In my capacity as a member of the Judicial Executive Board, I am also party to the evidence submitted on behalf of the Lord Chief Justice relating to more general issues.

The development of the new tribunal system

6. My main purpose is to outline the dramatic developments that have taken place since the CRA was debated in relation to tribunals, and in particular their relationship with the courts, and to emphasise the need for this new role to be adequately reflected in the structure and working of the JAC.

7. The creation of the unified tribunal system by the Tribunals, Courts and Enforcement Act 2007 has been described by Sir Stephen Sedley as "a major landmark in the development of the United Kingdom's organic constitution." That Act brought together a wide range of tribunals into a single, coherent structure, established a unified judicial hierarchy, and made clear that the tribunals judiciary are as independent of the executive, and subject to the same statutory protections, as the courts judiciary. More than 30 separate tribunal jurisdictions have been, or are to be, brought into a unified two-tier structure, divided into a number of "Chambers" reflecting general areas of specialisation. The new tribunal structure system has some 5,000 full-time and part-time members, a substantial proportion of whom are are non-legal In very broad terms some 10% are salaried judges, 40% are fee-paid judges, 20% are doctors and the remainder are other types of non-legal members such as accountants, surveyors, and experts in disability or child development.

8. It also created a system of deployment and assignment across jurisdictional boundaries which in turn created the basis for a judicial career within the tribunal system, instead, as was the case before the TCE Act, a compartmentalised arrangement in which anyone seeking a varied judicial career or any form of advancement had to compete in separate competitions for any jurisdiction in which they wanted to work.

9. The TCE Act also created a limited degree of flexibility between the courts and tribunals judiciary. Salaried court judges can sit in tribunals by agreement. However, fee-paid courts judges cannot sit in tribunals, and neither salaried nor fee-paid judges in tribunals can sit in the courts. These restrictions are inefficient and serve as a block on judicial flexibility and career development.

10. These restrictions often lack rational justification. For instance, straightforward judicial reviews in immigration cases in the Administrative Court are often dealt with by circuit judges appointed under s9 of the Senior Courts Act 1981 and with little or no background in immigration law, while the Senior Immigration Judges, who are of equal standing to circuit judges and who have years of experience of immigration law, are not eligible to be appointed under s9. Allowing them to be appointed under s9 would also provide valuable extra judicial resources to the hard-pressed Administrative Court.

Tribunals and the JAC

11. Tribunals appointments not only outnumber court appointments in the work of the JAC, but they also raise special issues, such as the need to provide for the needs of the many non-legal applicants from a number of different disciplines, and to provide for jurisdictions which (unlike those of the courts) may extend to the whole UK. On the other hand these appointments do not necessarily raise the same constitutional issues as more senior judicial appointments, which may have led to the somewhat elaborate mechanisms and controls embodied in the 2005 Act. The need is for a simple and efficient system to provide competent judges as and when they arise.

12. In terms of numbers, Table 1 shows the relative number for appointments to courts and tribunals in recent years.

Table 1: selections for appointment by the JAC

Forecast 10/11	**Tribunals – 510** **Courts – 163**
Total 9/10	Tribunals – 411 Courts - 284
Total 08/09	Tribunals 226 Courts 213
Total 07/08	Tribunals 147 Courts 295

13. While it is the need to select non-legal members which in the past has caused tribunal appointments to outnumber courts appointments, in the most recent year the number of appointments as tribunal judges has outnumbered court appointments.

Table 2: selections broken down by type

Jurisdiction	**Number of recommendations for appointment**	**Year**
Courts	**163**	**2010/11**
	284	2009/10
	213	2008/09
	295	2007/08
Tribunals (Legal)	**315**	**2010/11**
	175	2009/10
	94	2008/09
	63	2007/08
Tribunals (Non-legal)	**195**	**2010/11**
	236	2009/10
	132	2008/09
	84	2007/08

14. It should be noted also that not all TCEA tribunal appointments are subject to the JAC. The most significant exception in terms of numbers is the appointment of non-legal members of the Employment Tribunals.

15. In 2009 the Tribunals Service itself conducted a substantial exercise by to select 360 non-legal members for appointment by the Secretary of State for Justice to the employment tribunals. This exercise was bigger than any ever conducted by the JAC, but was conducted in much the same way and to the same standards and so provides an interesting benchmark for the efficiency of the JAC. The TS used an outside agency to handle the administrative processes, including the administration of an online test. It attracted just under 4000 applicants for 360 vacancies. The whole process took 24 weeks to complete. It cost £82 per applicant and £965 per appointee (excluding the cost of replacing the judicial time spent on sifting and interviewing). Although the JAC does not publish figures in a form which allows direct comparison, it is believed that these figures compare very favourably with theirs.

16. I will be suggesting below that there is strong case for taking non-legal tribunal appointments out of the JAC system altogether.

The structure and performance of the JAC

17. The statutory framework within which the JAC works is not well adapted for the needs of tribunal business, even though that is the largest part of the JAC's work. The composition of the Commission is dictated by Schedule 12 to the Constitutional Reform Act 2005. Apart from the chair and the five lay members the composition of the Commission is heavily weighted towards the courts. Five specified types of courts judge must be represented on the Commission, together with a lay justice member, even though the JAC does not select magistrates. Only one tribunal member is required, and that person can be either a judge or a non-legal member.

18. In other organisations dealing with both courts and tribunals, such as the HMCTS Board and the Judicial College Board, it is usual for there to be parity or near-parity in representation between courts and tribunals, because there is roughly parity in numbers between the courts and the tribunals judiciary (including non-legal members but excluding magistrates). Although the Commission makes a very large number of recommendations for non-legal members none of the major professional or other groups (eg medical practitioners, accountants and experts in disability or children or regulation) are required to be represented on the Commission.

19. Notwithstanding these structural problems, the performance of the JAC has improved very substantially over the years, so that it now offers a generally satisfactory service to the tribunal system. This has been achieved by close working between tribunal judges and administrators and JAC staff to improve practices and efficiency. For example, after early difficulties in recruiting sufficient medical members for the Social Entitlement Chamber, close working with the tribunals judiciary and the profession enabled it to attract sufficient applicants for the first time. This included a change to the remuneration structure, more targeted advertising and outreach initiatives. The JAC is still, however, quite costly. As well as its own costs it relies heavily on assistance from judges, and for tribunals that assistance is equivalent to two or three full-time judges each year.

Diversity

20. The tribunals judiciary are more diverse than the courts judiciary. Although fully definitive figures are not available, the estimate from the Judicial Database is that the tribunals judiciary (ie judges and non-legal members) are 37% female. The comparable figure for the courts is 20%. About 10% of the tribunals judiciary are from a BAME background. The comparable figure for the courts is under 5%. Furthermore, in selection exercises over the past two years for entry-level judges the JAC recommendations for tribunals have been close to or slightly more than 50% female. This has not been achieved in appointments to the courts judiciary. Current selection exercises for large numbers of new tribunal judges are expected to produce similar figures.

21. It seems likely that the variety of tribunal appointments, their relative informality, and the large proportion of part-time appointments, make them a relatively attractive entry point for those thinking for the first time of a judicial career. The need is to remove barriers to developing a judicial career across the whole system. The first recommendation of the Neuberger Advisory Committee on Judicial Diversity (March 2010) was:

> "There should be a fundamental shift of approach from a focus on individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary."

22. I strongly agree. This has not yet been achieved. For example, good candidates from the tribunal system seeking appointment as Recorders have been forced to undertake qualifying tests, which give no weight to their judicial experience. Removing or reducing such obstacles would increase the possibilities for a more diverse courts judiciary.

Reform

23. I generally support the proposals for reform in the Lord Chancellor's letter of 4th January 2011 (having contributed to that review). In relation to the "constitutional" questions mentioned in that letter, I comment on three:-
    a. The Lord Chancellor should relinquish his decision-making role in relation to tribunal appointments. Requiring his approval is an unnecessary additional complication in a process which is already too long. The responsibility could be transferred to the Lord Chief Justice, or the Senior President of Tribunals.
    b. The Commission should be reduced in size, as suggested, provided that there is proportional representation for tribunals (para 18 above).
    c. The CRA should be amended to allow non-legal tribunal appointments to be carried out by HMCTS. The Tribunal Service has proved itself competent to carry out such competitions itself. There is no advantage in involving the JAC, whose processes including

statutory consultation provisions are designed for appointing judges, and which lacks expertise in relation to the different skills required for non-legal appointments..

24. Finally, more needs to be done to promote the concept of a single judicial career, as advocated by the Neuberger committee. As a first step, the relevant statutes should be amended to enable judges to deployed flexibly between the tribunals and courts, under arrangements agreed between the Lord Chancellor and the Lord Chief Justice (or his counterparts in Scotland and Northern Ireland) The JAC could possibly be involved as adviser, to ensure the overall fairness of the system, but there should be no requirement for a full JAC process.

30 June 2011

Professor Mary L. Clark, American University Washington College of Law

1. This Evidence addresses Question 21 on the May 13, 2011 Call for Evidence on the Judicial Appointments Process. More specifically, this Evidence addresses whether a pre-appointment parliamentary evaluative process, including possible scrutiny hearings, should be used in vetting higher court candidates, including those for the High Court, Court of Appeals, and U.K. Supreme Court, where the Constitutional Reform Act 2005 (CRA) did not provide for a parliamentary role in judicial appointments. My particular focus in this Evidence is on what, if anything, the U.S. judicial confirmation process can offer in thinking about the desirability and shape of a parliamentary evaluation process for higher court judges. My Evidence is also informed by Parliament's recent experiment with hosting scrutiny hearings for non-judicial public appointments, which I understand have been largely successful.

Exploring the pros and cons of introducing a pre-appointment parliamentary evaluation process for higher court judges and justices

2. There are several notable advantages to introducing pre-appointment parliamentary evaluation of higher court candidates (whether or not including scrutiny hearings). First, a parliamentary evaluation process could go a long way toward resetting the balance of power between Parliament and the higher courts, where the courts have gained substantial power to review parliamentary enactments in the aftermath of the Human Rights Act (HRA). Given this growth in judicial review, it is only fair and equitable—so goes the argument—that Parliament have an opportunity to evaluate higher court candidates.

3. Second, while most sources speak of a *balance,* rather than *separation,* of powers, the CRA's removal of the highest court from Parliament, establishment of a free-standing Supreme Court, and overhaul of the Lord Chancellor's responsibilities for judicial appointments reflect growing awareness of the importance of separation of powers principles. How might introducing a parliamentary evaluation of higher court candidates further the separation of powers? Quite simply, by evaluating judicial candidates, Parliament could exercise a greater check on the courts and on judicial appointment commission members. Because the CRA requires the judicial appointment commissions to recommend only one candidate per vacancy and constrains the Lord Chancellor to accept, reject, or seek reconsideration of that recommendation, the appointment

commissioners (including currently serving judges) exercise significant influence over judicial appointments, and their influence could be usefully checked by Parliament.

4. Third, because Parliament has constitutional power to remove Supreme Court justices by an Address to, a compelling argument can be made that one or both Houses of Parliament should play a role in evaluating justices pre-appointment.

5. Fourth, adopting a pre-appointment parliamentary evaluation process, specifically one located in the House of Commons, would promote the democratic accountability of higher court appointments to the degree that MPs represent their constituents' interests with regard to judicial appointments. As it stands, under the CRA, no participant in the current judicial appointment processes (for the U.K. Supreme Court and other courts) is required to be an elected office-holder other than the Prime Minister, who is not substantively involved in the selection of judicial candidates. Pre-appointment parliamentary evaluation would enable greater public accountability for judicial appointments.

6. On this point, University of Toronto Law Professor Peter Russell has termed the CRA's judicial appointment processes "the least accountable" in the common law world because they rely on judicial appointment commissions that have "no elected politicians in [their] membership and no devices to enhance transparency."[20] Looking to other countries that have introduced "some form of public accountability to the appointment process for their most senior judges," Russell declared it "unlikely" that the U.K. "will for much longer withstand pressure to introduce an element of political pluralism" in its judicial appointment system.[21]

7. Fifth, and in a related fashion, introducing a parliamentary evaluation of U.K. Supreme Court candidates in particular offers the possibility of generating greater political legitimacy for the new Court to decide sensitive matters. Having survived an appointment process overseen by a publicly elected body (if the evaluation process is located in the Commons), Supreme Court justices would gain a degree of public trust and confidence, or legitimacy, to address the types of highly charged matters increasingly coming before the U.K.'s highest court in the aftermath of the HRA.

8. By generating greater political legitimacy for the new Court (and in a similar fashion for the other higher courts), a parliamentary evaluation process could also generate greater independence for the courts and their members. Although seemingly counterintuitive -- that a more publicly accountable evaluation process could lead to a more independent judiciary -- the explanation lies with the boost in public trust and confidence, or legitimacy, that could be generated by a more accountable, transparent appointment process.

9. Sixth, adopting a parliamentary evaluative role would enable greater communication between Parliament and the higher courts, including the U.K. Supreme Court, especially important now that Parliament and the judiciary have been fully separated (or "segregated") through the removal and replacement of the Appellate Committee of the House of Lords with the free-standing U.K. Supreme Court. A parliamentary evaluation process, whether or not including hearings, could help facilitate a legislative-judicial dialogue about the role of courts and judges in society today and other important matters.[22] Greater communication might in turn promote greater understanding and comity.

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[20] Peter Russell, "Conclusion," in K. Malleson and P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, 2006, p. 429.

[21] *Id.*

[22] *See, e.g.,* A. Le Sueur, "Developing Mechanisms for Judicial Accountability in the U.K." (2004) 24 *Legal Studies* 73, 88.

10. Seventh, parliamentary hearings on higher court appointments could introduce prospective judges and their courts to the public and thereby educate the public about judges and judging more generally. It is for this public education reason that some commentators in the U.S. and U.K. have favoured legislative evaluative hearings for judges.[23] Others view such hearings sceptically, questioning whether the U.S. hearings serve an educational purpose at all.

11. Yet another virtue of introducing a parliamentary evaluative role is that it would enable the integration of professional *and* public values in the assessment of higher court candidates. This is so because the appointment commissions, with significant participation by judges and justices, reflect the professional values of the judiciary, while a parliamentary evaluation process might more likely reflect the public's values and aspirations for its judges.

12. Related to this last question of who is best able to evaluate judicial candidates is the question of who is best able to promote the diversification of the judiciary by sex, race, class, and professional background. Will appointment commission members (including currently serving judges and justices) best promote the goal of diversifying the judiciary, or will MPs or peers? The answer is that, to the extent that MPs (or peers) feel pressure from the public to promote a more diverse judiciary, then they will take this into account in evaluating judicial candidates. To the extent that the opposite is true, *i.e.*, that MPs (or peers) do not feel pressure from the public to promote a more diverse bench, then parliamentary involvement in judicial appointments might not have a positive influence on diversifying the judiciary. Lastly, to the extent that MPs (or peers) feel public pressure to promote a more traditionally constituted bench, then parliamentary involvement in judicial appointments would run counter to the diversification goal.

13. Arguments against introducing a parliamentary evaluation process for higher court candidates include, most significantly, that there is no need to reform existing judicial appointment processes—by introducing a parliamentary evaluative role or otherwise—because the appointment processes have recently been significantly overhauled by the CRA. These appointment processes should be given a chance to work before they are modified further (or so the argument goes).

14. Second, the spectacle nature of some of the most famous, or "infamous," U.S. Supreme Court confirmation hearings -- specifically those for Robert Bork and Clarence Thomas -- counsel against introducing parliamentary scrutiny hearings for higher court candidates, in the minds of some commentators. It should be noted, however, that such spectacles have not dominated the U.S. judicial confirmation experience.

Lessons from the U.S. judicial confirmation process to consider in thinking about the possibility of parliamentary evaluation of higher court judges and justices

15. One lesson learned from the U.S. judicial confirmation process (in thinking about the possibility of parliamentary evaluation of higher court judges and justices) is that serious consideration should be given to prohibiting judicial candidates from testifying at public hearings if any are included as part of a parliamentary evaluation process. This would not only help redress concern for the spectacle nature of U.S. judicial confirmation hearings (though not as widespread as often assumed, as noted above), but a number of U.S.-based commentators have advocated this reform, asserting that candidate testimony contributes little to effective Senate evaluation of judicial nominations.[24]

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[23] *See* J.A. Maltese, *The Selling of Supreme Court Nominees* (Johns Hopkins Univ. Press 1998), p. 148.

[24] *See, e.g.,* David M. O'Brien (ed.), *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* (1998); B. Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (2006), p. 119.

16. In the absence of candidate testimony, substantial information can be gained about judicial candidates from their responses to formal, written questionnaires, if any are used. In the U.S., lengthy questionnaires are issued to the judicial candidates by the White House and Justice Department, the American Bar Association (ABA), and Senate Judiciary Committee. In the U.K., formal, written questionnaires could be issued by the judicial appointment commissions, the Ministry of Justice, JUSTICE, and/or the parliamentary select committee charged with conducting the judicial evaluation process. Additionally, judicial candidates' records of academic and professional achievement could be mined for insights into their qualifications and character. Still further, there would be a wide range of individuals who could be called on to offer their views about a candidate in formal or informal interviews with parliamentary staff members and/or in parliamentary scrutiny hearings, if any. These might include Bar Council or Law Society officials, academics, interest group representatives (please see below), or others.

17. An alternative to an outright bar on judicial candidate testimony would be to exclude such testimony from public hearing sessions and instead allow for it only in closed parliamentary committee sessions, as is currently done in the U.S. Senate to address sensitive financial and ethical matters with each judicial candidate. Confidential, closed-door testimony by judicial candidates was introduced in the U.S. following Clarence Thomas' confirmation hearing as a response to criticism of the Senate Judiciary Committee's handling of the sexual harassment allegations against Thomas in open session, which was thought unduly sensational. Having judicial candidates appear before a closed-door session of the relevant parliamentary select committee may well prove more informative than in a public session, though a closed-door session would not promote the transparency of the parliamentary evaluation process. It would, however, minimize the concern for spectacles associated with the U.S. judicial confirmation process.

18. As an even-more-radical modification to the U.S. model, consideration could be given to dispensing with parliamentary hearings altogether. A parliamentary evaluation process need not be principally, or even at all, about hosting hearings, given the range of other information available to be scrutinized about the candidates.

Other issues to consider in thinking about reform of current judicial appointment processes in the U.K.

19. Thought should be given to whether an organisation like JUSTICE or another non-partisan good-government organisation might conduct evaluations of higher court candidates as is done by the ABA Standing Committee on the Federal Judiciary in the U.S. This idea is not without controversy, however, where some critics view the ABA's evaluations as biased in favor of traditional, pro-establishment candidates. Moreover, given the ABA's reliance on "secret soundings" with judges and other members of the legal profession in developing its candidate assessments, this type of evaluation process might seem little different than the Lord Chancellor's secret soundings, which pre-dated the CRA and were rejected in the CRA's endorsement of judicial appointments commissions.

20. Thought should also be given to how, if at all, Parliament might involve other interest groups in the judicial candidate evaluation process, where interest groups have come to play a significant role in the U.S. process, shaping public opinion and influencing Senators' (and presidents') understandings of what is politically possible in making judicial appointments. Interest group representatives also play a role by testifying at judicial confirmation hearings on the merits of individual candidates, but their influence is most significant pre-hearing.

Possible forms of parliamentary involvement in higher court appointments

21. Assuming, for the sake of argument, that Parliament undertakes a formal role in higher court appointments, what form might that take? Would parliamentary involvement necessarily include pre-appointment evaluative hearings? Or would parliamentary scrutiny occur through mechanisms other than hearings? Looking to other jurisdictions' experiences with legislative involvement in judicial appointments, Parliament could consider the following models:

22. The House of Lords (or House of Commons) could participate in the selection of judicial appointment commission members, as is done vis a vis the higher courts in France, Portugal, and elsewhere. This would necessitate amendment of the CRA, which does not provide for such a role for either the U.K. Supreme Court Appointment Commission or the Judicial Appointment Commission; or

23. Peers or MPs could serve as members of the judicial appointment commissions, as is done in Israel, South Africa, and elsewhere. This would also necessitate amendment of the CRA, given its specificity with respect to commission membership; or

24. The Chair of the relevant judicial appointment commission, together with the Lord Chancellor, could appear before a parliamentary select committee charged with oversight of the judicial appointment process to field questions about the selection process for each higher court candidate. This could occur before or after a particular appointment;[25] or

25. Newly appointed higher court judges could appear before a parliamentary select committee charged with oversight of the judicial appointment process. This would be a type of "meet and greet," providing Parliament and the public with an opportunity to get to know the new judge (or justice).[26] It would not, however, serve an evaluative purpose; or

26. Pre-appointment scrutiny of individual judicial candidates (whether or not including hearings) could be conducted by a parliamentary select committee charged with oversight of the judicial appointment process. The committee's scrutiny process could be followed by submission of a report of its findings to the overall House, but that report would not include a recommendation on the merits of the individual candidate; or

27. Pre-appointment scrutiny of individual judicial candidates (again, whether or not including hearings) could be conducted by a parliamentary select committee charged with oversight of the judicial appointment process, followed by submission of a committee recommendation on the merits of the individual candidates to the full House. This would be similar to the non-binding pre-appointment scrutiny hearings currently held in the House of Commons on an experimental basis for non-judicial public appointments "in which Parliament has a particularly strong interest because the officeholder exercises statutory or other powers in relation to protecting the public's rights and interests."[27] The same type of interest arguably extends to judicial officeholders. The experimental scrutiny hearings have focused on questions of candidates' professional competence and personal integrity, as should any scrutiny hearings for judicial candidates; or

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[25] A. Le Sueur, "Developing Mechanisms for Judicial Accountability in the U.K." (2004) 24 *Legal Studies* 73, 95, 97-98; D. Woodhouse, "Constitutional and Political Implications of a U.K. Supreme Court" (2004) 24 *Legal Studies* 134.

[26] *See, e.g.,* K. Malleson, "Testimony before the Canadian Parliament," Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness (April 30, 2004).

[27] Ministry of Justice, *The Governance of Britain*, Green Paper (The Stationery Office, 2007), Cm.7170.

28. Pre-appointment scrutiny (whether or not including hearings) could be conducted by a parliamentary select committee charged with oversight of the judicial appointment process, followed by submission of the committee's recommendations on the merits of the individual candidates to the full House for a vote on confirmation, as is done in the U.S. Senate.

29. My Evidence has focused principally on the merits of these last two approaches (¶¶ 27, 28), where the second to last (¶ 27) is analogous to that currently used on an experimental basis by the House of Commons for certain non-judicial public appointments, and the last (¶ 28) is most closely akin to the U.S. judicial confirmation model. If serious thought is given to introducing a parliamentary role in judicial appointments, I would recommend exploration of all of the above approaches.

30. In closing, I recognise the surprise with which support for consideration of a pre-appointment parliamentary evaluative role might be met, given the widespread scepticism with which the U.S. Senate confirmation process is currently held, a scepticism partially justified by the confirmation hearings for Robert Bork and Clarence Thomas. The best response to the failings of the U.S. model, however, is not to reject a legislative evaluative role, but to work to ensure a more substantive, less spectacle-driven process along the lines of the suggestions above.

June 2011

The Commercial Bar Association (COMBAR)

1. The House of Lords Select Committee on the Constitution has launched an inquiry into the judicial appointments process for courts and tribunals of England and Wales and Northern Ireland, and has called for evidence from interested parties. This is the response of the Commercial Bar Association for England and Wales (**COMBAR**) to that request.

2. COMBAR is a Specialist Bar Association, representing self-employed barristers who practise in the field of international and commercial law. Its members consist of thirty seven sets of chambers mainly in London where barristers practise in this field, together with a number of individual and honorary members. The great majority of leading practitioners at the Commercial Bar of England and Wales are members of COMBAR.

3. The vast majority of work done by our members is done in the Commercial Court in London, and in international arbitrations around the world in which the law governing the dispute is English law. Those disputes are often, indeed usually, between parties from different jurisdictions.

4. The Commercial Court, and arbitrations with their seat in London (which are ultimately under the supervision of the Commercial Court), are a substantial source of invisible earnings for London, and the UK more generally. The popularity of London as a source of dispute resolution in turn rests on the reputation of English commercial law; and more specifically the quality of the English judiciary, including in particular the specialist knowledge and ability of the judges of the Commercial Court.

5. The benefits of this to the London and UK economy of course go much wider than merely dispute resolution. The stability, sophistication and expertise of English commercial law – which depend to a very significant degree on the judges of the Commercial Court – are important not only for attracting legal work to the UK, but for attracting and retaining the underlying businesses themselves. The City often promotes English law, i.e. Commercial law, as a key reason why businesses and institutions should locate here.

6. In this area, London is in fierce competition with a number of other jurisdictions which are keen to promote themselves as global business and commercial dispute resolution centres, including (for example) New York, Paris, Dubai, Mumbai, Singapore and Hong Kong. Although London appears to be at least maintaining its market share for the moment, there is certainly no room for complacency.

7. The effective management and determination of complex commercial disputes of the type typically dealt with by the Commercial Court requires judges of exceptional ability, with extensive practical experience in this area of law. COMBAR believes that the process of appointment of judges to the Commercial Court to date has been effective in attracting and appointing candidates of the highest calibre. This is a considerable achievement, given that, in the area of commercial work, private practitioners will often have to accept a significant cut in earnings in order to take up a judicial appointment.

8. It is appreciated that the Select Committee has a broad range of issues concerning the appointment of judiciary generally, in all different types of courts and at all levels of seniority, which it will wish to consider. For example, the question of whether the judiciary needs to be "representative" of the community

which it judges may (or may not) be a matter of legitimate debate in relation to the administration of various areas of law. However, such a concept cannot easily be applied in the Commercial Court, where the parties are usually large commercial concerns, are frequently not UK-based, and in many instances will have no connection with the country at all apart from their choice of English law or jurisdiction.

9. COMBAR therefore has no particular stance on these wider issues: as we have said, we consider that in our field the appointment system is currently operating effectively.

10. However, COMBAR would be very concerned if any changes were made to the system of judicial appointment which (intentionally or unintentionally) led to greater obstacles being placed in the way of experienced commercial practitioners seeking judicial appointments, or which undermined the principle that appointments should be made strictly on merit, without regard to the candidates' race, sex, religion, or any other irrelevant characteristics of the candidates. We believe that any such development would be undesirable in principle, and in practice might harm the Commercial Court's international status and reputation as an international forum of choice for the resolution of complex commercial disputes.

11. Similarly, we consider that it would be potentially damaging to the standing and effectiveness of the Commercial Court if the appointments system were to be altered so as to promote or permit the appointment of judges to the Commercial Court who were not experienced and specialist practitioners. For example, we understand that it may be suggested that the judicial appointments system could be altered so that judges are appointed early in their careers, with a career path of judicial progression up the ranks, similar to the system operated in some civil law jurisdictions. We think that such a system would be unlikely to work in the commercial law field, as it is essential that the judges should be experienced practitioners if they are to be able to maintain the quality of case management and decision-making which currently exists in the Commercial Court.

13 July 2011

Richard Cornes and Charles Banner

Outline of submission

1. We write to address the issue of the appointment procedure to the Supreme Court of the United Kingdom. The reforms enacted by the Constitutional Reform Act 2005 **("the 2005 Act")** were in significant part pursued to increase the transparency of operation of the top court. In a number of respects, this has succeeded and the Supreme Court is now far more accessible and understandable than the Appellate Committee of the House of Lords previously was (as we note below). This has not, however, been the case with the appointments process, which has remained essentially opaque.

2. We advocate addressing these weaknesses by:

    a. A requirement or convention that future selection commissions should provide a brief statement of reasons for choosing the successful candidate(s), for open publication.

    b. The inclusion within the Supreme Court's Annual Report of a discussion by the President of his/her views on the overall balance within the membership of the Court.

    c. Including the Speaker of the House of Commons and the presiding officers of the devolved legislatures on future selection commissions.

    d. Establishing a convention that new Justices give an inaugural lecture on a topic of their choice, but touching on their view of the role of the Court, within six months of their appointment to the Court.

3. The one other aspect of the Committee's inquiry on which we comment is to advocate an increase in the retirement age to 75 or alternatively moving to the model adopted by the USA Supreme Court where there is no obligatory retirement age at all.

4. We write from the perspective of a legal academic specialising in top court matters (Richard Cornes) and a practitioner with experience of appearing before the Supreme Court and working for a year as a Judicial Assistant to the Law Lords (Charles Banner). We set out our backgrounds in the appendix below, together with contact details.

Why the composition of the Supreme Court matters

5. The Supreme Court plays a pivotal constitutional role at the apex of the UK justice system. Its decisions frequently impact upon the lives of ordinary members of the public. In the field of public law and human rights, it routinely deals with cases of considerable political significance.

6. Any legal practitioner will testify that the identity of the judge(s) sitting on any particular case (including in the Supreme Court) can, and not infrequently does, have a decisive impact on the outcome. In the UK this has been accepted orthodoxy since Lord Reid's seminal lecture *The Judge as Law Maker*.[28] At the level of the Supreme Court, it matters that there is a balance, to borrow Lord Reid's terms, between the black letter lawyers, the law reformers, and the pragmatists driven by common sense (rather than technicalities).

7. There are two issues in play here. The first is the process and criteria by which new Supreme Court Justices are appointed. We set out our views on this below. The second is whether the Court should sit *en banc*, to avoid speculation as to whether the case would have been decided differently had it been heard by a different panel of Justices. We note that the Court has made a practice of sitting in enlarged benches (of seven and nine) with increasing frequency, and that, in the interests of transparency it has published the criteria considered in deciding which cases should be so treated.[29] We would favour further movement in this direction, possibly with a move to a Court of nine which sat for the most part *en banc* (this appears to be outside the scope of the present inquiry, but if the Committee were to pursue it we would welcome the opportunity to provide a further submission on the point).

Future selection commissions should provide a brief statement of reasons for their choice

8. We turn then to our main concern: appointments to the Supreme Court. We consider that there is a potentially damaging lack of transparency in the process currently prescribed by the 2005 Act. Within the Court's first two years of operation difficulties have already become apparent. We refer to the well documented saga of the initial rejection and subsequent appointment of Jonathan Sumption QC as a Justice of the Supreme Court. It was widely rumoured, and documented in articles by Frances Gibb of *The Times* (a journalist regarded as speaking with some authority), that Mr Sumption applied in 2009 and had been privately informed that his candidacy would be considered favourably, only to be scuppered by objections from certain senior judges based on his limited judicial

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[28] (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

[29]< http://www.supremecourt.gov.uk/procedures/panel-numbers-criteria.html>.

experience.[30] Lord Dyson was the successful candidate. In 2011 a further vacancy arose and, this time, Mr Sumption was appointed. On neither occasion was there any official public statement outlining the basis for the decision. Nor, on the second occasion, was there any explanation as to why the perceived judicial inexperience that had allegedly held back Mr Sumption's 2009 candidacy was not considered to be an obstacle to his 2011 candidacy.

9. Lord Dyson and Mr Sumption were both excellent appointments, but that is not the point. On each occasion, any member of the public wanting to know why it was that the selection commission reached the decision that it did had nothing to go on except the tale told by Frances Gibbs in the *Times*. The damaging speculation and innuendo that followed in the media might have been avoided if the selection commission had provided a short statement of the reasons for its choice of recommendation (albeit drafted in such a way as not to undermine the unsuccessful candidates). A *duty* to give reasons would require legislation, but there is no reason why the next selection commission could not voluntarily provide a short statement of reasons. If it did, it is likely that this would become standard practice in future.

10. There have been significant moves in other respects towards greater transparency in the workings of the Supreme Court. Examples include the establishment of the Supreme Court Press Office,[31] the practice of judgments being accompanied by a Press Summary and the televising of hearings on the Sky News Supreme Court Channel.[32] The provision of a short explanation of the reasons behind the appointment of a new Justice would be consistent with this direction of travel. It would not be a particularly radical step. It might also provide an opportunity for the selection commission to explain how it took into account the objective of increasing judicial diversity, thereby demonstrating to the public that this is a consideration which is given genuine weight.

11. A possible additional measure to increase transparency (or an alternative if our proposal for the selection commission to provide a brief statement of reasons is not taken up) would be for the Supreme Court's Annual Report, required under s.34 of the 2005 Act, to include a discussion by the President of the Court of his/her views on the overall balance in the membership of the Court. This would inform future selection commissions and serve the broader purpose of increasing public understanding of the Court's composition and role.[33]

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30 See eg. Frances Gibb, 'Supreme Ambition, Jealousy and Outrage', *The Times*, 4th February 2010: <http://business.timesonline.co.uk/tol/business/law/article7013960.ece>.

31 <http://www.supremecourt.gov.uk/press-office.html>.

32 <http://news.sky.com/skynews/Supreme-Court>.

33 See further R. Cornes 'Gains (and Dangers of Losses) in Translation – the Leadership Function in the United kingdom's Supreme Court, Parameters and Prospects' [2011] *Public Law* 509 at p.522.

Providing a voice for the UK legislatures – including the presiding officers on the selection commissions

12. There was much concern in the lead up to passage of the 2005 Act to insulate appointments to the new Court from partisan political pressures. That was obviously prudent. Whilst the Lord Chancellor retains some residual discretion under s.29 of the 2005 Act (primarily to require the selection commission to reconsider its choice), we think this role will in time become illusory (if it has not already), leaving the selection commission as both the *de jure* selectors and the *de facto* appointers of new Justices.[34]

13. We consider it would be preferable to eliminate the Lord Chancellor's discretion altogether. If we are right to believe that his powers under s.29 are, or will become, illusory only, then the statute should be amended to reflect that reality. If we are wrong, then the worrying spectre is raised of not merely a party-politician but a Government minister intervening in the appointments process. If it is considered appropriate for the executive to have some formal role in the process, this is already provided through the requirement under s.26 of the 2005 Act that all recommendations for appointment are ultimately made (to the Queen) by the Prime Minister, who has no discretion to recommend any person other than the one notified to him under s.29.

14. In place of the Lord Chancellor's role, we would alter the membership of selection commissions by including representation from the legislatures: the Speaker of the House of Commons and the presiding officers of the devolved assemblies who by virtue of the offices they hold, are bound to speak for the entire legislative body in which they sit as opposed to any one part of it.[35]

15. This would provide genuine links to the elected branches of the state (in contrast to the Lord Chancellor's illusory powers), thus bestowing the appointments process with greater democratic legitimacy, whilst at the same time doing so in a way that would avoid partisan political meddling.

16. Allowing the National Assembly for Wales a distinct voice on the selection commissions would also go some way to addressing the need to ensure that the Supreme Court is considered legitimate in Wales, especially important given its role in supervising the legality of acts of the Welsh devolved administration and the burgeoning body of distinctly Welsh law following the enhanced law-making powers conferred by the Government of Wales Act 2006.[36]

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[34] See the discussion of the appointments process, *ibid* at pp.519-522.

[35] If this were to happen, there may also be a case for the Lord Speaker to be included, although the unelected nature of the House of Lords to some extent makes the argument for his/her involvement less compelling.

[36] Whilst the statutory consultees which the selection commission must consult include the First Minister for Wales (see s.27(2)(d) of the Constitutional Reform Act 2005 as amended), there is no distinct Welsh representation on the commission itself. Scotland and Northern Ireland by contrast are each represented on the commission.

Parliamentary confirmation hearings

17. We do not presently support the introduction of Parliamentary confirmation hearings. We have outlined above a less radical means of involving the legislature in the appointments process through including the Speaker of the House of Commons and the presiding officers of the devolved assemblies on future selection commissions. It would be sensible to test this in practice before considering whether to make the significantly greater leap of subjecting candidates and/or new appointees to a grilling in Parliament. It would also be necessary to consider extremely carefully whether confirmation hearings could be structured in such a way as to minimise the risks of party-political considerations being seen to influence the process or of deterring potential candidates from putting their names forward in the first place.

An inaugural lecture by each new Justice

18. If it is thought that the legislature (and indeed the public) should have an opportunity of 'getting to know' a new Supreme Court Justice, then this could be achieved through a convention that new appointees deliver an inaugural lecture (judges do, after all, quite regularly give public lectures) open to the public within six months of their appointment on a topic of their choice, but touching on their view of the role of the Supreme Court. This would be relatively straightforward and cost-effective to arrange. The technology already exists for a transcript of the lecture to be published via the Supreme Court website and for the lecture itself to be televised on the Sky News Supreme Court Channel. The profile of the event may be enhanced if there was an understanding or convention that the Prime Minister and/or Lord Chancellor would normally attend.

The retirement age should be raised

19. We conclude with a word on the compulsory retirement age. The current position is something of a mess. Under s.26 of the Judicial Pensions and Retirement Act 1993 **("the 1993 Act")**, Justices are obliged to retire at 70, although they can continue as Associate Justices until the age of 75.[37] Those who were first appointed to high judicial office prior to the coming into force of the 1993 Act on 31st March 1995 can continue full-time until the age of 75.[38] This gave rise to the bizarre situation earlier this year whereby Lord Collins of Mapesbury (first appointed to judicial office in 1997) was obliged to retire aged 70, barely two years after his appointment as a Law Lord, despite being a year younger than the Justice Secretary and despite the subsequent new appointee to the Court, Lord Wilson, being entitled to carry on until aged 75 owing to his

[37] See s.39 of the 2005 Act.

[38] See Schedule 7 of the 1993 Act.

having first assumed judicial office in 1993. Lord Collins continues to contribute to the work of the Supreme Court as an Associate Justice (a post which, to add to the confusion, carries a higher daily rate of pay than a full member of the Court). That he cannot continue as a full Justice is a waste of judicial talent.

20. There are countless of current and previous Law Lords who have continued until the former compulsory retirement age of 75 without any hint of their faculties declining. A retirement age of 70 would have robbed the law of some of the finest judgments of greats such as Lord Bingham. Even beyond 75, many have continued to sit as arbitrators (eg. Lord Hoffmann) or in overseas jurisdictions such as the Qatar Finance Centre Civil and Commercial Court (eg. Lord Woolf).[39] The Supreme Court's loss is the market's gain.

21. The retirement age of 70 should be repealed as soon as possible. The obvious replacement would be the former age limit of 75, although consideration should be given to the model adopted by the USA Supreme Court whereby there is no obligatory retirement age at all. In recent years Justices Rehnquist, Stevens, Ginsberg and Scalia have each carried on beyond 75 and many would consider that the Court would have been poorer had they been unable to do so. The obvious question of how to deal with medical incapacity is not exclusive to the over-75s and is already catered for by s.36 of the 2005 Act.

30 June 2011

Nicholas Davidson QC

I do not set out the questions, only my comments

1. a) Poor as regards Supreme Court; otherwise acceptable.
   b) Yes.

2. *Transparent*: in theory the process is sufficiently transparent. In practice it has looked poor over the Supreme Court appointments, probably because of leaks and/or rumours. The previous system did not, as far as I know, suffer from those.

   Accountable: the process should not be accountable in the sense of there being public scrutiny of the results of the process as distinct from reporting and observation of the process. Appointments have to be made and then lived with. It undermines any Judge's appointment if there is then what appears to be some kind of inquest as to whether that person should have been appointed.

[39] See <http://www.qfccourt.com/members.php> .

3. a) I have no view.
   b) By ensuring that the press and broadcast media are aware of the system.

4. I have no view.

5. a) No discernible effect.
   b) The quality should be judged against the duties of the particular post (as is recognised by the "ticket" system for qualification to sit in different jurisdictions). Important qualities include:

   judgment;
   integrity;
   intellectual (particularly analytical) ability;
   ability to concentrate;
   interpersonal skills (including the ability to control a Court without being overbearing, and to communicate effectively with all who may use the Court);
   independence of mind;
   willingness to respect others.

6. a) Supreme Court: poor. There never seemed to be a problem before. The delayed-for-his-convenience appointment of Jonathan Sumption has given a very poor impression. I strongly suspect that this impression could have been avoided. If the position is that retired members of the Supreme Court / Law Lords are available and eligible to cover the vacancy while Mr Sumption is unavailable, then that should have been vigorously publicised – the problem to my mind is the impression that the Court is being left short of the desired numbers for a considerable period for the personal benefit of an appointee whose appointment directly to the Supreme Court is itself striking and a matter of some controversy.
   b) Other Courts: good, but it seems to work badly for appointees, many of whom lose their practices and incomes for the period between being told that they will be appointed and actually being appointed (they turn down cases and the correct inference is drawn, it is said).

7. a) I'm not clear of cause and effect, but diversity has been increasing.
   b) Diversity is not a legitimate factor in the appointments process, *except* perhaps where a choice is to be made between two candidates of equal merit (one is still faced with the problem that to decide on diversity grounds is to discriminate, usually for a normally-prohibited reason). Merit should be the paramount consideration. When consulting a doctor, I do not care about the doctor's personal attributes - only the professional ones. A rape case will be tried by a

Judge of one gender or the other, and diversity efforts cannot change that even if an increase in the number of female Judges will affect the probability of the trial Judge being of a particular gender.
c) In my view the appointments process as such should not be aiming to increase diversity. Diversity should be addressed by:

- maximising the number of applicants from groups considered to be under-represented (possibly by providing training not just to Judges but to potential Judges);

- identifying with under-represented groups whether there are terms of work which deter members of such groups from applying and whether special terms (e.g. sitting hours friendly for child-care purposes) could be offered. (It is worth remarking that in the 70s a married woman would have to leave the Foreign Office if offered a foreign posting and she preferred not to go, in order not to be separated from her husband. The FCO has changed its personnel arrangements so as to maximise the chance of married personnel being able to stay in the diplomatic service.)

8 No comment.

9 No comment.

10 No.

a) Conspicuously, it is strongly rumoured that Jonathan Sumption was told before he first applied that if he applied he would be appointed. If the rumour is true, that is the opposite of a proper system operating properly. If untrue, the rumour should have been scotched.

b) It is frequently said that members of the Court of Appeal have been annoyed by his appointment. For such views to come into the public domain is damaging to the image of the judiciary. Appointments should deserve and get their support.

c) Either a complete list of candidates should be published, or (preferably) the list of applicants should be entirely confidential. It could be a deterrent to application for a candidate to feel that the facts of application and rejection would or could become known without the candidate's consent.

11 Probably.

12 I do not understand the question (I do not understand the significance of "first appointed to full-time judicial office"). I think Justices should not be required to retire before 72 - too many outstanding appointees are serving too short terms in the top Court.

13 Good.

14 Seems alright.

15 The only comments I make is the fairly minor one that the situation should not exist (it or something like it did) that all Judicial/barrister members at a given time are members of the same Inn of Court. Most barrister applicants, at least for the High Court, will be Benchers of the Inn and know the Judicial/barrister members from their own Inn.

16 a) At least below Court of Appeal level, it seems unnecessary that the full Commission should sign off on recommendations. Nothing in the pre-JAC process demonstrated a need for so many people.

b) The involvement of the Lord Chancellor is intriguing. If there is to be accountability, in the sense of someone being answerable to Parliament if something goes seriously wrong with a particular appointment, then his role is important - it would be gruesome for the Lord Chief Justice to be called to account by Parliament.

c) The Lord Chancellor should recommend directly to Her Majesty. The Prime Minister should have no role in the appointment process – any substantive role would be contrary to the principle of judicial independence – and transparency would be much greater if it could not be said that the Prime Minister recommended an appointment when in *substance* that was not the case.

17 No comment.

18 No comment.

19 a) The Executive, other than the Lord Chancellor and those working for him, should play no part whatsoever in the appointment process. I would prefer all choices to be made by the JAC, the Lord Chancellor having only a right of veto rather than choice. If we want a judicial system which is truly independent, and the legal system to be filled with practitioners who will be willing if need be to offend members of the Executive, then the judicial selection process should be

independent of the Executive. A colleague working in another EU country said to me only yesterday that it is difficult to obtain experts from that country to give evidence in a financial services sector for fear of offending the big corporations; I have experience of a client having to obtain solicitor representation from outside rather than inside London because of the reluctance of some solicitors to act against institutions in the relevant sector. These things illustrate that professionals can be tempted to be reluctant to risk offending powerful people who may influence their future.

20 An unfortunate situation, I fear: one wants to solve a supposed problem, and then says it costs too much to do the job properly. The worst idea would be to economise and to end up running a poor new system instead of a good (but nor perfect) old one.

21 a) No.
b) Yes. It would open the way to appointments foundering because of differences of political opinion between the candidate and politicians. And (as above) it would make for a real risk of lawyers' behaviour in their litigation practices being influenced by a desire to please, and a desire not to offend, political interests.

June 2011

Equal Justices Initiative (EJI)[40]

Professor Lizzie Barmes, Queen Mary, University of London
Professor Rosemary Hunter, University of Kent
Professor Kate Malleson, Queen Mary, University of London
Professor Leslie Moran, Birkbeck College, University of London
Dr Erika Rackley, Durham University
Professor Hilary Sommerlad, Leicester University

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.

40 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/.

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:
    1. 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;
    2. 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;
    3. Removing artificial barriers, hurdles and dead-ends in current judicial career paths;
    4. Greater openness as to the profile and appointment of Deputy High Court judges;
    5. Increased use of direct or lateral appointments, particularly to the senior judiciary;
    6. A requirement of diverse shortlists for all judicial appointments;
    7. According fairer weight to equivalent skills and experience in judicial selections at all levels, however these have been either demonstrated or acquired.
    8. 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.

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.[41] 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

41 Figures taken from the Report of the Diversity Taskforce, published in May 2011.

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.[42]
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, 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

[42] 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).

decision-making, particularly on collegial courts at appellate level.[43] 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.[44]

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

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[43] 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.

[44] Reported in House of Lords Hansard, 17 March 2011.

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 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.[45]

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 sections 69-96 of 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*.[46] 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,

[45] 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).

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

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 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.

June 2011

Equality and Diversity Committee of the Bar Council of England and Wales

Introduction

This is the response of the Equality and Diversity Committee of the Bar Council to the inquiry by the House of Lords Constitution Committee into the judicial appointments process. The Equality and Diversity Committee is one of a number of representative committees of the Bar council which is the governing body for all barristers in England and Wales. It represents and through the independent Bar Standards Board regulates over 15,000 barristers in self-employed and employed practice.

The promotion of diversity and inclusion across the bar is a key Bar Council objective. The Equality and Diversity Committee's main functions include working to widen access to and retain diversity within the profession; support the fulfilment of Bar Council statutory equality obligations; monitoring of diversity progress; and advice to the Bar Council on all equality and diversity matters affecting the profession. The Equality and Diversity Committee would be pleased to enlarge on its

observations in this document in giving oral evidence to the Committee, if invited to do so.

We note the composition of the Constitutional Affairs Committee and wonder if there is a prospect of the being greater diversity in the future as that will facilitate both perceptions and the Committee's ability to evaluate the sorts of issues that this inquiry raises.

Inquiry Questions and draft response

16. How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

We seek a more independent judicial appointments process. It is of fundamental constitutional importance to our democracy governed by the rule of law that there are effective guarantees to the independence of the judiciary. We would be concerned if government, for reasons related to the current public expenditure crisis or because of criticisms of judicial decisions, seek to reclaim greater executive control over the process of judicial appointments. It has long been the Bar Council's opinion (see Bar Council response in 2003 to the Department of Constitutional Affairs' consultation on "A New Way of Appointing Judges") that there can be no justification for the executive retaining any residual role in the appointment of judges. It remains our view that there should be a fully independent Judicial Appointments Commission (JAC) that makes a decision upon whom to appoint, with no final veto by the Lord Chancellor or other ministers at any level of appointment.

The JAC has established a selection process and supporting outreach policies, to explain its processes and encourage and widen access to appointments, that the Bar Council broadly supports. The number of applications for appointments has increased significantly and, although there have been issues with the introduction of new shortlisting and selection methods, changes were made in response to criticisms. The JAC has recently appointed a new Chair and we do not consider significant changes to its role or functions at this stage are necessary or appropriate. We support the continuation of the JAC as it is presently constituted.

However, we do not think that the rate of increased diversity in judicial appointments is sufficient. Particularly we are concerned about the lack of progress in the number of women and BME appointees to the senior levels of the judiciary and consider the process for appointing the most senior judges to be opaque. We recommend that the JAC continue to review the effectiveness of its procedures and ensure that all those involved in making selection decisions are trained in fair selection methods and the avoidance of bias.

A large number of female and BME barristers practice in publicly funded fields that are under threat because of cuts to the legal aid budget. This may well have contributed to the increase in applications to junior fee paying judicial posts in recent years as publicly funded practitioners seek alternatives to practise.

Additional encouragement is required to persuade some established female and BME practitioners who were deterred from applying under the less transparent pre 2005 process or deterred by the JAC's qualifying test from re-applying.

17. Is the appointments process sufficiently transparent and accountable?

No, not in respect of the senior judiciary (see above). We do not consider there is sufficient transparency in the selection and appointment process for Court of Appeal and Supreme Court judges and Heads of Division. We support the view set out in recommendation 41 of the Advisory Panel on Judicial Diversity (February 2010) that the selection for vacancies should be open and transparent with decisions made on an evidence base provided by the applicant and their referees in response to published criteria. See also our answer to Q. 11.

The process put in place by the JAC is much improved with greater transparency and independence in comparison to earlier appointment procedures. Numbers of applicants are increasing and the JAC has replaced a paper shortlisting process by a qualifying test for many of the first rung appointments. It has made necessary improvements to the operation of this qualifying test by providing more guidance to candidates on the specific qualities and abilities being assessed, the time frame for the test, the

allocation of marks between questions and the provision of practice papers. A frequent complaint from candidates concerns the lack of detailed feedback on those that do not achieve the pass mark. We acknowledge that there are costs associated with giving constructive feedback to all failed candidates that request it but this can be very important for candidates to improve their performance and make the right choice about re-application. It is of particular importance to candidates who may not have access to mentors with the experience to advise them. We welcome the JAC's recent decision to start publishing a qualifying test feedback report on its website but recommend, in addition, candidates should be given their qualifying test score and the cut off score for shortlisting.

The open appointment process for which the JAC is responsible does not extend to appointments of Deputy High Court Judges (section 9 appointments). It should. Also, the "ticketing" process by which Presiding Judges allocate judicial positions is not open and transparent across the divisions and these positions can provide important career development opportunities to appointees.

18. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

The public is not aware, in the main, of the judicial appointment process. It is important that judges are seen to be openly and fairly appointed on the basis of merit to strengthen public confidence in the judiciary. We do not support public/parliamentary hearings prior to appointing senior judges and consider that these would deter candidates and impact on the independence and impartiality of the judiciary. We suggest providing more information about the judicial appointment process through the media and educational bodies to a range of different audiences so that the public is more aware that the process is open and independent. A fully independent judicial appointments process would assist in this regard.

19. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

As stated above we think the appointment of all judges, and in particular the senior judiciary should be by an independent appointing body and that the Lord Chancellor or other government ministers should not make final decisions on candidates for appointment. The senior judiciary is called upon to spend increasing amounts of time making decisions in the name of the public and frequently adjudicating on the actions of Ministers and other public bodies. There is a particular need for constitutional safeguards from the risk, or even the appearance of a risk, that judicial independence is threatened by the Executive.

20. Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

It is not possible to discern effects on the quality of the judiciary within this comparatively short time since the setting up of the JAC's selection processes at the end of 2006 but the worldwide reputation of the judiciary remains high. We believe, from anecdotal evidence, that overall within the profession there is greater confidence in the fairness and independence of the judicial appointments process since the 2005 Act, although concerns remain about the validity of the qualifying test. (See answer to Q.2) We support the introduction of appraisal of the judiciary and believe that constructive feedback to appointees will help to strengthen and maintain the high quality of the judiciary, help to open up career paths and encourage career development. It may provide a mechanism overtime to review the quality of appointments.

Judicial references are required for most appointments and we recommend that the part they play in a candidate's success should be investigated. In many cases judges are well placed to know a candidate's strengths but there are candidates, for reasons related to practice area or caring responsibilities, who may have limited recent exposure to judges and will have to find alternative

referees. We suggest the success rates of candidates who have and do not have references from their chosen judges are compared.

21. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

    It can take a year or more from advertisement of a judicial vacancy to appointment. Sometimes appointed candidates have to wait for a vacancy to become available. The speed of the process has improved marginally only since 2005. The referral of selected candidates to the Lord Chancellor lengthens this process.

22. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

    There has been a small but perceptible increase in the percentage of female judicial appointees to the High Court Bench and below from 2007-10. BME appointments follow a similar pattern but it is not possible to say whether this improvement can be attributed to the JAC's changes to the selection process. In comparison, data on judicial appointees at all levels from 1998-2006 indicate a slightly larger rate of increase in the diversity of appointees. There has been no improvement in the gender or ethnic representation of the most senior judicial appointees over the same period and still no black or minority ethnic judge has been appointed ever to a senior position above the High Court Bench. This rate of improvement in the diversity of the judiciary is too slow to increase confidence that the judiciary is or soon will be reflective of society.

    (Judicial Diversity data http://www.judiciary.gov.uk/publications-and-reports/statistics/judges/annual-diversity-statistics)

    The view of the Bar Council expressed from 2003 (following the recommendations of an internal Working Group chaired by Lord Justice

Glidewell) is that diversity is seen not only as making a contribution in its own right to the quality of justice but also as giving a greater legitimacy to the body of judges as a whole. It broadens the basis of public confidence in the judiciary and achieves a greater degree of fairness between actual and potential applicants for judicial office. Though drawn from the ranks of lawyers, the judiciary must be seen to reflect the diversity of our society if it is to have the confidence of society as a whole and in particular of those who use the courts. Progress towards increased diversity needs to be substantially accelerated. This remains our view.

In response to a recent JAC consultation on its Qualities and Abilities framework against which judicial applicants are assessed, we argued for the adoption of an explicit reference to diversity in the framework. We support the JAC's approach in seeking to integrate diversity as a fundamental part of the whole selection process but consider that diversity is sufficiently important to be isolated as a distinct criterion that is assessed in the selection process. Our reasons relate to the slow pace of change in the diversity make up of the senior judiciary and the importance of a diverse judiciary to the public acceptance of the judiciary and criminal justice system. We consider social awareness an important component of diversity awareness and have a strong commitment to widening access to the profession irrespective of socio economic background. We supported the JAC's proposed inclusion of social awareness within its merit criteria.

23. 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?

See answers to Q. 1 and 4 above. The judiciary must be fiercely independent of political pressure, have high ability and integrity and be reflective of society.

Whilst the Human Rights Act (HRA) has reinforced the role of the separation of powers in the UK Constitution via the requirement in Article 6

(1) for an 'independent and impartial tribunal' the Lord Chancellor still retains some control over the judiciary. Although since the Constitutional Reform Act 2005 the Lord Chancellor can no longer perform a judicial role as sitting as a judge, he retains responsibility for appointing the selected candidates.

The Government has taken the view that appointment by the executive is permissible under Article 6 of the European Convention on Human Rights, provided the appointees are free from influence or pressure when carrying out their adjudicatory role (see Para. 4.3 of the 2007 paper: The Governance of Britain: Judicial Appointments at http://www.official-documents.gov.uk/document/cm72/7210/7210.pdf).

The Lord Chancellor retains powers over the appointment of judges. For the High Court and below he must appoint those selected under the Judicial Appointments Commission. The Commission produces a single name which the Lord Chancellor may reject or seek reconsideration from the Commission on specific grounds which are supported by reasons. The Commission is free to repeat the same name following its reconsideration. The Lord Chancellor retains a role in respect of senior appointees although these are not selected through JAC processes.

Whether this power of veto and requirement to select falls foul of Article 6 is as yet undecided and depends on the various interpretations of Article 6 – see ECJ cases such as *Procola v Luxembourg* (1996) 22 E.H.R.R. 193. For further analysis see Masterman, R. 2005. Determinative in the Abstract? Article 6(1) and the Separation of Powers. *European Human Rights Law Review* (6): 628-648.

However the Bar Council's Glidewell Report (Bar Council Working Party on Judicial Appointments and Silk, chaired by Sir Iain Glidewell, Mar 2003), concerning judicial appointments, made a number of recommendations,

including removing the power of the Lord Chancellor over High Court appointments and this remains our view.

24. Are there lessons that could be learnt from the appointments system in other jurisdictions?

    Canada and South Africa have made some progress in increasing diversity in their judiciary and the factors contributing to this progress and their relevance and applicability to the UK should be examined.

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

    No. See answers to Q.1, 2 and 4 above.

Appointments to the UK Supreme Court

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

    While we accept that members of the senior judiciary should rightly play a part in the selection of its members, we query whether judicial members should hold the balance in senior appointments. The senior judiciary lacks diversity in terms of gender, ethnicity, social background origins, age, disability and specialist field of practice with most members drawn from commercial practice. We recommend greater diversity of background and experience in the appointment panel and those consulted on appointments.

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

    Recent legislation has removed the default retirement age for most employees. Ability and not age should be the determining factor but, given the absence of appraisal at senior level, we acknowledge that long serving senior members of the judiciary may block the upward career route of others and slow the pace of change. We recommend that there are greater opportunities to work flexibly (reduced hours) at all levels of the judiciary

with a corresponding increase in posts. We suggest that the absence of permanent part-time arrangements for the High Court bench deters applications from those with caring responsibilities and recommend that the legislative limit on the number of senior judges is lifted to enable more appointments on a less than full time contract.

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

28. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?
See answers to Q. 1, 2 and 7 above.

29. Is the role and remit of the JAC appropriate? How (if at all) should it be altered?
The JAC should become an independent appointing body. Its role is limited currently to selection and recommendation. See answers to questions above.

30. What is the most appropriate size and balance of membership of the JAC?
We recommend that the professional representation is increased to include junior as well as senior representation from barrister and solicitor sides of the profession.

16. How (if at all) should the JAC's process be reformed? What is your assessment of the various proposals for reform set out by the Lord Chancellor in his letter to the Committee Chairman of 4th January 2011.

17. How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

Northern Ireland

18. How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

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?

As stated in our answers above, we propose that the Lord Chancellor and government ministers should not have a final veto on the appointment of members of the judiciary.

20. What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

In the absence of full appraisal information and reliable reference evidence for all candidates a robust and fair selection process is required. The scope for making further savings is limited without risking the quality of the selection process.

The role of Parliament

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

No. See answer to Q. 3 above. The introduction of confirmation hearings by Parliament will risk damage to the independence and impartiality of the judiciary.

The role of the judiciary

23. Do members of the judiciary have an appropriate role in the appointments process?

June 2011

Graham Gee, Lecturer in Law, University of Birmingham

Introduction

Graham Gee, Lecturer in Law, University of Birmingham

1. This paper responds to the call for evidence from the House of Lords Select Committee on the Constitution in connection with its inquiry on *The Judicial Appointments Process*. In particular, it responds to question 9 (on whether there are lessons to be learnt from other jurisdictions) and question 21 (on whether there is a case for parliamentary hearings for senior judicial posts).
2. The two questions are related insofar as debates in the UK about parliamentary scrutiny of judicial appointments are conducted in the shadow of confirmation hearings for appointments to the US Supreme Court. Typically, reference is made to these confirmation hearings to bolster the case against parliamentary scrutiny of judicial appointments.
3. The lesson that UK commentators usually draw is that hearings have led to the 'politicization' of appointments to the US Supreme Court. The dominant view is that the hearings are partisan and riddled with conflict, with the questioning of nominees either inappropriate (for example, where the Senators seek pledges from the nominees on how they will decide specific cases) or futile (as where nominees offer only bland answers that conceal rather than clarify their ideological views).
4. In this paper, I suggest that the 'politicization' of the process is less extensive than commonly supposed and that, in recent years, political conflict has stemmed more from how Presidents have used their power to select a nominee than from the Senate's confirmation role. The critical point is that hearings do not, in and of themselves, 'politicize' judicial appointments. It follows that little weight should be attached to arguments in UK debates that appeal to hearings for the US Supreme Court as evidence that scrutiny hearings necessarily 'politicize' appointments. (In this, my observations are limited to US Supreme Court and do not cover federal judicial appointments more generally).

The Appointment Process

5. The US Supreme Court is a nine-member court. Once appointed, Justices enjoy life tenure, unless impeached. There is no mandatory retirement. Vacancies arise either on the death or voluntary retirement of one of the Justices.
6. The US Constitution requires that the President select a nominee for the Court and that the Senate 'advise and consent' on the nomination. It does not stipulate criteria according to which the President and Senate should exercise these roles. One mistake made by many commentators is to focus only on the Senate's role, neglecting the President's role. This mistake is compounded by the tendency to focus exclusively on the Senate hearing. As the following paragraphs make clear, the hearing itself is only *one* of *five* steps in the Senate's scrutiny of the President's nominee.
7. The President selects a nominee when a vacancy arises. This choice of nominee is subject to scrutiny by the Senate. Current practice is for the Senate to refer the nomination to the Senate Judiciary Committee. This is a standing committee that operates from one Congress to the next, typically with relatively little change in its membership. The Judiciary Committee is generally regarded as one of the Senate's most prestigious committees. Its composition is decided in line with the ratio of majority to minority members in the Senate, with each party determining which of its members will sit on the Committee.
8. There are five stages to the Senate's scrutiny of a nominee. First, staff for each Senator on the Judiciary Committee will collect information about the nominee as soon as the President announces the nomination. Second, information is obtained

from official sources, including a confidential report from the FBI, a report from the American Bar Association evaluating the nominee's professional qualifications and a summary from the Congressional Research Service of any legal writings that the nominee has authored. At this stage, the Committee sends a comprehensive questionnaire to the nominee covering such areas as professional legal experience, possible conflicts of interest and financial interests. Third, the nominee next holds private meetings with each of the members of the Committee as well as with the Senate leadership. The purpose of these meetings is to provide an opportunity—prior to the hearing—for the nominee to address any concerns that the Senators might harbour about the nomination. The fourth stage is the hearing itself, where the nominee answers questions from the Senators on the Committee. Evidence is also taken from academics and interest groups. After the hearing, the Committee votes on whether to support or oppose the nominee's confirmation. Either way, the Committee refers the nomination back to the full Senate. The final stage is a vote by the Senate. If a majority of Senators vote in favour of confirmation, the nomination is confirmed.

Is the process politicized?

9. Clearly, there are strong political dimensions to the process. The Constitution specifically divides responsibility for appointing the Justices of the Supreme Court between two political institutions, but without prescribing any criteria according to which their respective roles are to be exercised, and thereby creating considerable scope for political conflict. Indeed, there have been episodes of political conflict (with all of the distortion, dishonesty, deceit and triviality that often accompanies such conflict). Plainly, it is also true that both the President and the Senate tend to consider a nominee's political ideology when deciding whether to nominate and confirm respectively.

10. That said, the characterization of the appointment process as 'politicized' is, in my view, unhelpful for four reasons. First, it generalises to a degree that conceals the unique set of circumstances that govern individual nominations. It is difficult to generalize about the process of appointing Justices to the Court for the simple reason that the total number of appointments is very small. Only 112 judges have been confirmed during the Court's 222-year history. What is more, the number of appointments made within a settled historical, political and institutional context is exceptionally small. It is therefore difficult to compare appointments through time because of changes within the political and legal systems, including the growth of the Presidency, the increasing incidence of 'divided government' (i.e. where one of the parties controls the Presidency and the other has a majority in the Senate) and, of course, the more powerful and extensive role exercised by the Supreme Court itself over the last sixty years or so.

11. Second, the characterisation of the process as 'politicized' is unhelpful to the extent that it implies that political conflict is an inevitable feature of the process. It is true that some nominations have trigged political conflict. But what tends to be overlooked is that most nominations have *not*. To illustrate this, consider how the Senate has actually voted in confirmation proceedings. Since 1969, the Senate has confirmed 15 Justices and 2 Chief Justices by a combined vote of 1,336 to 264. During the same period the Senate rejected 3 nominations by a vote of 164 to 132 (with a further 2 nominations withdrawn before a vote was taken). True, the rate of the Senate's refusal to confirm is higher during periods of divided government. At

the same time, 7 of the 17 appointments since 1969 were made during periods of divided government. In these instances, the President was still able to secure confirmation of the nominee despite the other party controlling the Senate.

12. Third, the characterisation implies that political conflict is inappropriate. Yet, it bears emphasis that the Constitution requires the Senate to 'advise and consent' on—and by implication, where appropriate, reject—the President's nominee. In this, scrutiny by the Senate provides a critical check on the President's ability to influence the shape of the Court. In a much-cited essay, Charles Black explained the importance of this check: 'the judiciary are not the President's people, they are not to work with him or for him'.[47] Admittedly the Senate has not always exercised the check as responsibly as might be hoped; so, for example, in 1916, the Senate threatened not to confirm Louis Brandeis for reasons widely regarded as anti-Semitic. However, on other occasions, the Senate has refused to confirm those about whom there were legitimate concerns, relating to such matters as the depth of their legal experience (e.g. Harold Carswell in 1970) or their professional ethics (e.g. Clement Haynsworth in 1969).

13. Fourth, it is normally a radical over-simplification to characterise confirmation proceedings as partisan. The Senate's refusal to confirm Robert H. Bork in 1987 is often cited as evidence of partisanship. A Democrat-controlled Senate refused to confirm Bork, an exceptionally well-qualified nominee who had served under one Republican President (Nixon) and was nominated by another (Reagan). However, it is difficult to conclude that Bork was rejected by a Democrat-controlled Senate *merely* because he was nominated by a Republican President if it is remembered that Justice Scalia was selected by Reagan in 1986 and subsequently confirmed by a 98 to 0 vote and when, in 1988, Justice Kennedy was also nominated by Reagan and confirmed 97-0 by the same Democrat-controlled Senate that had refused to confirm Bork.

14. All of which is to say that instead of making a broad, sweeping claim about the 'politicization' of the process, it is better to talk of the process being distinguished by periodic political conflict. These conflicts were anticipated by the Constitution itself and help balance the President's prerogative of nomination. Moreover, most occasions where the Senate has rejected a nomination cannot easily be explained by partisanship alone.

Are hearings a source of conflict?

15. There is no clear relationship between hearings and political conflict. Hearings are a fairly recent innovation: the first was held in 1939, and hearings only became routine from 1952. However, political conflict was an occasional feature of the appointment process long before 1939; indeed, there have been 29 unsuccessful nominations in the Court's history, with 22 of them occurring before the very first hearing in 1939.

16. A better explanation for some recent episodes of political conflict stems from the newly aggressive nomination strategies adopted by some recent Presidents. It is well known that the US Supreme Court has assumed an increasingly prominent role over the last sixty years or so. It is widely accepted that this is one reason why appointments attract considerable attention—and, from time to time, controversy. Less well appreciated is that as the Court's influence over constitutional matters has risen, Presidents have become increasingly aware of their own limited capacity to

[47] C.L. Black, 'A Note on Senatorial Consideration of Supreme Court Nominations' (1970) 79 *Yale Law Journal* 657.

influence constitutional affairs. For example, Presidential attempts to spearhead movements to amend the Constitution have failed and as have attempts to strip federal courts of jurisdiction over contentious social issues such as abortion and school prayers.

17. As a result some Presidents have turned to judicial appointments in an attempt to shape the constitutional agenda by selecting a nominee who falls outside the mainstream of constitutional thought and who might, if appointed, seek to upend the settled precedent of the Supreme Court (e.g. Robert Bork). In broad terms, it might be said that if presented with a nominee whose judicial ideology seems to fall outside the mainstream of constitutional thought, the Senate is likely to reject the nomination. If presented with a more moderate nominee, the Senate is likely to confirm (provided that the nominee is suitably qualified and has a strong record of professional integrity).

18. Two key points emerges from this. First, the President's power to nominate, in recent years, has been more a source of political conflict than the Senate's power to confirm. Second, insofar as the Senate might refuse to confirm a controversial nominee who would seek to upturn settled precedent, the confirmation process—including hearings—can be said to uphold the independence of the Court. Hence, whereas confirmation processes are often said to imperil the independence of the judiciary, it might be that sometimes the opposite is nearer the truth. In the US context, the Senate's involvement provides a means to protect the Supreme Court from presidential attempts to transform the interpretation and construction of the Constitution.

Should Senators ask nominees about their ideological views?

19. Confirmation hearings have been criticised for encouraging the questioning of nominees about their judicial ideology. (By 'judicial ideology', I mean a nominee's views on such matters as the proper role of and limits on courts, their preferred methodology for interpreting the Constitution as well as the underlying ideological commitments that might influence their decisions as a judge. Defined in this way, judicial ideology includes a person's views on such issues as abortion, privacy, affirmative action, free speech, the death penalty and the relationship between church and state).

20. There are two reasons why the Senate is entitled to question nominees about their judicial ideology:

- First, a nominee's judicial ideology will influence how they would vote—if confirmed—on the important issues that come before them, and it is thus appropriate for the Senate to question them on it. Those who are opposed to questions about a nominee's judicial ideology must argue either that a nominee's ideology is unlikely to affect how they decide the cases before them or that even if ideology shapes their decisions, a nominee should not be questioned about it by the Senate. Nether argument is attractive when it applies to members of as powerful an institution as the US Supreme Court.

- Second, the President considers a person's judicial ideology when deciding whether to nominate them to the Supreme Court and so should the Senate, since otherwise there is too much scope for Presidents to mould the Court in their own image.

21. Senators have also been criticised for asking questions that require a nominee to pledge to decide specific types of cases in a certain way. This is a valid criticism. That said, it is worth noting that most judges have repeatedly (and quite properly) refused to answer such questions.

Is the questioning of nominees futile?

22. The questioning of nominees about their judicial ideology is sometimes said to be futile, and for two main reasons. First, the nominees often provide bland and uncontroversial answers. Thus, the Senators' questions are said to be futile insofar as they fail to elicit any interesting or novel information. However, it is important to recall that the hearing is only one part of the Senate's scrutiny of the nominee. Comprehensive information will already have been obtained prior to the hearing.

23. Second, the questioning is also said to be futile insofar as the Senate can never be certain that a nominee's judicial ideology will not change. This is certainly true. However, the fact that there can be no certainty on this front does not render the Senate's questioning futile. The questioning of a nominee has multiple purposes, only one of which is to elicit information. It also provides a forum for the Senate to discuss issues of national importance—and, in this, to signal its concerns to the judiciary and public at large (e.g. the discussions of racism in the nominations of Rehnquist, Haynsworth and Carswell). Hearings also provide an opportunity to ask the nominee about any specific charges that emerge during the confirmation process (e.g. Clarence Thomas).

June 2011

Baroness Hale of Richmond DBE PC, Justice of the Supreme Court of the UK

This response is addressed principally to question 7 (diversity) in the context of the appointment of Justices of the Supreme Court. It will therefore range more widely than the specific questions (10, 11 and 12) asked about the Supreme Court.

Criteria for appointment

1. The Supreme Court is a collegiate court, deciding arguable questions of law of general public importance in panels of 5, 7 or 9. Larger panels are becoming much more common. It is essential that the members of those panels are not, and are not seen to be, composed of a largely homogenous group, but bring a range of experience and expertise to their decisions. As Benjamin Cardozo put it: 'out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements'.

2. Thus diversity in the widest sense should be regarded as an essential criterion in making up the composition of the Court. The criteria for any appointment should make it clear that one component of merit is what the candidate

can bring to the collective mix. There are many parameters of such diversity. These include:

> (a) Specialist legal expertise. In this age of increasing complexity and specialisation in the law it is not enough to say that any good lawyer can turn his hand to anything. Regard should be had to the subject-matter of the cases coming before the Court. We need at least one expert in the fields of law which regularly arise and preferably two. The current English composition of the Court is woefully unbalanced, with three (soon to be four) commercial lawyers, two public lawyers, two family lawyers and only one Chancery lawyer.
>
> (b) Professional experience. Whatever may be the merits of appointing advocates and litigators elsewhere in the system, a Supreme Court benefits from a range of professional experience, whether as judge, legal practitioner, public servant or academic lawyer. The appointment of Lord Collins, a solicitor (and perhaps even me, an academic and public servant), together with the experience of other Supreme Courts elsewhere in the world, has shown this. Once again, the current composition of the Court is seriously unbalanced.
>
> (c) Personal background and experience. This covers a wide range of factors, including race, gender, disability, and the other characteristics protected under the Equality Act. Our experiences of life are quite simply different from those of our white male able-bodied colleagues. The important questions of law which affect us all should not be decided only by people whose experience of life is so very similar. A woman litigant should be able to go into the Court and see more than one person who shares at least some of her experience. I should not stick out like a bad tooth, as I do at present.

3. This is in no way inconsistent with appointment on merit. The need for one kind of diversity is already statutorily recognised in the requirement that there be Justices with knowledge of the law in Scotland and Northern Ireland. All persons appointed should obviously be lawyers of outstanding ability and achievement. They should also be suited to judicial work, but it should not be assumed that only kind of career fits one for this. There is evidence that diverse panels improve the quality of decision-making rather than the reverse.

Widening the pool

4. Serious efforts are needed to widen the pool of those thought suitable for appointment to the Court. Making the above criteria clear is a first step towards encouraging suitable candidates to come forward. But outreach work should be done among, for example, judges at other levels than the Court of Appeal, especially in the High Court (where there are stars who have not been appointed to the Court of Appeal partly because that Court recruits for particular subject areas), but also among academics, public servants and practitioners. It is not difficult to think of academics whose doctrinal skills, ability to use those skills in different legal fields, and appreciation of issues of legal policy would make them suitable candidates.

5. There is no problem in principle with encouraging suitable candidates to apply. This is regularly done in other types of appointment. It should be seen as a responsibility of the Court to consult the Bar, the Law Society, the Society of Legal Scholars and other bodies, as well as the Justices' own knowledge, and to consider who might be encouraged to apply. It is also important (at this or any level) that candidates should not feel disheartened or in some way ashamed if they apply and are not appointed first time round. Most of us who have had experience in the real world of jobs, even top jobs, have had to live with some disappointments.

Strengthening the appointing panel

6. A panel of five is too small for such an important task. It does need to have two members of the Court, because they can best explain the work and needs of the Court to the others. It should have representatives from all three jurisdictions in the United Kingdom, because this is a Court for the whole United Kingdom. But it should also have representatives from the barristers', solicitors' and academic professions, and from Parliament.

7. The process currently lacks any democratic accountability. Experience of confirmation hearings elsewhere in the world is not encouraging. We surely do not want our judges to be chosen for their political affiliations. Post-appointment 'getting to know you' hearings might improve Parliamentary understanding the Court and its work, but they would not improve the accountability of the system.

8. One solution would be to revert to the position where the selection panel puts up two or three names to the relevant Minister who then makes a choice. Such a system is very common elsewhere in the common law world and is in no way inconsistent with an independent and a-political judiciary. But it would be to re-introduce direct political responsibility for the choice which it was the object of the 2005 Act to remove.

9. A different solution would be to include two (or three) senior Parliamentarians on the selection panel, one from the Government and one from the Opposition. This would preserve political balance, involve Parliamentarians in the selection process, increase accountability and improve knowledge of the Court, what it does and who does it. Broadening the panel in this way would, or should, reduce the potential for 'cloning' in the present system.

Conclusion

10. It follows from the above that I do not think that the current system is working well. There are small ways in which it could be improved: for example, retain the requirement for knowledge of the law in Scotland and Northern Ireland but remove the need for 'experience of practice' there, so that academic and other non-practising lawyers may be appointed, as in England and Wales; remove the second round of consultation; encourage people to apply; give more information, etc). But no system of appointments which produces only one woman in the 92 years since the Sex Disqualification (Removal) Act 1919 can be considered remotely

satisfactory. Other countries in the common law world are doing much better. There are so many very able women (and other under-represented) lawyers around. You just have to know where and how to look for them and (which may be even harder) how to recognise them when you find them.

30 June 2011

Josephine Hayes, Barrister

1. The appointing body and, more importantly, the appointees to the judiciary should understand recent advances in understanding of how the mind and brain actually process information.
2. Professor Drew Westen writes: "The vision of mind that has captured the imagination of philosophers, cognitive scientists, economists, and political scientists since the eighteenth century – a dispassionate mind that makes decisions by weighing the evidence and reasoning to the most valid conclusions – bears no relation to how the mind and brain actually work."[48] He goes on to say that the evidence we find compelling or uncompelling, the data we readily believe or dispute, the sources we find credible or incredible, reflect their congeniality with our emotional agendas. He asks: "Can members of Congress or [sc. United States] Supreme Court justices really decide impartially on questions pertaining to impeachment, removal, or election of the president, or are their judgments little more than rationalizations for their emotional preferences and prejudices?"[49]
3. Professor Westen points out that in *Bush v Gore* the US Supreme Court split along party lines. "Perhaps most damning, the conservative majority, known for its consistently negative attitudes toward federal intervention in state matters, judicial activism, and the equal protection clause of the Constitution, nonetheless stepped in to overrule the Florida Supreme Court and used the equal protection clause to justify its decision. …[The] most charitable explanation of the decision by the conservative majority in *Bush v Gore* was that the justices lacked any self-awareness of the capacity for self-deception and rationalization that they share with the general public."[50] He also outlines a less charitable explanation.
4. A prerequisite for fair decision-making in all cases, especially in cases with a political aspect, is conscious awareness and understanding of what Professor Drew Westen calls the "two sets of often competing constraints" that shape our judgments: "*cognitive constraints,* imposed by the information we have available, and *emotional constraints*, imposed by the feelings associated with one conclusion or another. Most of the time, this battle for control of our minds occurs outside of awareness… Positive and negative feelings influence which arguments reach consciousness, the amount of time we spend thinking about different arguments, the extent to which we either accept or search for "holes" in arguments or evidence that is emotionally threatening, the news outlets we follow, and the company we keep… Several experiments

[48] *The Political Brain* (2007) p. ix
[49] *Ibid,* pp. 96, 97.
[50] *The Political Brain* (2007) p. 98.

have found that people evaluate evidence that disconfirms their cherished beliefs much more critically than evidence that supports their values, attitudes, religious beliefs, or scientific theories, and that the capacity for rationalization and selective scrutiny of evidence starts early…"[51]

5. The present judicial appointments system for England and Wales consists of commissioners selected from individuals eminent in their fields by selectors who are also eminent in their fields. This, although opaque and lacking in democratic legitimacy, puts distance between those recommended for judicial appointment from the political class. This distance does not in itself mean that the appointees will provide the fairest possible judicial determination of issues, especially ones that have a constitutional and/or political importance, because even if it were a good idea to seek candidates who do not have *any* positive and negative feelings about issues, it would not be possible to find any.
6. I suggest that this Committee should take evidence from eminent scientists in the field of cognitive science, as to how judicial selection and training may be improved with the goal of achieving decisions as free as possible from self-deception, rationalization and prejudice.
7. Cognitive science can improve judicial appointments in another way, too. In litigation there are facts in dispute, and in most cases the judge determines the facts that are in dispute; in the rest a jury does so. Deciding the facts is more important than the law because the facts are the basis for the application of the law, and for appeals from the decision at trial. The facts as found by the judge become the assumed truth that binds the parties (though generally not non-parties, so that one can end up with different cases having different findings of fact concerning the same subject matter). If the judge at trial gets the law wrong, an appeal court can put it right, but if he/she gets the facts wrong, the appellate courts will scarcely ever interfere. Therefore the assessment of witnesses, deciding where the truth lies on disputed issues of fact, is a key quality for a judge to have, perhaps the most important from the perspective of the citizen.
8. The appeal courts justify this refusal to overturn decisions of fact on appeal by reference to the importance of the judge at trial having seen the witnesses' demeanour. But in all the discussions of judicial appointments that I have read or heard, there was no discussion of the ability to spot when a person is lying.
9. Professor Lord Winston has confirmed[52] that individuals differ in their ability to spot when a person is lying. Understanding of this has progressed rapidly in recent years. Those who can, do it by closely observing the speaker to spot non-verbal signs such as fleeting facial expressions. To some extent it can be taught. The ability is on the familiar bell curve with most people around the average. Some people are very good at it; the security services like to employ them at debriefings. At the other end of the graph, some people cannot read facial expressions or other non-verbal signs well, and a few cannot at all. Such individuals are often very good systemizers, or

[51] *Ibid.* p. 100.
[52] See the 3rd programme of the BBC documentary series "The Human Mind" (2003).

identifiers of patterns, who like working with rules, and can be very successful with rule-based systems such as logic, mathematics or law.[53]

10. In my experience presenting cases in court I have on numerous occasions had the strong and extremely unpleasant impression that the judge was failing to spot a liar in the witness box. Some judges do not even look at the witness while he or she is speaking, hence are bound to miss nuances communicated by gestures or expressions which do not fit the words used; apparently they have no idea that non-verbal signals are important. They cope by minute textual analysis of the words used; seizing on any verbal inconsistencies between the witness's oral evidence and the documents in the case (nowadays including the witness's signed statement, even though it is generally not in the witness's own words but prepared by others). This misses liars; it also favours witnesses who are glib over those with less facility with words. In cases where documents are not available, so that it is just one witness's word against another's, these judges simply flounder. I believe that in several cases of mine the wrong person was believed and consequently justice was not done. Colleagues have mentioned corroborating experiences.
11. No one would appoint a tone-deaf person to judge a singing contest. How did these individuals get on to the Bench? It seems to me that they were able to flourish in their previous careers as advocates because their function was to assume the truth of their instructions, advise on that basis and to present that assumed truth in court. They never had to *decide* where the truth lay. Only when they switched to the decision-making function did their weakness become apparent.
12. In the past, the judiciary were drawn from the Bar and seen by the Bar as their terrain. Then the Law Society demanded that their members be eligible as well. The branches of the legal profession will argue in the interests of their members, and they are not good at self-criticism. They are not going to say that judging is not just a matter of textual criticism and the application of rules, nor that competitiveness and a love of winning are not useful in a judge, nor that the skills required of the judiciary are not the same as those required at the Bar.
13. The judiciary might do a better job for the public if it were a career judiciary. Candidates would be identified for characteristics that would include, among other qualities, dedication to adjudicating fairly between parties and ability to do so. As part of this selection process, candidates would be vetted for their ability to understand non-verbal, as well as verbal, communications. Cognitive science experts would be recruited to run specifically designed tests of suitability.
14. As tests tend to show that women are in general slightly better at this than men, this process might over time result in more equal proportions of women and men among the judiciary. The selection of judges mainly from the predominantly male Bar will perpetuate the unacceptably low percentage of women.

30th June 2011

[53] Professor Simon Baron-Cohen of Cambridge University, author of "Mindblindness", "The Essential Difference" and "Zero Degrees of Empathy", is expert in this field.

Professor Robert Hazell, Director of the Constitution Unit, School of Public Policy, University College London and Professor Kate Malleson, Professor of Law, Queen Mary University of London

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SUMMARY OF KEY POINTS

Parliament should play a role in the appointment of the most senior judges: Justices of the Supreme Court, and Heads of Division in the Court of Appeal

For senior judicial appointments (High Court and above) the government should be presented with a minimum of three names, not a single name, by the Judicial Appointments Commission

The government's preferred candidate should attend a scrutiny hearing with the Lords Constitution Committee or the Commons Justice Committee (or a joint sitting of both), similar to the pre-appointment scrutiny hearings for other senior public appointments.

RESEARCH PROJECT ON THE POLITICS OF JUDICIAL INDEPENDENCE

We recently started a three year project on the Politics of Judicial Independence, working with Dr Graham Gee (Birmingham). We are only just starting our first interviews, so we have no data from the project on which to base a submission. But we have done other research which is relevant to your inquiry. We are therefore submitting this evidence as individuals. I hope that later on we might have more to report from our research project.

A ROLE FOR PARLIAMENT IN THE APPOINTMENT OF JUDGES

This submission builds on earlier evidence submitted by Robert Hazell to the Constitutional Affairs Committee of the House of Commons when they enquired into the proposed new system of judicial appointments in 2003. As then, our main purpose is to encourage Parliament to take more interest in the appointment of judges. The debate in 2003 became excessively polarised, with the judiciary wanting the appointment of judges to be wholly removed from the hands of the executive. This is to misunderstand the British constitution, which rests not on rigid separation of powers, but on a careful balance of powers between all three branches of government.

For the system of government to work properly there needs to be trust, confidence and mutual respect between all three branches of government: executive, legislature and judiciary. Appointments to the judiciary are too important to be left to the Judicial Appointments Commission alone. Because of its power to put forward a single name, and the extreme difficulty for the Lord Chancellor in rejecting that name, the JAC has become *de facto* an appointing body. Ministers should have greater choice; and the legislature should be more strongly involved, in its classic scrutiny role. To act as a check and balance on both executive and judiciary, and to

hold the ring when there are tensions between them, Parliament has an important role to play.

THE EXECUTIVE SHOULD HAVE THE FINAL SAY IN APPOINTING JUDGES

We strongly supported the creation of the Judicial Appointments Commission. It was a logical next step from the steps already taken to make the process of judicial appointments fairer, more open and more transparent. And we strongly supported the Executive continuing to have the final say in judicial appointments, which is the system in other common law countries. But for appointments to the High Court and above, Prof Hazell argued then, and we still believe that the Commission should recommend a short list of names to the Justice Secretary. It is very important for the Executive to retain an effective role in senior judicial appointments, in order for the government to retain trust and confidence in the judges. If the government has a purely nominal role, and is largely excluded from the process, it will be less inclined to respect the judiciary or defend them when they came under attack.

THE EXECUTIVE SHOULD BE GIVEN A CHOICE

The arguments advanced for giving a role to Parliament are strengthened if (as we believe should happen) Ministers are given an element of choice, by requiring the Judicial Appointments Commission to submit a short list rather than a single name. The Commission could submit the names ranked in their order of preference, with a commentary explaining the reasons for their preference. That would help to make explicit the criteria and reasoning applied by the Commission, and require ministers to be explicit about their own criteria if they decided not to follow the Commission's rank order.

To present ministers with a single name assumes too simplistic a model of "merit". Ministers may take a different view about the balance of skills and experience that are required when filling a vacancy. They may feel that a public or constitutional lawyer is required to fill a gap on the Supreme Court, rather than another commercial lawyer; or someone who can provide stronger leadership (as implicitly Lord Irvine did when appointing Lord Bingham to be senior law lord). That is essentially a policy decision, and it is right that policy decisions should ultimately be made by ministers.

MINISTER'S CHOICES SHOULD BE SUBJECT TO SCRUTINY BY PARLIAMENT

To guard against concerns that ministers might allow political bias to creep into their decisions, they should be subject to scrutiny by Parliament. Judicial appointments and the work of the Commission generally should be subject to scrutiny by the Commons Justice Committee and the Lords Constitution Committee (as evinced by this inquiry). But very senior judicial appointees (Justices of the Supreme Court, and the four heads of division) should be invited by Parliament to present themselves for a scrutiny hearing. The committee would have no power of veto over the appointment. The main purpose of the hearing would be to introduce the new appointee to Parliament, and to give the committee the opportunity to develop a dialogue with the most senior judges on constitutional, legal and judicial policy. Such

dialogue is becoming increasingly frequent, with the judges having given evidence 19 times to the Commons Justice Committee in the last five years, four times to the Lords Constitution Committee, and once to the Joint Committee on Human Rights, the Commons Public Administration Committee, and the Public Accounts Committee.

SELECT COMMITTEES ARE SCRUTINISING OTHER SENIOR PUBLIC APPOINTMENTS

Since 2008 Select Committees have been scrutinising appointments to the most important public bodies. Pre-appointment scrutiny hearings for the top 60 public appointments were first introduced under Gordon Brown's premiership. Fears were expressed that this would undermine the integrity of the public appointments process; or that Select Committees would engage in inappropriate lines of questioning. Neither concern has proved justified.

In 2009 the Constitution Unit was commissioned by the Commons Liaison Committee and the Cabinet Office to conduct an evaluation of Pre-Appointment Scrutiny Hearings. We studied the first 20 pre-appointment hearings, interviewing 60 people (including the appointees, select committee chairs, and Whitehall officials). Our report was published by the Liaison Committee in March 2010 (HC 426).

Our research showed that Select Committees have had considerable influence over senior public appointments through their scrutiny hearings. Our interviews with the candidates and in Whitehall brought out that the scrutiny hearings:

- Act as a check on political patronage (though the public appointment rules had already largely tackled that problem)
- Help to ensure that independent and robust candidates are appointed
- Add to the appointee's legitimacy, within their organisation and with the media and the public
- Enable the appointee to meet the Select Committee at an early stage to discuss their plans and priorities.

Select Committees can have this influence without having a veto. The Constitution Unit does not support Select Committees having a power of veto over senior public appointments, and explained why in a submission to the Liaison Committee in June 2011, followed by oral evidence given by Prof Hazell to the Committee on 16 June.

SIMILAR CONSIDERATIONS APPLY TO VERY SENIOR JUDICIAL APPOINTMENTS

The arguments for parliamentary scrutiny of top judicial appointments are similar, but also contain reasons which are specific to judges:

— Parliament has the power to scrutinise all acts of the executive. Appointments of senior judges are an important exercise of ministerial discretion, and it is equally important that they should be subject to parliamentary scrutiny.

Professor Robert Hazell, Director of the Constitution Unit, School of Public Policy, University College London and Professor Kate Malleson, Professor of Law, Queen Mary University of London

— The judges fear that ministers may show political bias if they are given a choice. Parliamentary scrutiny can be a useful check against such bias.

— Parliament nowadays has little contact with the judges. The senior judges are largely unknown to MPs. Supreme Court justices will be unknown to the Lords now that the law lords have departed. There is value in a formal presentation of the senior judges to Parliament, to foster continuing dialogue.

— Through such dialogue political and judicial actors can better understand the constraints under which the other operates. This understanding has been lacking in some aspects of the privacy debate

— The judges should meet the body vested with the constitutional power to dismiss them. Senior judges can be removed only by resolution of both Houses of Parliament.

The main arguments advanced against such a proposal are as follows:

— It would risk politicising judicial appointments, as they are in the United States. But the American constitution involves built-in conflict between President and Congress. Supreme Court appointments in the US are less on merit, and overtly partisan, in a manner quite foreign to the UK.

— It would expose appointees to intrusive questioning about their personal and private lives. Even in the US, such questioning is the exception not the rule. In the UK, it is unknown: Select Committees have followed the Liaison Committee guidelines on proper lines of questioning.

The committee conducting the scrutiny hearings could be the Justice Committee in the Commons, the Constitution Committee in the Lords, or a joint sitting of both committees. Given the constitutional guardian function of the House of Lords, and the role of both Houses in dissmissing judges, we would favour a joint session of both committees.

There are two precedents for such a proposal. The first is the new system of pre-appointment scrutiny hearings described above. The wider precedent for involving all three branches of government in judicial appointments is the delicate constitutional balance which supports the working of the new Human Rights Act. That requires ministers, the courts and Parliament each to play their part in upholding human rights, and in keeping the other branches of government up to the mark. It requires a constant dialogue between all three branches of government. Select Committees provide a forum in which the judges can explain their views and their concerns on legal and human rights issues, and ministers can explain theirs. No other body can facilitate a three-way dialogue in this fashion. It illustrates how Parliament can hold the ring between the judiciary and the executive, especially when there are tensions between them.

WOULD PARLIAMENT AND THE JUDGES HAVE THE CONFIDENCE TO DO THIS?

The question raised in this submission is largely a matter for Parliament. It does not require legislation. It requires political will on the part of Parliament to make use of existing powers which Parliament already has. If Parliament wanted to take this

forward, it would need to draft some guidelines to reassure the judges about the process. They could be based upon the guidelines prepared by the Liaison Committee for pre-appointment scrutiny hearings in the House of Commons.

We hope the Constitution Committee will have the confidence to issue an invitation to newly appointed senior judges to appear before it; and we hope the judges will have the confidence to accept the invitation. Both sides stand to gain from better dialogue between the judiciary and the legislature. For government to work properly requires trust and confidence between all three branches of government. That requires a three way conversation, in which Parliament must play its part.

June 2011

InterLaw Diversity Forum for Lesbian, Gay, Bisexual and Transgender ("LGBT") Networks[54]

Professor Leslie Moran, Birkbeck College, University of London
Daniel Winterfeldt, Co-Chair InterLaw Diversity Forum and partner at CMS Cameron McKenna
Laura Hodgson, Co-Chair InterLaw Diversity Forum and a professional support lawyer at Norton Rose

Introduction

1. Interlaw Diversity Forum 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. Diversity is also central to judicial selection, a process that must be open, transparent and accountable.

2. Sexual diversity raises particular challenges for judicial diversity policies and initiatives. It is barely 20 years since a policy only to appoint people to judicial office who were married was formally abandoned. While on the face of it this policy did not differentiate between heterosexuals and homosexuals, it's avowed objective was to ensure that there would be no 'homosexual controversy' in the judiciary. To all intents and purposes this marital policy operated as a sexuality policy, with the aim of achieving a uniformaly heterosexual judiciary. Its operation included a rigorous investigation into the private lives of all those interested in judicial appointment.[55]

[54] The InterLaw Diversity Forum is an inter-organisational forum for the LGBT people in law firms and all personnel (lawyers and non-lawyers) in the legal sector, including in-house counsel. It has over 800 members and supporters from more than 70 law firms and 40 corporates and financial institutions.. The InterLaw Diversity Forum's overall objective is to encourage LGBT diversity and inclusion in the legal sector.

[55] Richardson, C (1992) 'Homosexuality and the judiciary', *New Law Journal (*31 Jan 1992) at 130-13 and Moran L.J. (2006) 'Judicial diversity and the challenge of sexuality: Some preliminary findings', (2006) 28(4) Sydney Law Review, 565-598

3. Another related challenge is the perception that sexuality is about 'private life' and as such strictly extra judicial. We will address this particular challenge later.

4. If the desire and practices to avoid 'homosexual controversy' might have had some justification prior to the Sexual Offences Act 1967 before which all consensual sexual acts between men in private were contrary to law, its operation post '67 is a clear indication of the 'chilling effect' of lingering discrimination upon government in general and judicial appointments in particular.

5. Much in the law has changed to address ongoing sexual orientation discrimination. Popular perceptions are also changing. Parliament has passed a raft of new laws to challenge discrimination, creating new rights for those in same sex domestic partnerships and other family and caring relationships, reforming criminal laws, equalising rights in the workplace. Together with the Human Rights Act 1998, the Gender Recognition Act 2004 a major advance in the protection of transgender people and the Equality Act 2010 lesbians gay men, bisexuals and transgender (LGBT) people are well on the way to being recognised as full citizens.

6. In sharp contrast to these major changes the composition of the judiciary appears to be little changed: still uniformally heteroseuxal. We say 'appears to be' as there is no official information about the sexual composition of the judiciary. This state of affairs raises major constitutional issues that need to be addressed by this committee.

The constitutional implications: the legitimacy of the judiciary

7. The first constitutional issue is the legitimacy of the judiciary. Law reform has created a raft of new rights for LGBT people. Disputes about these rights will inevitably come to the courts, placing new demands on the judiciary and raising their profile. The current *Equal Treatment Bench Book* shows that considerable efforts are being made within the judiciary to prepare the judiciary to meet some of the challenges when dealing with LGBT people in courtroom settings. We welcome these efforts.

8. But more needs to be done. Research by Stonewall exploring lesbian and gay expectations of unfairness contains some relevant findings. In the context of criminal justice it reported that almost 25% of respondents expected to be treated unfairly by the judiciary.[56] Two in five lesbian and gay parents reported expectations they would be treated worse than heterosexuals if they were to appear before a family court judge.[57] Other research on LGBT users of the courts in England and Wales[58] offers further empirical evidence

[56] Hunt R. And S. Dick (2008) *Serves you right: lesbian and gay expectations of discrimination,* Stonewall London at 12.
[57] Above at 19.
[58] Brower, T. (2006) Pride & Prejudice: Sexual Orientation Fairness in the Courts of England and Wales, 13 *Buffalo. Women's L. J.* 17 and Brower, T (2007) Multi-stable Figures: Sexual Orientation Visibility and its Effects on the Experiences of Sexual Minorities in the Courts, 27 *Pace L. Rev.* 141.

in support of a conclusion that there is a lack of confidence in the ability of the courts and the judiciary to deliver justice.

9. A different perspective on judicial legitimacy comes from InterLaw Diversity Forum's study of LGBT legal professional perceptions of barriers to careers in the judiciary (a copy has been submitted with this evidence). [59] The judiciary as a career choice and a workplace, this research suggests, is associated with sexual orientation discrimination. For example;

    - When asked about aspects of judicial office that they found unappealing just over 1 in 3 of all LGBT respondents associated the judiciary with hostility to their sexuality.
    - LGBT respondents are more likely than respondents to a study undertaken by the Judicial Appointments Commission on barriers to judicial careers,[60] to identify 'judicial culture' as a reason why they never applied for judicial office (29% compared to 17%).
    - Being 'lesbian, gay or 'bisexual' is rated by LGBT respondents as a negative influence on the outcome of an application for judicial appointment.
    - Gay women and BME LGBT lawyers cite judicial culture as unappealing at much higher levels than the white or male LGBT respondents. This is a familiar double-whammy effect that is very marked indeed in this survey.

10. Experiences and expectations of prejudice by LGBT court users, citizens and members of the legal professions all suggest a judiciary that will struggle to achieve legitimacy. How might this state of affairs be changed?

The judicial appointments process.

11. This brings us to the second constitutional issue, the judicial appointments process. The InterLaw Diversity Forum's research on barriers to judicial careers offers a unique insight into LGBT legal professional perceptions of the current arrangements and their impact on diversity. The findings we report here focus specifically upon the Judicial Appointments Commission.

12. The data suggests there is much support from LGBT legal professionals for the JAC. Between 85% and 90% believe the creation of the JAC was a positive development. There is evidence of a good awareness of the JAC within this group of legal professionals. Almost three out of four LGBT respondents (74%) claim previous awareness of the JAC. However, the finding that two out of three LGBT respondents had not accessed JAC communications and that gay women/lesbians were the subgroup least likely to have accessed any of the JAC communications — 85% compared to 61%

[59] Moran L.J. and D. Winterfeldt (2011) Barriers to Application for Judicial Appointment: Lesbian, Gay, Bisexual and Transgender Research, InterLaw Diversity Forum, London

[60] Allen A. (2009) *Barriers to application for judicial appointment research,* British Market Research Bureau, Judicial Appointments Commission London

of gay men, may suggest that awarenss is limited and based on perceptions generated at a distance than from more directly acquired knowledge.

13. However, other findings suggest that there are more severe problems with the JAC and wider judicial appointment's process. We asked about perceptions of the fairness of the appointments process. The data suggests LGBT respondents are less likely to believe that the selection process is fair than respondents to the JAC *Barriers* study:

    - 39% of JAC respondents believed the selection process to be fair in contrast to 27% of LGBT respondents.
    - Gay women/Lesbians and BME LGBT respondents are most likely to disagree with the statement, 'the selection process is fair': 62% BME and 57% Gay women.
    - LGBT respondents are less likely to express a belief that judges are selected on a merit-only basis.

Appointment 'on merit'

14. This brings us to the third constitutional issue, appointment on merit. Under the current law 'merit' and 'diversity' play different roles. 'Diversity' is limited to widening the pool of applicants available for selection (s. 64 Constitutional Reform Act 2005). 'Merit' is the primary appointment criteria (s.63).
15. The challenge in respect of increasing the diversity of judges has often been framed in terms of ensuring that the pool of eligible lawyers becomes more diverse. LGBT lawyers willingness to participate in the pool of applicants is not where the challenge seems to lie. In fact the InterLaw Diversity Forum's research suggests more LGBT lawyers than the lawyers sampled in the *JAC Barriers Report* questionnaire have an interest in applying for for judicial office. 16% of respondents had already applied for judicial office and 96% of respondents thought that the work would be enjoyable and similarly high levels indicated the public service aspect and the chance the make a difference as appealing. The problem is 'merit'.
16. Two of the headline findings drawn from the InterLaw Diversity Forum's research report are pertinant here.
    - LGBT respondents are less likely to express a belief that judges are selected on a merit-only basis.
    - A larger percentage of LGBT respondents than respondents to the JAC's research on barriers to judicial appointment (70% compared with 55%) indicate that they believe there is prejudice within the selection process.

    Opinons on the point also seem to be more starkly drawn and more firmly held by the LGBT respondents.
    - A smaller number of LGBT respondents than JAC respondents (14% compared to 22%) do not feel that there is prejudice within the

selection process, and a smaller number of LGBT respondents say they 'don't know' (17% compared to 23%).

- Lesbians (100%) are most likely to feel that there is prejudice in the process of appointment and most likely to feel strongly about this.
- BME LGBTs similarly hold believe that prejudice plays an important role in the judicial appointments process.

The InterLaw Diversity Forum's research data suggests that the current division between diversity and 'merit' is not meeting the challenge. Merit without due regard to diversity is merit tinged by prejudice.

17. There is some variation amongst subgroups within the LGBT community and this mirrors some of the findings in the *JAC Barriers Report*. LGBT barristers are more likely than LGBT solicitors to believe that selection is purely merit based (50% compared with 38%). Gay men (48%) are more likely than gay women/lesbians (13%) to believe that selection is purely merit based. Ethnicity also generated differences. White LGBTs (43%) are more likely than BME LGBTs (16%) to believe judicial appointment is purely on merit.
18. We would urge the committee to adopt a more robust approach to merit to ensure that diversity is fully intergrated into it. Diversity and merit are not mutually exclusive. The South African Constitution provides an example of how to achieve closer integration. Article 174 brings together merit and diversity as co-existing constitutional obligations. With that example in mind but with the objective and having due regard to the wider range of characteristic protected under the Equalities Act 2010 we propose the following. Section 63 of the Constitutional Reform Act 2005 needs to be redrafted to ensure that 'merit' incorporates recognition of the need for the judiciary to reflect broadly the 9 characteristics protected under the Equalities Act 2010.

Public awareness of the judiciary, judicial appointments and diversity

19. Last but not least we want to briefly address the question of public, and we would add professional, awareness about judiciary. There has been much recent talk of the need to engage in 'myth busting' about judicial diversity. Contrary to what is suggested, the 'myths', that the judiciary lacks diversity, tend to paint an all too accurate picture of the judicial family. In turn those 'myths' are being fed and supported by the official information that is currently available about the composition of the judcial family.
20. The bigger picture is that few LGBT citizens have direct contact with the judiciary. Knowledge of the courts and the judiciary in particular comes from

the mass media and related sources such as official communications that feed the mass media. This generates two overaching perceptions. The first is that judges do not and should not speak of sexuality, as it is an extra judicial matter, of no relevance to the office they hold. The second is that it is not only an invasion of their private life but also a threatening scandalous invasion. Both are far from correct.

21. If official sources of information about the senior members of the judicial family are now, thanks to the internet, more readily available then they formally give the impression that private life of the judiciary and their sexuality in particular is strictly off limits. But the impression that this creates of a clear barrier between details about professional lives and domestic lives is false. Information about the sexuality of members of the judiciary is relatively easy to discover and is to be found in the pages of the most respectable volumes that record the professional life of members of the judiciary. For example this information is easily accessible by turning to the pages of the latest volume of *Who's Who.* Each entry relating to a member of the judiciary invariably contains family details for each judge (and in the main these families are described as heterosexual relationships) supplied by the judge. Judicial private lives are here being lived out in a very public way.
22. One response to this might be that, *Who's Who* is a private publication and the decision by a judge to give family information is also a private matter. However the study of official biographical information about senior members of the judiciary in other jurisdictions suggests that this is not so formal or strict a divide as may be the case in England and Wales.[61] For example the biographical webpages of the judges of South Africa's Constitutional Court[62] contain a wealth of what might be regarded as 'personal information'. The page for Justice Edwin Cameron is a fine example of how a gay man holding a senior judicial post can have his sexuality represented in a manner perfectly attunded to the demands of high judicial office.[63]
23. References to what might be regarded by some as the 'private lives' of the judiciary are only ever used in these official and public contexts to express something positive about those that hold judicial office. This actively works against the reduction of private life to a secret world ripe for exploitation as a source of scandal for the media. It is also has the potential to be a key dimension of a very clear commitment to openness and transparecy, as is illustrated by the South African example.
24. The current approach to providing information about the judiciary positively works against making the diversity of those who make up the judicial family apparent. We would urge committee members to look at the biographical pages of of the UK Supreme Court. From the photographs attached to each

[61] Moran L.J. (2011) 'Forming sexualities as judicial virtues' Sexualities 14(3) 273-289.
[62] http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm
[63] http://www.constitutionalcourt.org.za/site/judges/justicecameron/index1.html.

page it is at times difficult to differentiate one judge from another.[64] We would urge the committee to give serious consideration to the need for a much more thoughtful, creative and positive approach to representing the judiciary to the public.

Recommendations for reform

We conclude with a selection of key recommendations made in the InterLaw Diversity Forum's research report that relate to the issues raised in this statement of evidence to the select committee on the constitution. A full list of recommendations based on the research can be found in that report.

Selected recommendations

1. Demographic data relating to 'sexual orientation' should be collected and published for all branches of the judicial family, judicial appointments and applications for appointment. We are delighted that the JAC has announced it will now collect this data.

2. All key judicial appointments fora should have specific regards to sexual diversity issues.

3. Diversity criteria, including sexual orientation, should be included into the selection process for all key judicial appointments fora, with the objective of having a sexual diversity stakeholder on each.

4. All key judicial diversity advisory and policy development decision making fora should have specific regard to sexual diversity issues and incorporate sexual diversity stakeholders.

5. A review of the composition of the appointments panels, especially for the most senior judicial appointments, including Supreme Court, heads of division, Lord Justices and High Court, should be undertaken with the objective of widening stakeholder participation in the appointments process.

6. The professional profile and appointment of the most senior judges (High Court and above) should be more transparent. We welcome the Parliamentary post-appointment hearings with senior judges. For example the present Lord Chief Justice met with the Constitution Committee between his appointment and taking up office.

7. Following the example of the Constitutional Court of South Africa each appointee to the High Court and above should have a biographical web page that enables access to a transcript of appointment interview together with access to a full CV. The biographical note should have due regard to the need to ensure that public information about the senior members of the judicial family should contribute to portraying the diversity of the judiciary.

[64] http://www.supremecourt.gov.uk/about/biographies.html

8. The Judges Council should create either a standing committee or a working party on equality and diversity with lesbian and gay judicial representation. Annual reports of its work, or summaries should be made public.

9. The Judiciary should participate in the Stonewall Equality workplace index exercise.

June 2011

Sundeep Iyer, Department of Government, Harvard University

Abstract: Academics have commonly suggested that appointments commissions could increase gender equity in appointments since patronage might play a smaller role in commissions than in systems where one person is responsible for making appointments. This testimony assesses whether commissions in England and Northern Ireland have actually increased gender diversity in judicial appointments. Though women were appointed more frequently in the first year after appointment commissions were established, any increase in the gender equity of appointments vanished soon thereafter. If the theory linking patronage and judicial gender diversity is accurate, the result here suggests that the fibers of patronage may have reemerged after the creation of appointments commissions. The testimony concludes with a theoretical explanation for why the benefits of appointment commissions for gender equity were so short-lived.

(1) One common theory among academics asserts that appointments commissions can increase judicial gender equity because patronage plays a smaller role in commissions than in systems where one person is responsible for making appointments.[65] Each member of a commission would exert a check on the others, preventing them from offering out appointments based on the office-seeker's connections. This matters for women because, as the theory goes, women are less likely to benefit from patronage than men. If patronage plays a smaller role in an appointments commission, it follows that women would be appointed in greater numbers when judges are selected by an independent commission.

[65] M. Henry et al, *The Success of Women and Minorities in Achieving Judicial Office: The Selection Process* (Fund for Modern Courts 1985), p. 65; K. Tokarz ``Women Judges and Merit Selection Under the Missouri Plan" (1986) 64 Washington University Law Quarterly, p. 951; K. Bratton and R. Spill, ``Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts" (2002) 82 Social Science Quarterly, pp. 507-508.

(2) Now at a juncture where we might expect that the effect of UK appointments commissions on judicial gender diversity should be apparent, it is crucial to determine whether recent constitutional changes to appointments procedures have increased gender equity on the bench. The Northern Ireland Judicial Appointments Commission was established in 2005, and the Judicial Appointments Commission was established in England in 2006. To assess whether UK commissions have increased gender diversity in appointments, I will consider complete appointment data from England, Northern Ireland, Australia and New Zealand, using the latter two countries as control cases. The data considered here includes over 6,000 appointments to 650 different judicial posts in these four jurisdictions between 1998 and 2008.

(3) Australia and New Zealand both make strong comparator cases. In both countries, the Governor-General and Ministers usually make the appointments after informal consultations, so the status quo appointment procedures are very similar to procedures in the UK jurisdictions prior to the creation of appointments commissions. The qualifications for judicial office, which usually include a set number of years as a barrister, are similar, and public concern about gender diversity in the judiciary is high. In addition, "patronage was a pronounced feature of selections" in all five jurisdictions when there was no appointment commission. Legal connections - similarly challenging for women to come by in Australia, New Zealand and the UK – often defined opportunities in the absence of an appointments commission.[66] Variation in the particulars of some courts and in the qualifications for some posts across the four jurisdictions make the comparison somewhat imperfect, but the

[66] R. Levy, "Judicial Selections Reform in Comparative Context" (2007) 40 U. B.C Law Review, p. 605.

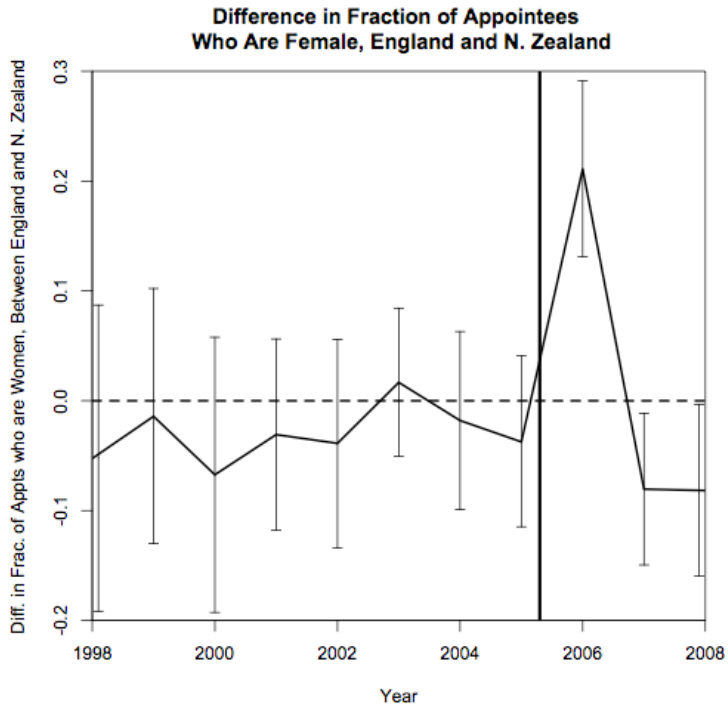
balance of evidence suggests that Australia and New Zealand are strikingly apt comparator cases for the UK with respect to this testimony's inquiry.

(4) In the analyses that follow, Australia and New Zealand are the control units, and the UK jurisdictions are each considered separately as the treated units. The treatment is the establishment of an appointments commission. The variable of interest is the fraction of all appointees in a given year who were women. I consider whether, relative to the control units (Australia and New Zealand), the fraction of women appointees in the treated units (the UK jurisdictions) increased after commissions were established. I compare the post-commission fraction of women appointees from the UK commissions with that same fraction in the control unit to assess whether there was an increase after the creation of the commission in the UK jurisdiction's fraction of women appointees, relative to the control.

(5) I use the synthetic control method, which combines different control units into a single synthetic control that maximizes the similarity in pre-treatment – or pre-commission – appointment outcomes between the synthetic control and the treated unit. A major advantage of this method is that even if the synthetic control does not constitute a better match than the individual control units, the method can help us choose which among several individual control units best matches the treated unit. That is exactly the purpose the method serves here. For both UK commissions, the suggested synthetic control is identical to the data for one of the individual control countries, so I just use that individual country as the control unit.[67] For ease of analysis, I manipulate the data so that pre-commission and post-commission appointments break cleanly with calendar years. For instance, the English JAC began operating in June 2006, but I push back the date of JAC appointments by

[67] Complete details on methods and data are provided in the full working paper version of this testimony, available online at http://www.law.qmul.ac.uk/eji/research/index.html.

five months (and make the same change for the control country) so that in the figure below, appointments shown for 2005 were made pre-commission and appointments shown for 2006 were made post-commission. I make a similar adjustment for NIJAC, as well.



(6) I first consider England, whose optimal match is New Zealand. The figure above displays the yearly difference in the proportion of total appointees who were women between England and New Zealand; the yearly vertical bars represent the 95% confidence interval for each difference, and the bold vertical line separates pre-commission and post-commission appointments. The difference in the fraction of appointees who were women is stable between 1998 and 2005, indicating that New Zealand is a good match for England. But in the first year after JAC was established, the fraction of women appointees in England increases dramatically relative to the control. This increase is large and statistically significant.[68] What is most striking,

[68] The 95% interval for the largest pre-commission difference between England and New Zealand, is (-0.12,0.15), from 2003. This does not contain 0.21, the difference estimate for the year after the establishment of the JAC.

though, is that in the subsequent two years, the percentage of women appointees in England drops back to pre-commission levels relative to the control. This drop is also statistically significant.[69] This evidence suggests that while establishing an appointments commission initially had a positive influence on judicial gender diversity, that positive effect quickly eroded.

(7) Next, I consider Northern Ireland, whose optimal match is also New Zealand. The figure above plots the difference in the proportion of appointees who were women between Northern Ireland and New Zealand; the yearly vertical bars represent the 95% confidence interval for each difference, and the bold vertical line separates pre-commission and post-commission appointments. In the year after Northern Ireland's JAC was established, there is a sharp uptick in the proportion of appointees who were women, relative to the control. This uptick is large and statistically significant.[70] But this uptick lasts just one year - then, there is a sharp and

[69] The 95% interval for the 2006 estimate is (0.05,0.37). The 2007 and 2008 differences in proportions are both -0.08.

[70] The 95% confidence interval associated with the largest pre-commission difference in Northern Ireland and New Zealand's proportion of women appointed, in 2004, is (-0.08, 0.24). The difference in 2005 is 0.33.

significant decline in the proportion of appointees who were women in Northern Ireland relative to New Zealand.[71] Yet again, an uptick in gender diversity accompanies the commission in the year after it is created, but that uptick disappears almost immediately after the first year.

(8) These empirical results suggest that UK judicial appointments commissions have not consistently increased gender diversity on the bench. In the year following the establishment of commissions, there is an uptick in the proportion of women appointees. But that effect disappears almost immediately after the first year, and the commission then tends to appoint women at the same rates at which women had been appointed before the creation of the appointments commission.[72]

(9) The patronage theory popular among those who study judicial appointments may still explain how appointments commissions influence the gender equity of judicial appointments, but if it does, it applies with more nuance than is typically granted. In the first year after the appointments commission is created, at least some members (particularly lay members) might not know barristers well. But with time, the members of the commission might become more familiar with the office-seekers, making them more vulnerable to conferring patronage upon office-seekers. Of course, the merit-based appointment criteria and qualifying tests used by the JAC and NIJAC are designed to prevent patronage from being the only, or even the deciding, factor in appointment decisions. But patronage might still matter at the margins for appointments made in the commission setting. Even an influence at the

[71] The 95% confidence interval associated with the difference in Northern Ireland and New Zealand's proportion of women appointed in the year after NIJAC was established is (0.14, 0.53). The next highest post-commission difference is 0.07.

[72] These results were also replicated in Scotland, where the Judicial Appointments Board began making appointments in 2002. See the working paper version, supra 3. The result reported here, then, can hardly be considered an anomaly.

margins could be enough to cast a noticeable pall on the frequency with which women are appointed.

(10) Public policy scholars offer an alternate way of conceptualizing why the effects of this constitutional policy implementation might change over time. One important time effect is ``fade-out." A commonly cited example is Head Start, an American public education program designed to improve learning outcomes for low-income children. While the program improves preschoolers' cognitive and social abilities, these effects decline as Head Start graduates move into elementary school. Studies attribute fade-out to the lack of follow-up interventions, without which students are placed back into weak educational environments.[73] Head Start and appointments commissions are not quite analogous, but insights gleaned from the former may be instructive when examining the latter. Without sufficient follow-up interventions designed to prevent patronage from influencing appointments decisions, the potential positive influence of appointment commissions on judicial gender equity might not be realised.

(11) The statistical analyses in this testimony suggest that fade-out effects apply to UK appointments commissions. Of course, patronage theory might not be the sole link between gender diversity and appointments commissions. For instance, the commission may have faced greater public and political scrutiny in its first year, which may have led it to pick a more diverse group of appointees. When the commission “survived" the scrutiny (as was the case in England and Northern Ireland), the impetus – be it conscious or subconscious – for picking more diverse appointees might have disappeared. Indeed, it is crucial to thoroughly understand the

[73] V. Lee and S. Loeb, ``Where Do Head Start Attendees End Up? One Reason Why Preschool Effects Fade Out" (1995) 17 Educational Evaluation and Policy Analysis, p. 62; R. McKey et al., ``The Impact of Head Start on Children, Families, and Communities" (1985), final report of the Head Start Evaluation, Synthesis, and Utililzation Project, p. III-64.

totality of causes for the initial uptick in judicial gender diversity after the establishment of commissions in England and Northern Ireland. Only then will it be possible to tailor the appropriate follow-up interventions to harness the potential positive influence of appointments commissions on judicial gender diversity.

23 June 2011

Nick Jones, Traffic Commissioner for the Welsh Traffic Area and Traffic Commissioner for the West Midland Traffic Area

Response to Inquiry into Judicial Appointments

My professional background includes experience as a public sector chief officer, as a justices' clerk advising lay justices and as the person who developed the first training for those who undertook selection exercises which, in turn, led to the recruitment of lay justices. My experience in courts included serving for a decade on NACRO's Race Issues Advisory Committee which gave me extensive experience of issues connected to both judicial recruitment (for the lay judiciary) and equality of opportunity. As Traffic Commissioner for the West Midland Traffic Area and as Traffic Commissioner for the Welsh Traffic Area, I wish to make representations to the Inquiry being conducted on judicial appointments:

Background

Currently traffic commissioners do not fall within the scope of either the existing HM Courts Service or the Tribunals Service. Traffic commissioners are listed tribunals for the purposes of Schedule 7 of the Tribunals, Courts and Enforcement Act 2007 and currently fall under the oversight of the Administrative Justice and Tribunals Council. That oversight will disappear with the abolition of that body. The Judicial Appointments Commission recognises the tribunal function exercised but currently has no involvement in the appointment of either traffic commissioners or the senior traffic commissioner. Much of the formal training undertaken by traffic commissioners is through the Judicial College (previously the Judicial Studies Board).

There are 7 full time traffic commissioners covering eight traffic areas within Great Britain. Our jurisdiction includes granting or refusing applications for heavy goods or public service vehicle licences, curtailment of authorisation, suspension of licences to operate, revocation of licences to operate and personal disqualification of operators and directors, as well taking action against transport managers who do not work to the requisite standard. Traffic commissioners also consider the conduct of drivers who hold or apply for licences to drive large goods and passenger-carrying vehicles. Traffic commissioners also have powers in respect of failures to operate local services and may impose regulatory sanctions including financial penalties. Traffic commissioners are also the appeal body in relation to impounded goods and public service vehicles.

Nick Jones, Traffic Commissioner for the Welsh Traffic Area and Traffic Commissioner for the West Midland Traffic Area

Traffic commissioners act as single person tribunals and the responsibility for taking action under the relevant legislation is vested in the individual traffic commissioner dealing with a case.

There are approximately 20 or so deputy traffic commissioners, most of whom sit in a variety of judicial jurisdictions where part time appointments processes are carried out by the Judicial Appointments Commission.

Specific Comments

An independent justice system must ensure that the appointment process for the judiciary is not one that leaves itself open to improper influence. In the case of judges who are appointed by the Queen the appointment is on recommendation by the Judicial Appointments Commission to ensure an objective selection process is carried out. Obviously, judges are not appointed by the police or prosecution agencies. Currently traffic commissioners are appointed by the Secretary of State for Transport; in practice the process is conducted by civil servants in DfT who make a recommendation to him or her; unfortunately that system for the appointment of traffic commissioners, the statutory Senior Traffic Commissioner and deputy traffic commissioners is one that does not fit well with the concept of an independent judiciary.

Most of the proceedings undertaken by traffic commissioners are inquisitorial in nature and indeed it is this feature that has enabled extensive work to be undertaken by relatively few individuals at comparatively little cost to the licence fee payer. This, in turn, facilitates an efficiency which compares favourably with those other jurisdictions with adversarial processes. The logistics industry as a whole employs over 2 million people and we receive considerable support from the trade bodies and from industry generally, who welcome our work to improve road safety and to seek a level playing field for those who operate in the large goods vehicle and the bus and coach industries.

One relatively small feature of the work of traffic commissioners is adversarial and it is this jurisdiction that illustrates the problems caused by a lack of an independent appointment process. VOSA has the responsibility delegated by DfT for providing administrative support for TCs, but it is also party to proceedings in impounding cases. Where a large goods vehicle or a passenger carrying vehicle is found operating without a valid licence issued by a traffic commissioner, VOSA have the power to impound that vehicle and dispose of it.

Traffic commissioners have, on a number of occasions, sought to encourage Departmental officials to consider the legal position as the starting point on how policy changes might be implemented. Regrettably the precedents offered by the higher courts in cases such as *R (on the application of Brooke and another) v Parole Board and another; R (on the application of Murphy) v Parole Board and another [2008] EWCA Civ* 29, *Starrs v Ruxton (1999)* 8 BHRC 1and most recently *Forrest v the Lord Chancellor and the Lord Chief Justice [2011] EWHC 142 (Admin)* have been ignored or dismissed. As *Brooke* particularly stresses it is often not only the method of appointment but also other connected issues such security of tenure and the use of financial controls, which go to the ultimate question of whether a tribunal can

demonstrate sufficient objective independence in order to satisfy both the common law and the requirements of European Convention on Human Rights.

In recent months a number of my fellow traffic commissioners were forced to voice concerns publicly over issues of jurisdiction as Departmental officials sought to give the agency delegated to support traffic commissioners, the Vehicle and Operator Services Agency (VOSA) and as referred to above a party to some proceedings before traffic commissioners, a direct management role in the performance of traffic commissioners. The response included unfortunate email correspondence that suggested that if the traffic commissioners were not going to adjudicate as senior VOSA staff thought they should, those officials would arrange for the hearings to be listed before any deputy traffic commissioner who might not hold the same view. As indicated above, the majority of deputy traffic commissioners sit in other jurisdictions subject to the Judicial Appointments Commission and are therefore well aware of the importance of applying the law properly.

The illustration above is given as it is the conflict which most easily reflects the threat to judicial independence in the current arrangements for appointments of traffic commissioners. Others could be given but are not included in this submission for the sake of brevity.

My published annual reports to the Secretary of State for 2009–2010 sought to identify concerns at a tendency for some civil servants to seek to apply policies that are not necessarily in accordance with the law. I also made a clear reference to the appointment process for traffic commissioners and their deputies. The need for an objective assessment is now even more urgent in view of the fact that during the next few months a formal recruitment process will be undertaken for the statutory post of Senior Traffic Commissioner on a fixed term. I have grave doubts that any recruitment process will be regarded by any informed observer as objective. For the avoidance of doubt I do not intend applying for the post, I point this out to demonstrate that I do not have a personal interest in the outcome, other than seeking to ensure that I work in a jurisdiction where the governance arrangements for appointment meet modern standards.

It is within my knowledge that a recruitment process was commenced during the last year for deputy traffic commissioners but it was stopped before appointments were made. I was pleased that the exercise was not concluded as it involved advertising in a national newspaper with, to my knowledge, no attempt to involve advertising in any specialist legal journal. There are no legal impediments to appointing someone who is not a lawyer to the post of deputy traffic commissioner, however if one looks at the jurisdiction it is manifestly one that is judicial in nature. Those currently exercising the functions all have extensive experience of acting within different jurisdictions. The existing deputies who work on a part time basis will confirm that their work as deputy traffic commissioner is every bit as "judicial" as are the other jurisdictions where they sit, albeit the nature of the work is specialist.

Conclusion

Whilst the appointment process could undoubtedly benefit from speeding up, my evidence to the Inquiry is on the discreet issue of the appointment of traffic

commissioners with a request that it considers recommendations in respect of tribunals which currently sit outside the ambit of the Judicial Appointments Commission, including the appointment of traffic commissioners, deputy traffic commissioners and in particular the statutory Senior Traffic Commissioner.

I have attempted to summarise the issues involved in an attempt to achieve brevity, however I am willing to expand on any point raised and to answer questions. My colleagues are aware of the contents of this letter.

30 June 2011

Judicial Appointments Commission (JAC)

Summary

1. This is the response of the Judicial Appointments Commission (JAC) to the Constitution Committee's call for evidence in their inquiry into the judicial appointments process.

2. The CRA was a milestone in the separation of the powers of parliament, the executive and the judiciary. It created a clear separation and delineation in the respective roles of the Lord Chancellor and the Lord Chief Justice and as part of that separation, it created, through statute, an independent commission to select candidates for judicial office.

3. The JAC was established by the Constitutional Reform Act 2005 (CRA) as an independent, executive Non-Departmental Public Body sponsored by the Ministry of Justice.

4. The JAC has now been in operation for just over five years and has established its position in the judicial landscape. Under the Chairmanship of Baroness Prashar, the JAC entrenched the principles of independence in its policies and processes and selection on merit. The JAC is now a more confident and mature organisation and the time is now right to review its processes and work with partners to further reduce costs and increase the speed of the appointments process.

5. This work has begun and is already yielding benefits. JAC funding peaked in 2008/09 but the JAC has consistently reduced costs since then and is now significantly cheaper, per application handled and per selection, than when the process was run by the executive. It runs exercises to timetables agreed with the Ministry of Justice and has built relationships with key partners; developing collaborative relationships, while safeguarding its independence. The JAC recognises that there are still elements of its selection processes which cause some groups concern but balances these concerns against the necessity of ensuring selection processes are transparent, fair to all applicants and achievable within its funding.

6. While there are areas where legislative change might be helpful to clarify the intentions of the CRA or to allow some flexibility, the JAC would be very wary of changes that would impact in any way on the principle of the separation of powers, independence in selection, both from the judiciary and the executive, and selection on merit alone.

7. The increasing focus on the role of the judiciary necessitates the maintenance of a judicial appointments process that is not only independent in fact, but also in perception. The JAC has attracted much international interest as a model for an independent selection and has done much for the transparency of the selection processes under its control (those at High Court and below).

8. The JAC is well aware of the challenges that increasing the diversity of the judiciary poses. It is fully engaged with the work of the Task Force set up by the Lord Chancellor to implement the recommendations of his Advisory Panel on Judicial Diversity and continues to focus on its statutory duty to widen the pool of those available for selection. The achievement of a truly diverse judiciary is a long term aim and one in which many will need to play a part. The JAC would be against the introduction of targets which would artificially increase the pace of change, given the negative impact they would be likely to have on the quality of applications from other groups and the perception of the appointments system and the judiciary as a whole.

Question 1: How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

9. The JAC believes that the current judicial appointments process for selections at High Court level and below is appropriate.

10. Perceptions of an independent, non-partisan judiciary, both nationally and internationally rely upon an appointments process independent of both the executive and the judiciary. It is crucial that the selection process is not just independent in fact, but that it is seen to be so.

11. In the Constitution Committee's Sixth Report (2006/07 Session) the Committee considered how the judicial role was developing, and observed that the changes introduced by the CRA were designed to bring the institutional relationships between the judiciary and the other branches of government into line with the changing substantive role of the courts. In particular, the reforms were intended to secure the independence of the judiciary by 'redrawing the relationship between the judiciary and the other branches of government' and putting it on a 'modern footing'.[74]

12. Provided this remains the will of Parliament, it is important to continue to underpin the independence of the judiciary through selection arrangements

[74] http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15102.htm

for new judges which remain independent of the executive, but which nevertheless ensure an appropriate level of involvement of the executive, the judiciary and Parliament. In that regard, the arrangements put in place by Parliament in the CRA have been successful in delivering that degree of appropriate independence and in the view of the JAC should largely remain unchanged.

13. For positions for which the JAC makes recommendations, where the full process is under its control (i.e. those up to and including High Court), the process is working well.

    - The JAC, apart from in a few specific cases for non-legal vacancies, receives applications in sufficient number and quality to make recommendations of candidates of merit.

    - From the perspective of candidates applying for a judicial role the process appears to have gained broad acceptance. Levels of complaints are low; only 1% of all applications since the JAC was formed have resulted in a complaint, with the majority of complaints being from candidates who are dissatisfied with the decision not to select them.

    - The initial fear suggested by some that many high quality candidates would be put off applying, appears unfounded with application levels from meritorious candidates remaining high.

    - There are elements of the processes used by the JAC, for example qualifying tests for large exercises, which were initially contentious and remain so in some quarters. However, there are increasingly high levels of acceptance for these (particularly from solicitors).

    - While the JAC will adapt its processes in response to feedback where possible and practical, the overriding concern is to ensure processes are fair to all candidates, and allow the organisation to fulfil its statutory remit of widening the pool of applicants, while continuing to select only on merit.

14. While a groundbreaking piece of legislation, the CRA created a rigid statutory framework within which the JAC operates. Should a suitable legislative vehicle become available, the JAC would be keen to address areas which may allow greater flexibility, clarity of roles and aid increasingly diverse selections to be made.

Question 2: Is the appointments process sufficiently transparent and accountable?

<u>Appointments processes</u>

15. The level of the JAC's responsibility for, and involvement in, selections is laid out by the CRA.

16. Supreme Court[75] – The JAC's involvement is limited to the requirement that a member of the Commission sit as one of the five members of the selection panel.

17. Senior appointments (Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lords Justices of Appeal)[76] – The JAC must appoint a selection panel, chaired by the Lord Chief Justice, which must determine and apply the selection process. The panel is a committee of the Commission and the JAC provides administrative support. The panels comprise of the Lord Chief Justice, a second senior judicial member designated by the Lord Chief Justice, the JAC Chairman and a lay Commissioner of the JAC designated by the JAC Chairman. [77] These selections do not go through the whole Commission.

18. Puisne judges and other office holders (High Court and below)[78] -. The Commission are responsible for defining the selection process and making selections. An outline of the JAC's selection process for these roles is at Annex A.

Transparency

19. The JAC is transparent both in its operation as a public body, and in its selection processes for those positions for which it is responsible for determining the selection process, while respecting the need for candidate confidentiality in relation to personal data. The JAC introduced a number of new methods for achieving this and increasing the levels of transparency from the previous process. These include:

    - setting out selection processes for appointments up to and including the High Court on the JAC website and in Annual Reports;

    - producing an information pack on each specific selection exercise containing more detail on the processes and indicative timelines, available to candidates on the website when the exercise launches;

    - undertaking outreach work, particularly with groups currently under represented in the judiciary, and with people who may not have previously thought of a judicial career, to explain the application and selection processes and to make potential candidates aware of what they can apply for;

    - publishing a longer term programme of selection exercises to enable candidates to identify future opportunities and make any necessary preparations;

[75] CRA, part 3, s.26-31 with the composition of the selection commission set out in schedule 8.
[76] CRA, part 4, chapter 2, s.67-84
[77] The membership of the panel for selecting Lords Justices of Appeal is prescribed in section 80 of the CRA.
[78] CRA, part 4, chapter 2, s.85-94

- clearly setting out on the JAC website when an exercise launches and is open for applications;

- encouraging potential candidates to sign up to an email alert letting them know when an exercise has launched. This has proved both popular, with over 9,000 people signing up in 2010/11, and effective in encouraging people to 'click through' from the email alert to the JAC website;

- publishing a monthly electronic update on forthcoming vacancies called Judging Your Future;

- publishing feedback reports for all qualifying tests, designed to help candidates understand what characterised a successful paper, and to consider that against their experience;

- producing a video of an example role-play with the Law Society, to help candidates prepare and give them a better idea of what to expect from that aspect of the selection process.

Accountability

20. The JAC has a complaints procedure which is set out on its website. If a complainant is not satisfied with the response from the JAC they can refer the case to the Judicial Appointments and Conduct Ombudsman for further investigation. Since the JAC started operation in 2006 no complaints have been fully upheld against it by the Ombudsman and three have been partially upheld.

21. As a public body the Chief Executive is Accounting Officer and is accountable to Parliament, through the Ministry of Justice's Chief Accounting Officer, for the performance of the JAC. The Chairman and Commissioners can be called by Select Committees to give evidence on the performance and processes of the JAC. On an operational level, the JAC is audited both by the Ministry of Justice's internal audit team and by the National Audit Office.

22. The JAC publishes an Annual Report and Accounts. The Annual Report includes information on the performance of the JAC and includes details of exercises run, numbers of applications received, recommendations made and rejections or requests for reconsideration received from the Lord Chancellor.

23. The JAC publishes statistics on the diversity of those applying, those shortlisted and those recommended for judicial appointment. These statistics are published as 'Official Statistics', meaning that they are released in accordance with the Code of Practice on Official Statistics published by the UK Statistics Authority and approved by the Head of Profession for Statistics at the Ministry of Justice.

Question 3: How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

24. Public understanding of the judicial appointments process is limited, particularly in relation to the JAC's role in senior appointments.

25. The JAC has limited resources for outreach and this in turn limits its ability to raise awareness in the broadest sense among the general public. It therefore focuses on raising awareness among potential candidates; particularly where a judicial career might traditionally not have been considered. The JAC achieves this through:

    - working closely with professional bodies such as the Law Society, Bar Council, Institute of Legal Executives and representative groups such as the Interlaw Diversity Forum, the Black Solicitors Network, the Society of Asian Lawyers and the Association of Women Solicitors to deliver outreach events and material;

    - using the JAC website to provide a clear and comprehensive range of material on the process, materials used in past selection exercises and case studies of successful candidates;

    - using social media, such as Twitter (becomeajudge), LinkedIn and Facebook to raise awareness in non-traditional areas;

    - running limited advertising in national and specialist trade press. As the advertising budget has decreased the JAC has generally moved away from advertising individual posts (unless they are particularly specialist), to using generic advertising which will raise awareness of judicial appointments and challenge preconceptions;

    - alerting the relevant specialist media to selection exercises as they launch and using the judicial intranet and judicial associations to highlight vacancies where existing judicial experience is required;

    - supplementing the lower level of advertising by gaining additional, no cost, coverage in the media with press releases, articles and interviews.

26. In addition to the focus on attracting potential candidates, the JAC frequently hosts visits from international delegations which are keen to understand the British judicial appointments process. This raises the profile of the independent judiciary internationally.

27. The judiciary and professions have a remit to undertake outreach work with schools, colleges, universities and law schools, for example under the recommendations of the Lord Chancellor's Advisory Panel on Judicial Diversity and the JAC provides material that can be used for this purpose.

Question 4: Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

28. The JAC believes that the appointments process for the offices for which it makes selections (High Court and below) gives adequate regard to the independence of the judiciary.

29. Key elements in ensuring this are:

- the provision in the CRA that selection processes used up to and including High Court should be for the Commission to determine, independently of the Lord Chancellor.

- the public launch of all selection exercises which are open to all who meet the relevant eligibility criteria;

- the limitation of the Lord Chancellor's involvement to approval of recommendations and making appointments. Levels of rejections of recommendations made by the JAC, or requests for reconsideration, have been very low, around one per year on average; and

- the requirement, set out in the CRA, for the JAC to provide the Lord Chancellor with one name for each vacancy only (i.e. the Lord Chancellor does not get a list of candidates from which he can choose).

30. The CRA established the JAC and set out detailed arrangements that provide for the JAC to make selections for judicial appointment which are independent of the executive, but which nevertheless ensure an appropriate level of involvement of the executive, the judiciary and Parliament. In addition to making appointments, the CRA (s65) also provides that subject to an affirmative resolution of both Houses of Parliament, the Lord Chancellor may issue formal guidance to the JAC. However, such guidance has never been issued and the scope for executive involvement in the selection process is extremely limited.

31. As the JAC is sponsored by the Ministry of Justice, the Lord Chancellor sets the funding of the JAC. The JAC has so far been able to operate effectively within its funding allocations and further detail is set out in response to question 20. The Lord Chancellor has the power to include the JAC in draft legislation and this can cause the JAC concern, for example the JAC was concerned with the implications of inclusion in Schedule 7 of the Public Bodies Bill last year.

32. Judicial involvement in the selection process is covered in the response to question 22.

Question 5: Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

33. The JAC do not claim to have increased the quality of the judiciary by comparison with period before 2006 when the Lord Chancellor made selections. The Lord Chancellor has recognised the continued quality of those appointed to judicial office[79] and Lord Chief Justice has given strong recognition to the achievements of the JAC.[80] The problem which led to the creation of the JAC was not the quality of appointments, but the opacity of the process and the lack of independence from the executive.

34. Selections for judicial appointment are made in a unique environment where in the majority of cases the candidates are selected for positions where there is no probation period; no appraisal and almost no termination for poor performance. Selection on merit alone is therefore even more critical.

35. The JAC's processes are designed to be transparent, fair and thorough. These processes assess the quality and good character of applicants and ensure only the most meritorious are recommended. The Commission will only recommend candidates who are of sufficient merit. While the Commission is largely successful in recommending sufficient candidates to fill the vacancies, if there are not candidates of sufficiently high quality the Commission will not make a recommendation. This was the case for 12.5 out of 446.5 legal posts in 2010/11 (i.e. less than 3%).

36. Although there is no reason to suppose that past Lord Chancellors had been influenced by political considerations in making appointments, the growing political sensitivity of much of the judiciary's work would sooner or later have led to suspicion that this was happening, which the lack of transparency of the previous process would have made it hard to dispel. In the longer term all of this would have undermined both respect for the judiciary and the willingness of outstanding candidates to apply. The creation of the JAC was timely, and has ensured that this situation will not arise. In particular, the JAC has earned the respect and trust of the legal professions from whom most judicial appointments are drawn. This is reflected in the high quality of applications at all levels.

37. The number of rejections or requests for reconsideration of recommendations by the Lord Chancellor is very low; around one every year and the Lord Chancellor's recent review of the end to end judicial appointments process did not identify the quality of recommendations being made as an issue.

38. JAC regularly meets stakeholders and asks for their feedback. Should any suggestion of a drop in quality arise, it would take this very seriously. Some parties have questioned whether some meritorious candidates are unsuccessful in being selected. It is important to highlight that it can be a very competitive process with applicants for each post on average around 7:1 and

[79] http://www.parliament.uk/documents/lords-committees/constitution/LordChancellor/FinalLCandLCJEvidence.pdf
[80] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-diversity-conf.pdf

can be as high as 20:1. However, the JAC wants to address these concerns. Candidates can be unsuccessful in the process due to lack of preparation, and they may not have had previous experience of a similar selection process. In response to this, a new part of the JAC website will be developed called 'application readiness'. Though outreach activity and information provided the JAC encourages candidates to self-select and only apply when they are ready and have had sufficient experience; the additional information on our website will support this message. The website already provides test papers and feedback on previous exercises.

39. Assessment of the performance of serving judges is a matter for the Lord Chief Justice. It would not be appropriate for the JAC to appraise the quality of judicial office holders. However, the JAC strongly supports the development and use of judicial appraisal within the judiciary.

Question 6: What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

40. The total length of the appointments process, from identification of the vacancy to an appointed candidate being available to sit can be too long as a whole; both for HM Courts and Tribunals Service, and for candidates going through the process.

41. The JAC runs the middle part of the end to end appointment process. The front end of the process (where future vacancies are identified and requirements are agreed) and the latter stages (making appointments, training and deploying judges) are the responsibility of the Ministry of Justice, HM Courts and Tribunals Service and the judiciary. An overview of the end-to-end selection process is at Annex B.

42. The JAC is engaging with the Ministry of Justice to support them in their efforts to scrutinise and reduce the length of the end-to-end process. The JAC continues to look for and implement ways to shorten the stages of the process under its direct control without sacrificing the quality of selections made, fairness or transparency.

43. Selection exercises can vary in length depending on their size and complexity. The programme of selection exercises which the JAC will run during a year is agreed with the Ministry of Justice, to meet the demands of the Courts and Tribunals Service. This programme includes agreement of how long it should take the JAC to run its part. The speed of exercises is balanced against accommodating more exercises in the programme, potential variables in the number of vacancies to be filled; the funding available to the JAC; and the availability of the judiciary from their other responsibilities to undertake their role in the exercises.

44. The JAC hopes to improve the efficiency of the selection process through increased use of IT, particularly at the application and shortlisting stages. Following the postponement of a funding bid to improve IT through system replacement, the JAC is investigating options that would yield results in these areas, the outsourcing some IT requirements being a particular example.

45. It is important to remember the seniority of posts being selected for and the importance of ensuring the right candidate is selected, this is of particular significance in relation to salaried roles. While being as efficient as possible, it is not a process which should be rushed.

Question 7: What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

46. The JAC has a statutory duty to have regard to the need to widen the pool of candidates available for selection and believes that only by having the widest possible pool of excellent applicants can the most meritorious be selected. Diversity is a pressing concern in seeking to attract applications and in ensuring the process is fair. Once the process starts the sole consideration is merit and the JAC makes selections on merit alone.

47. In 2010/11 the JAC and the Ministry of Justice jointly undertook a full analysis of the changes in the diversity of selections since judicial appointments data was first published in 1998/99. The first volume, which covered women and BME candidates, was published in July 2010[81] and the second volume, covering solicitors, was released in January 2011.[82] The new analysis provided a picture of diversity trends in judicial appointments over the past decade. This research has been shared with relevant partners to identify what needs to be done collectively to make further progress.

48. Graphs using this data, and including additional official statistics data subsequently published, showing selections of women, BME and solicitor candidates are at Annex C.

49. The long term analysis indicated that women are applying and being selected in increasing numbers under the JAC. They are performing well across the board, including in applications and selections for the High Court, Circuit Bench and Recorderships. BME lawyers are applying in larger numbers, and BME candidates are doing well in selection exercises for posts such as Recorder and Deputy District Judge, which are traditionally the first step on the judicial ladder. The JAC wants to see BME candidates continue to progress through the judiciary. BME applications for the Circuit Bench have increased significantly as have selections in a lesser measure. BME applications for the most recent High Court exercise doubled and were 7% of applications. Two of the 13 selected were BME candidates.

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[81] Available at: http://jac.judiciary.gov.uk/about-jac/1005.htm
[82] Available at: http://jac.judiciary.gov.uk/about-jac/1181.htm

50. Progress has been slower on solicitor applications than for women and BME candidates. There has been little difference in the proportion of solicitors applying for most roles over the past ten years – there have been small increases but no dramatic leap forward. For some judicial roles – for example Circuit judge – the number of solicitors applying and being appointed has decreased. Following the publication of these findings the JAC and the Law Society agreed a joint action plan to drive up applications from solicitors and support those applying to perform to their best advantage in the selection process.[83] The JAC would like to see more applicants for fee-paid positions from strong solicitor candidates as this would be the foundation for more solicitors as salaried judges.

51. As the Lord Chancellor's Advisory Panel on Judicial Diversity recognised, increasing judicial diversity, at every level, is a shared endeavour. Particularly, increasing selection of BME candidates, especially in the senior levels of the judiciary, is a long term goal and is dependent on factors outside the control of the JAC.

52. The JAC is opposed to targets for selection of candidates from certain groups, as this could conflict with its statutory remit to select solely on merit. The JAC measures progress of under-represented groups against the pool of eligible candidates, i.e. all those who could apply. This allows performance in terms of diversity to be tracked without the disadvantages of a formal target.

53. The experience of the JAC, especially in the first year of its existence, suggests that any widespread suspicion that there was an informal policy of positive discrimination, let alone an overt, target driven policy of that kind, would have a very damaging impact on the quality of applications from the majority sections of society, especially to the more senior appointments. The reputation of the process is critical in ensuring the quality of applications, and in turn the quality of selections. Should high quality candidates of any background be deterred this could have a damaging effect on the quality of selections and the make up of the judiciary.

54. In February 2010 the Lord Chancellor's Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, published its report. It made 53 recommendations, 15 of which referred directly to the JAC. The previous Chairman of the JAC, Baroness Prashar, accepted these recommendations, joined the Judicial Diversity Taskforce and began the work of putting the recommendations in place with the Taskforce reporting progress in May 2011. The JAC is committed both to working on the 15 recommendations allocated to it specifically, and supporting partners as they implement their recommendations.

55. The JAC carries out outreach activity to raise awareness of judicial appointments and attract potential candidates from non-traditional

[83] http://www.judicialappointments.gov.uk/static/documents/JAC_TLS_News_release_Jan_20_2011.pdf

backgrounds. The JAC then ensures that its selection processes are fair and non-discriminatory.

56. Selection materials, such as qualifying tests and role play scenarios are 'equality proofed'. This ensures they are fair and there is no unintended bias that might disproportionately affect one group of candidates. At the application, shortlisting and recommendation stages of the selection process the progression of the four target groups (women, BME, disabled and solicitor candidates) is monitored for any evidence of unfairness. The JAC's Reasonable Adjustments Policy is designed to make the selection process as accessible as possible to candidates with a disability and to meet the requirements of the Disability Discrimination Acts 1995 and 2005.

57. The JAC currently collects diversity data on applicants for judicial office. From July 2011 the JAC will also be monitoring the sexual orientation and religion of judicial candidates. This data is used to monitor progress of different groups through the process. As with all monitoring, completion of the form will be voluntary and will form no part of the selection process. This monitoring is in line with best practice and the JAC duties under the new Equality Act.

58. While recognising the needs of HM Courts and Tribunals Service, the JAC challenges non-statutory minimum entry requirements applied by the Lord Chancellor where it believes these will unnecessarily restrict the diversity of applicants. The JAC encourages salaried part-time working to be made available as much as possible, as a lack of part-time working can act as a disincentive to potential applicants, including for those from under-represented groups. At senior judicial levels the Maximum Number of Judges Order restricts the numbers of the judiciary without making provision for part-timers only to count as, for example, 0.5 or 0.8 of a post holder.

59. The JAC cannot increase judicial diversity alone, many other bodies have a role to play. For example, secondary and higher education, progression through the legal profession and the imposition of additional, non-statutory eligibility criteria, are all factors that will weigh on this. The JAC introduced the Judicial Appointments Diversity Forum in 2006 to involve bodies which can influence the diversity agenda, including the Ministry of Justice, representatives of the legal professions, the Legal Services Board, the Judicial Studies Board and the Attorney General's Office. Earlier this year, it was agreed that Chairmanship of the Forum should rotate among members, to ensure equal ownership of the Forum and its objectives.

Question 8: 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?

60. Constitutional developments have made the existence of a clearly and demonstrably independent judiciary increasingly important. An independent

appointments process is integral to this. Even if Parliament had not legislated for this in 2005, by now it is likely that a selection process under the control of the Lord Chancellor would be untenable.

Question 9: Are there lessons that could be learnt from the appointments system in other jurisdictions?

61. The British system leads the way in independent judicial appointments. It has attracted international attention and the JAC regularly receives visits from foreign delegations.

62. The JAC monitors international developments and seeks to learn from them. In particular the JAC maintains regular contact with Scottish and Northern Irish appointments bodies to share expertise and address arising issues.

63. The JAC is aware of the ability of other appointment systems to increase the diversity of the judiciary, but is also aware of the other potential consequences that can arise from less independent systems, as highlighted in essays by Professor Jeffrey Jowell QC and Graham Gee in the collection of essays on judicial appointments published in 2010. The essays are available on the JAC website.[84]

64. One issue raised by the report of Baroness Neuberger and the Lord Chancellor's Advisory Panel on Judicial Diversity was the concept of a judicial career, looking to countries such as France. Although not a formal route, this can now happen in practice with candidates taking a fee-paid appointment and using the experience gained there to aid applications for more senior judicial roles.

Appointments to the UK Supreme Court

Question 10: Is the system for recommendations made to the Lord Chancellor by a five-member selection commission working well?
Question 11: Is the process for consulting the senior judiciary and heads of the devolved administrations satisfactory?
Question 12: Should the compulsory retirement age for Justices first appointed to full-time judicial office be raised from 70 years?

65. The JAC's role in Supreme Court selections is outlined at question 2. Public understanding of the role of the JAC in the process is limited and it is often assumed that the JAC's involvement in more significant than it actually is in reality. The requirement for a JAC Commissioner to be included in the Supreme Court selection panel could imply the processes have the same integrity and independence as those run entirely by the JAC – but the JAC member is only one of five and does not control the way in which the process is run.

[84] http://www.judicialappointments.gov.uk/static/documents/JA_web.pdf

66. There are sections of the CRA which could usefully be clarified and the role of the JAC Commissioner on the selection panel for Supreme Court appointments is one of these areas.

67. The JAC has developed significant experience in recruitment and considers it best practice to question the appropriateness of anyone being involved in the selection of their successor, particularly in appointments which are likely to be heavily scrutinised and where transparency is valuable. This is the case for the position of President of the Supreme Court.

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

Question 13: How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?

68. When the JAC was created under the CRA it had to establish its place in the existing landscape. It is a major achievement that the existence of an independent JAC is now widely accepted and recognised as a positive development. The work of Baroness Prashar, Chairman for the first four and a half years of the JAC's existence, was integral in achieving this position and in establishing and maintaining the JAC's independence.

69. The JAC is now a more confident and mature organisation and the time is now right to review its processes and work with partners to further reduce costs and increase the speed of the appointments process.

70. The JAC has consistently delivered the programme of selection exercises and made recommendations for vacancies requested by the Ministry of Justice. In almost all cases it has met or exceeded the key performance indicators and targets set for it.

71. The JAC's operation is effective. In the last year the JAC handled an increased workload (making 50% more recommendations and handling 50% more applications) than in the previous year. This was within funding reduced by 10% from the previous year, and while making preparations to be able to meet a further 20% funding cut this year. The experience of candidates going through the process appears to be positive and as a result the JAC receives a very low level of complaints.

72. The JAC is not complacent and recognises its challenges. Achieving increased diversity in judicial appointments remains a challenge; while the JAC is confident its processes are fair to all applicants and works hard to encourage a wider range of well qualified people to put themselves forward, there is much that is out of the JAC's control as outlined in response to question 7. The JAC recognises there remains some opposition from certain groups to parts of the selection process, for example qualifying tests. It is working to continue to refine and improve selection processes but recognises it is not possible, practical or fair to concede to the wishes of all groups.

73. The JAC continues to look for further efficiencies, both to increase the speed of selections, and to continue to operate within a reduced budget. It may be possible to achieve some of this through improved IT. However, as the funding and therefore staffing of the JAC decreases it will be increasingly focussed on the delivery of selection exercises and have less staff resource to devote to change projects.

Question 14: Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

74. The role and remit of the JAC is a matter for Parliament. At present this is set out by the CRA. The Act gives the JAC three key statutory duties: to select candidates solely on merit; to select only people of good character; and to have regard to the need to encourage diversity in the range of persons available for selection for appointments.

75. There are elements of the CRA the JAC would be keen to address should a suitable legislative vehicle arise, in order to increase the flexibility with which the JAC can operate, while safeguarding independence and maintaining the principle of selections made on merit alone.

Question 15: What is the most appropriate size and balance of membership of the JAC?

76. There is a case for reviewing the size and make up of the Commission and introducing a mechanism to allow flexibility in the size of the Commission. Changes of this nature would require the Commission to operate differently but should it should not be assumed that this would be a cost saving measure.

77. The CRA requires that the Commission must consist of a lay Chairman and 14 Commissioners.[85] The Commissioners must include: five judicial members; one barrister; one solicitor; five lay members; one tribunal member; and one lay justice member. Each Commissioner is appointed in his or her own right, not as a delegate or representative of his or her profession. Twelve Commissioners, including the Chairman, were selected through open competition and three by the Judges' Council.

78. The composition of the Commission reflects lengthy and complex debate during the passing of the CRA and ensures a breadth of knowledge, experience and expertise.

79. The JAC continues to look for ways to use Commissioners' time to the greatest effect and would be keen to explore ways to do so further, if necessary through legislative change to allow greater flexibility in the size and composition of the Commission. For example, when the CRA was passed it was envisaged that the JAC would take on the appointment of lay magistrates. The previous Lord Chancellor has made it clear this will not happen and it might therefore seem unnecessary to have a lay magistrate as a statutory member of the Commission.

[85] Constitutional Reform Act (CRA) 2005, Schedule 12, part 1 (1).

80. Other than the Chairman, eight Commissioners (barrister, solicitor, lay justice and five lay members) are paid an annual salary of £12,180 for three days a month. Work undertaken by the judicial members of the Commission is covered by their judicial salary. In 2010/11 overtime was only paid to those Commissioners working on the selection panel for the High Court selection exercise at a rate of £406 per day.

81. Approximately 60% of Commissioner time is spent on the selection process (via their role as an Assigned Commissioner to exercises and attendance at Selection and Character Committee meetings). Commissioners also spend around 20% of their time working on strategy and policy through their involvement in specialist working groups and decisions at board meetings. The other 20% covers activity such as ad hoc meetings and outreach events.

Question 16: How (if at all) should the JAC's process be reformed? 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?

82. The JAC consistently looks to improve its processes, especially in response to feedback, but feedback can be contradictory, and the JAC's priority is to maintain processes that are fair, open and transparent, and allow identification of the most meritorious candidates for selection.

83. As the Lord Chancellor's letter of 4 January 2011 recognised, the JAC has a programme of reform underway which closely mirrors his proposals. The letter laid out 12 proposals directly relating to the JAC. The JAC's response to each of these is outlined at Annex D.

84. The initial focus of the JAC's internal reform programme, which began in October 2010, was primarily on greater efficiency and ensuring the organisation was well prepared to meet the challenges from the Spending Review. It has also provided an opportunity to look for improvements in processes and procedures and this focus has increased now that initial changes to meet budget reductions have been implemented. Between October 2010 and March 2011 the JAC completed phase one of the programme. This identified areas where immediate change was possible and generated 140 ideas from JAC staff, and some partners. The programme and the resulting changes are expected to realise savings of over £0.5m.

85. Phase two of the programme will evaluate options for more significant change in the operation of the JAC's processes, for example considering methods of shortlisting and increasing the use of IT in selection.

86. The Lord Chancellor's letter to the Committee Chairman also laid out a number of proposals for wider constitutional change which would be consulted on should a legislative vehicle become available. In considering the list, the JAC would be concerned to ensure that application of any of these suggestions would not impact negatively on the ability of the JAC to make selections that were sufficiently independent of both the executive and the

judiciary; that they would have no adverse impacts on the diversity of selections made; and that they were achievable within resource available to the JAC.

87. While not an option raised in the Lord Chancellor's letter, should there be a desire to further clarify the JAC's position as an independent body consideration could be given to making the JAC a parliamentary body (in the same way as the Electoral Commission). The JAC raised this option in January 2008, in its response to the Ministry of Justice consultation paper on "The Governance of Britain: Judicial Appointments".[86] This would increase the independence, and the public perception of the independence, of the JAC. The Lord Chancellor's current role in setting the JAC's funding and his ability to include it, alongside other bodies linked to his department, in constitutional legislation such as the Public Bodies Bill could be seen to create a conflict and give him or her the means of threatening the independence of the JAC's decision making.

Question 17: How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

88. JACO performs a valuable role which the JAC supports. It is correct that there should be an appeals process against decisions made at the first tier complaint investigation which are conducted within the JAC. There are often lessons to be learned from a complaint, even if it is not upheld and, in this sense, JACO provides a very useful, if indirect, contribution to JAC process change.

89. The JAC can see no immediate case for reforming JACO's role. The CRA makes clear that he should investigate the complaint made and judge whether any maladministration has occurred.

90. The CRA only allows the Ombudsman to investigate complaints which were investigated by the JAC. Other than the Commission's handling of their complaint, it should not be possible for the complainant to widen the complaint to the Ombudsman to include issues not originally raised with and investigated by the JAC.

Northern Ireland

Question 18: How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

91. While the JAC is unable to comment on judicial appointments in Northern Ireland it believes the principle of an independent selecting Commission is the right one. On a practical level the JAC and the Northern Ireland Judicial Appointments Board keep in contact regarding emerging issues, hold annual

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86 http://www.judicialappointments.gov.uk/static/documents/JAC_Response_to_MoJ_Consultation_Paper_170108.pdf

trilateral meetings with the Judicial Appointments Board for Scotland and help advertise each other's judicial vacancies.

The role of the executive

Question 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?

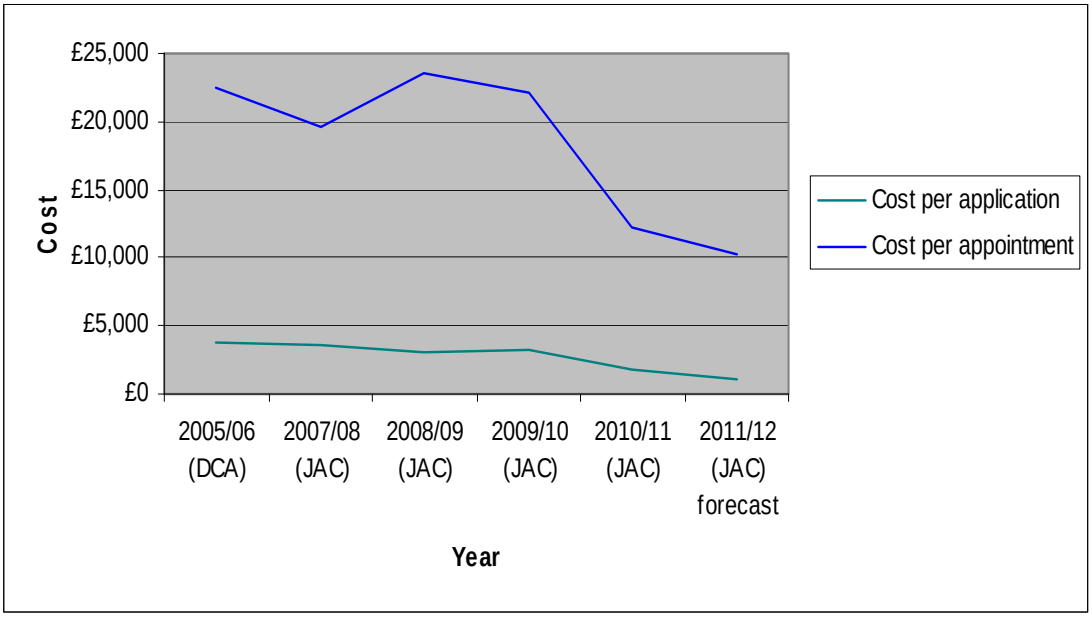
92. The Lord Chancellor's role is potentially quite extensive, but as outlined under question 4 a convention has emerged that the Lord Chancellor's involvement is minimal and the vast majority of the JAC's recommendations are accepted without request for reconsideration or rejection.

Question 20: What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

93. The JAC's funding has reduced significantly over the last three years as it has become more efficient and been able to operate 'business as usual'.

94. The JAC would have concerns over any serious further reduction in funding. It considers the current level of funding is appropriate for the current programme of selection exercises. The JAC works with the Ministry of Justice to plan the programme it will deliver, in context of funding it is given. However, with the capital expenditure on IT that was mooted but withdrawn in 2010, the JAC would be able to have considerably more efficient processes for applications, data transfer and shortlisting by test.

95. Despite being an independent body, with the additional costs inherent in that, the JAC is cheaper than the previous system run by the then Department for Constitutional Affairs, per application and appointment.



Year	2005/06 (DCA)	2007/08 (JAC)	2008/09 (JAC)	2009/10 (JAC)	2010/11 (JAC)	2011/12 (JAC) *forecast*
Expenditure (£m)	£5.35	£6.98	£8.14	£7.65	£6.10	£5.52
Soft Charges (£m)	£2.23	£1.96	£2.40	£2.23	£2.12	£1.70
Total (£m)	£7.58	£8.94	£10.54	£9.88	£8.22	£7.22
Applications	2025	2535	3518	3084	4684	7016
Appointments (DCA) or recommendations (JAC)	337	458	449	446	684	706
Exercises	19	24	25	25	21	31
Cost per application	£3,743	£3,527	£2,996	£3,204	£1,755	£1,029
Cost per appointment	£22,493	£19,520	£23,474	£22,152	£12,018	£10,227
Average staff per year	Not known	101	107	105	91	81

96. The JAC is allocated grant-in-aid funding each year which it controls and spends on staffing and the costs of running selection exercises. In addition to this the JAC is required to record 'soft charges' or 'non-cash charges' as a

part of its expenditure, these allocate a cost to items and services the JAC receives as a body sponsored by the Ministry of Justice, such as rent and IT support. The JAC has some ability to reduce these, for example it recently reduced the amount of office space used therefore reducing the rent element of the charges. However, the JAC has very limited ability to challenge the levels of these costs and has concerns over level of these charges as a proportion of its overall budget. This is a particular concern in relation to IT support where low service levels on occasion require the JAC to incur further additional cost achieving manual workarounds.

97. The JAC is allocated funding on a yearly basis. It would prefer a longer term arrangement where a budget was set following a spending review for the rest of that four or five year period. This would allow longer term planning and enhance autonomy and independence. As covered under question 16 the appropriateness of the JAC's dependency on the Ministry of Justice could be questioned.

The role of Parliament

Question 21: Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

98. The JAC considers that robust and transparent selection processes for appointments for the most senior judicial positions would negate any perceived need for confirmation hearings. It considers that the introduction of confirmation hearings could lead to accusations of politicisation of the judicial appointments process and undermine confidence in the selecting procedures.

99. The JAC would want to be sure that should confirmation hearings be introduced there was adequate assurance that these would not undermine confidence in JAC selections. The JAC would also question the impact on the cost and time of the end to end process.

100. The JAC Chairman is subject to a pre-appointment hearing by the Justice Committee. The JAC has found the process to run smoothly although it inevitably extends the appointment process. The JAC considers that this and the Annual Report laid before Parliament give sufficient assurance on the transparency of robust processes used to select judges at High Court level and below.

The role of the judiciary

Question 22: Do members of the judiciary have an appropriate role in the appointments process?

101. Members of the judiciary play a fundamental and essential role in the appointments process. The JAC considers their current role in the process

to be appropriate and proportionate, although it is aware of the increasing pressures on judicial time and is conscious of the need to use the time available to greatest effect.

102. Judges are used throughout the process: in devising, developing and marking qualifying tests; in setting role play scenarios; and in sitting on panels for sifts and interviews. The CRA requires that for all candidates likely to be considered for selection, the summary reports are sent to the Lord Chief Justice and to one other person who has held the post or has relevant experience. These 'statutory consultees' are asked to give a view on the suitability of each candidate so referred.

103. When they consider candidates to recommend for appointment, Commissioners take into account the responses from statutory consultees with all the other information about a candidate. They may decide not to follow the views expressed by the consultees but if this happens, when making recommendations to the Lord Chancellor, Commissioners must give reasons.

104. As set out by the CRA, five members of the Commission must be judges, including the Vice Chairman. The CRA also ensures that both lay and judicial commissioners are involved in the final selection decisions, with at least three Commissioners required, and at least one judicial and one lay member present.

105. Judges also play a role in providing references and, like many others, have a shared interest in encouraging suitable candidates, particularly those from under-represented groups, to consider becoming a judge. Many agree to speak at JAC outreach events or appear as 'case studies' on the website and in feature articles. The JAC finds this support very valuable.

Annexes

Annex A – Overview of selection process

Early Stages

The selection process typically starts when a vacancy request is received from the Lord Chancellor. The vacancy request contains the number and location of the posts, whether part-time working is available and the minimum eligibility requirements for appointment to the post laid down by the statute, as well as any additional criteria applied by the Lord Chancellor.

The JAC prepares an application form and accompanying information pack providing all that is required for a candidate. The JAC promotes the selection exercise through online and paper based media and through representative bodies and other organisations. It is then launched on the JAC website, inviting applications. Once an application is received, it is checked to see whether the candidate meets the eligibility requirements.

Shortlisting

Shortlisting of candidates can take two forms:

- Qualifying test – this consists of a written paper which tests a number of the qualities and abilities required for judicial office. Shortlisting is a competitive process, so the tests are designed to be challenging and include an element of time pressure. Qualifying tests do not have a pass mark; rather they identify those people with the highest scores to be invited to the selection day. Experienced judges generally prepare, mark and moderate qualifying tests to ensure appropriateness and consistency. Tests are anonymised when marked.

- Paper-based sift – a panel typically consisting of a panel chair, judicial member and independent member assesses the self assessment supplied by the candidate, and their references. The information is assessed against the qualities and abilities framework, and the candidates who best demonstrate these are invited to the next stage of the application process.

The JAC normally invites candidates to the selection day in a ratio of between two and three candidates per vacancy. The JAC uses qualifying tests for most selection exercises below the level of Senior Circuit Judge. However, processes are tailored to each post, so a paper-based sift may be used if the number of vacancies is small, or in other limited circumstances.

References

References are used by the JAC to gain a view of a candidate's past performance, experience, track record and suitability for appointment. The JAC uses two types of reference: JAC nominated and candidate nominated. JAC nominated referees are

tailored for each exercise and are listed within the information pack. Candidate nominated referees are expected to have direct knowledge of either the professional or voluntary work of the candidate.

Selection day

Shortlisted candidates are invited to a selection day, which may consist of an interview only (possibly including a presentation or situational questions), or an interview and role-play. These are conducted and assessed by a panel which usually consists of a panel chair, judicial member and independent member. The role-play, which is usually devised by judges or tribunal members, typically simulates a court or tribunal environment. This allows the candidate the opportunity to demonstrate that they have the required qualities and abilities, and that they can perform under pressure.

Panel assessment

The panel members consider all the information about each candidate (their performance in the interview and role play, the candidate's self assessment and references) and assess them against the qualities and abilities. The panel chair then completes a summary report, providing an overall panel assessment. This report forms part of the information presented to Commissioners when they make their recommendations.

Statutory Consultation

All candidates likely to be considered for recommendation are subject to statutory consultation.[87] Consequently, the panel chair's summary report is sent to the Lord Chief Justice and to one other person, nominated by him, who has held the post or has relevant experience.

When they consider candidates to recommend for appointment, Commissioners take into account the responses from statutory consultees with all the other information about a candidate. They may decide not to follow the views expressed by the consultees but if this happens, the Commission must give its reasons, when making recommendations to the Lord Chancellor.

Selection

Commissioners make the final decision on which candidate to recommend to the Lord Chancellor for appointment. In doing so, they consider those candidates that the selection panels have assessed as best meeting the requirements of the role, having been provided with information gathered on those individuals during the whole process.

[87] CRA 2005, Part 4, chapter 2, 88 (3)

Checks

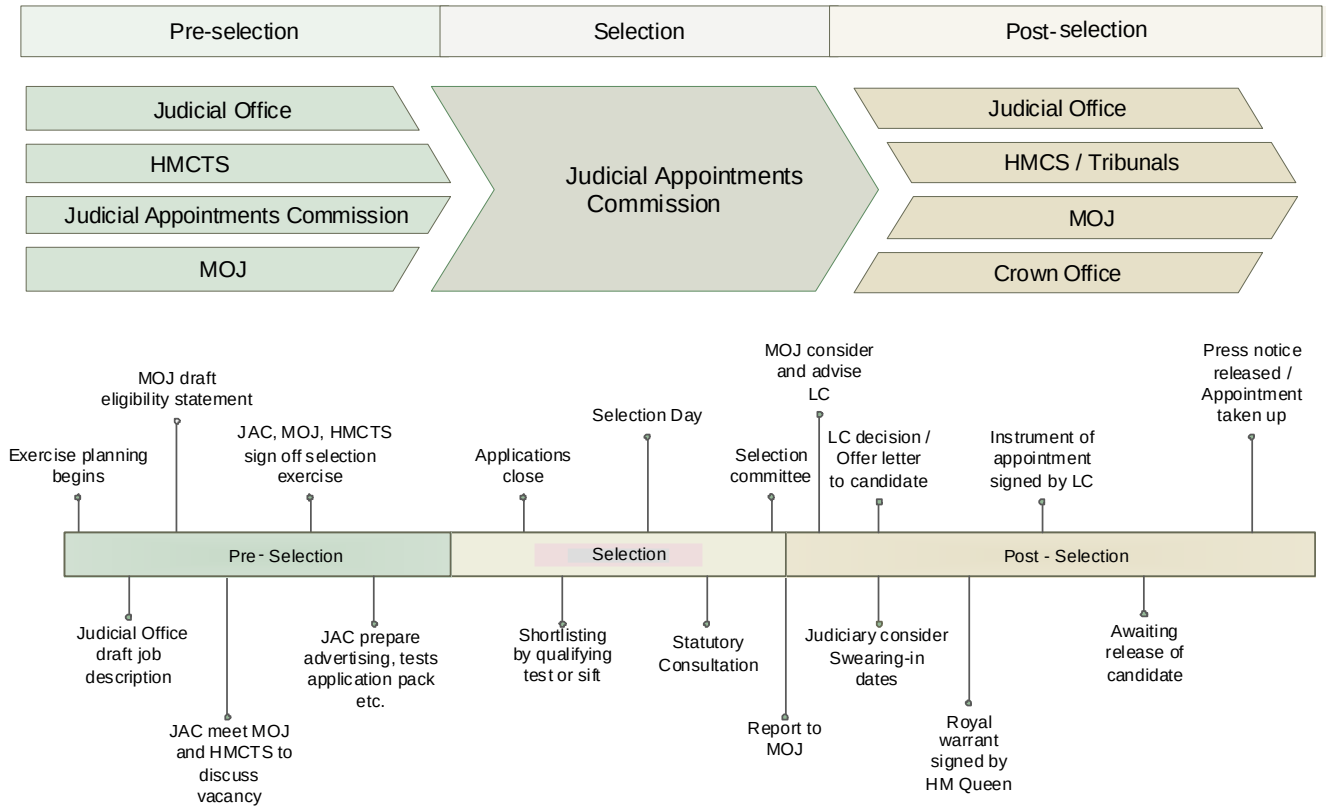
In accordance with the JAC's statutory duty, the good character of the candidates is also assessed. If the candidate is an existing judicial office holder, the Office for Judicial Complaints is asked to check whether there are complaints outstanding against them. For other candidates financial, criminal and professional background checks are carried out.

Quality Assurance

Quality assurance measures are applied throughout the selection process to ensure the proper procedures are applied and the highest standards are maintained. The quality checks include:

- assigning a Commissioner to each exercise, who works closely with the JAC selection exercise team to ensure standards are met;
- reviewing the progression of candidates through each stage of the process for any possible unfairness;
- observing interviews to share good practice across panels; and
- overseeing moderation in the marking of tests and the results of panel assessments to ensure consistency (because of the number of candidates, many exercises will use a number of test markers and more than one panel).

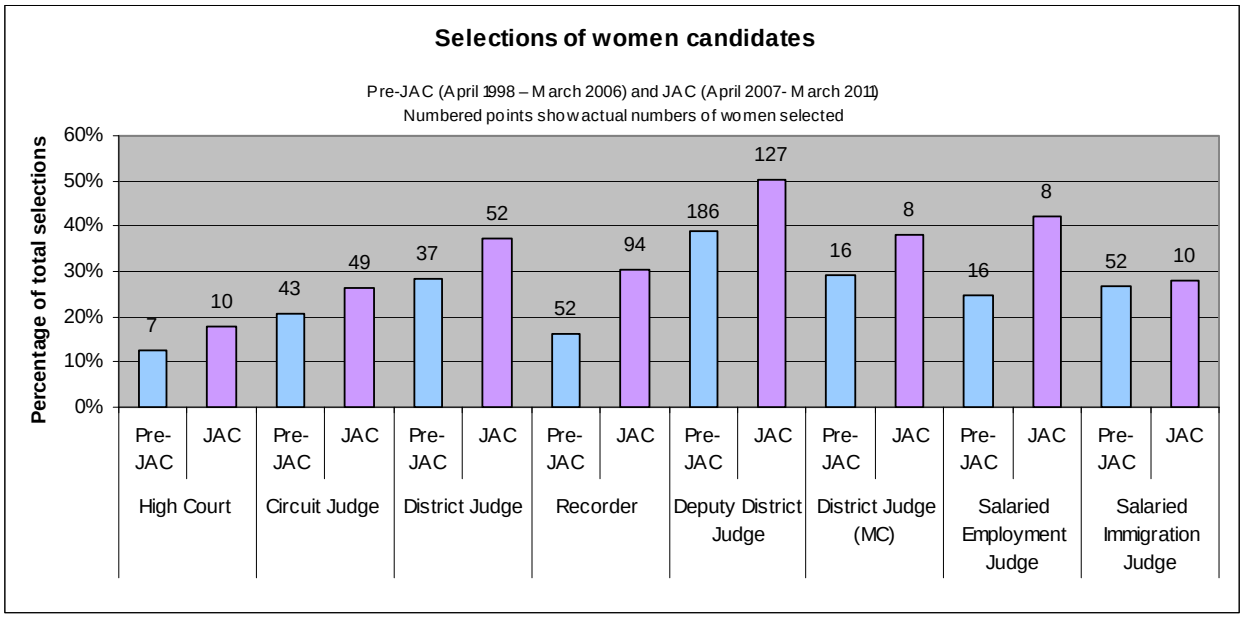
Annex B – The end to end appointments process

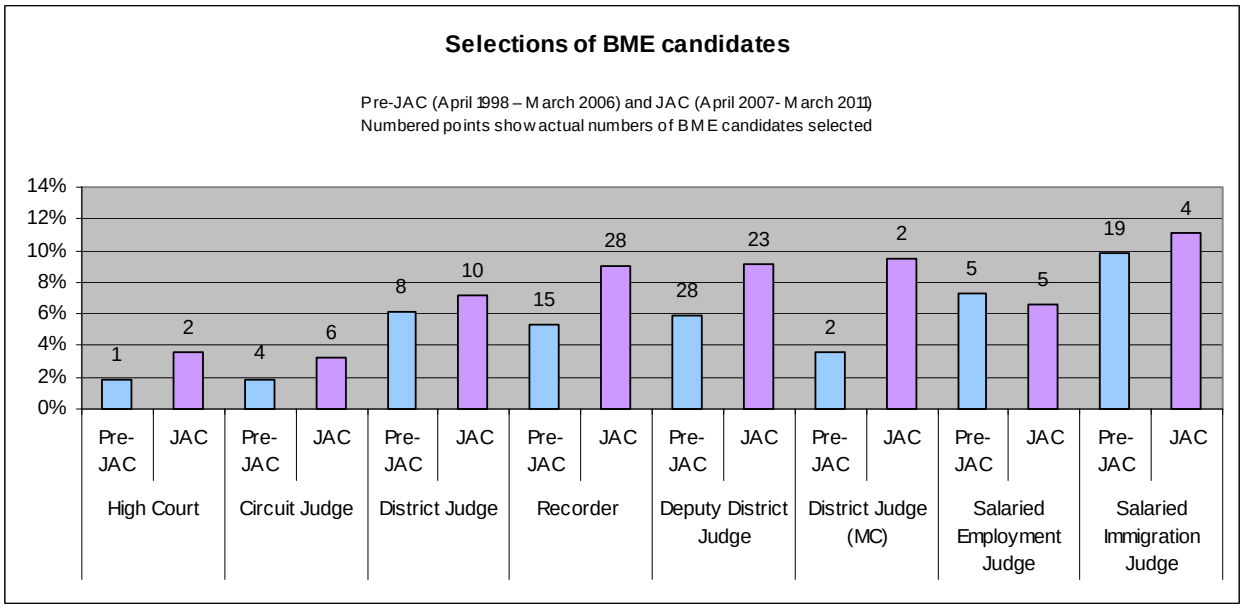


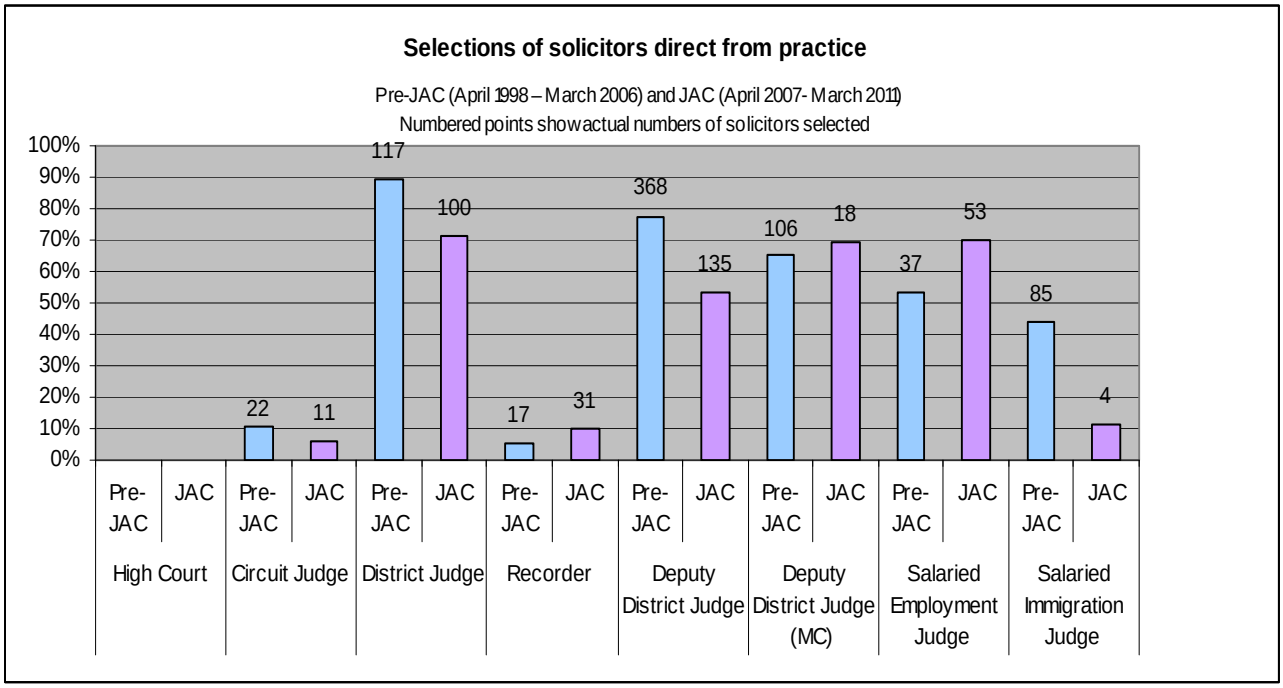
Annex C – Selections of women, BME and solicitor candidates, pre and post creation of JAC

Graphs show the percentage of women/BME/solicitor candidates selected as a proportion of the total selections made in that period.

The numbers above each bar show the actual number of selections made. The percentage of selections may rise while the actual number of selections made (shown above the bar) may be lower.







Note: Figures do not reflect selections of solicitors where they already held a salaried judicial post. For example, a solicitor who became a Circuit Judge and then a High Court Judge will be recorded in the High Court selection exercise statistics as a salaried judicial office holder, rather than as a solicitor and will not appear here.

Graph data taken from the statistical digests of judicial appointments of women, BME and solicitor candidates from 1998/99 to 2008/09 and JAC Official Statistics Bulletins, available on the JAC website. 2006/07 is excluded as it was a transitional year where exercises were run by JAC, but under former DCA processes.

Annex D – JAC responses to LC's recommendations in letter of 4 January to Baroness Jay

<table>
<tr><th></th><th>Lord Chancellor's immediate areas for consideration</th><th>JAC Position</th></tr>
<tr><td>1</td><td>Commissioners should no longer sign-off recommendations collectively as a committee of 15; they should be involved in selection exercises as strategic "sponsors".</td><td>This approach is being trialled. Once the exercises on which this approach is being trialled are completed the approach will be evaluated. If assessed to have been successful it will be rolled out more widely.</td></tr>
<tr><td>2</td><td>A review of staff grading, with a view to reducing the numbers and grades of the most senior staff</td><td>JAC staff numbers have continued to reduce and much of this has taken place at senior levels. By the end of September 2011 there will be half the number of senior civil servants than there were in 2009.

Overall staff levels have reduced as per the table below:

<table>
<tr><td></td><td>31 March 2010</td><td>31 March 2011</td><td>30 Sept 2011 (forecast)</td></tr>
<tr><td>SCS</td><td>5</td><td>4</td><td>3</td></tr>
<tr><td>Band A</td><td>18</td><td>14.4</td><td>14.4</td></tr>
<tr><td>Band B</td><td>19</td><td>14</td><td>14</td></tr>
<tr><td>Other staff</td><td>63</td><td>42.8</td><td>43.8</td></tr>
<tr><td>Total</td><td>105</td><td>75.2</td><td>75.2</td></tr>
</table>
</td></tr>
<tr><td>3</td><td>More flexible deployment of administrative staff, to respond more effectively to fluctuations in workload.</td><td>The reduction from six to three SCS since October 2009 has been made possible by reducing the number of Directorates from five to two. The recent organisational restructure at the end of March 2011, saw the bringing together of all selection exercise activity under one director, with support aspects under another.

The overall reduction in staff numbers resulted in a far more flexible workforce, skilled in different tasks.</td></tr>
<tr><td>4</td><td>Focus staff resourcing on selection activity and reduce</td><td>Staffing levels within the operational support functions have decreased by over a quarter in</td></tr>
</table>

	the amount of resource currently invested in other corporate functions.	the last year. An early release scheme was run at the beginning of 2011 and as staff have left the JAC it has been carefully assessed whether they should be replaced. The JAC continues to take this approach as staff leave the organisation.
5	Use of external providers to carry out functions, such as administration, transactional finance and organisation of test and selection days.	The JAC is supportive of the proposal to use external providers for certain sections of the process and are investigating options for this which it hopes to pilot later this year.
6	Developing a more flexible set of selection activity options, to better suit the scope of different types of competition, for example generic qualifying tests for "entry level" posts and appropriate use of role play assessments.	When agreeing the most appropriate selection process for each exercise the JAC considers the size and level of the post. Further options are under consideration as part of the JAC's People, Process and Performance programme.
7	Considering the use of technology to make the selection process more efficient, and to improve the candidate experience.	The JAC is keen to increase the use of technology in the selection process. Last year the JAC submitted a business case to MoJ for funding but it was refused. Where possible the use of IT in the process is being increased, for example, contacting candidates by email, and the JAC may be able to increase this with further use of outsourcing.
8	Considering contracting out some aspects of the selection process through an external provider.	As per question 5
9	Limiting the number of references taken, and ensuring that they are strictly evidence-based.	The JAC promotes evidence based references and works with the Law Society and the Judicial College to improve the quality of references. The number of references required is dependent on the post in question.
10	The JAC should undertake such data collection, sharing and evaluation as is necessary	This already occurs to a large extent. Diversity breakdowns of selection exercises on our website under the code of official

	to ensure the selection process is fair, transparent and based solely on merit.	statistics. These breakdowns show the progression of women, BME, solicitor and disabled candidates through the selection process, and compare them with the pool of those eligible to apply.
11	The stages of the process before and after the JAC's selection exercise should be simplified with a smaller role for the Ministry of Justice and the Judicial Office taking responsibility for the post-selection process.	The JAC would support simplification of these stages by the Ministry of Justice if it were to improve the experience of candidates.
12	The approach to outreach should be consolidated across the JAC, Judicial Office and Courts.	This has been discussed between the organisations and activity will be coordinated where possible. The JAC recently fed into the update of the Lord Chancellor's Panel on Judicial Diversity, published on 9 May 2011. The JAC also co-ordinates its outreach with the professions and has a programme of joint outreach events each year.

June 2011

Judicial Executive Board

General

1. The appointment process since 2005 has continued to produce appointments of high quality. Whatever changes may take place, it is critical that this remains so. It is fundamental to any process that, consistent with the constitutional principle of independence of the judiciary, it ensures the selection of the best qualified candidates. Among other things, that requires the appointment of individuals selected on merit from the widest pool of candidates, by an open, speedy, non-political process. To ensure that the pool is the 'widest' the process should be properly diverse and further steps taken in both the long and short term to encourage all eligible candidates to seek judicial appointment.

Questions 1 and 6

2. Substantially as a result of the detailed and prescriptive mechanisms put in place by the Constitutional Reform Act 2005 (the 2005 Act), the process has proved to be too slow. That needs to be changed. The principle established by the 2005 Act, that judicial appointments should be carried out by an independent body free from any political influence must be maintained. The work of the

appointments body should be subject to scrutiny by Parliament. The judiciary should be properly represented on the independent body and upon each selection panel. They should be properly consulted on selections, and a sensible balance needs to be maintained between proper consultation and representation and an over reliance on the views of a few.

Question 2

3. We have nothing to add to what has been said elsewhere.

Question 3

4. If public awareness and understanding of the appointment process needs improving, it could be achieved through, for instance, public legal education, outreach programmes in schools and universities, and the provision of information on the UK Supreme Court's (UKSC) and the Judiciary of England and Wales' (the JO) websites.

Questions 4 and 5

5. We do not believe that the changes in the appointment process have had any adverse impact on the independence of the judiciary.

6. For the reasons expressed in paragraphs 104-106 of the Report of the Advisory Panel on Judicial Diversity 2010 (the Neuberger Report), applicants for full-time appointment should, save in exceptional cases, only be selected from those who have experience of sitting in a judicial capacity[88]. All fee-paid judges should be sufficiently appraised, by an appraisal system 'owned and run by the judiciary', to enable the JAC to make an informed judgement on the suitability of any applicant for a full-time appointment[89]. The Neuberger Report explained how a universal appraisal system would be likely to assist in the creation of a more diverse judiciary[90]. That is something the judiciary has long proposed[91]. It is understood that despite the success of a pilot project, an appraisal system across the board has not been introduced on grounds of cost.

Question 7

7. Although there has been some improvement since 2005, the diversity of the judiciary as a whole has not widened sufficiently. Many factors have contributed to this position, which has been disappointing to the judiciary..

8. Judges should continue to be selected solely on merit. In order to promote greater diversity, we support the Neuberger Report's recommendation that "Social awareness, fairness and public service" be one of the stipulated aspects of merit[92] and that this could be expanded to include "an awareness and understanding…of diversity of the communities which the courts serve", (ii)

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88 Exceptions may need to apply to the recruitment of Specialist Recorders, who might not have the required sitting experience

89 Neuberger Report, recommendation 46.

90 Neuberger Report at [146] – [151].

91 Lord Judge CJ, Judicial Studies Board Lecture 2010 (http://www.judiciary.gov.uk/media/speeches/2010/jsb-2010-lecture).

92 The wording here is that appearing in the Neuberger report. The JAC has issued a consultation paper on the precise wording of this criterion.

"scrupulous commitment to fair treatment and an understanding of the differing needs of court users", and (iii) "commitment to public service, preferably demonstrated through experience". Although no doubt desirable, we do not think that the awareness and understanding needs to be "acquired by relevant experience."

9. We also endorse each of the particular recommendations, set out in the Neuberger Report, which seek to improve diversity. These include:

> (i) Greater efforts to encourage suitably qualified lawyers (in whatever branch of the profession) to apply to become judges;
>
> (ii) Training for members of selection panels at every level so that they may appreciate the disadvantages which those from less privileged or traditional backgrounds, or with greater external commitments, have had to overcome, thereby demonstrating their potential and determination;
>
> (iii) Applying the tie breaker provisions of section 159 of the Equality Act 2010; and
>
> (iv) An appraisal system to encourage and assess part-time judges and assist full-time judges to develop their careers.
>
> (v) Mentoring of judges;
>
> (vi) Encouragement of movement between the tribunal judiciary and the courts' judiciary, where appropriate.

Question 8

10. The 2005 Act simply transferred the previous jurisdiction exercised by the Judicial Committee of the House of Lords unaltered to a statutory Supreme Court. While the interpretative provisions in both the Human Rights Act 1998 and the European Communities Act 1972, together with other developments in domestic law, have required the judiciary to consider and rule on areas of social policy, this is by no means new. For a long time, the courts have had to make decisions which have social and administrative consequences.

Question 9

11. While an examination of appointment systems in other countries may be helpful, allowances must be made for the many differences which may exist between those countries and the UK. For instance, in the UK, the courts cannot declare laws to be unconstitutional, whereas in most other countries, the courts have that power. Further, the UK does not have a career judiciary as such. Appointments are generally made from established practitioners.

12. That said, an examination of systems in overseas jurisdictions might provide guidance on steps which could be taken to increase diversity without diluting the

quality or independence of the judiciary, and on steps which should be avoided[93]. Overseas experience suggests that the best means of ensuring non-political, merit-based and diverse appointments is through an independent commission. The key to transforming diversity[94] would appear to be a commission which itself is diverse.

Question 10

13. It is essential that the appointments process to the UKSC should command the confidence of the public, the legal profession and the judiciary. We deal below with the role of the Executive and Parliament.

14. There is a perception that the present process is not satisfactory. We do not disagree with the Neuberger Report[95] that the UKSC appointment process should not largely be in the hands of the UKSC itself; if it is excessively so the court's ability to develop and change is fettered. Equally, we do not disagree with its conclusion that neither the President of the UKSC (PSC) nor Deputy PSC should sit on a Supreme Court Selection Commission (SCSC) panel which is selecting their respective successors. The present process permits this.

15. We agree with the Neuberger Report's recommendation that[96]: 'The selection process to the Supreme Court for the United Kingdom should be reviewed to reduce the number of serving Justices involved and to ensure there is always a gender and, wherever possible, an ethnic mix on the selection panel. This review process should involve consultation with the Lord Chief Justices of England & Wales and Northern Ireland and the Lord President of the Court of Session.'

16. Given the importance of the appointments, the process of consultation should be thorough and extend significantly beyond the existing members of the UKSC. All members of the selection panel should receive the results of the consultation in full. We consider that the Lord Chancellor (LC) should also be part of the consultation process.

17. It is acknowledged that Justices of the UKSC (SCJ) should be men and women with the ability to deal with broad issues of public importance, whether or not they have the specialist knowledge or experience of the legal issues likely to arise. There should also be (if it does not already exist) some analysis of the various areas of legal knowledge, qualities and experience which the UKSC needs or projects it will need. The analysis should be regularly reviewed.

18. The measures to increase diversity endorsed in the answer to Question 7 above should be applied to the UKSC.

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93 Reference could again be made to the United States, Canada, and South Africa, amongst others.
94 See Neuberger Report, recommendation 31.
95 *Ibid* recommendation 41 – 43.
96 Recommendation 43.

19. Given the UKSC's role and constitution, it ought to work as closely as possible with the senior judiciary of each jurisdiction on as many matters of judicial administration (particularly in respect of appointments) as possible.

Question 11

20. The process for consulting the senior judiciary needs to be changed, as set out in Question 10, and: i) as recommended by the Neuberger Report, the judiciary of the relevant constituent jurisdiction needs to be directly represented on the SCSC; and ii) all judicial consultation should be seen in a wider context.

21. We have no experience of the process of consultation with devolved administrations. We consider that in cases where an SCJ is to be appointed because of expertise in the law of a particular jurisdiction, the selecting body of that jurisdiction ought to be represented on the SCSC.

Question 12

22. There is no legitimate justification for differential retirement ages for members of the full-time judiciary on the basis of their first appointment, whether that is to the High Court, Court of Appeal (CA), UKSC, or otherwise. If the retirement age is to be increased it should be increased generally.

Questions 13 and 14

23. See our answers to questions 1 and 5, above.

24. In respect of widening diversity, the LC should be responsible for ensuring that the system of outreach is effective. The JAC's sole focus should be running selection competitions.

Question 15

25. The JAC should have fewer members. In any event, it is unnecessary to have all members involved in every selection process.

Question 16

26. We are generally supportive of the LC's proposals set out in his letter of 4 January 2011. The proposals which do not require legislation should be adopted.

27. The LC should only be involved at the selection stage regarding Lord Chief Justice, Heads of Division, CA, and High Court, selections. The Prime Minister should have no role. The PSC should not be on any panel which selects judges for England and Wales, any more than he is involved in the selection of judges for Scotland or Northern Ireland. The panel selecting Heads of Division should be chaired by the LCJ. The panel selecting the LCJ should be chaired by the most senior Head of Division who is not a candidate for the position.

28. As to (e) and (f), see the answers to questions 15 and 14 respectively; as to (g), the Office of Judicial Complaints should be maintained. Its processes should be streamlined and improved (Its processes are currently under review.).

Question 17

29. See paragraph 35.

Question 18

30. We offer no comment on Northern Ireland's appointment process.

Question 19[97] **and 20**

31. The LC as Secretary of State for Justice has a real and legitimate interest in the most senior appointments, i.e., to the High Court, the CA, Heads of Division and UKSC. Insofar as Circuit and District Bench appointments are concerned, we doubt that the LC would, in most cases, be able to add any specific value to the appointment process, other than to assure himself that the process, in general terms, runs satisfactorily.

32. In respect of the most senior appointments, we doubt that the LC's interest is properly reflected in the present processes. We suggest that the LC: i) need play no part in appointments up to and including the Circuit Bench and ii) should play a more effective role in the selection process for the more senior appointments (perhaps by being consulted at an earlier stage). This should be the matter of detailed discussion.

33. We cannot comment on Question 20.

Question 21

34. Apart from the proper role for the LC, who is required by the 2005 Act and by oath to uphold the independence of the judiciary, in the ways we have described, politicians should not be involved in the appointment of judges. The introduction of Parliamentary confirmation hearings carries with it a real risk that the appointment process will become politicised. That would be contrary to the constitutional principle of the independence of the judiciary and undermine public confidence in the judiciary.

35. Rather than introducing confirmation hearing, Parliament could develop an enhanced scrutiny role in relation to the annual reports of the JAC and JACO laid before it.

Question 22

36. The exact degree and nature of judicial participation depends on the nature and level of appointment. It is however an essential feature of the appointment process that there must be direct judicial involvement. In order to maximise the benefit of such participation, a diverse, appropriately trained, range of judges should be involved.

July 2011

[97] Also see the answers to Questions 10 and 16.

Legal Services Board

Introduction

1. The Legal Services Board is the independent body responsible for overseeing the regulation of lawyers in England and Wales. Our goal is to reform and modernise the legal services market by putting the public and consumer interests at the heart of the system. The Board is independent of Government and of the legal profession. It oversees ten separate bodies, the Approved Regulators, which themselves regulate the circa 120,000 lawyers practising throughout the jurisdiction. The Board also oversees the Office for Legal Complaints, which runs the newly established Legal Ombudsman scheme.

2. Our clear focus is on delivering the eight regulatory objectives, set out in the Legal Services Act 2007. These are:
    - protecting and promoting the public interest
    - supporting the constitutional principle of the rule of law
    - improving access to justice
    - protecting and promoting the interests of consumers
    - promoting competition in the provision of services in the legal sector
    - encouraging an independent, strong, diverse and effective legal profession
    - increasing public understanding of citizen's legal rights and duties
    - promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.

3. Given our statutory role as an independent regulator, we do not consider it appropriate to comment on the operation of the judicial appointments system generally. This submission focuses solely on the theme of increasing the diversity of the judiciary (question 7 in the call for evidence), where we consider there is an important and legitimate role for regulators to play in contributing to the achievement of a more diverse judiciary.

The importance of a diverse legal profession

4. Both the legal profession and the judiciary should reflect the diversity of the society they serve. In July 2010 we published a document outlining in more detail what we consider the regulatory objectives mean in practice. In relation to diversity, we set out our view that:

> *"a diverse legal profession is one that reflects and is representative of the full spectrum of the population it serves so as to harness the broadest possible range of talent in the meeting of the regulatory objectives. We consider that for public interest reasons and good business sense as much*

as for meeting this regulatory objective that the legal industry should reflect the population it serves. At entry, retention and progression we will support approved regulators in ensuring that there are no artificial barriers or discriminatory hurdles to legal careers caused by regulation. We will promote equality and diversity through our regulatory framework and we expect approved regulators to do the same."

5. When considering diversity, we include the protected characteristics for the purposes of the new public sector equality duty under the Equality Act 2010:
    - age
    - disability
    - gender reassignment
    - pregnancy and maternity
    - race
    - religion or belief
    - sex
    - sexual orientation

6. We also consider social mobility to be a high priority, and an additional dimension of diversity. There is extensive research to suggest that socio-economic background acts as a barrier to entry and progression in the legal profession.

7. There is an important relationship between the diversity of the judiciary and the diversity of the pool of those eligible for appointment. The latter is related to the diversity of the legal profession at all levels. This was recognised by the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, which made a specific recommendation that the Bar Council, Law Society and ILEX do further work to improve the diversity profile of members of the professions who are suitable for judicial appointment at all levels.

<u>The evidence</u>

8. We have commissioned original qualitative research by a team of leading academics entitled *Diversity in the Legal Profession in England and Wales: a qualitative study of barriers and individual choices.*[98]

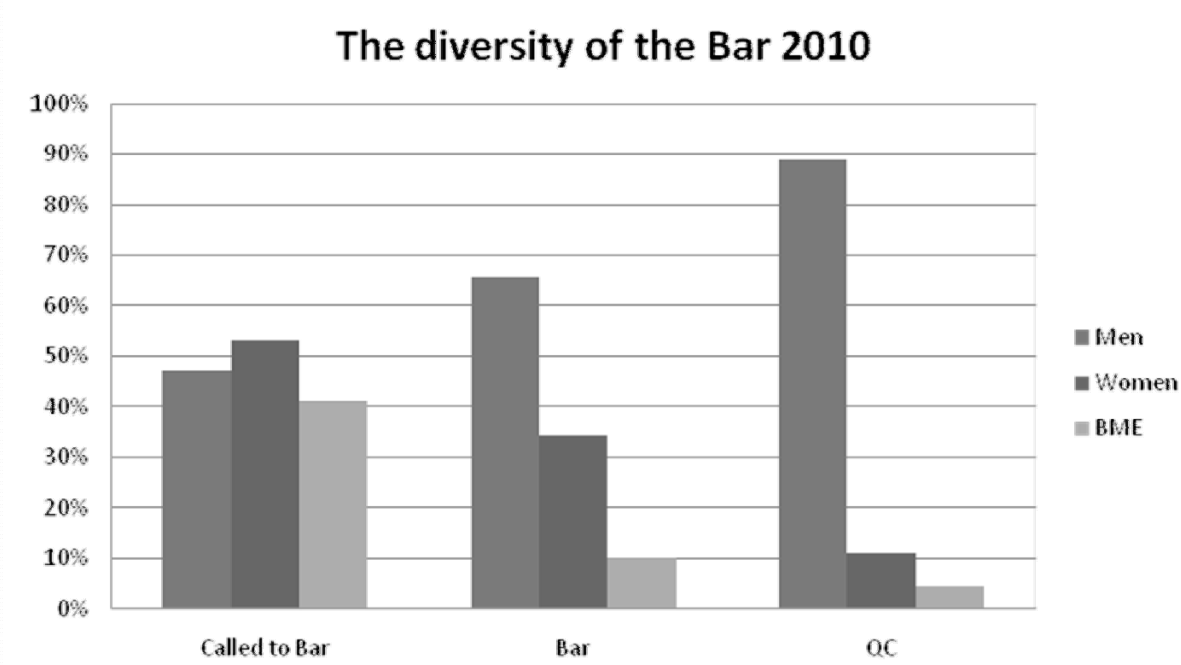
9. The main themes emerging from the research include:
    - the fragmentation of the profession and consequent nuanced nature of respondents' experiences

[98] Available on the Legal Services Board website: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/Board_diversity_in_the_legal_profession_final.pdf

- the legacy of the profession's white, male elitist origins and the significance of cultural stereotypes
- the importance for career success of personal relations/ bonding and socialising
- the long hours' culture and emphasis on commitment (rarely defined)
- the lack of transparency of some key procedures and practices in some organisations.

10. There is reasonably comprehensive aggregate data about the gender and ethnicity profiles of the solicitors and barristers professions. This suggests that significant progress has been made with increasing the diversity profile of new entrants to the profession. However, it is much less clear that progress is being made on retention and progression. The charts below summarise the latest data, and illustrate the relative lack of diversity at the more senior levels of the profession.

Source: The Law Society (2011) Trends in the solicitors' profession: annual statistical report 2010



Source: Bar Council (2011) Bar Barometer: Trends in the Profile of the Bar

11. There is insufficient data available to enable us to make a reliable assessment about other important aspects of diversity – including disability, sexual orientation, religion or belief, pregnancy and maternity, gender reassignment and socio-economic background. Our preliminary assessment of past data and existing research studies shows that the picture has been reasonably stable over several years. While there has been some trickle up effect this is not occurring at a pace commensurate with the increased diversity on entry to the profession[99]. An early priority is therefore establishing a more comprehensive evidence base to inform policy interventions.

<u>What we are doing to increase diversity and social mobility in the legal workforce</u>

12. While we recognise the significant efforts being made by the professional bodies to encourage greater diversity and social mobility in the legal workforce, we also consider that regulators have an important role to play in driving action. Voluntary action by interest groups and providers can be effective, but regulation can help ensure that the onus is put on individual firms and chambers to take action. This action could be about removing structural or cultural barriers for particular groups, encouraging applications from particular groups, or putting in place specific schemes to support particular groups of staff and develop their potential.

13. We do not suggest that the principle of appointment on merit should be compromised, either within the legal profession or the judiciary. However, it may be necessary for those recruiting and promoting individuals to be more

[99] For example see "Old Boys' Networks, Family Connections and the English Legal Profession", Blackwell, M, 2011

conscious of possible biases in how merit is defined and assessed and to recognise that different approaches can be equally effective.

14. We are challenging the approved regulators that we oversee to set high expectations of those who they regulate. We will act decisively where necessary if we believe that statutory duties are not being properly addressed.

15. The Board has established the following immediate priorities that it expects approved regulators to address during 2011/12 in order to meet the regulatory objective about encouraging diversity:
    - gathering an evidence base about the composition of the workforce to inform targeted policy responses
    - evaluating the effectiveness and impact of existing diversity initiatives
    - promoting transparency about workforce diversity at entity level as an incentive on owners/managers to take action (both in terms of "peer pressure" and better information for corporate and individual consumers and potential employees, which they can use to inform their choice of law firm).

16. Transparency about diversity is important because it makes firms and chambers accountable for their decisions. It is within the power of the managers of firms and chambers to address the issues about retention and progression – they recruit, promote and retain the workforce and establish the culture of the profession. Greater transparency will act as a strong incentive on firms and chambers to prioritise work to encourage diversity and social mobility. It is not the whole answer to the diversity challenge, but it will establish a strong foundation for future policy interventions, which should be targeted based on the available evidence. We expect to publish further details in the course of July and will share these with the Committee.

17. In addition to the work we are doing specifically on the diversity of the legal workforce, we are also seeking to embed the principles of equality and diversity across the legal services regulatory framework. For example, we are working with our Approved Regulators to open up more entry routes into the profession, including non-graduate routes, which will help open the profession to the widest possible pool of talent. We are involved with the work to respond to the report of the Panel on Fair Access to the Professions.

<u>Conclusion</u>

18. We strongly support the principle that diversity is a legitimate factor to bear in mind as part of the appointments process.

19. We are currently working to strengthen our links with the Judicial Appointments Commission, to identify how regulators can contribute more effectively to making progress on increasing diversity alongside the work being done by professional bodies and representative groups. Our proposals for gathering a more comprehensive evidence base and promoting transparency by individual firms and chambers are the first step in this process.

29 June 2011

Legal Services Committee of the Bar Council of England and Wales

Introduction

1. This is the response of the Legal Services Committee of the Bar Council ("LSC") to the inquiry by the House of Lords Constitution Committee ("the Committee") into the judicial appointments process. The LSC is one of a number of representative committees of the Bar Council which is the governing body for the Bar of England and Wales. It represents, and through the independent Bar Standards Board, regulates approximately 15,000 barristers (self-employed as well as employed). In assembling this response to the House of Lords Constitution Committee, which is made on behalf of the Bar Council, the LSC has consulted with Specialist Bar Associations (SBAs) and the Circuits. It remains the case that the majority of judicial appointments are filled by members of the Bar who have a great deal of experience and expertise to contribute to the judicial process. The Bar Council would be pleased to enlarge on its observations in this memorandum in giving oral evidence to the committee, if invited to do so.

The Committee's Purpose

2. In announcing its decision to begin an inquiry into the judicial appointments process, on 13 May 2011, the House of Lords Constitution Committee, via its press release made the following observations:

There appears to be a consensus that all judicial appointments should be made on merit and that the process should respect the constitutional principle of the independence of the judiciary. Beyond this, there is a range of questions including achieving greater diversity of those selected, ensuring appropriate accountability and transparency, the efficiency and effectiveness of the appointments systems, and the respective roles of the independent selection commissions, ministers, the judiciary and Parliament.

Wider constitutional developments, particularly the enactment of the Human Rights Act 1998, have significantly enhanced the role of the judiciary. These developments, in turn, have affected the public's perceptions of and confidence in the judicial appointments process. In this context, there is a need to ensure that the judicial appointments system is, and is seen to be, a fair, independent and open process.

3. The committee's decision to inquire into the process by which judges are appointed suggests that the concern expressed consistently by the Bar, namely that the current system is not working effectively, is belatedly being taken seriously.

4. It is essential that both the Circuit and Higher Judiciary remain robust and independent of the Executive and Legislature. In order to achieve this, the right candidates must be selected, consistently. Practical legal ability, of a high standard, derived from extensive experience in litigation and advisory work, taken together with clarity of thought and expression, and the ability to focus on the essentials, provided, historically, the unspoken criteria for selection. These virtues, underpinned by experience in the context of self reliance in private practice, provided some of the finest jurists in the common law world. Since Judges have fundamentally important constitutional and practical powers to restrain and inhibit Executive abuses or Governmental excesses, particularly in the field of Public and Administrative law, it is vital that only the best candidates are appointed, who can act fearlessly in the face of pressure and ill-informed criticism. The risk of conflict with the Executive arises (although in a more limited number of cases) within the Criminal law, which is predominantly the preserve of the Circuit Bench – but there are occasions when cases must be stayed and even cases where law enforcement authorities have protected the Executive from scrutiny (q.v. The Scott Inquiry). Given that the liberty of the subject is often the issue at stake, judicial appointees must be of the highest calibre. In the context of Family Law, it is similarly difficult to overstate the degree of influence and importance that Judges exercise over peoples' lives.

5. The job of a Judge is, in consequence, often onerous and exhausting. The status which Judges once enjoyed, expressed with his notorious confidence by Lord Hewart, the Lord Chief Justice in 1936, "His Majesty's judges are satisfied with the almost universal admiration in which they are held," has long been a thing of the past. The modern judiciary, particularly in the field of criminal and public law, face routine attacks in the media, which are almost unprecedented in their degree of ignorance and vituperation. Political hostility is another emerging threat. If one, in spite of these hazards, is minded to apply for judicial office, it should be axiomatic that the application process is clear, dealt with fairly and efficiently and widely advertised among all members of the profession. It follows that any competition should likewise be clear, properly resourced, unbiased, and objectively and consistently assessed. If these principles are followed, the results of these competitions should be intelligible, open to scrutiny by all applicants and should be uncontroversial. There is however considerable disquiet expressed about the current system, caused by a combination of anomalous results and "illustrious failures." The absence of feedback is another widespread criticism from those candidates who were unsuccessful.

6. The JAC would seem to maintain that there is no realistic alternative to an initial written sift. The assessment of more than a thousand candidates via interview would be impossible. A paper sift, comparing the self-assessments and references of more than a thousand candidates would likewise cause delay and arbitrary conclusions. It may be that a near stalemate has been reached – not over the inevitability of written testing – but how to address and resolve the continuing problems. The failure to obtain a Recordership is a bar to a judicial career before it

has even begun and any failure for a permanent judicial post is similarly grave for the unsuccessful applicant. It is against this background that the LSC welcomes the Committee's proposal to take evidence and examine the process.

7. The committee has posed 22 questions for consideration. The LSC will answer those upon which it can make a sensible contribution. In drafting its response, the LSC gratefully acknowledges the contribution of individual members of the Bar. Moreover, appended to this response are papers the LSC has received from Specialist Bar Associations (SBAs), that were of particular assistance. The Committee is invited to study each one and call for further evidence from the SBAs, should they consider it desirable or necessary.

The Questions Posed

8. In the section entitled "overview" the Committee asks for evidence upon the following:

1. How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

9. There is no desire to return to the past. The "tap on the shoulder" of legend, the impenetrable process of "soundings" had to be replaced. The Bar accepts that a short-listing procedure had to be devised, which was uniform and fair.

10. It is now apparent, however, that some outstanding candidates – a figure too great to be merely random – are not passing the written entry tests, the first hurdle in the selection process to become Circuit Judges or Recorders[100]. Their reputations are impeccable: thus, exceptional candidates, held in high esteem by their peers, with the relevant practical and legal experience have not been allowed to proceed to the next stage. This may have very profound repercussions if it dissuades them from re-applying and prevents others (aware of their colleagues' failures) from attempting the tests in the first place.

11. It may be that the process is the least unsatisfactory system of selection yet devised but it continues to cause substantial unease when apparently outstanding candidates are rejected. The appointment process must, nevertheless, remain independent and inviolable from Executive or Legislative interference. The evolving constitutional role and position of the judiciary is not to be used as a pretext for any incursion upon judicial independence. Parliament established the JAC in 2006 and ought to respect it. This does not preclude a select committee from investigating the

[100] The following is indicative of the nature of the problem "[X and Y] are practitioners of the highest quality both in terms of their ability but also their standing and reputation at the Bar. Were one to try to select the best criminal barristers at their call each would probably be ranked as the best. They are universally well thought of, formidable advocates and noted for their good judgement and sense of fairness." Neither passed the initial sift.

efficiency of the Commission or its progress since it began to select and recommend candidates to the Lord Chancellor for appointment.

2. Is the appointments process sufficiently transparent and accountable?

12. Response: No. The initial written testing, the short-listing of candidates via a written test is not as transparent or intelligible as the JAC might suggest. One candidate (who was successful) stated that the rejection of others who competed with her (and were evidently better qualified) caused her considerable concern. An unsuccessful candidate of great distinction compared his answers with those of a successful colleague and neither could understand what had distinguished their results. There is no transparency or adequate feedback.

13. The test is intended to allow all to compete equally and to neutralise the advantage many male white middle class candidates enjoy by way of references and access to Judges. One contributor stated that:

> *Little weight [is given] to either (a) relevant experience in the courts as an advocate, and (b) the views of judges and other referees. It does this because the pool of people who have (a) and can obtain (b) is largely limited to advocates who regularly practise in the courts.*

Another observed that,

> *to see so many talented individuals fail even to achieve an interview where the JAC would have an opportunity to consider references shows that something is badly wrong with the present system.*

A written first stage, as the SOLE basis for the first sift, does not command popular support at the Criminal Bar. One contributor made the case for modification as follows:

> *The process of selection is based on an examination and no matter how able the applicant if they fail to pass in the top quota they do not get interviewed. This is unfair because the examination does not test on actual legal and procedural knowledge. In no other walks of life does actual experience and the ability to do the job count for almost nothing. Could you imagine the public concern if Doctors were appointed on the basis of what they are assessed as being capable of achieving with no real regard to their actual previous work.*

14. There are also significant problems with lack of feedback – especially during the initial qualifying test (initial written sift). A candidate must be entitled to see his paper and (if not) at least discover where he was ranked.

3. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

15. Response: There is a place for the constitution to be taught as part of the core curriculum. Educational visits to colleges and placements for students all increase awareness. Public Information broadcasting is another option. Most end users are not so much concerned with how their judge was appointed but in receiving a fair hearing. In appreciating his fairness, conscientiousness, courtesy and willingness to listen, a litigant or defendant might even feel (in defeat) that they could not have expected anything more.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

16. Response: the Bar supported the creation of the JAC to provide demonstrable independence from the Executive in the selection process of judges. The selection process has since aroused concern that the "systemization" of appointments might exclude alpha candidates who are exceptional. The robust, independent and liberal minded practitioner may not "fit." These "individualists" (once appointed) have often been an inspiring influence and have demonstrated, in its best traditions, the independence of the judiciary.

5. Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

17. Response: it is too early to say. What criteria do you employ – the number of cases disposed of in a week or the qualitative assessment of the parties involved? One feature continues to cause concern. Philosophically, the JAC believes that candidates of real calibre have transferrable skills. How will this approach affect the quality of the Judiciary long term? This is, perhaps, nothing more than a noble fiction which promotes amateurism: the Commercial Court, historically, has contributed a considerable amount to the Balance of Payments as a result of the invisible earnings it commands. Will it maintain its pre-eminence as the best forum in which to litigate international disputes if commercial specialists are deterred from applying? The Chancery Division and Family Division all have formidable technical demands so far as practice, procedure and case law. The JAC's strongly held belief that skills are portable and subject divisions can be surmounted by people of the quality appointed may not be correct. An evidence-based assessment will be needed but only five years have passed.

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

18. Response: Candidates have been left "in limbo" and one candidate maintains that he wasted 10 months of his life by applying for a post, which was (in effect) withdrawn, during the competition.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

19. Response: the LSC believes that greater diversity among the judiciary is a legitimate policy objective and in the public interest, and this should be reflected in the appointments process. That said, we believe strongly that judicial appointments should be based on merit. Experience has shown that it is taking longer to appoint candidates of ability from diverse backgrounds than the Bar (and the JAC) had hoped. We do not under-estimate the challenges involved but more effort needs to be made, by the JAC working with the Bar Council and others, to ensure that appropriately qualified candidates are not deterred from offering themselves for appointment. We are ready, able and willing to assist with that process.

8. 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?

20. Response: This must refer to the qualification or the erosion of the absolute legislative authority of Parliament since 1972. The risk of conflict between the judiciary and the Executive and Legislature is not without precedent but the opportunities for conflict have multiplied, critics of the HRA 1998 maintain. The HRA 1998 has given the courts a say in determining the compatibility of legislation with the convention. This was a constitutional achievement of great moment, which has robustly promoted the Rule of Law (e.g. quashing indefinite detention of foreign nationals on security grounds). The contrast with the U.S experience is enlightening.

21. It is vitally important that the quality of the judiciary is maintained, in view of the criticisms of the HRA 1998 and threats of its repeal – the judiciary have not arrogated powers that were not theirs to exercise but are merely doing what Parliament intended. The example of Lord Bingham, a commercial specialist who was, at one time, an outstanding Lord Chief before he crowned his career as Senior Lord of Appeal in Ordinary is paradigmatic. His fidelity to the rule of law and to judicial independence enabled fundamental rights to be preserved in the face of profound threats to basic liberties. His humanizing influence puts him among the most outstanding and influential judges of the last 100 years.

9. Are there lessons that could be learnt from the appointments system in other jurisdictions?

22. Response: Judges ought to aim to be autonomous and not to be popular (e.g. contrast the US system of electioneering). Nor should the US experience be followed re Legislature or Executive scrutiny (e.g. Senate Inquiries into individual appointments to the Supreme Court). The suggestion in question 21 is wholly incompatible with an independent Judiciary.

Comment on Questions 1-9

23. The Committee, in drafting these questions, was perhaps aware of the widely publicised views expressed by Sir Stephen Sedley when reviewing Vernon Bogdanor's "New British Constitution" in October 2009:

"The requirement to apply for all judicial posts is no doubt an advance on the tap on the shoulder from a Lord Chancellor who has been taking private soundings from senior judges – itself an advance on Lord Salisbury's belief (cited by Bogdanor) that an unwritten law dictated 'that party claims should always weigh very heavily in the disposal of the highest legal appointments'. But the self-promotion that applications involve does not necessarily reveal the best candidates. Nor has it done much so far to redress the imbalances on the bench of gender and ethnicity. This is not because the appointments commission has been less than conscientious in its efforts. It is because the legal profession itself does not give women and minorities the same chance to shine as their white male counterparts. The real stars probably shine anyway; but the critical difference is with the average – sometimes very average – white male practitioner who can still reach the upper tranche of the practising profession. You cannot constitutionalise this problem: it has legal aspects but it reaches deeper than any law.

There is a further series of problems with recorderships – part-time judicial appointments. These are a requisite first step on the staircase to the bench, for which applications can now outnumber vacancies by a factor of 20 or more. The new system, recognising the hazards of self-promotion, moved from shortlisting on the basis of references, with its capacity for idiosyncrasy, to a tickbox system which had the effect of excluding good candidates with atypical CVs, and from there to shortlisting by examination. This too is proving problematic: barristers who are at or close to the peak of an intellectually exacting profession, and whom the judges they appear before know to be outstandingly able, are failing the examinations which allow them to be shortlisted for interview as potential recorders. The commission is yet again reviewing the system, for it would be ironic if a practice which, though indefensible in principle, delivered at least some of the goods had been replaced by a process which rewarded mediocrity at the expense of talent."

24. The Bar recognises the problem encapsulated in the above quotation and has a genuine desire and positive commitment to promote equality of access to and advancement within the profession for all. As a profession, its membership embraces all sections of society, irrespective of race, gender, or beliefs. A merit-based selection procedure, resulting in a more diverse and representative Judiciary, selected from the best and most suitable applicants should be the objective of the process. The LSC could not support those who might countenance positive discrimination for BME candidates or a return to "the tap on the shoulder" for those "traditional" candidates perceived to be outstanding. The LSC accepts that some

method of testing is inevitable but shares the concerns expressed by former Lord Justice Sedley.

25. The current system involves an initial written selection sift. These are qualifying tests, which are currently used for almost all large exercises for appointments below Senior Circuit Judge level. They are exclusively deployed as a short-listing tool. There is no fixed pass-mark. A decision is made about the maximum number of candidates that can be assessed in detail, generally between 2.5 and 3 times the number of vacancies. Subject to an intensive review of candidates close to the margin, the appropriate number of candidates is selected for detailed assessment in merit order.

26. Most concerns expressed are centred upon the random and apparently arbitrary results (as perceived) within the initial written selection sift. One QC (in response to a survey conducted in 2010) expressed it succinctly:

> *"The main [criticism], which has some force, is that the test is excluding a number of outstanding candidates who by the consensus of the profession would make outstanding judges. The number is small, but the individuals involved are prominent practitioners, and this is a source of concern."*

27. The dilemma which confronts the JAC, if they are to secure the confidence of the profession and future applicants, is to find a means to regularise these anomalies and apparently aberrant results whilst continuing to ensure that BME candidates of promise without as much experience or exposure to the highest courts (for the purposes of references) remain in contention at the later stages of selection. If the greatest degree of weight in initial sifting were given to those of extensive experience and in possession of the finest references, it would be inevitable that the reservoir of candidates would be unduly restricted at the expense of highly competent practitioners from BME backgrounds. This would be profoundly unsatisfactory.

28. If, however, genuinely outstanding candidates, who command the universal respect of their peers, are being and continue to be rejected, the consequences will be similarly grave: the process will lose the confidence of the profession; potentially outstanding Judges will not be selected or will choose not to enter such competitions. As one contributor stated to the LSC last year:

> *If able candidates are not appointed, and some of the best people are deterred from applying by the vagaries of the system, that has serious implications for the administration of justice.*

29. Other responses (during that survey) were on the same lines:

> *The problem with a system that produces astonishing results is that it puts off good candidates from applying. Able candidates who have been unsuccessful will be unwilling to subject themselves to something that is so unpredictable.*

30. It is now apparent, one year on, that good candidates continue to fail and even some outstanding candidates have been rejected. As one SBA noted:

> *The experience of ALBA[101] is that there is clear evidence that a number of public law QCs who would have been expected to be very strong candidates for posts have been failing the exams and therefore their application forms, including relevant experience, academic ability and references, are never even considered…. there is a very strong impression that a number of first rate candidates are failing at the first hurdle.*

31. The problem may be insuperable. The JAC has to, indeed it must, fit the test to a very diverse pool of candidates, of quite different professional and personal backgrounds. A uniform selection procedure is a prerequisite, and the JAC might claim that it cannot tailor the applications procedure to every constituency. This may put older candidates at a disadvantage, if (for example) their examination technique is non-existent or their breadth of knowledge and experience makes them over scrupulous in outlining competing arguments rather than being concise. One practitioner suggested, "The current judicial examination selection system will only produce the theoretical excelling younger candidate or one tutored by those companies advertising their services of getting you through the process and not the genuinely experienced."

32. If the elimination of these outstanding candidates was due to any systemic feature of the tests deployed, it would be a matter of very considerable concern. Many of those rejected were or are now, QCs or Treasury Counsel, highly regarded by their peers and the senior judiciary. Are the suggestions that the failures are candidate-related justified? It has been suggested that poor exam-technique or mismanagement of the time allocation explains most of these surprising anecdotal failures. If bad planning of the use of the allocated time, and insufficient attention to the distribution of marks between questions, truly represents the reasons for the rejection of outstanding candidates then that would bring a degree of comfort to future candidates. It might possibly dispel concerns over systemic flaws within the initial written sift, which continue to gather momentum. The LSC therefore suggests that the Committee should scrutinise the papers of those unsuccessful candidates (having obtained the appropriate consents).The LSC contends that provided their anonymity is respected, those willing to have their efforts examined, may enable the Committee to resolve this vexed issue of whether the written qualifying test is inherently flawed by examining the best evidence.

33. There is also the linked question of consistency of marking. Are there anomalies in marking standards? If so, are these vagaries within an acceptable margin of error inherent in any system of written testing, or are they grossly aberrant? As one senior criminal practitioner submitted:

> *We have no assurance as to the consistency of the marking for the Recorder qualifying test. I understand that the papers are marked by a number of different teams. Any academic institution would operate the well recognised quality control*

[101] CONSTITUTIONAL AND ADMINISTRATIVE BAR ASSOCIATION

system of having a small percentage of papers from each team either cross-marked by one of the other teams or by an independent assessor. This has a number of benefits.

It reveals whether there is an inconsistency of grading between markers; it allows for systematic regrading if a particular team or individual is found to be under-marking or over- marking compared to others; and (most importantly) it provides a quality control for questions by revealing if any particular question or type/format of question has a tendency to produce an unacceptable range of marking. The latter should then lead to redesign for future papers and if gross, to remarking in relation to that question. If this somewhat basic, academically accepted, system is not in place then it should be. If in fact this or some other system for monitoring the consistency of marking is in place, but the JAC website fails to publicise that fact, then the information about the process should be corrected so that there is some reassurance that this aspect is fair.

Specific Comment on Question 7 - Diversity

34. The Bar is fully committed and sees as essential, the desire to establish a more diverse and representative Judiciary, so that public confidence is maintained. This objective is not straightforward, nor easy to implement as the following paragraphs taken from Baroness Neuberger's Final Report of the Advisory Panel on Judicial Diversity (24 February 2010) make clear:

63. Diversity in the judiciary must start with diversity in the legal profession. There will only be the potential for diverse appointments if the legal profession can attract and retain gifted men and women from all backgrounds up to the stage when they are ready and suitable for judicial appointment.

64. Men and women enter the legal profession in relatively even numbers, whilst BAME representation has improved, but lower retention rates for women and BAME lawyers means that the pool of well-qualified experienced legal practitioners is not as diverse as it should be. The proportion of female associates made up to partner level in 2009 at the top 30 UK firms stands at 27%. In 2008, just six of the 41 firms that participated in the Black Solicitors Network's (BSN) diversity table had black partners.

65. Efforts have also been made, including by the Attorney General, to ensure that there is fair access to quality work for talented practitioners from all backgrounds and this will be key to ensuring potential candidates for judicial office have the opportunity to shine.

66. The problem to date has been the lack of a planned and concerted programme to move to a more diverse profession at senior levels. For example, large numbers of talented women are lost to the profession when they have a family. There is a real opportunity to develop training to support those who have been absent from the profession and may be interested in returning to the law, although not to practice. The judiciary might be an attractive career option for women, particularly if more flexible ways of working as a judge can be developed. In a number of other

> *jurisdictions e.g. in South Africa, such a Developing Judicial Skills course has been a successful means of encouraging women into the judiciary. Our proposals on Developing Judicial Skills are discussed in more detail later on at paragraphs 80-84.*
>
> *67. Some consultees expressed concerns that legal aid developments might also adversely affect the diversity of the pool of potential applicants for judicial appointment.*
>
> *68. A survey by the Bar Council and Family Law Bar Association (FLBA) indicates that dependency on legal aid varies according to gender and ethnicity.12 9% of white male family barristers derive more than 80% of their gross income from family legal aid, compared with 14% of BAME men, 17% of white women and 22% of BAME women barristers. According to the survey more than half (52%) of BAME female barristers derive more than 60% of their income from family legal aid, as do 41% of white women barristers.*
>
> *69. The efficacy of planned reforms to legal aid is not within the Panel's remit, but any disproportionate impact on women and BAME professionals would be a cause for concern, as it would impact upon the eligible pool for judicial office. This needs to be closely monitored.*

35. There is a degree of progress in securing a more diverse judiciary at junior levels but the rate of change is too slow and there has been little improvement in the senior judiciary. The loss of women and BME candidates as they reach seniority in the profession is lamentable: what is clear, however, is that these impediments (lack of training for rejoining the profession and acute financial uncertainty in legal aid) cannot be remedied quickly – nor solved by the implementation of a "First Written Sift" of aspiring candidates.

36. It is clear (and recognised as an imperative) that the Bar continues to encourage all those who are talented to join it, regardless of ethnic or social background: a diverse judiciary can only be drawn from a diverse pool of candidates from the Bar. **The Committee ought to acknowledge that without material support and the preservation of publicly funded work at rates that adequately remunerate the onerous effort, responsibility, expertise and skill of those who specialise in these areas, there will be limited progress in achieving what Baroness Neuberger already regards as a long-term goal.**[102]

Should the committee decide to receive oral evidence it should not hesitate to contact the Chairman of the Bar Council, Peter Lodder QC, [PeterLodder@BarCouncil.org.uk] or the Chairman of the LSC, Richard Salter QC, [rsalter@3vb.com].

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[102] The Legal Aid, Sentencing and Rehabilitation of Offenders Bill currently before Parliament, will (if enacted) do nothing to promote the cause of a more diverse judiciary. It will have a disproportionately adverse impact upon publicly funded BME practitioners who will be further discouraged from continuing to practise in crime and family. It will do nothing to encourage BME candidates thinking of pursuing a career at the Bar in these areas of practice in order to acquire the experience necessary for a possible judicial career in due course.

ANNEXE A

Responses from SBAs and Circuits And Proposals for the Committee

37. A number of responses have been received and the following is an "amalgam" of them:

The procedures

a) The application

38. The time scale within which applications must be received following formal advertisement is simply too short. The decision whether to apply is potentially life altering and advice needs to be taken, referees identified and the form completed. The contrast between such period and the delays thereafter particularly that to final selection, still more appointment, is stark. One candidate was left in limbo for three years, over which time she claims she was told she had been successful only to have the offer withdrawn[103]. It devastated her practice. The procedure for selection must be fair, decisive and within a reasonable period. Once an offer is made and accepted, it ought not to be rescinded, except in exceptional circumstances, which did not arise in the case cited.

39. Another candidate spoke of the experience in these terms:

> *I applied in April, sat the exam in June, and was interviewed during September. We were all originally told we would be informed of the outcome early January 2011.*
>
> *On 26th January we were informed that the decision would be delayed until early March and that the MOJ requirements had now been changed so they were no longer going to appoint 49 Judges but only 30 and none of those appointments would be for the position I had gone for. All the time, trouble, and expense of committing to the exercise was wasted, including having passed an exam and having been interviewed for a position, which in effect had been withdrawn.*

b) The form

40. The form itself is probably unobjectionable albeit that the time taken to complete it is, as countless respondees have suggested, quite extraordinary. Evidence based material is clearly appropriate but:

- To attempt to identify different material (examples and referees) for so many criteria, may be unduly burdensome
- There is a widespread belief that too much attention is focussed on the form thus rewarding:

[103] This may well have been a placement on a Section 87 list of appointable candidates; an undesirable practice which ought to be kept to a minimum. Guaranteed appointments ought to extend to at least the Circuit Bench or even District Judges.

- Those prepared to "blow their own trumpets"; and/or
- Those who consult professional advisers for assistance with the form
- This belief, prevalent on the NE Circuit does not arise at this stage of the process as the initial sift is almost exclusively reliant upon the test.
- Too many referees are called for and they appear to be consulted too late

c) <u>The test</u>

41. The qualifying test has caused much concern but subject to the points raised below, it is recognised that it is a necessary step for those seeking the first step on the judicial "ladder." The issue is not to abandon the test but to ensure that the anomalies referred to are addressed by giving greater weight to forensic experience. However:

- There is real concern (on the NE Circuit and the Western Circuit) that there are problems with confidentiality – this is dealt with below at (i)
- There is some concern that the test unintentionally favours those with particular specialisms / backgrounds to the disadvantage of others
- There can be no justification for using such at more senior levels –if you are thought fit to sit in any capacity then further advancement must depend on appraisal, interview and referees – there are many who have seriously considered handing in Recorderships on the basis that they failed the qualifying test for the Circuit Bench
- There are concerns about inconsistency (undesirable but perhaps unavoidable at first appointment stage) and disparity with people failing one test but passing others (either in different geographical areas or for different positions)
- The procedure is thought to be too inflexible: a distinguished member of the Chancery Bar thought that it might signal the end of Chancery practitioners applying for the Family Division High Court Bench. He stated that Family Law required Chancery expertise and an acute knowledge of trusts, taxation and finance. He could not see Chancery practitioners applying for that Division of the High Court from now on. This was contrary to the interests of the Judiciary, which recognised the necessity of Chancery expertise in the FD.

d) <u>Role play</u>

42. For new appointees there is recognition this is a necessary and generally successful part of the process. As one candidate stated:

> *I thought the interview and mock trial was well conducted. The scenarios were well thought through and realistic. I thought this part of the process was likely to reveal the most suited candidates of those who had passed the test.*

e) Referees

43. There is a widely held belief that referees, certainly for more senior positions, are consulted too late and their views not given sufficient weight. They should be consulted pre-interview and their observations incorporated into the interview process. A more radical but frankly wholly sensible solution is to urge appraisal of part time appointees. Once a Recorder, Deputy District Judge applies there is a history of judicial experience/ performance, which appears to count for nought. This is a nonsense and would not be acceptable in any other profession.

f) Interviews

44. Interviews are not the subject of major criticism though for some specialist positions (but as one contributor stated from personal experience, there is a worrying lack of understanding within the panel about the nature of the jurisdiction and the qualities required). Another thought that this process revealed a lack of knowledge by the interviewers of the form submitted by the interviewee.

g) Feedback

45. The quality and extent of feedback is a major criticism. It is delayed, superficial, and frankly unhelpful. This is a universal criticism. It must be remedied:

> *No feedback is provided – even as to the mark attained. If one had sat a GCSE in P.E., one would know the grade, the mark, the pass mark and have the chance to have the paper re-marked.*

h) Delay

46. There are major concerns as to delays in notification and, for those who are successful, in the appointment process itself. It is recognised this is not strictly a JAC problem but as much a Ministry one but it cannot be right, particularly given the confidentiality issue above, to leave successful candidates hanging around for up to a year.

i) Confidentiality

47. This again caused considerable concern to at least two Circuits. As one contributor made plain, the notification procedure made it obvious who had passed to the next stage. The paradox was not concern for the feelings of those who had failed but for the fact that candidates who remained in contention had their practices blighted:

> *The Bar is a small place. I knew most of those who sat the exam. We commiserated afterwards. Then when the letters arrived, people asked how one had got on. We knew who had had an interview, and who had not. Therefore, when the interviews came and went there were discussions. Then in December, everyone got a letter on the same day. Those who were unsuccessful said so. Those who were successful were told to keep the news confidential. One need not be a genius to work out who had been successful. Yet they are not allowed to speak about it. However, gossip starts, and continues, and in some cases, some people's practices have been affected. Since the last competition ran from in effect January 2009 to this coming October, that can have pretty devastating effects.*

Proposals

1. The written test (and the laudable intention behind it) must remain - but it is absurd to disregard (at the initial stage) the very things that justify the experience and competency of the applicant: none of the relevant information about a candidate is considered at all at the first stage.

2. The solution is to give greater prominence to referees, peer review and to appraisal over an extended period as a precursor to the application. This is objective and transparent and ensures that those who apply are monitored.

3. For the Employed Bar, suitable equivalent monitoring and appraisal can be devised. The Employed Barristers' Committee has expressed concern over the requirement for candidates for most salaried judicial posts to have had previous fee paid experience, which excludes a proportion of their membership

4. Greater transparency and information on the JAC website will enable older candidates, with less recent practice in examinations, to prepare for the tests.

5. The lack of feedback in respect of the qualifying test is a serious impediment. The Employed Barristers' Committee is also aware of concerns that the lack of feedback is dissuading potential candidates from re-applying for judicial office. Such candidates are – perhaps understandably – unwilling to put a great deal of time and effort into a further application if they have no indication of the reasons for their previous application being turned down. Feedback reports, without divulging candidate scores might now be presented in future, given the degree of criticism the JAC has sustained. This will enable the unsuccessful candidate to understand what is required of him in the Qualifying Tests – the JAC has recently published a report covering the Recorder (Civil) Qualifying test.

Finally, it is essential that increased Judicial Shadowing opportunities are made available to all, especially BME candidates, and the proposals for a Judicial College to prepare applicants is worthy of further investigation.

June 2011

Sir Thomas Legg KCB QC

1. I welcome the opportunity to respond to the Select Committee's call for evidence.

2. My main career was in the Lord Chancellor's Department (now the Ministry of Justice). During the years 1982 to 1998, first as Deputy Secretary and then as Permanent Secretary, I was closely involved with assisting and advising the Lord Chancellor on judicial appointments at every level. Since then I have retained an interest in the subject and most recently in the issue of diversity.

Overview

3. While agreeing broadly with the framework laid down by the Constitutional Reform Act 2005, I have two main concerns about the present appointments system. In brief, I believe that:-

   (1) the Act strikes the balance of roles and powers too far towards the judges and too far away from the Executive; and

   (2) the system will not achieve sufficient diversity, and thereby ensure quality in the widest sense, without further and more radical change in certain respects.

4. It may fit the Committee's approach most conveniently to express these concerns first in relation to appointments to the Supreme Court, and then to the wider judiciary in England and Wales (to which, at that level, I confine myself).

The Supreme Court

5. **Role of the Executive.** The selection commission for each vacancy in the Supreme Court is normally required to be chaired by the President of the Court, supported by the Deputy President. These two judges, the most senior in the entire judiciary, must in practice have a predominant influence over the three representatives of the United Kingdom appointment commissions who comprise the remainder of the commission. The Lord Chancellor has only a tightly limited power to reject or request reconsideration of the single candidate proposed by the selection commission.

6. In my view, this gives the judicial element disproportionate influence as against the Ministerial element. The underlying rationale seems to be a belief that judicial independence requires the judges themselves, tempered by a lay element, to have a dominant role in the process, and Ministers to have a correspondingly very limited role.

7. That belief, I submit, is mistaken. Judicial independence is indeed vital, and it rests on foundations of law, culture and tradition, including restraint by the other branches of government. But it does not require the judges to exercise predominant power over their own selection. They never did so at senior levels in former times, when their independence was already unquestioned.

8. The judges should of course play a major role in judicial appointments, and I fully agree that there should also nowadays be a lay element. However, no body of public servants, however eminent, should have a deciding voice in choosing their own colleagues and successors. I therefore contend that, for the long-term health, quality and therefore standing and independence of the senior judiciary there should also be an equal involvement of other branches of government. The appointment of senior judges is a political act, in the broadest sense, and it is for the benefit and protection of the judiciary itself that this reality should be recognised.

9. I reject the historically unfounded assumption that the involvement of a Government Minister in judicial appointments must import an element of party politics. Of course there was a time long ago when that element played a major part, and even as recently as the late 19th century. It continued to do so, though diminishingly, thereafter, and traces were still noticeable even after the Second World War. But by the 1960s political influence in that sense was gone, and I can personally testify that by the 1980s its exclusion from the appointments system was firmly established and vigorously protected.

10. I therefore contend that the Lord Chancellor should have restored to him, at the least, a real choice between several candidates for each Supreme Court vacancy – preferably 4-5 of them, if that many are appointable, as will normally be the case at this level. I recognise that this raises various subordinate but important issues and choices which require careful consideration. But in my view the principle that the senior and accountable Minister of the Crown, responsible for the overall justice system, should have a real power and responsibility over senior judicial appointments is vital.

11. **Role of Parliament.** For appointments to the Supreme Court, I would also go further. Having considered this issue for many years, I have come to the conclusion that developments in their jurisdiction, and more widely in public life, make it more and more desirable that our most senior judges should be able to ground their mandate on the authority, not only of the Executive, still less of the judges themselves and a few laymen alone, but of Parliament itself.

12. Of course I am aware, having often discussed it with them, that this departure would be unpopular with many judges and lawyers, and indeed that it might not at first commend itself to all senior Parliamentarians. I am also aware of the various counter-arguments and risks, and of the objections taken to the way the similar procedure operates in the United States. Nonetheless I believe that, in modern conditions, the proper interests and

protection of our own judiciary require some British equivalent, at least for the Supreme Court of the United Kingdom.

13. The course I would suggest would be for the Lord Chancellor to propose the single candidate that he selects (from the list proposed to him by the selection commission) for consideration by a joint committee of both Houses of Parliament. This consideration should include a public interview, conducted under ground-rules to be agreed in advance between the committee and the Lord Chancellor, and approved by both Houses of Parliament.

14. There should be a reasonable presumption in favour of the candidate, which should normally lead to him or her being approved by the committee, after which the Prime Minister should be required to recommend The Queen to make the appointment. However, for the process to be meaningful, I believe it should be accepted that, if the committee rejects the candidate, that is the end of the candidature.

15. **Diversity.** I will say more below about the overall need to secure more diversity in the wider judiciary. If achieved, that should by itself lead to more diverse candidates for the Supreme Court. But there is a special further point about diversity *within* appellate courts which sit with several judges, especially at the highest levels.

16. Here the public interest requires something more than that the judges appointed should be of the highest individual merit. It also requires that the court should, as far as possible, represent a balance, not just of the judges' legal specialisms, but of their personal background, talents and experience. I am not suggesting that such a balanced variety can be rigidly legislated for, or that it will be easy to fulfil in any mathematical way; or that it should overwhelm the appointments process with political correctness. But I do contend that recognition of the need for it should be integrated into the appointments system.

17. I therefore suggest that it should be an openly-declared policy, in determining the merits of candidates for the Supreme Court, to ensure that as far as possible the Court comprises the best achievable balance of differing professional and personal background and experience, including gender and ethnicity. The pursuit of such a policy should inform each selection commission in deciding on the list of candidates to be presented to the Lord Chancellor.

18. I would also argue that, in addition to the Supreme Court, such a requirement could and should be applied to the Court of Appeal of England and Wales.

The wider judiciary

19. **Role of the Executive.** In the wider judiciary of England and Wales, as for the Supreme Court, I believe that the current system is unbalanced as

between the judiciary and the Lord Chancellor. I am in favour of the Judicial Appointments Commission and believe it plays a valuable role. But it is no criticism of the senior and other judges and lawyers who are rightly included in its membership to believe that in practice the present system must normally accord them a decisively influential role in most senior appointments. Taken with the very restricted powers of the Lord Chancellor under the 2005 Act, I consider that this means that the judiciary is playing a disprop-ortionate part in selecting their own colleagues and successors.

20. As mentioned above, I regard the judges' involvement in appointments as essential, but not to a predominating extent; and here too I therefore consider that, at least for appointments to the Circuit Bench and its equivalents, and above (ie especially to the High Court and Court of Appeal), the Lord Chancellor should be required to be presented with a real choice of 3-5 candidates for each vacancy, unless it can be persuasively demonstrated that there are less than three appointable candidates.

21. **Diversity.** In spite of real efforts by the Judicial Appointments Commission (JAC), and of the recent (Neuberger) Working Group, progress towards adequate inclusion in the professional judiciary of women and people from ethnic minorities (BMEs) remains unacceptably slow and inadequate. This is of great importance in itself; but I have come to see it as also a symptom of an even wider emerging problem, which is that we should be recruiting our judges from a wider professional base.

22. The future quality and credibility of the judiciary depend, in my view, on restructuring the appointments system to ensure the recruitment of a wider stream of lawyers, including more women and BMEs. In particular, this restructuring should be aimed at recruiting more solicitors and employed lawyers. This can and must be done while maintaining, and over time improving, the overall quality of the judiciary, which indeed is its primary purpose.

23. The three main current barriers to the recruitment of more solicitors and employed lawyers, and with them more women and BMEs, are: (1) the part-time sitting requirement in its present form; (2) the merit test in its present form; and (3) the culture, working patterns and career prospects of the judiciary. I believe that they each need a measure of further reform.

24. My own suggestion is that the *part-time sitting requirement* should be replaced by an initial and intensive selection, followed by a full-time sandwich course of several months' training and sitting, satisfactory completion of which, with proof of good health, should lead to full-time appointment. This could be phased in progressively, beginning with District Judges and working up the hierarchy.

25. The present *merit test* should be further re-formulated to require the JAC to apply the policy of diversification in selecting from among appointable

candidates, where there is no candidate judged to be individually head and shoulders above the others.

26. I further believe that, to *make the judiciary a more attractive career* to wider groups of lawyers, and especially to able younger women lawyers, there should be more promotion up the ranks. This would require more developed systems of appraisal and continuous training than we have yet achieved, although the recent establishment of the Judicial Training College is a good step in the right direction. There should also be a more wide-spread, consistent and effective culture and policy of judicial promotion.

27. Conversely, I consider that it would also be beneficial to recognise more effectively that, subject to the appropriate short-term restrictions, a judge at any level may, without incurring disapproval, retire from the Bench and return to practice.

27 June 2011

Lord Mance

Note: The paragraph numbers which appear in bold inside square-brackets refer to the Select Committee's numbered themes.
In summary, see:

Theme 12: paras 8-9 below
Theme 4: para 16
Theme 6: paras 13, 15 and 23
Theme 7: paras 10, 11, 13, 15 and 18-20
Theme 8: para 15
Theme 9: para 17
Theme 10: paras 23-24
Theme 11: paras 18-19
Theme 19: paras 23-24
Theme 21: para 21
Theme 22: paras 19-20

Introduction

1. I became involved in comparing judicial appointment systems within Europe and in advising the Committee of Ministers as chair from 2000 to 2003 (and a member until 2010) of the Council of Europe's Consultative Council of European Judges (CCJE). The CCJE's first Opinion http://www.coe.int/t/dghl/cooperation/ccje addressed the subject, favouring the

intervention of an independent authority with substantial judicial representation applying objective standards[104].

2. In 2005 I was a member of the ad hoc panel[105] which, after interviewing all candidates, recommended the appointment of Eleanor Sharpston QC as Advocate General at the European Court of Justice to succeed (Sir) Francis Jacobs QC.
3. In 2010 I was appointed by the Council of Ministers of the European Union as a member of the 7 person panel created by the Treaty of Lisbon under Article 255 of the Treaty on the Functioning of the European Union to review the suitability for appointment of candidates proposed by the governments of Europe to serve as judges and advocates general on the Court of Justice and General Court[106]. The panel was established to increase confidence in the quality of the judiciary at the European level, and includes a member (Ms Ana Palacio) nominated by the European Parliament. Earlier this year we published a report on our first year's activity, excluding information identifying the outcome of particular candidatures[107].
4. I also have an interest in judicial appointments as the husband of a candidate in recent selection processes, Lady Justice Arden.
5. I will focus on appellate appointments, and on appropriate principles.

Criteria

6. The individual qualities which have been identified for Supreme Court selection processes have, recently and rightly, been expanded beyond the purely legal and intellectual, to recognise the value of social awareness and understanding of the contemporary world, ability to participate in a wider representational role and vision.

Appointing commissions and processes

7. What really matters is how and by whom the criteria are evaluated. Merit tends to be judged through the prism of the experience and characteristics of those who sit on and are consulted by appointing commissions. The line between different candidates at an appellate level, all of them usually judges of proven skill and experience in a court below, is likely to be a fine one. **[Theme 7]**
8. I am unaware whether the appellate commissions use any formal evaluation or interview techniques[108], or whether individual decisions are made and recorded in a formalised way by reference to the particular criteria[109]. **[Theme 2]**

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[104] See especially paras. 23-24 of opinion No 1.

[105] It also included a Scottish judge, two civil servants (from the Ministry of Justice and Foreign Office) and an independent lay member with personnel expertise.

[106] See Council Decisions 2010/124/EU and 2010/125/EU appointing the members and establishing the operating rules of this panel.

[107] The limitation of this panel is that it reviews only one candidate, presented by the relevant national government, at a time and its function is to assess suitability, rather than choose the best from a range of candidates.

[108] Some ten years ago, when judges were acquiring increasing administrative responsibilities, I remember the value of a visit organised to the Judge Institute of Management in Cambridge, where in the space of a day insights gained into some fairly basic truths which I have not forgotten to this day. As someone who myself interviews candidates for judicial appointment, I believe that equivalent insights in this area could be valuable - see also the next footnote.

[109] The Privy Council has just heard a series of cases concerning the use of the Canadian Public Service Commission to introduce formalised and objective appointment systems for senior civil servants in Trinidad and Tobago. I do not suggest that the position is strictly comparable, but there may be more science to the evaluation of merit than the present system acknowledges.

9. The present appellate processes do not appear to involve external review or reporting (even on a confidential basis). This contrasts with the position in relation to the main JAC: Schedule 12, para 32(1) of the 2005 Act. As mentioned above, the TFEU Article 255 panel issued a report after a year's activity earlier this year. On 28 February, the president, accompanied by the panel member nominated by the European Parliament, attended to discuss the report with the European Parliament's Legal Affairs Committee in a session which, to preserve the confidentiality of individual outcomes, was held in part in camera. **[Theme 2]**
10. While the operation and decision-making processes of the appellate appointments commissions are not public, I believe that there is probably more scope for recognising diversity itself as an aspect of merit in the criteria as they are published and applied. In my opinion and experience, diversity of background, experience and outlook is and should be seen as a distinctly positive factor in an appellate court. It is much more than a matter of appearance[110]. **[Theme 7]**
11. Selection should not be on an entirely individual basis. It should have regard to the needs and existing composition of the court as a whole. That also argues for some continuity on the relevant appellate appointments commissions, greater than the present system of *ad hoc* commissions perhaps allows. **[Theme 7]**
12. Judges are capable of developing and expanding their interests. Appellate judges become of necessity generalists, dealing frequently with cases outside their original specialisms. This is, indeed, a positive aspect of the common law system, which itself introduces an element of diversity, enabling cross-fertilisation of different areas of law and avoiding the blinkered or errant approaches which like-thinking specialists can sometimes develop. Nonetheless, importance continues to attach to original experience and specialisms, as witnessed also by the practice of ensuring that any panel sitting in a specialist area at a Court of Appeal or Supreme Court level contains, so far as possible, a judge with specialist knowledge and experience in that area[111]. The present appellate courts can be regarded as lacking in diversity and the Supreme Court is over-represented in some areas of original experience and under-represented in others.
13. Leaving aside any obviously inadmissible candidates, it should be possible at an appellate level possible to arrange interviews for all candidates[112]. Without this, the real choice is restricted at the outset, and the role of members of the appointments commission who do not already know the candidates (i.e. generally the non-judicial members) must necessarily be constrained. And, as observed above (para 7), the line between candidates is likely to be a fine one. **[Themes 6 and 7]**
14. In my view, there should be somewhat larger and more broadly based commissions for appointments at both the Court of Appeal and Supreme Court levels. The increasing interest in the judiciary and its composition and role following the Human Rights Act, and the public interest generated by the new

110 The principles that any appointment process should ensure equality of opportunity, appointment on merit and appropriate consideration to the need for the progressive attainment of gender equality and the removal of other historic factors of discrimination are endorsed in the Commonwealth's Latimer House Principles on the Accountability of and relationship between the three branches of government: http://www.cmja.org/downloads/Latimer%20House/Commonwealth%20Principles%20on%20Three%20Arms%20of%20Government.pdf

111 And as also recognised by the quota contained in s.30(2)(c) of the 2005 Act, requiring justices between them to have "knowledge of, and experience of practice in, the law of each part" of the UK.

112 This has not been the practice at the Supreme Court level, despite the small numbers of candidates involved.

Supreme Court, make greater public representation on these commissions important. **[Themes 6, 7 and 8]**

15. Judicial independence does not mean judges appointing themselves. At the appointments stage, it means a system that is independent of political bias[113]. In practice, political considerations played no role, and there was no threat to judicial independence, when the Lord Chancellor was the effective decision-making authority. Equally, the present system does not, and any system involving broader based appellate commissions need not, present any risk to judicial independence. **[Theme 4]**
16. Overseas jurisdictions demonstrate a wide variety of systems. On the continent, political considerations continue to play a (sometimes very divisive) role on higher councils for the judiciary and within the judiciary itself[114]. Clearly, the United Kingdom should avoid this. In Germany, the involvement of legislatures and the executive in judicial appointments is regarded as giving the judiciary in the exercise of its functions a certain democratic underpinning[115]. Greater diversity has been achieved both in Canada under a reformed and, it is understood, pro-active appointments system and in Australia and New Zealand, where the attorney-general continues to have a traditional role in leading an executive decision on judicial appointments[116]. **[Theme 9]**
17. The present appellate appointments commissions here are judicially led, the other members being members of the English and Welsh JACs in the case of the Court of Appeal and members of the JACs of all three jurisdictions in the case of the Supreme Court. In the latter case, at least one JAC member of the commission has often also been a judge. The statutory processes of consultation are also heavily focused on the judiciary, as were the informal processes of soundings that preceded them. **[Themes 7 and 11]**
18. Judicial input into appellate appointments is unquestionably very important, since judges see the conduct and judgments of judges in lower courts, from which (I would agree) appointments can be expected to continue usually to come (see the report of Baroness Neuberger's Advisory Panel on Judicial Diversity, paras 103-107). But there are others who are also well capable of evaluating such matters, from different angles which are themselves highly relevant. **[Themes 7, 11 and 22]**
19. I would favour appellate commissions, particularly at the Supreme Court level, which are more inclusive of the various public interests in the law[117]. I would suggest that such appointing commissions should at least include representatives of both legal professions (by which I mean the practising and the academic), and they might also include one or two from Parliament. **[Themes 7, 15 and 22]**

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113 Again, see paras 24-25 of the CCJE's Opinion No. 1 (footnote 1 above). More recent CCJE opinions, e.g. Opinion No. 10 (2007) on Councils for the Judiciary, para 18, and the CCJE's Magna Carta of Judges (2010) – also on http://www.coe.int/t/dghl/cooperation/ccje - express a view that such councils should have a substantial majority of judges. In a context where the judiciary of many Council of Europe states was until recently under effective political control, this is understandable. But the position and the issues in the UK are quite different.

114 The CCJE's Opinion No. 1 examined the position in 2000.

115 See the CCJE's Opinion No. 1, para 19. It does not therefore always avoid political controversy and criticism for lack of transparency: see e.g. http://brosch.blogspot.com/2008/07/im-shocked-politics-even-in-german.html.

116 The latter system retains some forceful judicial support there, including that expressed by a recently retired member of the High Court of Australia, the Hon Michael Kirby in A Darwinian reflection on values and appointments in final national courts, published in From House of Lords to Supreme Court (Hart Publishing, Jan 2011) and at www.michaelkirby.com.au.

117 This might involve a greater risk of public knowledge of candidatures. But the present system has already appeared incapable of avoiding this.

20. Another possible way of seeking to achieve greater public accountability would be to require appointing commissions to present a shortlist of suitable candidates to the Lord Chancellor, from which he or she would select. This would however involve a controversial augmentation of his role, in an opposite direction to that taken by the 2005 Act. **[Themes 6 and 7]**
21. I understand the constitutional argument for the present provision that every Supreme Court appointments commission must include a member from the JAC commission of each of the three jurisdictions. In practice[118], it would probably be sufficient if each JAC was consulted and the only requirement was for a member from the jurisdiction from whom the appointment was to come.
22. More detailed points on the present system are that (a) it has been interpreted as providing for a retiring president or vice-president to sit on the commission choosing their successors - this is undesirable[119]; and (b) there is no procedure recognising, at any rate expressly, that a member of the commission may be unable to serve as such due to a conflict of interest.

The Lord Chancellor's role

23. The Lord Chancellor's current long-stop role is cumbersome to operate. The Lord Chancellor is a consultee on the original applications, and there seems no reason why he or she could not see all other consultees' responses to the commissions, without having himself to embark on a fresh consultation process. **[Themes 6, 10 and 19]**
24. The Lord Chancellor's current role is hedged around to the point where it is unlikely to lead to any actual rejection or request for reconsideration. But I would not abolish it, since even a remote long-stop can have some impact, if only indirectly. As to the possibility of an augmented role, see paragraph 20 above. **[Themes 10 and 19]**

A pre-confirmation hearing?

25. I do not see merit in a formal pre-confirmation hearing process before Parliament. While the appellate committee of the House of Lords existed, its members had of course some profile within Parliament, and this is now decreasingly the case. But I doubt whether a formal pre-confirmation hearing would be an easy or productive innovation, and the United States example is not encouraging. I am not sure what the relevant Parliamentary committee or the public would hope or be able to obtain by way of non-political understanding of a proposed justice, or his or her skills, understanding or philosophy. That said, there is no reason why appellate judges should not appear before Parliamentary committees on matters where their roles or insights may be relevant[120]. **[Theme 21]**

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118 And bearing in mind also that the Scottish or Northern Irish representative has often been a judge: para 17 above.

119 There is also something to be said for the view that current members of the Supreme Court should elect their own president or vice-president, but that is a side issue.

120 As already occurs. (I also did so myself last year, giving evidence to the committee scrutinising what became the Third Party (Rights against Insurers) Act 2010.)

Robert Martin, President, Social Entitlement Chamber

Summary

- The Social Entitlement Chamber is the largest business user of the Judicial Appointments Commission ('JAC')

- The creation of the JAC has been a significant step in securing the constitutional principle of the independence of the judiciary

- There is scope for making efficiency savings in the appointments process, without compromising the principle of independence, by changing the method of appointing non-legally qualified tribunal members

- Such members should be appointed by the Senior President of Tribunals following a selection process approved by the JAC but operated by the judiciary with administrative support from HM Courts and Tribunals Service

Introduction

1. The Social Entitlement Chamber is part of the First-tier Tribunal. The Chamber comprises 3 jurisdictions which respectively deal with appeals against decisions made by government departments or agencies concerning social security and child support, criminal injuries compensation and asylum support.

2. The Chamber has the following judicial complement –

    83 salaried judges
    570 fee-paid judges
    746 medically qualified members
    409 members who are experts in disability
    21 members qualified in accountancy
    15 members who are experts in dealing with victims of violent crime.

3. The workload of the Chamber has risen from some 250,000 appeals in 2008-09 to 420,000 appeals in 2010-11. The intake is projected to rise to 590,000 in 2013-14. The main driver is legislative change.

4. To keep pace with its growing workload, the Chamber has had frequent recourse to the JAC for the recruitment and selection of tribunal judges and members. The following figures indicate the scale of use:

2009-10	3 exercises appointing 19 judges & 96 members
2010-11	2 exercises appointing 297 members
2011-12	4 exercises appointing 30 judges & 126 members

2012-13 5 exercises scheduled for 51 judges & 250 members

5. This memorandum of evidence draws upon my own experience and that of judicial colleagues within the Chamber in using the judicial appointments process. It addresses only those questions posed by the Select Committee that directly relate to the Chamber's jurisdiction. The memorandum follows the sequence of the Committee's questions.

Overview

6. *(Question 1)* The creation of the JAC has been a significant step in furthering the constitutional principle of the independence of the judiciary by reducing the involvement of the executive in the selection and appointment of the judiciary. It underpins the collective independence of the judiciary by delivering a demonstrably fair and open system.

7. The current process is appropriate for the appointment of judges.

8. However, the process is designed for and geared to the appointment of judges. It does not operate efficiently in the appointment of non-legally qualified fee-paid tribunal members ('NLMs'). There is essentially a lack of proportionality. NLMs typically will be engaged in tribunal work for less than 30 days a year. They will not be giving up their practices or main occupations for a judicial appointment. There is little prospect of their developing a judicial career. They do not conduct proceedings or decide cases on their own but sit always with a judge.

9. In the case of the Chamber's Social Security and Child Support jurisdiction, the appointment of NLMs prior to 1999 was made by the President, the judicial head of the jurisdiction. In 1999 the power of appointment was transferred to the Lord Chancellor. That transfer had merit at the time because the jurisdiction was perceived as not sufficiently independent of its sponsoring department, DWP. With its independence now secured by the reforms introduced by the Tribunals, Courts and Enforcement Act 2007, there is a strong argument in favour of the power of appointment of NLMs in the Chamber reverting to the present head of the tribunals judiciary, that is, to the Senior President of Tribunals.

10. Prior to 1999, the administration of the selection and appointment process for NLMs was carried out efficiently by the jurisdiction's own support staff under the direction of its senior judges. That administrative role could be taken up by HM Courts and Tribunals Service, using existing management resources and decentralised operations and accommodation to save costs.

11. There may be a residual role for the JAC in such a revised process in an advisory or auditing capacity. It might, for example, nominate one of its own panel of interviewers to participate in the selection. Such an arrangement

worked well in a competition run in 2010 to fill the non-statutory post of Principal Judge in the Chamber's Criminal Injuries Compensation jurisdiction.

12. *(Question 2)* The current judicial appointments process is felt to be sufficiently transparent. It is also reasonably accountable, save to the extent that the interests of the business user, i.e. the tribunal to which the judge or member is appointed, may not be taken into account. For example, the JAC may recommend the appointment of a candidate who is formally eligible to apply for a post but of no practical use because s/he lives too far from the hearing centre where the vacancy exists or cannot be deployed because of a conflict of interest.

13. *(Question 3)* We suspect that surveys of the public would reveal little understanding of the judicial appointments system, notwithstanding the information available on the JAC's and other websites. The point at which members of the public become interested in the appointments process is when they are about to become embroiled in legal proceedings. The focus for increasing understanding should be the information provided by the tribunal to prospective users. In this Chamber, that information takes the form of leaflets, DVDs and web-sites.

14. *(Question 4)* See response to Question 1.

15. *(Question 5)* There are major methodological obstacles in trying to measure changes in the quality of judicial appointments over time. A preliminary question would be whether you are measuring the quality of judicial appointments or the quality of the judiciary. Proxy indicators of the latter, such as the proportion of judgments overturned on appeal, are influenced by multiple factors, of which the appointment process is but one. There is a risk of rushing to conclusions on quality of appointments in general on the basis of encountering an exceptionally good or an exceptionally disappointing candidate.

16. What can be more readily measured over time is change in the diversity of judicial appointments, though such changes are more likely to be a function of changes in the composition of the pool from which candidates are drawn than changes in the process itself.

17. The JAC selection process in a competition of moderate size typically takes 10 months from the initial planning meeting to forwarding recommendations to the Lord Chancellor. This time-scale does not count the preliminary stage of tribunals lodging bids for places in the selection programme (which is done on a rolling programme 3 years in advance) and the time taken by the Lord Chancellor to approve the recommendations. (There is always a rush to submit the recommendations before the summer recess.) The entire recruitment process from the business user putting forward its detailed requirements to the successful candidates being in post is generally well in excess of a year. This is a particular problem in tribunals because of the volatility of the intake of work.

18. There have been encouraging signs over the past 12 months or so of a willingness on the part of the JAC to be more flexible in its procedures by compressing its timetable or dropping standard steps in the process, e.g. not running a qualifying test where the number of candidates was unlikely to exceed the number of vacancies, or holding interviews concurrently at regional locations to ease congestion at its headquarters. There has also been greater consultation with HMCTS in prioritising its programme of selection exercises. In spite of these improvements, the speed and efficiency of the process compares unfavourably with that in operation pre-2005. The existence of the JAC simply builds in more stages to the appointments process.

19. *(Question 7)* A diverse judiciary is essential if it is, and is seen to be, fairly constituted and deserving of public confidence. The possession of the qualities and abilities requisite for judicial office is not the preserve of one gender, race, ethnicity or class nor compromised by disability or sexual orientation. Appointment on merit is not inconsistent with increasing the diversity of the judiciary. Conversely, a judiciary that is not diverse in its composition is likely to signify an appointments process that is unfair.

20. While the JAC's record of appointments may, statistically, show a greater range of diversity than under the previous regimes, it is important to remember how poor the baseline, how homogeneous the judiciary pre-2005. It is also important to recognize that improvements in diversity are not, wholly or mainly, attributable to changes in the appointments process but reflect changes in the pool of eligible candidates. Virtually all the judges in this Chamber have been and continue to be drawn from the ranks of solicitors and barristers. Changes in the diversity of the legal profession feed through to the pool of candidates. Further down the chain, changes in the diversity of law graduates may influence the diversity of the legal profession.

21. We have reservations about one measure introduced by the JAC which aims to "widen the pool" of candidates. This is the attempt to create a level playing field between candidates who have directly relevant experience and those who do not. For example, in assessing whether a candidate has knowledge of the law relevant to the post sought, actual possession of that knowledge and the ability to acquire that knowledge are ranked equally. In setting a qualifying test for candidates for a specific judicial post, the JAC will endeavour to eliminate any advantage that might accrue to a candidate who has experience of the law and practice applicable in the post. While the aim is laudable, the attempt to neutralize relevant knowledge and experience carries the risk of discrediting the process. The risk is particularly evident in competitions for salaried judicial posts where some of the candidates will have held similar posts on a fee-paid basis. Insufficient weight is given to the performance of the candidate in the fee-paid post, notwithstanding that it may be a good predictor of how the candidate would perform in the salaried post.

22. We have no comments on Questions 8-12. They do not relate to this Chamber.

The role of the JAC

23. *(Question 13)* Our assessment of the performance of the JAC in its first years is that the Commission was authoritarian in its approach and inflexible in its operations. It micro-managed the appointments process down to the level of prescribing what questions could be asked of a candidate at interview. (The questions had to be identical for every candidate, irrespective of their varied backgrounds and attributes, and follow a prescribed format.) The criteria for assessment (a list of qualities and abilities) were standard for every judicial office, regardless of the content of the post. For example, a senior judicial role with substantial leadership and managerial responsibilities was assessed against the same criteria as for an entry-level fee-paid role. The JAC was reluctant to engage with the business user to the extent of declining to share with the jurisdiction to which a successful candidate was appointed any information about the candidate save his or her name and address.

24. Over the past year or so, there has been a noticeable improvement. The JAC is less defensive, more amenable to suggestions from the business user and more ready to introduce flexibility into its operations. For example, it is open to advice on drafting and placing recruitment adverts, willing to accept offers of help with administrative support, more adaptive in the design of role play exercises for candidates, more responsive to users' needs in setting its programme of work.

25. *(Question 14)* The remit of the JAC should be amended to remove its role in relation to the appointment of NLMs. (See response to Question 1.)

26. *(Question 15)* The current number of Commissioners is probably excessive, especially with the practice of the Commissioners acting collectively in making recommendations for appointment. The size appears to be a reflection of the perceived need to include a representative from each group of "stakeholders". It might usefully be rebalanced on a smaller scale to comprise equal numbers of business users and representatives of the public interest.

27. *(Question 16)* A significant challenge for the JAC is to devise a fair and cost-effective means of managing the numbers of applicants for the purpose of deciding who should reach the interview stage. It is not unknown for the ratio of applicants to vacancies to exceed 30 : 1, whereas the JAC's normative ratio of interviewees to vacancies is less than 3 : 1. The methods currently used by the JAC to reach a manageable number of interviewees are the sift and the qualifying test. The sift involves assessing each applicant against the same list of qualities and abilities as used at interview but using only the information contained on the application form. This is a time-consuming and largely speculative exercise requiring a panel of assessors to score each applicant and rank them in order of surmised merit. The qualifying test is fairly labour-intensive, as it requires a unique test to be devised for each exercise, with applicants' efforts marked and moderated. (Running the tests on-line would be cheaper but carries the risk that applicants' efforts might not be their own

work.) However, the main drawback to the qualifying test is that sole dependency on the results of the test ensures that it is the applicants who are good at sitting tests who get the interviews. (Coaching candidates for judicial office is a growth industry.)

28. We consider that there is scope for examining multiple channels of entry to the interview stage, including modified sifts, tests, foundation courses.

29. We support the Lord Chancellor's proposals that –

    (a) the Judicial Office should take over responsibility for the post-selection process;

    (b) the JAC's remit should be limited to legal positions (the selection of non-legal tribunal members being carried out not by "HMCTS" as stated in the Lord Chancellor's letter but by the Senior President of Tribunals).

30. *(Questions 17 and 18)* We have no comment.

The role of the executive

31. *(Question 19)* We consider, for reasons set out earlier, that the Lord Chancellor's role in the appointment of NLMs should be transferred to the Senior President of Tribunals.

32. *(Question 20)* There is scope for making more effective use of the JAC's funds by transferring expenditure from formal sifts to increasing the ratio of interviewees to vacancies. The proposal to remove the selection of NLMs from the JAC's remit is likely to produce a net saving to the Ministry of Justice, even when the costs of HMCTS administering the process are taken into account.

33. *(Question 21)* No comment.

The role of the judiciary

34. *(Question 22)* The tribunals judiciary makes a substantial contribution to the appointments process. Currently, we set the recruitment requirements, collaborate with the JAC in planning the exercise, draft much of the documentation (adverts, job specifications), design, pilot and mark qualifying tests and role-plays, moderate outcomes, participate in sifts and interview candidates, provide references, act as statutory consultees, facilitate the post-selection process. We consider that this is an appropriate role and an effective use of judicial time, because, as the business user, the quality of the appointments is crucial to us.

June 2011

Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC

Introduction

1. In this evidence we will seek to address some (but not all) of the questions posed by the Committee in its call for evidence dated 13 May 2011. We identify the relevant questions at the beginning of each of our responses below.

Question 1: The current operation of the judicial appointments process

2. In general, the current operation of the judicial appointments process works reasonably well, though subject to three caveats.

3. Firstly, we consider that more should and could be done to secure greater diversity in the judiciary and we address this further below.

4. Secondly, again as we address further below, the system for the appointment of Supreme Court judges is at variance with some of the principles which inform the Judicial Appointments Commission (JAC) and we should like to see that process modified.

5. Thirdly, we have concerns that some important judicial appointments take place outside the usual processes altogether. These include the appointment of Deputy High Court judges which can be an important career developmental step for those aspiring to the High Court bench. We consider that such is difficult to justify and may undermine efforts to promote a fairer and more transparent system of appointment and could, without considerable care, militate against efforts to secure a more diverse judiciary.

Questions 7 (in part) and 8: The importance of diversity and the impact of constitutional developments

6. The senior judiciary is at present drawn from a narrow section of society. There has only ever been one woman in the Supreme Court (formerly the Appellate Committee of the House of Lords), Lady Hale, and there has only ever been one High Court judge (and none more senior) from a Black or Minority Ethnic (BME) background (Mrs Justice Dobbs). The social background from which judges are generally drawn is generally, too, very narrow and whilst this in large part reflects the professional pools from which appointments take place, more could be done to ensure that

talented people in the professions from less traditional backgrounds secure appointment.

7. The desirability of greater diversity in the judiciary, and the steps that can be taken to achieve it, have been thoroughly set out by others, in particular in the 2010 report by the Advisory Panel on Judicial Diversity chaired by Baroness Neuberger. As has been pointed out, merit and diversity are not in conflict, they reinforce each other. There are three main reasons why the current lack of diversity matters.

8. The first reason is that diversity should be seen as making a contribution to justice itself: the more experiences that are channelled into the legal system, the more it may be hoped that the quality of justice will be improved. As Ruth Bader Ginsburg said in her inaugural speech, on her appointment as a Justice of the Supreme Court of the United States on 10 August 1993:

> "A system of justice will be the richer for diversity of background and experience. It will be the poorer, in terms of appreciating what is at stake and the impact of its judgments, if all of its members are cast from the same mould."[121]

9. The second reason is that a wider pool will give the judiciary greater legitimacy. In this context, it is important to recall that the judiciary is one of the three branches of the state. The judges exercise power entrusted to them by the public. While there is no serious demand for election to judicial office in this country, as happens in many of the states of the USA (although not on the federal bench), this does not mean that a democratic society should simply tolerate the status quo without question. It is entitled to ask whether its judiciary need really be so narrowly drawn. After all, the judges have always exercised considerable power over the executive, particularly through the power of judicial review. The ministers and other public authorities who are subject to judicial review have a democratic legitimacy which flows from their accountability to the electorate: judges therefore need to be representative of society in other ways.

10. In the last generation, the powers of the judiciary have increased so that they also extend to review of Acts of Parliament. Under European Union law, where it is directly effective in the national legal system, the courts have not only the power but the duty to disapply national legislation which is inconsistent with it. In this limited sense, our courts do have the power to "strike down" Acts of Parliament in the way that the supreme courts of other countries can do under their constitutions. Under the Human Rights Act 1998, the courts do not have the power to strike down Acts of Parliament, but the higher courts do have the power to make a declaration of incompatibility in respect of such Acts.

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[121] (1993) 77 Judicature 126.

11. The third reason, which flows from the second, is that widening the pool will increase public confidence in the judiciary. When decisions are made about the public interest, or where the balance lies between the rights of the individual and the interest of the community (as under many of the articles of the Convention which are set out in the Human Rights Act), the public are more likely to have confidence in the courts' decisions if they know that the judges as a body are representative of the society they serve.

12. The point has been made well by Lady Hale:

> "There are plenty of able lawyers around from whom to pick a judiciary which would be more reflective of the general population – more women, more religious and ethnic minorities, more varied social and educational backgrounds, more varied professional backgrounds.
>
> This matters because democracy matters. The judiciary may or should be independent of government and Parliament but ultimately we are the link between them and the people. We are the instrument by which the will of Parliament and government is enforced upon the people. We are also the instrument which keeps the other organs of the state, the police and those who administer the laws, under control."[122]

Question 10 and Question 22 (in part): The system for appointing new judges to the Supreme Court

13. We would suggest that the system established by the Constitutional Reform Act 2005 (CRA) for Supreme Court (SC) appointees is, on reflection, at variance with the principles which underlie the JAC for England and Wales, which was created by the same Act. There are the following main differences, which flow from the provisions of sections 25-31 of, and Sch. 8 to, the CRA:

    (1) The JAC is a large commission (15 members), so diminishing the influence of any one member of it. The SC panel is much smaller (5 members).
    (2) The JAC has a non-judicial majority and has a large lay element. The SC panel can have a judicial majority and only has to have one lay member.
    (3) The JAC must have a lay chair. The SC panel is chaired by the President of the SC and the Deputy President is also a member.

14. The current system was cogently criticised by the retired Australian judge, Sir Michael Kirby in a lecture given at Freshfields in London on 2 June 2010. However fair the process may in fact be, we agree that there

[122] Brenda Hale, 'Equality and the Judiciary' [2001] Public Law 489, at 503.

are risks to the maintenance of public confidence in such a system. It would be healthier in a democratic society if the principles which inform the composition of the JAC were also to be used in the case of the SC panel.

Question 21: Parliamentary scrutiny of senior judicial appointments

15. Although we think that there is a legitimate role for Parliament to scrutinise the judicial appointments process, we do not think this should extend to the introduction of confirmation hearings for specific nominees for appointment. We think that few candidates would be willing to put themselves forward for judicial appointment in this country if such a procedure were adopted, and perhaps not the ablest ones. It would risk politicising the appointments process in a way which this country has been fortunate to avoid in the recent past. It would also risk undermining the public's confidence that the senior judiciary is appointed strictly on merit and having regard to integrity and independence.

16. However, we see nothing wrong with the appointments process itself being subject to scrutiny by a Parliamentary committee, perhaps a joint committee of both Houses, which would include suitable members, some with legal experience and others with experience of public appointments. For example, the chair of the JAC might be asked to report to that committee on an annual basis and the SC panel's processes and records could be examined on a confidential basis. Such scrutiny would serve to reinforce, rather than undermine, transparency and therefore public confidence in the system.

24 June 2011

Alison McKenna, Principal Judge, First-Tier Tribunal (CHARITY)

I write in response to the call for evidence, and specifically in relation to questions 13 and 16 of your invitation dated 13 May.

1. My Background

1.1 I was called to the Bar in 1988 and spent five years at the independent bar. After a career in the GLS I moved to private practice and re-qualified as a solicitor.

1.2 I was appointed as a fee-paid Tribunal Judge in 2002 and became a salaried Tribunal President (now a Principal Judge in the First-tier Tribunal) after a JAC competition in 2008. I now sit in a number of Tribunal jurisdictions in both the First-tier and Upper Tribunal.

1.3 I have been appraised and assessed as "highly competent".

2. My Experience of the JAC

2.1 In addition to the process leading to my existing appointment, I have applied for four posts (all in 2010): Civil Recorder, High Court Judge, Chamber President, Circuit Judge.

(a) Civil Recorder

I was told I had failed the written test for this post. I was not given any individual feed back. I am aware that the Chancery Bar Association (of which I am a member) wrote to you with criticism of the selection process in that competition and I endorse the concerns it expressed.

(b) High Court Judge

I applied for this post so that I would have to be given individual feedback on my application. It was the only way to obtain such feedback. The feedback I received was helpful, confirming that I met the competencies for a Court appointment but not at a high enough level to be invited to interview for a High Court appointment.

(c) Tribunal Chamber President

I was interviewed for this post and the feedback described me as strong and appointable. I was not in fact appointed but felt this was the least cumbersome and best run exercise that I have been involved with.

(d) Circuit Judge

I sat the test for this, passed it and attended for interview. This surprised me as I had been told I failed the Recorder test. The other candidates I met at interview were already sitting as Recorders, so I had some sense that I had jumped into the wrong pool of candidates.

I had indicated an interest in the Family and Civil posts but after the test and the interview the appointment criteria were changed so that fewer appointments were required and the majority of those required were for heavy crime. I was not offered appointment.

Recently I was contacted by the JAC to say that I was being considered for an urgent appointment that had arisen.

I was very disappointed to feel that I had wasted my time on applying for a CJ post in this competition. The criteria were changed after I had completed the assessment process. This was the only time I felt I have been unfairly treated by JAC. I have seen correspondence from the Chair of the Chancery

Bar Association to the JAC and the Lord Chancellor about this exercise and endorse the points he made.

3. My Comments

3.1 I have always felt that I have been courteously and (subject to 2 (d) above) fairly treated by the JAC, however it seems to me that the system is itself unfair. In none of the above posts was I able to point to my appraisal report and to independent evidence that I am already functioning as a competent Judge. For each of these posts, I had to start right back at the beginning, as though I did not already hold a judicial appointment. This is an expensive and inefficient way for the JAC to conduct exercises above "entry level".

3.2 The process of filling in the forms and the need to keep asking my referees for their input has been wearing and I am now experiencing "application fatigue" and feel discouraged from applying again. I support the proposals for reform of the appointments process as set out by the Lord Chancellor in his letter to Baroness Jay of 4 January 2011. In particular, I would say that each of the above selection exercises has taken far too long. The JAC's way of operating also has an impact on the diversity of the judiciary, which I comment on below.

3.3 There is no judicial career structure and I now feel "stuck" in my current post with little opportunity to progress. The JAC's approach treats me as a completely new candidate every time and does not allow me to demonstrate my experience and strengths. As I was 44 when I was appointed, and have agreed not to go back into private practice, this is highly unsatisfactory.

3.4 I strongly support the recommendations made in Julia Neuberger's recent report for the development of a judicial career path. The JAC has an important role to play in this process, but it must find a better way to take account of existing Judges' experience than that of asking referees who never see you in Court anyway. Where there is appraisal material, this should be used and where there is not, an appraisal system should be introduced as a matter of urgency.

3.5 It is in my view especially important to develop a career path for the Tribunal Judges, as we represent judicial diversity at the entry-level appointments, but are not being progressed by the JAC's system of appointment. This leads many of us to feel that there is a "glass ceiling" which we cannot break through.

4. Northern Ireland

4.1 I recently sat on an appointment board for the NIJAC, to appoint my counterpart in Northern Ireland. I found its approach to its work refreshing and it appears not to be beset by many of the delays and difficulties experienced by the JAC. It struck me as significant that NIJAC has not

adopted a completely competency based approach, and it seems to me that the JAC should review its own approach to see what can be learned form NIJAC.

5. Non Legal Members of Tribunals

5.1 I would support the idea of non-legal appointments being removed from the JAC. I sat on the appointment board for the non-legal members of the then Charity Tribunal (after my own appointment and so only for the interview stage) and felt it was badly handled by JAC, which had no experience of the sort of candidate who would be most suitable. There was considerable public criticism of the Tribunal (which should have been directed at the JAC) for not paying expenses to candidates who worked in the voluntary sector and had to travel to London twice. There was also criticism because the cut off age was too low, given how useful the experience of older people in the voluntary sector would be to the Tribunal. The inefficient short-listing process led to me sitting through 30 interviews for 7 candidates, which took a whole week. A competent Principal Judge and Chamber President could devise a much more efficient process, having experience of the lay members required for the type of work in their own Tribunal jurisdiction.

13 June 2011

Baroness Neuberger DBE

I am writing in response to your call for evidence for the Committee's inquiry into the judicial appointments process. Whilst I am neither qualified nor indeed willing to reflect on other questions, I would particularly like to address question 7:

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

I chaired the Advisory panel on Judicial Diversity for just under a year from 2009-2010, appointed by the then Lord Chancellor, Jack Straw. We were a six strong panel, including Lord Justice Goldring, now Senior Presiding Judge, as well as three other lawyers and two others, including myself, who were not lawyers. We were unanimous in all our recommendations.

Our main concern is the lack of progress in improving judicial diversity since our report was published. We recommended a series of proposed changes- part of a whole package which, taken together, would, we believe, have made a considerable difference. Most of these could have been started by now. We also suggested that there would need to be considerable political will, across the judiciary itself and the legal professions, to deliver this package, and recommended that a Judicial Diversity Taskforce be set up, which would build on the old tripartite group of the Lord Chancellor, the Lord Chief Justice and the chair of the Judicial Appointments Commission and include the leaders of the legal profession- the chairs of the Bar

Council, Law Society and ILEX as well as the Senior President of Tribunals. This Taskforce has now met, and I have seen its report of 9th May, but remain very concerned that there has been inadequate progress, and am not yet convinced that there is sufficient will within the group to drive through all the necessary changes.

To comply with the recommendations of the panel I chaired, there needs to be, as an early minimum establishment of seriousness about this. In particular there should be

(i) the establishment of judicial appraisal as a norm

(ii) courses in judicial skills provided ideally by the new Judicial College or by other approved providers, so that aspiring candidates can learn what is involved, and show that they are serious about their applications and

(iii) serious encouragement of solicitors to apply, carrying on the work we started, as a Panel, with several of the city law firms needing to change their attitude to their middle ranking and senior people taking time to sit as recorders or in tribunals, which they agreed to take forward. Only a very small part of these proposals seems to be under way.

On the specific question of appointments to the Supreme Court, the Panel recommended that no judge be involved in the selection of his/her successor, that only one of the serving Supreme Court justices should sit on the panel, with a second judicial representative coming from another jurisdiction, and ensuring that the selection commission itself is diverse. That would require the nominations from the judicial appointments commissions/boards from each part of the UK needing to support that objective. We felt it was not necessary for the chairs of each of those boards/commissions to sit on each exercise. This was flagged up to the President of the Supreme Court before we made the firm recommendation, and he did not demur. In the case of the Court of Appeal, we recommended that a five person panel be instituted, so that there is no need for a casting vote provision. Once again, we shared that recommendation with the Lord Chief Justice before going firm with it, and he did not demur.

The report speaks for itself. The questions I would hope the Committee would ask are about why so little progress has been made at this stage, given both the present and the previous Lord Chancellor's acceptance of all of our recommendations.

I ought perhaps to declare an interest as sister-in-law of the present Master of the Rolls. He was not in that position when I started on my work chairing the Panel.

June 2011

Northern Ireland Judicial Appointments Commission (NIJAC)

Executive Summary

Northern Ireland Judicial Appointments Commission (NIJAC)

Introduction

- In May 2011, the House of Lords Select Committee on the Constitution called for evidence in relation to the judicial appointments process.
- The scope of the Committee's enquiry invites evidence on 9 themes ranging from the assessment of the process to the impact of the Human Rights Act (1998) upon constitutional arrangements.
- The Committee has asked for responses to 22 questions.
- Only question 18 relates to Northern Ireland '*How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board*?'.
- This is the response of the Northern Ireland Judicial Appointments Commission.

The Response – Key Themes

- NIJAC was established against a background of a long troubled history. In 1998, there was a major political breakthrough when the political parties agreed to the Belfast Agreement.
- Emanating from the Agreement came an extensive review of the criminal justice system in NI. The review covered such issues as: courts, judiciary, prosecution, victims and witnesses, sentences, probation, prisons, law reform and juvenile justice.
- In March 2000, the Review Team published its report containing 294 recommendations for improving criminal justice in NI, including the judicial appointments process.
- Government and the main political parties accepted the review recommendations. The Review Team stated ' …. *Given the political and community divisions which exist in NI, we do not believe it would be feasible, particularly from the perspective of judicial independence, to leave significant discretion on appointment matters in the hands of Ministers on the Executive Committee*.'
- In June 2005, NIJAC was established under the 2002 & 2004 Northern Ireland Justice Acts which implemented the Criminal Justice Review (2000) recommendations.
- It is an independent non-Government body responsible for judicial appointments in Northern Ireland and has a statutory remit to select and recommend, or select and appoint, applicants for judicial office solely on the basis of merit.
- NIJAC also has a statutory duty to engage in a programme of action to ensure that the Northern Ireland judiciary is reflective of society and that the widest possible range of people are available for selection and appointment.
- On 12 April 2010, policing and justice powers were devolved to the Northern Ireland Assembly (Northern Ireland Act 2009).
- The 2009 Act extended NIJAC's statutory duties further. It is now not only a **recommending** body (Crown appointments) but also an **appointing body** (non Crown appointments).

- At that time, NIJAC's sponsoring department changed from the Northern Ireland Courts Service to the Office of the First Minister and the Deputy First Minister (OFMDFM).
- **OFMDFM's role is one of oversight, ensuring accountability for NIJAC's governance and finance; it does not play any role in the judicial appointments process.**
- The role of NIJAC Commissioners (legal and lay) is expansive. Commissioners not only sit on Selection Committees in relation to judicial appointments but they are also responsible for strategic direction, policy decision making, governance and finance.
- Since inception, NIJAC has developed and maintained a judicial equity monitoring database, plus mechanisms for collating and analysing feedback, to inform the judicial appointments process and the programme of action.
- It has also commissioned research into the barriers and disincentives to applying for judicial office.
- Research findings also inform the work and direction of NIJAC (e.g. refinement of processes i.e. the review of Consultee arrangements), introduction of a judicial shadowing scheme, publication of a Guide to Judicial Careers and other publications, website development etc.
- NIJAC also undertakes regular benchmarking/scoping exercises in relation to other jurisdictions/organisations, at national and international level, to ensure awareness and best practice.
- There is a varied and wide range of judicial posts to which NIJAC recruits i.e. legal and lay/ordinary and posts which require other experience outside the legal profession i.e. land valuation, medical, finance, HR and health and social care (58% are non legal posts).
- Since inception in June 2005, NIJAC has recommended 234 people for judicial appointment across 43 recruitment campaigns: 88 legally-qualified, 24 medically qualified and 122 others. As at the 1 August 2011, there were 679 judicial post holders – 43% are women.
- In addition, NIJAC has also overseen 507 judicial appointment renewals.
- Judicial equity monitoring data, complemented by research findings, has provided evidence that community background is not an issue in the judicial appointments process. As at the 1 August 2011, 53% of judicial officers declared a Protestant community background, 41% declared a Catholic background and 6% stated that they were from neither. This is broadly reflective of Northern Ireland society.
- From a Northern Ireland stance, ethnicity is not a particular issue. Ethnic groups only represent 0.9%[123] of the overall population compared to 12.5% in England and Wales. However, 1.35% of current NI judicial office holders have declared a non-white ethnic background.
- Gender is an issue in that, although more women are being appointed to the lower judicial tiers, there is low representation at the higher court tiers (especially the High Court). However, the issue of low female representation at senior level is reflected in other areas e.g. the legal profession itself (at partnership level within law firms and at QC level), public appointments, Boards, senior management positions etc.

[123] Figures are taken from the 2001 census.

- To ensure the merit principle is adhered to and that the appointments process is open and transparent, NIJAC has developed a generic Judicial Selection Framework which can be tailored to the specific requirements of the judicial office being recruited to.
- A range of assessment and selection methods have also been developed i.e. role plays, case studies, shortlisting tests, to ensure transparency and openness in the judicial appointments process.
- Given Northern Ireland's demographics and smaller jurisdiction, NIJAC recruits on a competition-by-competition basis. It does not retain reserve lists or undertake 'batch recruitment exercises', as is the practice in England & Wales and Scotland. NIJAC's approach helps to ensure that the applicant pool is not limited.
- In addition, again due to a smaller jurisdiction and NIJAC's statutory duty to ensure the widest possible range of people are available for selection, NIJAC does not restrict recruitment to substantive office to those holding fee-paid judicial office[124].
- NIJAC has in place a robust programme of action and undertakes **specific** tailored outreach (Competition Outreach Plans) and **general** outreach to the legal and medical profession, other professional bodies, law students and civic society.
- Commissioners are aware that there are other external factors which may impact upon NIJAC's statutory remit and, where appropriate, will seek to influence other key stakeholders.
- Commissioners, under the Chairmanship of the Lord Chief Justice and Head of the Judiciary of Northern Ireland, carry out their work ensuring NIJAC fulfils all of its statutory obligations, free from any political influence or interference from the Northern Ireland Assembly or any government department within the Assembly.

29 September 2011

NIJAC – The Historical and Political Context

1. NIJAC was established against a background of a complex historical past coupled with thirty years of extreme sectarian conflict in Northern Ireland (NI).

2. It is this background that greatly differentiates NI from England & Wales and how, constitutionally, the current judicial appointments process in NI evolved.

3. In 1998, in NI, there was a major political breakthrough when the political parties agreed to the Belfast Agreement[125].

4. The Agreement set out a complex series of provisions including: the future status and system of Government in NI, the relationship between the institutions in

[124] Out of a total of 679 posts (as at 1 August 2011), only 282 (42%) are legal posts.
[125] Also known as the Good Friday Agreement or the Stormont Agreement.

NI and the Republic of Ireland (RoI), human rights, the decommissioning of arms and the normalisation of NI society.

5. On the 23 May 1998, the Agreement was approved by NI voters in a referendum. On the same date, it was also approved by voters in the RoI in a referendum to amend the RoI's Constitution.

6. The Agreement came into force on 2 December 1999.

7. Emanating from the Agreement came an extensive review of the criminal justice system in NI. The review covered such issues as: courts, judiciary, prosecution, victims and witnesses, sentences, probation, prisons, law reform and juvenile justice.

8. The Review Team published its Report in March 2000[126]. The Report contained 294 recommendations for improving the criminal justice system in NI, including the judicial appointments process. Government and the main NI political parties accepted the Review recommendations.

9. The Review Team, in its Report, stated:

'*We believe that in NI an appointments commission would enhance public confidence. But the factor which, above all, sways us in favour of recommending such a body is the imperative that if political responsibility for judicial appointments is to be devolved, the appointments process must be transparent and responsive to society's needs on the one hand, but on the other, it must be clearly seen to be insulated from political influence. Given the political and community divisions which exist in NI, we do not believe that it would be feasible, particularly from the perspective of judicial independence, to leave significant discretion on appointment matters in the hands of Ministers on the Executive Committee*'.[127]

10. In June 2005, NIJAC was established under the Justice (NI) Acts 2002 & 2004 (see paragraph 20 below) which implemented the recommendations of the Criminal Justice Review.

11. NIJAC is an independent public body established to ensure an independent judicial appointments process that secures public confidence in the NI justice system. A judicial appointments process that is free of any political interference.

12. Despite several suspensions of the Northern Ireland Assembly (the longest period being from October 2002 – May 2007), NIJAC continued to function, independently, under the sponsorship of the then Northern Ireland Courts Service.

13. In 2006, the political parties were still trying reach agreement in relation to the devolution of power to NI. The St Andrews Agreement was the result of multi-party talks between the British and Irish Governments and the main NI political parties including: the Democratic Unionist Party (DUP) and Sinn Fein (SF).

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[126] Commonly referred to as the Criminal Justice Review.
[127] Paragraph 6.102

14. The key elements of the St Andrews Agreement included: the acceptance of the Police Service of NI by SF and a commitment by the DUP to power sharing with republicans/nationalists.

15. This Agreement also envisaged the devolution of policing and justice, within two years, to a restored Northern Ireland Assembly.[128]

16. The devolution of policing and justice powers took place on 12 April 2010 through the NI Act 2009 which established a Department of Justice in NI (DoJ).

17. The 2009 Act extended NIJAC's statutory duties further (see paragraphs 21-25 below) and as a matter of political expediency its sponsoring department changed from the Northern Ireland Courts Service[129] to the Office of the First Minister and Deputy First Minister (OFMDFM).

18. **OFMDFM's role is one of oversight, ensuring accountability for NIJAC's governance and finance; it does not have any role in the judicial appointments process.**

19. It should also be noted that the 2009 Act also contained a sunset clause in relation to the newly-established DoJ:

'*The department dissolves on 1 May 2012 unless, before 1 May 2012—*

(a) the Assembly resolves that the department is to continue operating from 1 May 2012, …… '

To date, we are unaware of any discussion taking place within the Northern Ireland Assembly in relation to the future of the DoJ.

NIJAC's Statutory Duties

2002 & 2004 Justice (Northern Ireland) Acts

20. The 2002 & 2004 Justice Acts sets out NIJAC's key statutory responsibilities.

- To conduct the appointments process and to select and recommend for appointment in respect of all listed[130] judicial appointments up to, and including, High Court Judge.
- To recommend individuals solely on the basis of merit.
- To engage in a programme of action to secure, so far as it is reasonably practicable to do so, that recommendations for appointments to judicial office are reflective of the community in NI.

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[128] The Northern Ireland Assembly was restored in May 2007 with Ian Paisley (DUP) as First Minister and Martin McGuinness (SF) as deputy First Minister.

[129] On the devolution of justice the Northern Ireland Courts Service became the Northern Ireland Courts and Tribunals Service; an agency of the newly-established DoJ.

[130] These listed offices are set out in Schedule 1 of the 2002 Justice Act (approximately 680 judicial offices including many of NI's Tribunal appointments).

- To engage in a programme of action to secure, as far as it is reasonably practicable to do so, that a range of persons reflective of the community in NI are available for consideration by the Commission whenever it is required to recommend a person for appointment to a listed judicial office.
- To publish an annual report setting out the activities and accounts for the period.

The Northern Ireland Act 2009 (Devolution of Policing and Justice)

21. The 2009 Act extended NIJAC's statutory duties further in that NIJAC became not only a **recommending** body in respect of Crown[131] appointments, but also an appointing body in respect of non Crown[132] appointments.

22. Becoming an **appointing body** has now afforded NIJAC with an opportunity to review and revise the timelines involved in the length of time between advertising vacancies to actual appointment. Work is ongoing in this area.

23. In addition, the 2009 Act also gave NIJAC a say over the judicial complement and determining certain elements (non financial) of some Terms and Conditions. NIJAC's new post devolution responsibilities can be summarised as follows:

- agreeing with the DoJ the maximum number of persons who may hold a judicial office at any one time;
- agreeing legislative change governing the maximum number of judicial offices;
- deciding elements of terms and conditions for certain judicial offices;
- supporting the DoJ in judicial succession planning; and
- providing Commissioners to participate in 'removal tribunals' convened by the Lord Chief Justice or the Judicial Appointments Ombudsman for NI.

24. The DoJ's responsibilities in relation to Courts are delivered through the Northern Ireland Courts and Tribunals Service (NICTS). NICTS is responsible for the effective administration of the courts and tribunals in NI and advising NIJAC of any judicial resourcing requirements.

25. To support the new post devolution arrangements, NIJAC has developed a protocol with NICTS and OFMDFM which sets out the specific responsibilities of each body to effect judicial appointments in NI. The protocol has been designed to build upon and develop further the good working relationships between the organisations.

The Role of NIJAC's Commissioners

[131] Crown appointments are mainly full-time substantive posts in various Courts and Tribunals throughout NI e.g. High Court Judge, County Court Judge, District Judge (Magistrates' Courts), Coroners, Social Security Commissioner/Child Support Commissioner etc.

[132] These are mainly fee-paid posts in various Courts and Tribunals throughout NI e.g. Deputy District Judge (Magistrates' Courts), Deputy Statutory Officers, fee-paid members of Tribunals including: the Appeal Tribunals, Care Tribunal, NI Valuation Tribunal, Lands Tribunal, Heath & Safety Tribunal, Charity Tribunal for NI, Industrial Tribunals and Fair Employment Tribunal, NI Traffic Penalty Tribunal etc. It should also be noted that Tribunal membership can consist of legal professionals and people from other professional backgrounds i.e. medical, finance, HR and health and social care.

26. The 2002 Justice Act sets out the composition of NIJAC as follows:

- a Chairman (the Lord Chief Justice of NI);
- five judicial members[133] (to include a Lord Justice of Appeal, a judge of the High Court, a county court judge, a district judge (magistrates' courts) and a lay magistrate);
- two legal members (to include a barrister nominated by the General Council of the Bar of NI and a solicitor nominated by the Law Society of NI); and
- five lay persons[134].

27. NIJAC's Commissioners have an expansive role in that, they not only serve on Selection Committees in relation to judicial appointments, but they are also responsible for strategic direction, policy decision making, governance and finance; they all have equal standing.

28. Unlike the JAC (England & Wales) and the Judicial Appointments Board (Scotland), NIJAC does not retain reserve lists or engage in 'batch recruitment exercises'.

29. Given NI's demographics and smaller jurisdiction, NIJAC will recruit on a competition-by-competition basis. This approach assists in underpinning the merit principle and also allows for those who may have just attained the appropriate eligibility requirements to apply for judicial office. For example, if a competition was not run each time a need arose but someone was appointed from a merit list, this would be limiting the applicant pool especially where fewer females had the requisite years' standing for a particular post.

30. In addition, again due to a smaller jurisdiction and, NIJAC's statutory duty to ensure the widest possible range of people are available for selection, NIJAC does not restrict recruitment, to legal substantive posts to fee-paid judicial office holders. Fee-paid posts are an excellent means whereby the post-holder can gain an insight into judicial life and ascertain whether or not a full-time substantive post is the way forward for her/him.

Is the NI Judiciary Reflective of the Society it Serves? – Current Composition

31. NIJAC's core business is running appointment competitions for judicial office for legal, professional and lay members.

32. Since June 2005, NIJAC has recommended 234 people for judicial appointment across 43 recruitment campaigns: 88 legally-qualified, 24 medically qualified and 122 others[135]. As at the 1 August 2011, there were 679 judicial office holders.

33. In addition, NIJAC has overseen 507 judicial appointment renewals.

[133] The judicial members are nominated by the Lord Chief Justice.
[134] NIJAC's Lay Commissioners also sit on Panels in relation to Court of Appeal and Supreme Court Judge appointments.
[135] Figures quoted are at 1 August 2011.

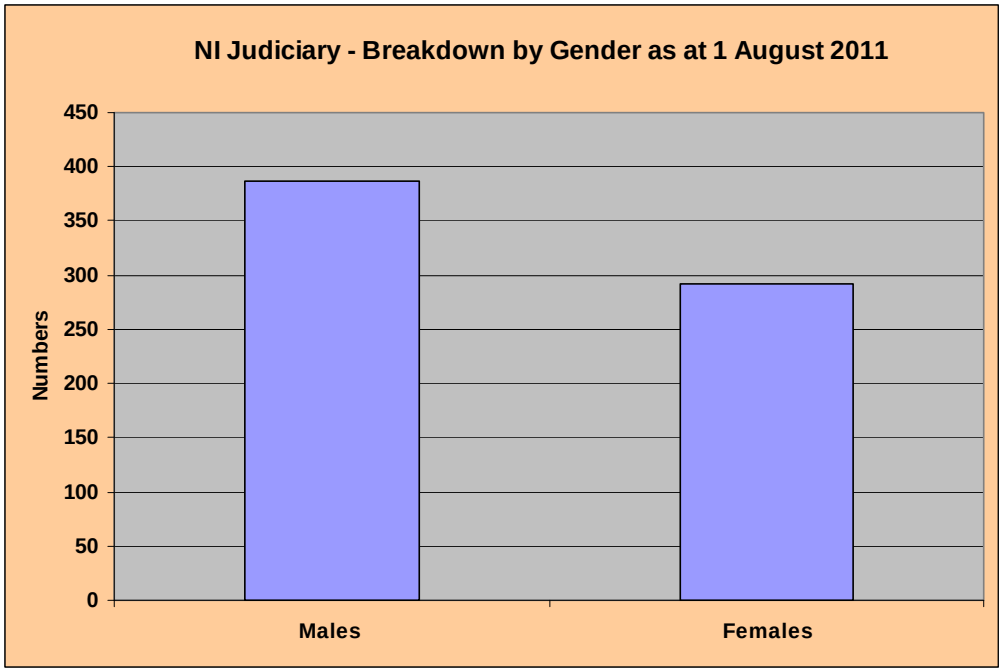
Gender

34. The overall gender breakdown of the NI judiciary is fairly balanced, out of the 679 judicial office holders 292 are women (43%) (see figure below).

35. To date there are no women serving on the High Court Bench. However, there is a better balance at other tiers:

- overall, over 4 out of 10 judicial office holders are women;
- almost 1 in 4 of County Court Judges and Magistrates' Courts District Judges are women;
- 4 out of 10 legal tribunal offices are held by women;
- a third of tribunal medical members are women; and
- women represent over 50% of the lay magistracy.

It is also of note that research has found that whilst more men than women apply for legal judicial office (23% and 13% respectively) proportionately, women are more successful in their application (48% men and 59% women).

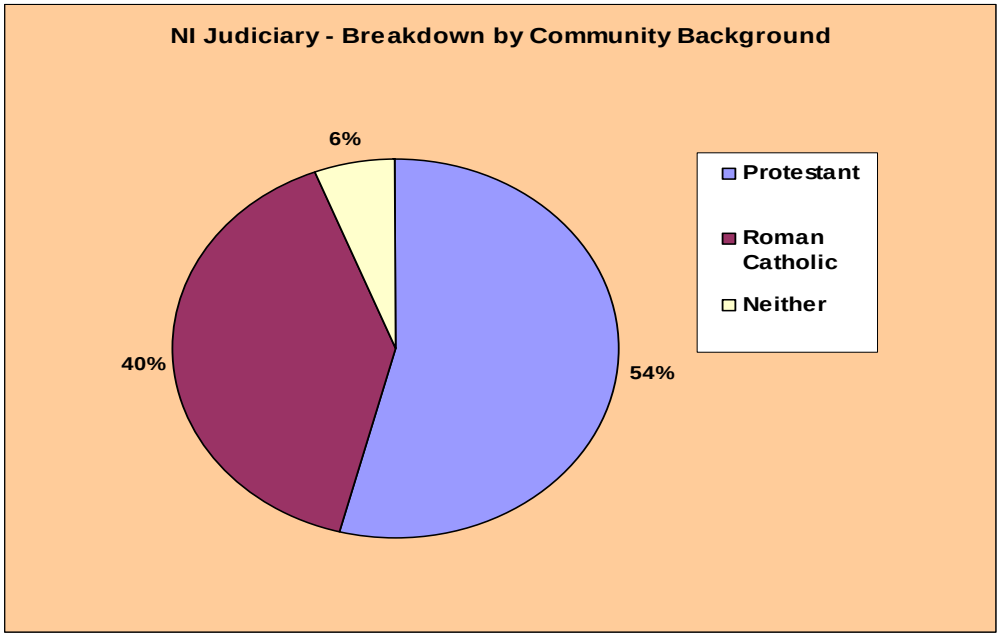


Community Background

36. Equity monitoring (see paragraphs 48-52 below) carried out by NIJAC shows that the NI judiciary is reasonably reflective of the community it serves: 53% of judicial officers declared a Protestant Background, 41% declared a Catholic background and 6% stated that they were from neither (see figure below).

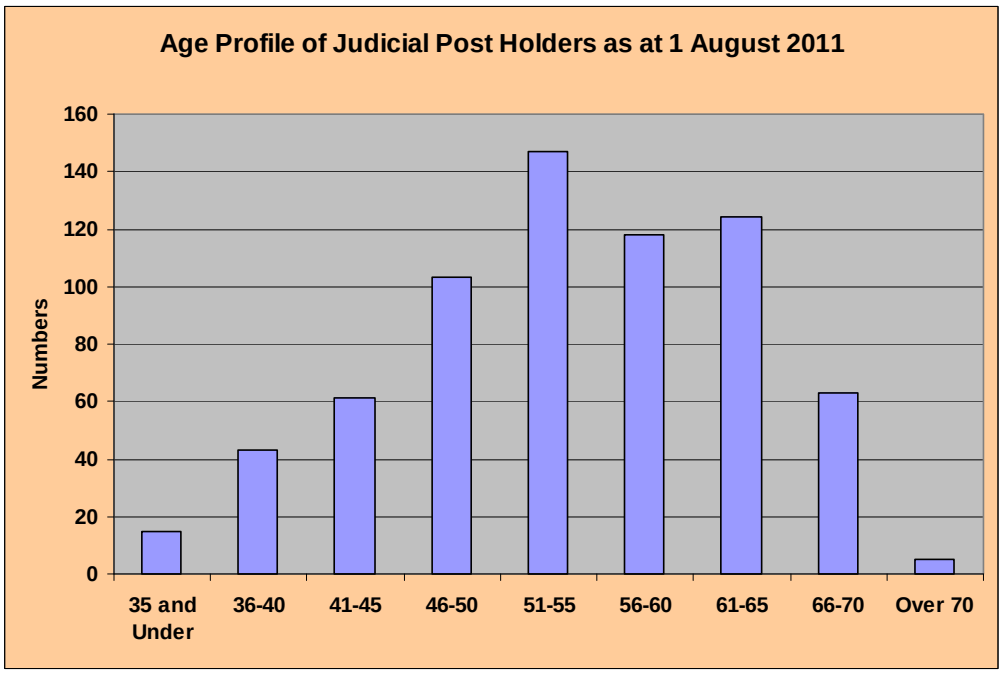
37. Research commissioned with the Northern Ireland Research and Statistics Agency (NISRA) and Queen's University, Belfast (QUB) (see paragraphs 53-56

below) also indicates that community background is not an issue, or a perceived barrier to judicial appointment.

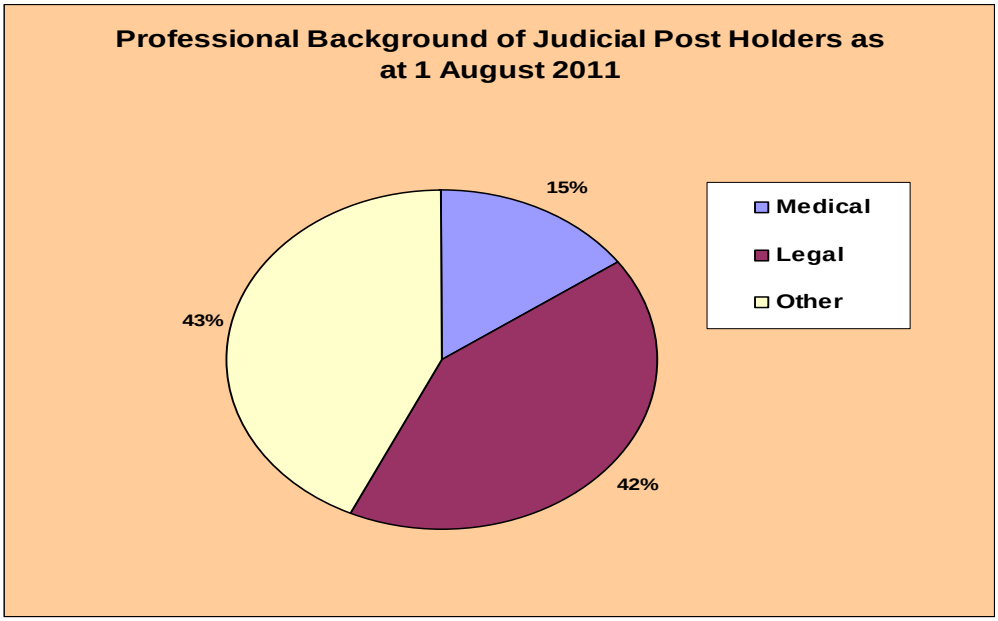


Age Profile

38. It is also interesting to note that in NI, 54% of judicial post holders are aged 55 and under (see below).



39. The range of judicial posts in NI is also wide and varied. The figure below shows the breakdown of judicial posts by profession (58% are non legal posts).



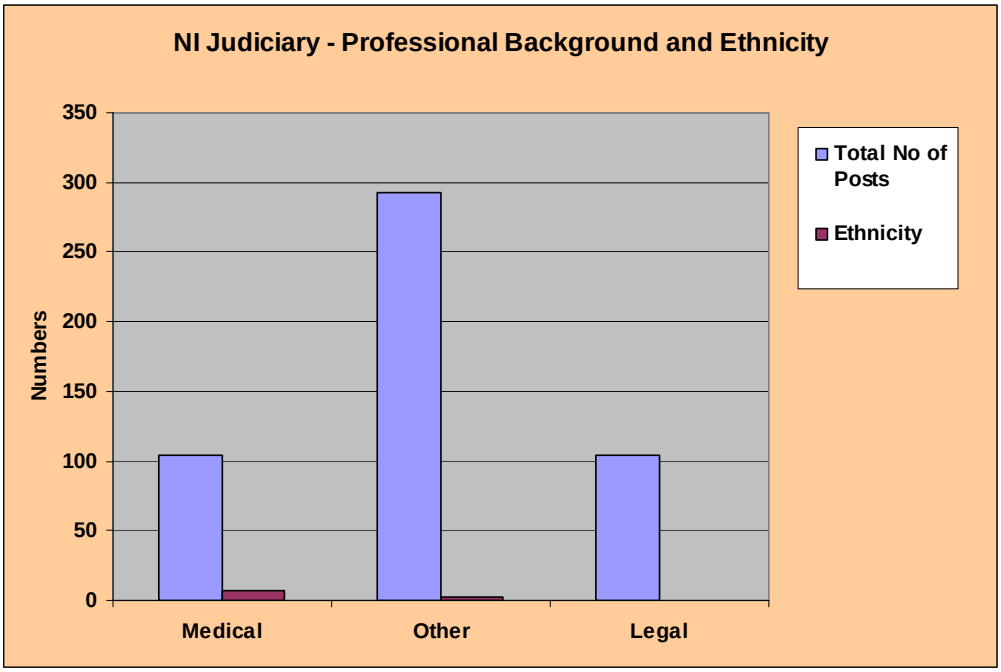
Ethnicity

40. Given the smaller jurisdiction ethnicity is not a particular issue for NI. Ethnic groups represent only 0.9%[136] of the overall population (compared to England & Wales where ethnic groups represent 12.5% of the population[137]).

41. Judicial equity monitoring data[138] shows that whilst all legal judicial office holders (substantive and fee-paid) are white, 7 fee-paid judicial medical members declared a non-white ethnic background (5 Indian, 1 Pakistani and 1 other i.e. 6.7% of judicial medical post holders).

42. Two of the 293 'other' judicial office holders declared a Chinese ethnic background (0.7%) therefore approximately 1.35% of the current NI judiciary have declared a non-white ethnic background.

[136] This figure includes Irish Traveller.
[137] Figures are taken from the 2001 census. Approximately 99% of NI society is white, 0.25% Chinese, 0.09% Indian, 0.04% Pakistani, 0.03% Black African, 0.02% Black Caribbean, 0.02% Other Black, 0.02% Asian, 0.8% Other Ethnic Groups, 0.2% Mixed Other and 0.1% declared an Irish Traveller background. In England 87% of the population gave their ethnic origin as 'White British', this figure rose to 96% in Wales. London had the highest proportion of people from minority backgrounds (33.4% Bangladeshis, 10% Black Caribbean and 2% Chinese) whereas the highest proportion of people who declared their ethnic group as White British were in the North East, Wales and the South West.
[138] The Bar Council of NI collates equity monitoring information in relation to staff only (barristers are self-employed).



Comment

43. Gender is an issue, for although women are well represented at lay magistrate level and within tribunals, they are not appropriately represented within the upper court tiers. However, this is indicative of other 'professions' e.g. low female representation within the legal profession itself (partnership level within law firms and at QC level), Board Level, senior management positions and in public appointments etc.

44. Various research projects[139] have concluded that there are numerous factors impacting on low female representation at senior levels including:

- awareness/attraction;
- confidence/capacity;
- education/experience; and
- lack of support/encouragement.

NIJAC's own research findings also reflect these key themes.

How Does NIJAC Select for Appointment?

45. Commissioners have continually strived to ensure that NIJAC fulfils all of its statutory responsibilities. An open and transparent system for judicial appointments enhances public confidence in the justice system as a whole.

[139] In 2009, NIJAC carried out a major organisational benchmarking/scoping exercise to ascertain the barriers, in general, and gender specific, as to the reasons given for low female representation at senior levels. It should also be noted that NIJAC continually undertakes this type of exercise to ensure awareness of developments in other jurisdictions/organisations, at national and international level, and that it adheres to best practice.

46. For each competition a Selection Committee (representative of Commission)[140] will be established. The Committee will agree the shortlisting criteria, assessment methods[141] to be used and interview questions.

47. Regardless of the route[142] to application and the assessment methods to be used – NIJAC uses a Judicial Selection Framework for assessment and selection across all competitions.

48. This Framework has been well researched and tested and applicant feedback would indicate that it has become embedded, and accepted, in the judicial appointments process. It can also be tailored to reflect the requirements of the specific office under recruitment.

49. The Framework consists of knowledge requirements and four areas of competence: analysis/decision making, leadership/management, communication and understanding people and society.

50. NIJAC has its own published complaints procedure, and ultimately, an individual can go to the NI Judicial Appointments Ombudsman.

NIJAC - Judicial Equity Monitoring

51. On the establishment of NIJAC in 2005 the composition of the serving judiciary was unknown.

52. In 2006, to establish baseline data, the then Chairman of NIJAC and Lord Chief Justice, the Right Honourable, Sir Brian Kerr, wrote individually to each serving judicial office holder requesting them to complete an equity monitoring form. There was a 100% response.

53. The information provided formed the basis of NIJAC's current judicial equity monitoring database which is continually updated, (per judicial appointment competition) in relation to applicant pools and appointees.

54. NIJAC has a statutory remit to collate equity monitoring data for publication in its Annual Report and Accounts; this data includes: gender, community background, age on appointment, ethnic origin, disability and personal/business location. Since late 2009, NIJAC also collates data in relation to professional background to monitor (and address in Outreach Plans) any 'gaps' in the number of applicants coming forward from a particular professional background.

55. Judicial equity monitoring data is analysed and an annual report is produced by NISRA. This annual report and internal evaluation inform Commissioners about

[140] Depending upon the nature of the vacancy under recruitment an 'expert member' maybe co-opted on to the Selection Committee e.g. serving medical judicial officer for medical posts.
[141] NIJAC has developed a range of assessment methods which will be used appropriately depending on the nature of the post under recruitment these have included: role plays, case studies and shortlisting tests.
[142] Depending on the office under recruitment applicants may simply be invited to express an interest e.g. Appeal Tribunals (Medical) Members and on fulfilling the eligibility requirements individuals will be invited straight to interview.

any under-representation, the need of any policy/process refinement in the judicial appointments process and informs targeted outreach activity.

NIJAC - Addressing Research Findings

56. In conjunction with establishing a judicial equity monitoring database, NIJAC also commissioned a two-staged research project into the 'Barriers and Disincentives to Judicial Office[143]'. The research findings were published in October 2008 and have driven and informed NIJAC's programme of action (see paragraphs 59-61 below).

57. The emerging themes emanating from this research were:

Issues for NIJAC to influence -

- aspects of judicial office that did not appeal e.g. security, disruption to family life, isolation of the role;
- the perception that Family Law was not highly valued in the selection process;
- lack of flexible working;
- lack of part-time opportunities in salaried posts; and
- gendered briefing practices.

Issues that NIJAC could directly address –

- lack of or incorrect awareness of judicial life;
- lack of knowledge about NIJAC's role, statutory remit and activities;
- the need to communicate NIJAC's commitment to the merit principle;
- the need to demystify the appointments process; and
- the need to refine and simplify the appointments process.

58. Much work has been done to refine policy e.g. review of Consultee arrangements. Applicant information packs have been redesigned (making application documentation less onerous). A Judicial Selection Framework (common to all judicial offices) has been researched, tested and implemented. Additionally, guidance on applying for judicial office has also been published to encourage and support potential applicants.

Examples from the Programme of Action informed by research findings

- the introduction of a judicial shadowing scheme (launched in October 2009) which is open to legal and medical professionals and those with experience in land valuation[144];

[143] NISRA carried out phase 1 of the research project 'A Survey of Views' which consisted of a postal questionnaire which was sent to members of the serving judiciary and the membership of the Bar Council and Law Society of NI. This was complemented by follow-up discussions with a number of key informants and/or focus groups to explore qualitatively the findings of the survey. This second phase was carried out by a team from QUB.

[144] To date the scheme has proved particularly popular with solicitors and it is available in all courts and most Tribunals – it is limited to one placement in any given year.

- publication of a Guide to Judicial Careers[145] which contains interviews with judicial post holders, deals with some of the myths and misconceptions about judicial office and highlights the range of work available; and
- the launch of the NIJAC website[146] (www.nijac.gov.uk) which is disability friendly and is regularly updated with vacancies, guidance, appointments, renewals and tips re applying (weblog/evaluation reports have indicated that it has now become the primary source of information for judicial vacancies and news).

59. A copy of the Executive Summary of the NISRA/QUB research findings is attached for your information at Flag A or you can access the research reports by using the following link: www.nijac.gov.uk/publications/research .

Competition Evaluation

60. In addition to the above, each competition is also evaluated at each stage of the appointments process i.e. non applicants, applicants, those who were not short-listed for interview (where appropriate), interviewees, non successful applicants and successful applicants. Each Selection Committee also provides feedback and an evaluation report is produced for each competition.

61. Regular reviews are carried out of all evaluation reports and an analysis completed to glean the necessary feedback to inform future work and direction. This is an ongoing process.

A Programme of Action – NIJAC's Outreach

62. A Competition Outreach Plan (COP) is prepared for each judicial appointment competition. The COP outlines the specific and tailored outreach to be undertaken for the particular vacancy under recruitment.

For example, in general:

Judicial Legal Offices

- local press;
- NIJAC, NICTS, Legal Island, Bar Council and Law Society websites;
- arrange for a current judicial office holder to make herself/himself available to act as a point of contact for potential applicants;
- relevant government departments;

[145] The Guide was first published in October 2009 and a fifth edition was produced in April 2011 (in light of the post devolution arrangements and the inclusion of additional judicial profiles to reflect more the work of Tribunals in NI). Over 4000 copies have been distributed throughout NI including: Bar Council, Law Society, University Schools of Law (under and post graduate level), Education and Library Boards, Northern Ireland Medical and Dental Training Association (NIMDTA), Royal Institute of Chartered Surveyors, British Medical Council etc.

[146] The website was redesigned and re-launched in August 2011 improving user friendliness and ease of access further. It has been redesigned to include an online recruitment facility which NIJAC is aiming to introduce later this year.

- refer applicants, where appropriate, to the judicial profile/nature of the role as published on the website; and
- utilise any additional promotional opportunities such as events/seminars to relay and promote the judicial vacancy being recruited to.

Judicial Medical Posts[147]

- local press;
- specialist publication e.g. British Medical Journal and website;
- NIJAC, NIMDTA websites;
- British Medical Association (NI Division);
- Royal College of GPs (NI Division);
- Royal College of Psychiatrists (NI Division);
- all Medical Directors, and where appropriate, Training Committees, Health and Social Care Trusts;
- Directors of Health Trusts;
- Medical/Legal Society;
- Women's Medical Federation (NI Division);
- School of Medicine (QUB);
- Central Services Agency's internal email (GPs, Locums and Practice Managers);
- personal letter to those Consultants with the required speciality; and
- utilise any additional promotional opportunities such as events/seminars to relay and promote the judicial vacancies being recruited to.

Lay/Ordinary Posts

- local press;
- NIJAC, NICTS, NI Direct, Sound Vision Ulster and other appropriate websites e.g. the charityjob website in relation to the Charity Tribunal for NI;
- NI Local Government Association;
- community/voluntary sector e.g. NI Council for Ethnic Minorities, Rural Community Network, Disability Action, NI Council for Voluntary Action etc;
- Chief Executive's Forum;
- job centres; and
- utilise any additional promotional opportunities such as events/seminars to relay and promote the judicial vacancies being recruited to.

63. In addition to the specific outreach outlined above, NIJAC undertakes a programme of **general** outreach.

64. During 2010/2011, NIJAC contributed to or hosted 16 events reaching over 1,200 people across various legal and other professional organisations (including law students at both under and post graduate level).

[147] NIJAC and the JAC (England & Wales) have both experienced difficulties in recruiting the appropriate number of medical professionals to fill vacancies (the main disincentive is the remuneration rate). During November 2010 – February 2011, NIJAC carried out extensive research into exploring new advertising avenues to target GPs and Consultants. 12 medical posts were advertised in May 2011 which resulted in 57 applicants – the best ever response to an advertisement for judicial medical officers.

Impacting External Factors

65. Commissioners are aware that there are a number of external factors which could impact NIJAC's statutory obligations. These include:

- current economic downturn;
- structure of the legal profession;
- lack of flexible working within the legal profession and judiciary; and
- security concerns about taking on a judicial role (NI specific).

66. Whilst the economy and security are totally outside NIJAC's sphere of influence, Commissioners and Executive staff continue to raise issues i.e. lack of flexible working with the relevant stakeholders and seek to influence future direction and policy decisions.

In Summary

67. Since NIJAC's inception in June 2005 there is now in place in NI:

- an independent judicial appointments body;
- a judicial appointments process that is open, transparent and free from any political interference;
- a programme of action to ensure that the widest possible range of people are available for selection, to help to achieve a NI judiciary that is reflective of the community it serves;
- a judicial equity monitoring database that allows for the identification of any under-representation;
- a generic Judicial Selection Framework which can be tailored to the specific requirements of the post under recruitment and a range of assessment/selection methods to ensure the judicial appointments process is open and transparent; and
- mechanisms which allow for continual evaluation/analysis to further improve/refine the judicial appointment process and inform the programme of action.

68. It is positive to note that community background is not an issue and that there is an increasing number of women being appointed to the lower judicial tiers.

69. There is also a positive picture emerging in terms of the age profile of the judiciary in NI. In conjunction, with the increasing numbers of women at the lower judicial tiers, this perhaps goes some way to dispel the common perception that the judiciary is 'old, male, pale and stale'.

70. NIJAC Commissioners are well aware that more work needs to be done in encouraging applications from women for the higher court tiers but the issue of low women representation at senior levels is replicated across other areas e.g. the legal profession itself, public appointments etc.

71. Commissioners select and appoint or recommend for appointment, on the merit principle, individuals to judicial office.

72. Commissioners and the Executive Team continue to work with key stakeholders i.e. judiciary, Bar Council, Law Society, NICTS etc to influence those policy decisions (or lack of e.g. flexible working) which may impact upon NIJAC's statutory remit to ensure the NI judiciary is reflective of the society it serves and that the widest possible range of people is available for judicial selection.

73. They carry out this work, under the Chairmanship of the Lord Chief Justice who is also Head of the Judiciary in NI, free from any political influence and interference from the Northern Ireland Assembly or any other government department within the Assembly.

29 September 2011

Professor Alan Paterson OBE, Director, Centre for Professional Legal Studies, Strathclyde University Law School

Overview

How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

1. In my view[148] the movement towards a purer separation of powers in the UK in the last fifteen years has created an accountability problem. The increased power of the judiciary – the taking over of the running of the courts, the judges' heightened role in judicial appointment , the expanded ambit of judicial review and the incorporation of the ECHR into our domestic law, makes clear, if there was any doubt, that the judiciary are a branch of government in the modern state. As part of government in a democracy the judiciary have not only to be independent, they also have to be accountable. This is the true conundrum behind the question 'Who guards the guardians?' For it is not simply who is to guard them, but how is it possible to guard them in the first place, because every measure designed to preserve the judiciary's independence simultaneously makes them less accountable to the community they were appointed to serve.
2. The old system had certain advantages and it produced many excellent judges. However, it was wholly lacking in transparency, was not equal opportunities compliant , had no input from the non-lawyer community and was open to the accusation of cronyism. The UK judiciary has largely

[148] The views expressed in this evidence are based on my arguments contained in Chapter Four of *Lawyers and the Public interest*, The Hamlyn Lectures 2010 (Cambridge University Press, 2011).

Professor Alan Paterson OBE, Director, Centre for Professional Legal Studies, Strathclyde University Law School

Is the appointments process sufficiently transparent and accountable?

3. The current appointment process is more transparent than the previous one, but problems remain.

3. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

4. Very limited. A parliamentary confirmation process for Supreme Court Justices and Heads of Division might be of assistance here.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

5. See the Overview set out above

5. Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

6. The answer partly depends on how "quality" is defined. If it includes "fitness for purpose", then a more diverse judiciary in terms of gender, race and geography does represent an improvement in quality. The lack of judicial appraisal is not helpful in the context of quality of appointment. "Fitness for purpose" can best be gauged in an individual context by an assessment process that is class, race and gender neutral and which gives "non-standard" candidates with potential the same opportunity as those with traditional backgrounds. In this regard the English Commission is to be commended for its use of assessment centres and the development of legal tests that do not favour candidates with particular legal backgrounds.

[149] T. Legg, 'Judges for the New Century' 2001 *Public Law* 62,73. See also Robert Stevens,'Judges do and should have political views. By giving the judges an even greater voice in the selection of their members than they have today, it is unclear why that should be superior from an apolitical point of view. It is replacing one oligarchy with another.'R .B. Stevens, 'Unpacking the Judges' (1993) *Current Legal Problems* 1 at p.20.

Professor Alan Paterson OBE, Director, Centre for Professional Legal Studies, Strathclyde University Law School

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

7. A switch to appointment by a commission was always going to take longer than the previous system since it requires advertisement, short listing, interviews and tests as well as the consultations that took place in the past. There can also be delays once a recommendation goes to the Lord Chancellor.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

8. It helps to specify what we mean when we say that the judiciary should reflect the communities which they serve. It does not mean that the judiciary should represent society in some crude, identikit way. It does mean that the judiciary should not be restricted to the white, male, middle class cadre that it very largely was until fifteen years ago.

9. Diversity is desirable in the judiciary because it undermines the democratic legitimacy of the judiciary if it is drawn from only one sector of the community, it is discriminatory and a huge waste of talent to appoint only white males, it would provide role models to bring a wider diversity into the recruitment pool and it would increase public confidence in the judiciary and the justice system, particularly amongst the under-represented sectors.

10. Nonetheless, many have argued that taking diversity into account in the selection process would entail watering down the principle of merit selection. This presupposes that the concept of merit is an objective one. In fact, it is culturally defined. If it were not we would still be largely appointing relatives of the Lord Chancellor, or politicians or politically experienced individuals to judicial posts. Any discussion of 'merit' necessarily begs questions about the kind of judges we want. There is no reason why in the 21st century diversity should not be an integral part of merit, as indeed should geography. Judges are inescapably part of government and in a democracy governments have rightly concluded that they must be diverse.

8. 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?

11. See Overview above.

9. Are there lessons that could be learnt from the appointments system in other jurisdictions?

12. The federal judicial appointments process in Canada in recent times has lessons for other jurisdictions which wish to increase the diversity of their judiciary. We can also learn from the experience of jurisdictions which have parliamentary confirmation processes.

Appointments to the UK Supreme Court

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

13. Not in my opinion. In relation to Supreme Court appointments , the need for accountability is particularly strong. I do not think that the current appointment mechanism provides sufficient accountability. Firstly, it fails the Tom Legg/ Robert Stevens "self-perpetuating oligarchy" test. Effectively the Supreme Court is choosing its successors. This is an institutional problem, not a personal critique of the President and Depute President, far less the other members of the Court.[150]

14. Secondly, the potential for a cloning effect is reinforced by the view apparently held in a number of quarters that despite the express terms of the Constitutional Reform Act 2005 'English and Welsh' positions on the Supreme Court should go to candidates who have served in the High Court and Court of Appeal. In this connection the most recent appointment to the Supreme Court is to be welcomed. There seems no reason why brilliant city lawyers, academics or leaders of the Bar should not be appointable directly to the Court.

15. I would favour two innovations. I believe it is clear that at the level of High Court and above the trickle up theory is not working. Kate Malleson's proposal that a short-list of names should go to the Lord Chancellor with respect to any position from High Court and above containing the name of at least one woman, is one that is worthy of serious consideration.[151] Secondly, I consider that for appointments to the Supreme Court we should introduce a pre-appointment confirmation procedure appearance before the Constitutional Committee of the House of Lord, probably after nomination.[152] I do not believe that it is appropriate that the British public and media are far less aware of the interests, values, expertise or track record of their supreme court appointees than the American public and media are of theirs. Properly managed confirmation hearings could be informative without being intrusive or demeaning.[153]

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

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

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[150] A related critique is contained in the Report of the Advisory Panel on Judicial Diversity 2010, Recommendation 41 :'No judge should be directly involved in the selection of his/her successor and there should always be a gender and, wherever possible, an ethnic mix on the selection panel'.

[151] Kate Malleson, 'Is the Supreme Court a Constitutional Court in all but name?' paper delivered at conference on *The Supreme Court and the Constitution* Queen Mary University of London 3rd November 2010.

[152] See Mary Clark's helpful article 'Introducing a Parliamentary confirmation process for new Supreme Court justices' 2010 *Public Law* 464.

[153]In recent years confirmation hearings of Supreme Court justices in the USA have been fairly uneventful. Another model would be the public interview held with candidates for the South African Constitutional Court by a Judicial Selection Committee. See Kate Malleson, 'Selecting Judges in the Era of Devolution and Human Rights' in A le Sueur (ed.) *Building the UK's New Supreme Court* (Oxford: OUP, 2004) p.310.

16. Yes. The current system leads to unnecessarily early retirements. The age of 75 would seem a reasonable compromise.

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

13. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?

14. Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

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

17. The Scottish Judicial Appointments Board has a lay Chair and 50% of its members are laypersons. I believe there are arguments that the JAC should have such a composition.

16. How (if at all) should the JAC's process be reformed? 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?

17.How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

Northern Ireland

18. How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

18. The NI Judicial Appointments Commission has made significant progress in relation to diversity research and the implementation of its action plan from this research, as well as in the use of legal tests.

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?

20. What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

The role of Parliament

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

19. See para. 15 above.

The role of the judiciary

22. Do members of the judiciary have an appropriate role in the appointments process?

20. See Overview above.

June 2011

Dr Erika Rackley

I. SUMMARY

1. This evidence makes an argument for diversity in the judiciary. It argues that a diverse judiciary is, all other things being equal, a better judiciary. It is better not (just) because it is more representative and democratically legitimate, but because it is better positioned to do the job assigned to it – to do justice. A judiciary is stronger, and the justice dispensed better, where its decision-making is informed by a wider array of perspectives and experiences. Diversity is therefore not only a legitimate part of, but is in fact fundamental to, the appointments process. This view supports the consensus that all judicial appointments should be made on merit. A commitment to ensuring that we have 'the best' judges, that is a set of judges who will do the job of judging as well as possible, requires that one be committed to (amongst other things) a diverse judiciary. This in turn requires that positive steps are taken to deliver greater diversity, including:
    a. Clear and measureable targets at all stages and levels of the appointments process;
    b. A requirement for the diverse short lists for all judicial appointments;
    c. Greater diversity of those making judicial appointments (at all levels);
    d. Improved clarity of statistical data.

II. WHAT EFFECT (IF ANY) HAVE CHANGES TO THE APPOINTMENTS PROCESS HAD UPON THE DIVERSITY OF THE JUDICIARY?

2. It is clear that the changes to the judicial appointments process have had very little impact on the diversity of the judiciary, particularly in its upper echelons.[154] As the Committee notes, the process for the appointment of Supreme Court Justices has been used for seven vacancies *all* of which have been filled by men. Baroness Hale remains the only woman on the UK

[154] Though this evidence focuses on the position of women judges, there is a similar or greater lack of diversity in relation to all groups protected by the Equality Act 2010.

Supreme Court. This compares poorly, in terms of diversity, with a number of comparator institutions.[155]

Country	Court	Number of Women Judges	Total number in post	Representation of women as a %
	International Criminal Court	11	18	61.1%
Canada	Supreme Court	4	9	44.4%
Australia	High Court	3	7	42.9%
	European Court of Human Rights	19	47	40.4%
Israel	Supreme Court	5	15	33.3%
USA	Supreme Court	3	9	33.3%
	European Court of Justice	5	27	18.5%
South Africa	Constitutional Court	2	11	18.2%
UK	Supreme Court	1	11[156]	9.1%

3. There has been no woman judge in a senior administrative role (as a Head of Division) since Baroness Bulter-Sloss' retirement as President of the Family Division in 2005. Moreover though the percentage of women in the senior judiciary (that is the High Court and above) has increased slightly from around 7% in 2000 to 12.8% in 2011, the proportion of women judges on the Court of Appeal is now at its lowest level since 2000.[157]

Court of Appeal	Number of Women Judges	Total number of Judges	Representation of women as a %
2 October 2000	3	40	7.5%
14 February 2011	4	43	9.3%
7 June 2011	3	43	7.0%

4. The Report of the Diversity Taskforce, published in May 2011, gives the figure of 20.6% as the percentage of women in the judiciary as a whole (an increase from 14.1% in 2001). In fact, once members of the fee-paid judiciary

[155] Source – Court websites (accessed 29 June 2011). A more comprehensive table can be found on the Equal Justices Initiative (EJI) website (http://www.law.qmul.ac.uk/eji/statistics/index.html).
[156] Excluding Jonathan Sumption QC who is yet to be sworn in as a Supreme Court Justice.
[157] Table taken from EJI website.

are excluded this figure decreases to 18.9%. This supports the view that the majority of gains have been in the lower levels of the judiciary.

5. The position of black and minority ethnic (BME) judges is even worse. The percentage of BME judges in the salaried judiciary is just 2.8% (rising to 4.8% in relation to the judiciary overall). There are no BME judges in the Supreme Court or Court of Appeal. The percentage of BME High Court judges is stated as 3.5%. Within this, Mrs Justice Dobbs is the only visible minority (0.9%).

III. IS DIVERSITY A LEGITIMATE FACTOR TO BEAR IN MIND AS PART OF THE APPOINTMENTS PROCESS?

6. Diversity may be a relevant and legitimate factor in the appointments process in two ways.

Diversity as a 'tie-break'

7. First, diversity may be relevant in so-called 'tie break' situations. Thus, where the merits of two or more candidates are equal, the extent to which a candidate, by virtue of their possession of a protected characteristic, will contribute to the diversity of the judiciary as a whole may 'tip the balance' in their favour.[158] This approach has been given statutory footing in s 159 of the Equality Act 2010 and in the same year the Advisory Panel on Judicial Diversity chaired by Baroness Neuberger recommended that these provisions should be utilised by the JAC.[159]
8. However, in view of the evidence presented to the Diversity Taskforce chaired by Lord McNally that the JAC has *always* been able to distinguish between candidates, this approach is unlikely to yield significant changes to the diversity of the judiciary. If this is the only role for consideration of diversity in the appointments process then it means that diversity will (continue to) have no real bearing on that process.

Diversity is an essential component of appointment on merit

9. There is a second way in which diversity is relevant to the judicial appointments process. Rather than being an *additional* factor in the appointments process, which only bites when it is necessary to break a deadlock between two or more suitably qualified candidates, **diversity may also be understood as *an essential component of appointment on merit*.** On this view, diversity forms part of the assessment of the candidates' merit, that is how well they will do the job, the quality of their judging and so on. This understanding of the role of diversity is grounded in the view that the judiciary is stronger, and the justice dispensed better, where its decision-making is informed by a wider array of perspectives and experiences; that a judiciary is enriched in sum through the diversity of its parts.

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[158] Defined in section 4 of the Equalities Act 2010 as 'age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation'.
[159] Recommendation 21

10. Baroness Hale has made a similar point in the course of making what she terms 'a positive case for judicial diversity':

> 'Diversity of background and experience enriches the law … It is just as important that these different experiences should play their part in shaping and administering the law as the experiences of a certain class of men have played for centuries. They will not always make a difference but sometimes they will and should'.[160]

Similarly, Lord Justice Etherton has noted that 'a judiciary with a diversity of experience … is more likely to achieve the most just decision and the best outcome for society'.[161]

11. Once we accept that a judiciary is stronger for the diversity of experiences, skills and values of its members, we have a clear basis for saying why diversity *is* a relevant consideration in judicial appointments. Anyone truly concerned with 'maximising' merit – that is, with ensuring that our judiciary is as good as it can be – has a reason to seek diversity. Merit, far from standing in the way of the pursuit of diversity, provides an argument for it. As such, this argument for judicial diversity is an argument for a judiciary better positioned to do justice, to develop and apply the law sensibly and fairly.
12. The case for diversity on the basis of it resulting in better justice is based on the reality that, as Court of Appeal justice Lord Justice Etherton and others have stated, it is impossible to exclude 'a general outlook, or personal philosophy, based on an individual judge's life experience'[162] from judicial decision-making.
13. This is not an argument for non-legally motivated decision-making or judicial prejudice.

    Judges must apply the law. They are not, and should not, be free to advance their own 'agendas' irrespective of the proper constraints of judicial decision-making. But it is also clear that judges – especially those at the highest levels – are often called on to make decisions where the existing legal rules provide no clear answer. In such cases, the judge must turn to their own sense of justice, of what is right and wrong, to decide the case. And necessarily this will differ from judge to judge. None of this is controversial. Judges often disagree, and not simply on what the authorities say but on the direction the law should take.
14. *On these occasions* a judge must, necessarily, turn to his or her understanding of the aims of the law, the judicial function, justice and so on for an answer.[163] As Baroness Hale notes:

> '[T]he business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the

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160 B. Hale, "Maccabaean Lecture in Jurisprudence: A Minority Opinion?" (2008) 154 *Proceedings of the British Academy* 319, 331.

161 T. Etherton, "Liberty, the Archetype and Diversity: a Philosophy of Judging" [2010] *Public Law* 727, 728.

162 Etherton above at 740-741. See also Hale, above and J Raz *Practical Reason and Norms* (OUP, 1999)(first edn, 1975) p 139-140.

163 Hale, above at 336. For a fuller discussion of the points raised here see R. Hunter, "An Account of Feminist Judging" in *Feminist Judgments: From Theory to Practice*, R. Hunter, C McGlynn and E. Rackley (eds) (Hart Publishing, 2010).

> law, to the problem under discussion and to ideas of what makes a just result'.[164]

Accepting then that judges will, on occasion, necessarily have to fall back on their own judgment of what is right and wrong, just and unjust, reasonable and unreasonable, who our judges are matters for different individuals will differ in their understandings of what is fair, just and reasonable. And, among the factors which may influence or shape a judge's sense of fairness and justice, it is implausible to think that these will not include factors so central to a judge's experiences and outlook as her gender, race, sexual orientation and professional background. To the extent that a judge's sense of justice, their view of what is right and wrong, is informed by their own background, experiences and attributes – by who the judge is – then these will inevitably make some kind of difference to how they decide the case at hand.

15. Once it is accepted that an individual judge will inevitably at some point be forced to fall back on their own knowledge or perspectives when deciding cases, it seems reasonable to say that a judiciary with a greater wealth of expertise or insights to draw on will be better equipped than one with a narrower background or range of knowledge. Similarly we have reason to prefer a judge with a greater range of knowledge or perspectives to call upon than one who has fewer; and, when making judicial appointment, to pick a candidate who will add to the array of perspectives and insights already found on the bench to one who will not. None of this is to say that all insights and experiences are of equal value, but it *is* to say that, all things being equal, a judge and a judiciary with a broader array of perspectives and expertise, with a diverse range of life experiences, is better positioned to assess the merits of competing arguments or alternative routes the law could take and to decide the case accordingly. The judiciary is stronger, and the justice dispensed better, the more varied the perspectives and experiences that are involved in its decision-making.

IV. WHAT SHOULD BE DONE TO HELP DELIVER GREATER DIVERSITY?

16. The evidence to the Committee from the Equal Justices Initiative, of which I am a member, makes a number of recommendations in relation how to deliver increased judicial diversity, which I support. I will therefore focus here on four key issues.

Introduction of clear and measurable targets

17. There is a tendency to see all forms of positive action as intrinsically problematic. However, positive action can take a number of different forms ranging from quotas and preferential treatment to targets and policies such as those adopted by the JAC and others designed to encourage member from under-represented to apply for judicial positions.

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[164] Hale, above at 320.

18. The use of quotas and preferential treatment is contentious and is not recommended.
19. However, the use of non-binding targets is less controversial. Such targets set clear and measureable aspirations. They are commonly used both in business and government in order to establish a benchmark against which to measure progress.
20. Targets could be used to good effect in order to deliver greater diversity in the judiciary. Indeed, both the Advisory Panel on Judicial Diversity and Judicial Taskforce reports include the 'vision' that by 2020 there should be a 'much more diverse judiciary at all levels'.
21. I recommend the introduction of clear and measurable annual targets at both application and appointment level, throughout the judiciary, would provide a benchmark against which to measure whether progress is being made. These would serve, at least, two purposes: first, they would be an indication of clear and determined political commitment to a more diverse judiciary. Secondly, failure to meet a target would immediately provide an opportunity to consider reasons for this and crucially put in place measures to ensure that progress is made the following year.

Diverse short lists for all judicial appointments

22. 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. One way to demonstrate this is through the introduction of a statutory requirement that any shortlist provided by the JAC or the commission responsible for Supreme Court appointments provided to the Lord Chancellor should include a diversity of candidates.
23. In the meantime, where this is not the case the Lord Chancellor should make use of his ability under sections 69-96 of the Constitutional Reform Act 2005 to ask the JAC or selection commission to reconsider their recommendation.

Greater clarity of published statistical data

24. There is a need for greater clarity in relation to the presentation and keeping of statistical data. This has been a concern for over a decade. Despite the introduction of some (limited) initiatives to try and measure progress, there has been a singular failure to ensure the data is available in a form that enables such assessments to be made.
25. The figures collated by Judiciary of England and Wales are not only limited to sex and race, but are often outdated and inconsistent with other statistics included on the website. Moreover, changes in judicial role (presented without explanation) make it difficult to map the progress made at specific levels.
26. There needs to be a far more robust collation of statistical data to include the monitoring and benchmarking of all protected characteristics as well as distinguishing between salaried and fee-paid appointments. It is also necessary to address the anomalous position of Deputy High Court judges, about whom there is no publically available information.

Greater diversity among those making appointments

27. Recommendation 31 of the Advisory Panel on Judicial Diversity stated that 'the JAC must assemble diverse selection panels. There should always be a gender and, wherever possible, an ethnic mix'.
28. It is disappointing to note that the Diversity Taskforce reported that to date this has not been the case. Though a gender mix has 'often' been achieved, there has only 'sometimes' been an ethic mix.[165]
29. This is not acceptable. It is crucial that *all* JAC selection panels include a gender and ethnic mix in order to maintain the legitimacy of the appointments process and to ensure that all candidates have, in so far as is possible, a comparable experience of the appointments process.
30. The requirement of diversity should also be extended to the five-member commission responsible for appointments to the Supreme Court, though a formal requirement that the commission includes members of both sexes and, wherever possible, an ethnic mix.

June 2011

Mark Ryan BA, MA, PGCE, Barrister (non-practising)

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University. I have a particular interest in constitutional matters and in recent years I have submitted written evidence to a number of parliamentary committees. My submission, however, is made in my own personal capacity and indicates my personal observations on judicial appointments. It in no way reflects the views of my employer (Coventry University).

2. Questions 3 and 21: It is submitted that, at best, public awareness of the judicial appointments process is limited. In the light of greater public attention focused on judges and their decisions since the advent of the Human Rights Act 1998, it is important that the transparency and accountability of the process for appointing the judiciary is plain for the public to see. One solution would be to introduce parliamentary confirmation hearings (at least for senior judicial posts). The publicity surrounding these hearings would not only focus some much needed public attention on the process of appointments, but also highlight the putative judges themselves. It would also serve symbolically to demonstrate the constitutional connection between the judicial and legislative arms of the State.

3. Question 19: From a constitutional perspective it is submitted that the role of the executive in the judicial appointments process should be minimised. After all, in the context of the checks and balances of our uncodified constitution, the function of these judges (particularly in the context of judicial review proceedings) is to hold the executive to account under the law.
4. One very straight-forward reform - which might command general support - is to remove the (albeit purely formal) role of the Prime Minister from the process of appointing Supreme Court Justices. It is regrettable that a provision with this

[165] Improving Judicial Diversity: Progress towards delivery of the '*Report of the Advisory Panel on Judicial Diversity 2010*' (May 2011) at p 42.

objective in mind in the Constitutional Reform and Governance Bill was excised during the wash up of the Bill in April 2010.

5. Question 8: The Human Rights Act 1998 has served to enhance the traditional role of the judiciary in safeguarding human rights. It has led at times to a degree of friction between the judiciary and the executive (which in our uncodified constitution with an overly dominant Government is no bad thing). In constitutional theory as the Act preserves the principle of parliamentary sovereignty, the role of the judiciary in relation to Parliament has not altered. In practice, however, it could be argued that a subtle shift has occurred, because as a result of a section 4 declaration of incompatibility, there is a 'moral' obligation on Parliament (and the executive via a remedial order) to remedy a violation in domestic law of the European Convention.

29 June 2011.

Sir Konrad Schiemann[166]

I only wish to address two questions
Diversity – question 7

1. It is impossible for a limited number of judges to echo all the diversities of our society. For that our society is too rich in diversity.
2. It is often said that the judiciary as a whole should be representative of society as a whole. If by that is meant that the judges as a whole should reflect in their own persons the main characteristics of every significant segment of our society or alternatively should reflect in themselves the main characteristics of those parts of society with which the judges have most to do then I do not share this view since significant segments of our society are criminals or illiterate for example. Although these elements constitute a significant part of our clientele I do not consider that we should share these characteristics. If we did the rest of society would suffer. By contrast it does seem to me important that judges be chosen from amongst those who have the imaginative ability and willingness to see how things look from the point of view of others who do not share the judges' own characteristics. In so far as this is helped by reading and training the judges should read and be trained.
3. An entirely different problem arises from the fact that a particular judge in a particular case will be either male or female, either Caucasian or not and so on. Clearly the more judges that sit on a case the less important this factor becomes.
4. All that said, since no person's capacities for placing himself in the shoes of others are limitless, a certain degree of diversity is desirable. My own suspicion is that the search for good judges even without specifically aiming for diversity is likely to result in a judiciary which in general has these capacities to an adequate degree.
5. If, however, one rejects this optimistic point of view and considers that the selection process ought to aim in itself for a degree of diversity, then it is

[166] Erstwhile High Court and Court of Appeal Judge. Since 2004 judge at the Court of Justice of the European Union.

necessary to identify the characteristics in respect of which one wishes for diversity and to explain why it is important that any particular characteristic is found amongst one or more of the judges.

6. Judging by the press, there is apparently a strong desire amongst the public that judges should spend time listening to popular music, going shopping, and should themselves suffer from money or housing shortages. I myself doubt whether the selection process should aim at the representation of these characteristics in the judiciary.
7. Diversity as to hair colour or length, so far as I am aware, is not regarded as desirable as such. By contrast diversity as to skin colour, if it signifies diversity as to race, or diversity as to gender amongst the judiciary, is widely regarded as desirable. If the Committee shares this view it should try to identify exactly why diversity in regard to a particular characteristic is regarded as desirable. This will not be easy since it involves difficult questions as to why one group should be represented and not another, what is a race for this purpose, whether homosexuals or those just not interested in sexual activity constitute categories which should be represented as such, what other groups, for instance trade unionists, religious groups and/or atheists should be represented, whether there should be an attempt to match the judiciary with percentages of the population in particular groups and so on.

Compulsory Retirement Age – Question 12

It is manifestly undesirable that judges stay on when they have lost the capacity to do the job. It can be difficult for those in power to spot deteriorating faculties sufficiently early and also difficult to persuade a judge to retire once that deterioration has been detected. However, for good reasons, it is difficult to force a judge to retire. An identical compulsory retirement age for every judge is however a very rough tool with which to meet this problem – some people's faculties last longer than others'. I suggest that consideration be given to three points.

1. Should not a medical examination of judges (say) every 5 years (perhaps more frequently after 70) be instituted? It is done on appointment - although when I was appointed no form of mental or cognitive element was manifestly involved so far as I can recollect. I am not sufficiently expert to know whether incipient senility is nowadays reliably detectable. I am sure there will be borderline case. However there must be some persons who would fail at a particular point in their lives. The fear of failure might encourage the doubtful to go when the time is ripe.
2. If a judge is promoted at (say) 69 then I should have thought that it is a fair bet that he will continue to function at full capacity for more than one year.
3. The quality of quick and accurate recall is of greater importance to first instance than to appellate judges. The latter have time to check, consult and cogitate.

June 2011

Karamjit Singh CBE, Northern Ireland Judicial Appointments Ombudsman

Northern Ireland

1. I was appointed as the first Judicial Appointments Ombudsman for Northern Ireland for a five year term beginning in September 2006. This role was created by the statutory framework as set out in the Justice (Northern Ireland) Act 2002 and provides an independent and external element for those individuals who wish to complain about any administrative aspect of their own experience as candidates during an appointment process for judicial office. The devolution of policing and justice issues to the Northern Ireland Assembly has meant that my accountability framework in previously reporting to the Lord Chancellor and the Houses of Parliament has now been replaced by the Department of Justice and the Assembly.

2. My perspectives on judicial appointments and that of the Judicial Appointments Commission are drawn from my consideration of a small number of complaints during this period and contact with the Commission.
3. The assumptions underpinning all five of my Annual Reports are the independence and impartiality of the judiciary; judicial appointments should be free of bias, both in terms of perception and reality and judicial appointments are not just of interest to the legal community but also to a wider public. A statutory requirement to produce my first Report six months after my appointment provided a unique opportunity for me to meet with a wide spectrum of people, some sixty individuals, who were active in different facets of civic life.

Themes Arising From These Discussions

4. Complainants needed to understand how the complaints process operated; and it was important for my office to show it was demonstrably independent; as well as creating a wider understanding of the Ombudsman role in that it was not acting as advocate for complainants but investigating impartially and making recommendations to ensure good administrative practice.

5. A relatively small legal and judicial community could lead to a reluctance to complain and a possibility of candidate details circulating informally or speculation about potential applications. The judiciary should be reflective of the community and seeing judges appointed from a diverse range of non traditional backgrounds would be taken as a more open minded approach in judicial appointments; whilst other commentators emphasised appointments should be strictly on merit and not be influenced by seeking a community or gender balance. Although there was now a pool of women lawyers who were eligible for appointment, few women were visible at senior levels and organisations in the justice system should be sensitive to the image they conveyed.

6. The Judicial Appointments Commission should ensure there was consistency in its approach to competition procedures and appointments; and given there was a marked lack of awareness across civic society about the role of the Commission it should focus on how it was discharging its responsibilities so that the public at large could understand how judges were being appointed on an open and fair basis. Dealing with actual or potential conflicts of interest on the part of Commissioners when appointments were advertised was also highlighted as a potential issue.

7. There were perceptions that judicial appointments were largely seen as the preserve of the Bar with an emphasis on visibility before judges and that solicitors were likely to be disadvantaged. The justice system had been subject to considerable scrutiny and organisational change and the public focus had been on police and prisons whilst judicial appointments had only been of interest to the legal community. How lay persons were appointed to the magistracy was an important factor towards promoting confidence in the justice system.

8. Whilst Northern Ireland was changing as a society, community relations were still viewed through a traditional prism of two communities and there was little research into the experiences of minority ethnic communities or lawyers.

Themes Arising From Complaints

9. The Commission's arrangements to consider complaints ensured that a committee of different Commissioners to those involved in selection decisions was used and this promoted confidence in relation to perceptions of unfairness or closed minds. Outstanding consultee comments were now addressed by ensuring that candidates would know when the deadline for these responses would expire so that they could remind consultees. The Commission had also published documentation which described its role, the work of judicial postholders and the opportunities for career advancement.

10. I have suggested to the Commission that it gave further consideration to various issues such as the arrangements for dealing with complaints or concerns that are raised whilst competitions are still ongoing; how to balance transparency and fairness to complainants with confidentiality to other candidates; the detail in audit trails showing discussions and decisions taken at various stages of each competition; how feedback was drafted and communicated to candidates; how the training and insights for Commissioners (whether lay or legally qualified) could be developed further to ensure a consistency of approach for all competencies and in particular when assessing applications from candidates with traditional and non traditional career paths; what further guidance could be issued to consultees in order to further enhance their contribution to making a rounded assessment of applicants; and not formally completing a selection process until any outstanding complaints process has been completed.

11. As an Ombudsman I have to balance the issue of confidentiality to other candidates with the right of the complainant to expect as full an explanation as can be offered in the circumstances so that there is a clear understanding of the basis on which I have made my decision. Ensuring a thorough investigation does not mean that transparency must be absolute. These competing interests are accentuated when there are only a small number of candidates. The Commission has a responsibility for maintaining confidence in the integrity of future competitions in addition to the one where there may be a complaint. A further issue arises when there are few candidates in any specific competition in terms of how the Commission satisfies itself that there is a sufficient pool and that it has taken its general duty to promote diversity into account.

Some General Observations In Relation To England and Wales

12. During the past five years I have also been appointed as a Temporary Ombudsman by the Lord Chancellor in order to deal with a small number of cases in England and Wales where the Judicial Appointments and Conduct Ombudsman considered there may be a potential conflict of interest. With one exception these cases were concerned with complaints about the personal conduct of judicial office holders. In the one appointment complaint I made a recommendation that the Judicial Appointments Commission should consider whether the Commissioners determining complaints should be separate from those taking decisions in relation to the selection process, but it was felt that the Commission's existing procedures were tried and tested ones.

13. This may highlight a difference in the role of Commissioners from that of Northern Ireland, where they are intimately involved in the detail of all competitions, and that of England and Wales where they may provide the final tier of approval within the Commission given differences in the scale of appointments.

14. The Commissions have Commissioners who are drawn from different sectors and arrive through diverse routes (for example non legally qualified Commissioners tend to come through publicly advertised processes whilst this does not appear to be the case for judicial and legal members). Does this affect how individual Commissioners see their role? Are Commission Boards expected to function in similar terms to other public sector boards or should judicial and legal members be expected (or themselves) expect to have a distinct role. I would observe that at the current size of these Boards is much larger than the size that most observers would assume is appropriate for effective decision making at Board level.

15. As with other public bodies Commissions must take value for money considerations into account. This means that selection processes must be proportionate but also have robust audit trails in order to promote confidence that appointments are being made on merit and in a considered fashion.

16. In relation to confirmation hearings a number of questions arise in addition to the constitutional ones. What is the intention behind these confirmation hearings, do the participants have the requisite skills in making assessments and how do they relate to earlier parts of the public appointments process for these roles?

17. Diversity should be an integral component of the appointments process. I draw on my own experience as a member of the Judicial Studies Board over a decade ago when I chaired the panel which drafted the Equal Treatment Bench Book and we promoted the importance of these themes in promoting confidence in the administration of justice. Then as now a connection exists with human rights and access to justice.

29 June 2011

Society of Asian Lawyers (SAL)

1 This submission is made on behalf of the Society of Asian Lawyers ('SAL') in response to the invitation made by the House of Lords' Constitution Committee to submit contributions about the current system for appointing judges.

2 SAL only proposes to comment upon the following questions which the Committee will be looking into:

(a) Is the current system of making appointments based on merit?
(b) Do we have a sufficiently diverse judiciary?
(c) Should Parliament scrutinise judicial appointments?

<u>Is the current system of making appointments based on merit?</u>

3 SAL is clear that the current system is not based on merit. Some three years ago, SAL, together with various other groups representing BME lawyers, submitted a series of damning confidential reports to the then Lord Chancellor about the performance of the Judicial Appointments Commission ('the JAC') and about the inability or unwillingness of the Judicial Appointments and Complaints Ombudsman ("the JACO") to investigate complaints properly. Some three years later, nothing much appears to have changed, particularly in the context of the making of appointments at the level of senior-CJ and above.

4 The judiciary has a considerable amount of influence in the making of appointments at every level. Its influence is particularly significant when it comes to the making of appointments at a senior level. Entrance to the

judiciary at the level of senior-CJ and above is usually through appointment as a 'fee paid' deputy High Court Judge. That appointment is solely within the gift of the Heads of the various Divisions, with the JAC doing no more than rubber stamping the appointment. While invitations are made from time to time for 'expressions of interest' to be submitted by applicants who wish to be considered for appointment in that capacity, the following points should be noted: (a) applications are dealt with outside the auspices of the JAC and under procedures set up by the Heads of Division that are neither fair nor transparent and depend heavily on apparently secret soundings; (b) the procedures are likely to operate unfairly against applicants who do not fit the establishment profile, particularly solicitors and BME applicants; and (c) there appears to be no statutory right on the part of an unsuccessful applicant to complain – or if there is, it is unlikely to be exercised for fear that the unsuccessful applicant's future prospect of appointment or promotion may be adversely affected.

5. However, quite apart from this, there continues to be, so far as SAL is aware – or, at any rate, was some three years ago – a parallel system of making deputy High Court Judge appointments under s 9(4) of the Senior Courts Act 1981 which was based purely on patronage – the patronage of the Heads of Division. It would be interesting to see how many appointments of the current contingent of deputy High Court Judges were made under that procedure. It is understood that a considerable number of deputy High Court Judges in the Chancery Division were appointed under this procedure.

6 The influence of judges in the making of appointments can be seen at every level of entrance to the judiciary. Even at the most junior level, the views of the judicial member of the 'sift' or 'interview' panel will have considerable weight. But in the context of senior appointments, his views will, in reality, be the only views that will matter. The judicial member will concentrate primarily on matters such as 'technical knowledge and expertise' and whether the applicant has demonstrated 'intellectual ability' or – in the case of senior appointments – 'substantial intellectual ability'. Given that those 'qualities' or 'competences' will be the all-determining qualities or competences for appointment, particularly a senior appointment, the judicial member's indication about the suitability of a candidate will take precedence over the views of any other panel member both in the sift and at the interview. Given that – in the case of senior appointments at any rate – he will himself be of at least the status of a High Court Judge, he is likely to measure the standing of the applicant by the type of cases the applicant has done at the Bar, whether he is in silk and whether he fits the establishment profile. Solicitors and BME applicants are, therefore, unlikely to get a look-in.

<u>Do we have a sufficiently diverse judiciary?</u>

7 It is not surprising, given the above, that we do not have a sufficiently diverse judiciary. Fitting the establishment profile is very important.
SAL considers that even some of the BME judges (both full-time and part-time) have only been appointed on a 'token' basis because they fit the

establishment profile. This will continue to be the case until such time as the disproportionate influence that the judiciary brings to the system of making appointments is addressed.

8 The JAC has failed to address the unfairness in the system. Indeed, SAL considers that the JAC has allowed it to thrive, particularly: (a) by concentrating on the appropriateness of its procedures rather than by looking into whether unsuccessful applicants have actually been treated fairly; (b) seeking to promote its own (damaged) image rather than by addressing the complaints made about its performance; (c) continuing to allow judges to have a substantial say in making appointments when it should have made decisions about making appointments itself even if it meant that the decisions were unpopular among the judges; and (d) operating inefficiently.

9 The JAC has failed in its statutory duty to promote diversity. It has seriously let down BME lawyers. In many areas, the position is worse now than it was before the JAC was set up. SAL hopes very much that the appointment of the new Chairman will result in the improvement of the performance of the JAC, especially given its inadequate performance since its inception some five years ago.

Scrutiny by Parliament

10 SAL believes that scrutiny by Parliament is vital and must be implemented by legislation as a matter of urgency.

11 Sections 99 and 101 of the Constitutional Reform Act 2005 provide that the JACO's powers under the Act as regards the investigation of a complaint into the decision of the JAC may be exercised if there is 'maladministration'. This expression is not defined in the 2005 Act.
However, it is clear that it has an extremely wide meaning. Nevertheless, the JACO has construed it restrictively. He appears to think that his remit is primarily concerned with ensuring that the procedures implemented by the JAC for a selection exercise are fair rather than whether the decision of the panel is fair in the circumstances of a particular case – a view that must resonate with the views of the JAC itself.

12 SAL understands that the JACO has refused to exercise his powers in a variety of circumstances where, it is submitted, he should have done do. These have included circumstances where, for example, the reasons given for an applicant not being appointed have been so vague as to be almost meaningless and where the same panel has come to totally different conclusions in a space of a few weeks about the same applicant based on identical information received from the applicant. It is no surprise, therefore, that applicants feel it is pointless to complain about maladministration to JACO. In the absence of proper scrutiny by him of a complaint, there appears to be no purpose in retaining his office.

13 SAL considers it vital that there is an effective system of complaints that looks at whether an applicant has been treated unfairly by reference to all available information about his case. That means not just information about the procedures under which a selection exercise is launched but also about the substance of his application and of applications made by others. After all, unless the body considering the complaint has all the information about a particular case, including information about other applicants, one has to question how it can decide whether an applicant has been treated unfairly. There should also be a more effective system of remedies for the unsuccessful applicant where unfairness is established and a willingness on the part of the complaints body to exercise it readily. It would be interesting to know what remedies so far have been granted by the JACO in the rare case where a complaint has been successful.

14 SAL is attracted by parliamentary scrutiny for all the reasons set out above. It considers that parliamentary scrutiny should be both effective and extensive. If it is not, this will – as the actions of the JAC and the JACO have done – seek to give credence to a system of making appointments that is – within BME lawyers at any rate – largely discredited. The parliamentary scrutiny should involve looking into the grievances of individual applicants and make its judgments entirely divorced from any influence by the judiciary.

15 If the proposal for parliamentary scrutiny is accepted, it is hoped that the appropriate committee set up by Parliament for this purpose may be able to receive direct referrals from BME and other interested groups about why a particular person – who does not fit the establishment profile – has not been appointed and how it might be possible for him to increase his chances of appointment where it can be demonstrated that he has been let down by the system.

16 SAL makes one further point. It believes there is a strong argument for there to be a career judiciary. Every individual, without exception, should start from the bottom of the judicial ladder and work his way up to the top. In that way, no individual can complain that he was leapfrogged by another person who was less deserving of appointment than him.

28 June 2011

Senior Immigration Judge Hugo Storey, full-time judge of the Upper Tribunal (Immigration and Asylum Chamber) [167]

1. The question I wish to address is: Is the present judicial appointment system sufficiently based on the merit principle?

[167] I should declare at the outset that I write in a personal capacity only and I could also be said to have a personal interest in the reforms I discuss below. I would like to emphasize, however, that my main concern in making this submission is for our future generations of judges; at my age (65) even if the reforms I espouse were to be made soon, they may well be too late for me. I should also apologize for the fact that my submission is hastily prepared; pressure of judicial work has prevented submission of a more finished article.

2. Albeit not on the published list, the above question has a bearing upon points 1,4,5,7 and 9 and your Call for Evidence does state that respondents should "not feel constrained from drawing attention to other points about the judicial appointments process thought to be of significance to the United Kingdom constitution". Furthermore, the opening paragraph of your Call for Evidence identifies as an objective that "[t]here appears to be a consensus that all judicial appointments should be made on merit…"

3. I would submit that our present arrangements do not sufficiently embody this objective. The merit principle should govern not just selection but also eligibility for selection. In regard to selection I shall proceed here on the assumption that the system is fully merits-based. But as regards eligibility, currently it is only one section of the judiciary, the tribunal judiciary, whose judicial appointments eligibility criteria are based fully or largely on merit. It is still not the case for court judiciary posts, including some that are on the same or sometimes a lower SSRB pay scale as tribunal judiciary posts that are based on more inclusive eligibility criteria. It is not the case because eligibility criteria for court judiciary posts continue to be based not on relevant legal experience but on having been a practicing barrister or solicitor (or in some instances now a legal executive).

4. To illustrate why I consider that eligibility criteria for court judiciary posts lack a full merit basis, I would refer to my own case. I am a Senior Immigration Judge and full-time judicial member of the Upper Tribunal. I am a lawyer, holding a Ph D in law (in addition to an Oxford B.Phil in Politics). But I never practiced as a solicitor or barrister. I became eligible for this type of post[168] by virtue of an amendment made to the judicial appointment eligibility criteria for immigration judges and judicial members of the Immigration and Appeal Tribunal as set out in the Asylum and Immigration Act 1999.The effect of this amendment was to add to the categories of those eligible those with relevant legal (including judicial) experience. A similar provision was carried over into a subsequent 2002 Act and then refined within the Tribunals, Courts and Enforcement Act 2007. My current salary scale is the same as that of a Circuit judge, yet I am not even eligible to apply to become a Circuit judge (or for that matter to become a District Judge or Recorder). Despite having accrued over 20 years of judicial experience I cannot even compete for such posts against persons who have no judicial experience. I note that recently a legal executive was appointed as a District judge. In principle there is nothing to stop that person over time qualifying for senior judicial posts. Yet a law academic with a Ph D and lengthy judicial experience cannot progress further than the Upper Tribunal. That is an untenable anomaly.

5. The points made above need a little more development and linkage to the constitutional context.

6. In general terms it may seem odd to exclude from eligibility for judicial appointment persons such as law academics whose vocation is the study of law and who as part of their study have often to develop expertise in the application and

[168] Previously Vice President of the Immigration and Asylum Tribunal and then Vice President of the Asylum and Immigration Tribunal.

interpretation of the law. For when ordinary citizens ask, "What do members of the judiciary do?" (as distinct from members of the legislature and executive) one common answer is "they don't make or administer the law, they apply and interpret it". Yet our current legislation excludes from eligibility to apply for all court judiciary posts all those who do not have the requisite qualifications (for requisite periods of time) as solicitors and barristers (or sometimes legal executives). Those excluded include law academics and certain other persons with relevant legal experience. It cannot seriously be maintained that at least some persons in the latter categories – those who are law academics or who have relevant legal experience – do not have the requisite skills – and the requisite merit - to do the work of the court judiciary.

7. I would suggest that the current exclusionary character of court judiciary eligibility criteria offends against basic principles upon which a modern judiciary should be founded. I would submit that a fundamental tenet of any modern judicial appointments system should recognize that a truly merits-based system must be two-pronged:

> *A judicial appointments system based on merit must be one that ensures that suitable candidates are (a) eligible; and (b) appointable if they succeed in the relevant competition.*

8. I do not propose in my submission to address (b) which concerns what I have earlier referred to as selection.

9. It is widely assumed that (a) is catered for by our legislation. However, despite certain legislative reform measures that started with the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002 (Sch 4, para 2) and were refined and developed in the Tribunals, Courts and Enforcement Act 2007 (see especially ss.50, 52), these have not been applied to judicial appointments in the courts system. Eligibility criteria for recorders, circuit judges, High Court judges, Court of Appeal judges and Supreme Court judges remain governed by criteria that are essentially confined to those who are or have been solicitors or barristers (or sometimes now legal executives): see Senior Court Act 1981, Courts and Legal Services Act 1990, the County Courts Act 1984 (s.9), the Constitutional Reform Act 2005 (s.25)

10. Such criteria exclude (i) persons with relevant legal experience, e.g. law academics; and (ii) judges who have been appointed under as tribunal judges under criteria that have been developed by Parliament to extend to (i).

11. One question that might fairly be asked is "Is our judicial system losing out from excluding statutorily even from competing for judicial appointment to important judicial posts in the courts system individuals who have not been solicitors or barristers but who have had relevant legal experience?"

12. I do not have to hand comparative data but looking at the composition of the current CC I have no doubt that most if not all the peers on it will be well aware from their contacts with judges in Commonwealth and European countries that some of these countries adopt a less exclusionary approach to eligibility for judicial

appointments and permit, for example, law academics/jurists to be eligible to apply to sit even on their highest domestic courts.

13. Because the UK system is exclusionary in its approach to eligibility for court judiciary posts I cannot by definition point to domestic examples of persons whose potential contribution to the courts have been lost. Members of the CC will all be well aware, however, of the significant contributions made by certain judges who, whilst they gained appointment as judges through having been solicitors or barristers, have made their mark by virtue of their prior academic study of the law or their prior work as a law reform commissioner. As to my own case, that of an ex-law academic and current tribunal judge currently excluded from eligibility to court judiciary appointments, it is not for me to judge whether I would succeed in any judicial competition for such posts, but I think I am able to say that my own record does at least suggest fitness for eligibility. Several of my decisions have drawn positive comments from judges of the House of Lords and the Court of Appeal and indeed one of my cases has been cited with approval by no less than three senior courts in other European countries (the German Federal Administrative Court, the Swedish Migration Court of Appeal, The Czech Federal Administrative Court); and in its recent judgment in the case of Sufi and Elmi v The UK Apps no 8319/07 and 11449/07, 28 July 2011 the European Court of Human Rights has expressly approved several passages of legal analysis set out by me in a case called AM and AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091. At a recent two-day seminar conducted at the RCJ and the Supreme Court - bringing together senior UK judiciary and several judges of the Court of Justice in Luxembourg - I was one of only two non-senior judges invited to attend in light of my expertise in EU law.

14. I would venture to suggest that perpetuation of exclusionary judicial appointments criteria as described above is not only outdated and an infraction of the merit principle which should be at the heart of our modern constitution. It also makes it harder for our modern judicial system to cope with present trends such as that towards greater specialization (a trend that is been accelerated by cutbacks in legal aid). Judges of the Upper Tribunal have expertise that could increasingly have a potential role to play in the Administrative Court for example.

15. What can or might be done?

16. I shall not attempt a precise answer save to note two things.

17. First, it seems to me that the legislators have already developed a template that could at least serve as a starting-point for amendments of the judicial appointment eligibility criteria for court judiciary appointments so as to end exclusionary criteria: s. 52 of the TCEA 2007: see Appendix A.

18. Second, although it would only have limited scope, there is a simple and straightforward change that could be made to s.9 of the Senior Courts Act 1981 which sets out who is eligible for appointment as a deputy High Court judge. If that were amended so that the schedule included full-time judges of the Upper Tribunal, then that would enable persons such as myself, albeit not qualified in the traditional sense, to be at least eligible for such appointment.

Appendix A: Section 52, TCEA 2007

52 Meaning of "gain experience in law" in section 50

(1)This section applies for the purposes of section 50.

(2)A person gains experience in law during a period if the period is one during which the person is engaged in law-related activities.

(3)For the purposes of subsection (2), a person's engagement in law-related activities during a period is to be disregarded if the engagement is negligible in terms of the amount of time engaged.

(4)For the purposes of this section, each of the following is a "law-related activity"—

(a)the carrying-out of judicial functions of any court or tribunal;

(b)acting as an arbitrator;

(c)practice or employment as a lawyer;

(d)advising (whether or not in the course of practice or employment as a lawyer) on the application of the law;

(e)assisting (whether or not in the course of such practice) persons involved in proceedings for the resolution of issues arising under the law;

(f)acting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of proceedings;

(g)drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(h)teaching or researching law;

(i)any activity that, in the relevant decision-maker's opinion, is of a broadly similar nature to an activity within any of paragraphs (a) to (h).

(5)For the purposes of this section, an activity mentioned in subsection (4) is a "law-related activity" whether it—

(a)is done on a full-time or part-time basis;

(b)is or is not done for remuneration;

(c)is done in the United Kingdom or elsewhere.

(6)In subsection (4)(i) "the relevant decision-maker", in relation to determining whether a person satisfies the judicial-appointment eligibility condition on an N-year basis in a particular case, means—

(a)where the condition applies in respect of appointment by Her Majesty to an office or other position, the person whose function it is to recommend the exercise of Her Majesty's function of making appointments to that office or position;

(b)where the condition applies in respect of appointment, by any person other than Her Majesty, to an office or other position, that person.

(7)In subsection (6) "appointment", in relation to an office or position, includes any form of selection for that office or position (whether called appointment or selection, or not).

June 2011

Sehba Haroon Storey, Principal Judge Asylum Support

This response deals primarily with applicants for judicial appointments who already hold a fee paid or salaried judicial appointment.

1. My Background

1.1 I am the Principal Judge of Asylum Support, a jurisdiction within the Social Entitlement Chamber of the First-tier Tribunal (SEC-FTT). I also sit in the Criminal Injuries Compensation jurisdiction of the SEC-FTT and as a judge of the Upper Tribunal, Administrative Appeals Chamber. I am Chair of the Tribunals Judicial Diversity Group (TJDG) a sub-group of the Tribunals Judicial Executive Board (TJEB) and a member of the latter.

1.2 I make this response principally in a personal capacity but also, where relevant (and with the consent of the Senior President of Tribunals, Robert Carnwath LJ (SP)) drawing upon my work as Chair of the TJDG.

1.3 I am a solicitor of the Supreme Court, admitted to the Rolls in December 1987. My early employment history includes:

- the role of lay advisor in a law centre from 1980 – 1983;
- a solicitor/partner in private practice from 1987 – 2000;
- a number of fee paid tribunal appointments between 1992 – 2000; and
- a salaried tribunal appointment from 2000 to date.

1.4 I was offered my first Tribunal appointment in 1992 as an Immigration adjudicator followed quickly by a number of appointments within the Social Security and Child Support Tribunal. In 1999 I was offered a full time salaried post as head of a small and specialist tribunal. At the request of the Secretary of State for the Home

Department, my role and responsibilities were assessed by Price Waterhouse Cooper to be on par with judicial appointments within Group 5 of the Senior Salaries Review Body's table of judicial appointments.

2. My experience of the judicial appointments system

2.1 In the past 8 years, I have made a number of applications to secure an appointment to the Recorder and Circuit Bench. In 2003, when selection was based purely on references and interview, I was shortlisted in the Recorder competition and placed on a waiting list but I was not offered an appointment.

2.2 In 2006 I applied through the Judicial Appointments Commission (JAC) for the Circuit Bench competition. There was no qualifying test and selection for interview was based entirely on references and consideration of the application by a JAC panel. Candidates were required to score 20 points to be invited for interview. My score was 18 points. I was informed in feedback that I was not awarded the remaining 2 points required because I lacked current knowledge and experience of the criminal jurisdiction. It was suggested to me that I should seek to acquire the requisite experience through academic study as I was prohibited from practising law.

2.3 In 2006 I enrolled on a 2 year part-time course in Criminal Litigation LLM which I completed in 2008 with Merit (missing a distinction by a few marks). I applied again for the Circuit Bench in 2008, passed the qualifying test, and was invited to interview. I was not recommended for appointment. My feedback from JAC stated that whilst I was a "high quality candidate" and had demonstrated "all the qualities and abilities", the Panel felt that my application would have been stronger if I had acquired more sitting experience in crime as a Recorder (notwithstanding that this was not part of the published criteria for appointment). Thereafter, I sat the Recorder qualifying test in 2009 but was not selected for interview. I have recently sat the test again but will not know the outcome until late July.

3. The House of Lords Constitution Committee
The Judicial appointments process – call for evidence

Questions 1 & 2

3.1 The judicial appointments process is slow, laborious and expensive. It lacks transparency and accountability in the sense that all too often unsuccessful candidates (like myself) are left in the dark about why they were unsuccessful and the criteria used by the JAC for selection. Furthermore, I would suggest that the current procedure is inherently unfair to salaried tribunal judicial office holders, whose expertise and experience appears to carry little weight when seeking court appointments.

Question 3

3.2 I believe that outside of the legal profession, few people have an appreciation of the judicial appointments system. Within the profession, solicitors in particular, believe that the judiciary is largely made up of barristers and that solicitors are less well regarded for appointment. Much is being done to dispel this myth, both by the Courts judiciary under the leadership of the Lord Chief Justice (LJ) and by the Tribunal judiciary under the leadership of Carnwath LJ, Senior President of Tribunals.

Question 5

3.3 In theory, an independent judicial appointments system makes perfect sense and should result in the appointment of the most meritorious candidates who by definition will be the most capable of carrying out the functions of the office to which they are appointed.

3.4 The reality is quite different and speaking to District Judges and senior tribunal judges as well as trainers, there is a common thread of complaint that JAC regularly recommend individuals for appointment who have little or no experience of the work they are required to carry out, who lack the requisite judicial experience and who then need extensive training for which resources are unavailable. This simply adds to the spiralling cost of the appointments system.

3.5 There are positive signs too – the increasing numbers of diverse candidates appointed to the High Court Bench since 2008 is particularly welcome but progress on diversity is still remarkably slow.

3.6 In my opinion, the quality of applicants for judicial office can best be judged by reference to appraisal reports (which should carry greater weight then is currently the case) and to references from senior judges and judicial managers who have direct knowledge of the most able candidates.

3.7 Qualifying tests are, in my opinion, inherently unfair because:

- they are essentially, a test of ones ability to write/type at speed (– a good judge is not one who makes decisions without proper consideration);
- they rely exclusively on performance on one day with little or no regard for the quality and experience of judges from other disciplines;
- they are geared toward practising barrister/solicitors and not salaried tribunal judges; and
- they discriminate against full time tribunal judiciary who are prohibited from practising law and therefore do not have current knowledge of the relevant case law/statutes (e.g. crime).

3.8 Furthermore, qualifying tests are far more costly to administer taking into account the cost of booking hotel accommodation across the country and the time and expense of marking test papers as opposed to use of references and appraisal reports. The suggestion that qualifying tests may be made available online will lead to less, not greater fairness and transparency as there will be no control mechanisms for ensuring who is actually taking the test online.

Question 7

3.9 It is generally accepted that for society to have confidence in the judiciary, the latter must broadly reflect the diverse makeup of the society they serve. In a speech[169] at the Royal Courts of Justice, Bridget Prentice MP, Parliamentary Under-Secretary of State, Ministry of Justice, referred to a report produced by the Department of Communities and Local Government (DCLG) which revealed that "among black and Asian people the socio-demographic profile of judges was one of the main drivers of perception of discrimination in the courts". Of course, concerns over the lack of diversity in the judiciary relate equally to the absence of women, people with disabilities as well as professionals of different background, social class and education. As the Minister reminded us,

> "A system that only selects lawyers and judges from certain backgrounds simply misses out on a whole pool of people that have talent and skills in abundance, as well as new and different skills and experiences to add to the mix."

3.10 The establishment under the Constitutional Reform Act of the Judicial Appointments Commission (JAC) in 2005 under the leadership of Baroness Usha Prashar was intended to radically change the makeup of the judiciary. However, despite 5 years since it was established, and admittedly, some signs of progress, (most notably the appointments in since Autumn 2008 of 9 BAME applicants to the High Court Bench), the JAC has failed to persuade the public, politicians and professionals alike[170] that they are actively promoting diversity on the bench. As Lord Bach reminded their Lordships[171] in a 2008 debate, whilst women represent 51 per cent of the population of England and Wales, they represent less than 20 per cent of the English and Welsh judiciary[172]. Similarly, whilst 8 per cent of the UK population is BAME, less than 4 per cent of the judiciary is from this background[173]. In respect of both categories, the vast majority of these individuals are represented in the lower ranks of tribunal and court appointments, often in fee paid as opposed to salaried positions[174].

3.11 The will for change has existed for over a decade, but the mechanisms and processes established to bring about that change, have failed to deliver the result.

3.12 Thus, we need to explore different methods of appointment as well as greater use of assignment of judges between the courts and the tribunals. The 2007 Act

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169 24 October 2008, 'Equality in Justice Day' "Diversity in our legal Professions and Judiciary".

170 Law Society Gazette, 24 April 2008, *'Ethnic lawyer groups slam JAC diversity record';*
The Guardian 28 January 2008, '*First 10 High Court Judges under new diversity rules';*
The Guardian 19 May 2008, ' *Judicial diversity goes into reverse*'.

171 House of Lords debate, Wednesday 29 October 2008, Lord Bach, http://www.theyworkforyou.com/lords/

172 As Lord Falconer had rightly reminded his audience (n.4), "A country that fails to develop, recognise and promote the skills of 50 per cent of its population is a country that's getting things only half right".

173 Women (and BAME) candidates are disproportionately appointed to the lower end of the judicial ranks. Professor Kate Malleson*: Prospects for Parity: the position of women in the judiciary in England and Wales.*

174 Dobbs J, Diversity in the judiciary – Lecture, Queen Mary, University of London, 17 October 20007.

enabled all levels of the court judiciary to sit as tribunal judges subject only to the approval of the LCJ, SP and Lord Chancellor. The same is not so of tribunal judges who wish to sit in the court irrespective of the seniority or recognised ability of the judges in questions e.g. judges of the Upper Tribunal.

3.13 In order to achieve this, greater use should be made of s9 of the Senior courts Act 1981 to enable Tribunal judges of proven ability to be allowed to sit in the Courts, without the need to apply through JAC competitions. Similarly, salaried tribunal judges with proven judicial skills looking for a career path should have opportunities made available to them to sit in a part time capacity as district judges or Recorders.

Question 9

3.14 We have a great deal to learn from other jurisdictions, Canada being an example in point where the judiciary is far more diverse than the judiciary of England and Wales.

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

4.1 In my opinion, the functions of the JAC should be the subject of critical scrutiny with the possibility of an independent review procedure. This has not been achieved by the restrictive ambit of the Judicial Appointments and Conduct Ombudsman (JACO) as evidenced by statistics published in his successive annual reports. These reveal that over 91% of complaints made to JACO concerning the appointment process are routinely dismissed. Nor is their any evidence that JAC recommendations are challenged by the Lord Chancellor. Neither process is, in my opinion, open or transparent.

4.2 The JAC is currently disproportionately represented by Courts judiciary with only one Commissioner representing the interests of the tribunal judiciary. The courts and tribunal judiciary should be equally represented not least because the vast majority of the JAC's functions concern the appointment of tribunal judiciary and its non-legal members. Furthermore, Commissioners should only be appointed for a maximum of 3 years and be replaced regularly to allow for fresh blood and the development of new ideas.

5. The role of the executive

5.1 I consider it appropriate for the Lord Chancellor to play a greater role in scrutinising the functions of the JAC in particular in ensuring the promotion of diversity at all levels of the judiciary.

6. The role of Parliament

6.1 In my opinion, Parliament has no legitimate role to play in the appointment of an independent judiciary.

7. The role of the judiciary

7.1 As stated above, I am entirely in favour of a greater role for the judiciary in the appointments process, in particular the use of judicial references and appraisals for short-listing purposes. I would also wish to encourage an amendment to s9 of the Senior Act 1981 to enable salaried First-tier tribunal judiciary to sit at District Judges, Recorders and Circuit Judges and Upper Tribunal judiciary to sit as Deputy High Court Judges. Not only would this have the result of dramatically improving diversity statistics across the Courts judiciary but it could also result in substantial savings in the overall cost of judicial appointments and a speedier system of appointments.

30 June 2011

Supporting Higher Court Advocates (SAHCA)

SAHCA is the voice of Solicitor Advocates in England and Wales and represents more than 1250 members out of the 5000 solicitors currently with Higher Rights. There remain disproportionately few solicitor advocates on the Bench, but many of our members have recently been appointed, and would have evidence to offer of their personal experiences. Our current Chair and Secretary were both appointed as Recorders in recent years, and we are in close contact with solicitor judges of all levels. Should the Committee want to hear orally from recently appointed solicitors, we can provide contact details.

We have collated responses from our recently appointed members to some of the questions below:

1.

How would you assess the current operation of the judicial appointments process?

Overwhelmingly our respondents thought the current system was a great improvement on the past, and was proving to be successful at appointing candidates on merit alone after a fair and open process.

4.

Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

Candidates are asked specific questions both in the application form and at interview about independence, and the answers appear to be of critical importance to the panel. One of our members says she was asked several follow-up questions about her independence and experiences with this issue. Referees were also asked about it. It is hard to see how the JAC could place more emphasis on this issue.

5.

Have the reforms introduced in recent years had any discernible effect on the quality of the judicial appointments? How best can the quality of applicants be judged?

As court users and advocates, we would say that there is no discernible difference in the quality of recently appointed judges, but they are often more practical and user-friendly. Quality can be measured by the number of upheld appeals against recently appointed judges.

The current process for testing quality is extensive and draws on technical exams, practical role plays, interview and detailed references.

7.

What effect (If any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

We believe strongly that the reforms have encouraged those who would not have applied under the old regime to apply, which in itself has widened the pool of possible appointees. Recent appointees are younger, more ethnically diverse and more gender-balanced than they were under the old regime. Undoubtedly there are more solicitor advocates applying, and our members now feel that they are able to apply on an equal footing, whereas before they felt that the system was skewed towards those with social or professional contacts on the Bench.

We also believe strongly that diversity is important. Judges are often faced with members of the public acting for themselves or coming to appear as witnesses, and a diverse judiciary is much better placed to deal with our diverse population justly, and be seen to be doing so. It dispels some of the old myths which undermine respect for the judiciary. Furthermore appointments at a younger age makes for those who will have a judicial career, taking us away from the days when the judiciary was seen by some as no more than a safe haven for senior barristers.

We do not agree with any form of "positive" discrimination. Rather we support the current process which is open and appoints on merit only.

Our only suggestion for ensuring a genuinely open pool of candidates from the solicitors' side of the profession is for the SRA to consider a rule change: employers and fellow partners are the largest remaining block in the path of solicitors applying for judicial office, and we wonder whether the SRA should make it plain that those who prevent their colleagues from seeking or maintaining part-time judicial office are acting unethically. It is not unheard of for partnership deeds to rule it out, and even where it is not set out in plain words, many partnerships make it close to impossible for partners to seek judicial office. Potential candidates from the "magic circle" firms are particularly likely to encounter opposition.

13.

How would you assess the performance of the Judicial Appointments Commission since it was established in 2006?

Our members have found the JAC to be professional and helpful about the process and what candidates need to do to be appointed. The road shows are very valuable and the staff easy to contact by phone or email. The feedback system is also vital in encouraging unsuccessful candidates to try again.

We firmly believe it would be a retrograde step to reduce the JAC to a group of civil servants. The current combination of people makes for an appointment process that we believe is open, fair and well-designed to separate the wheat from the chaff.

The main problem identified is the slow process of appointment which seems to usually take around a year. Some of our members had major life changes in the period when they were waiting to hear whether or not they had been appointed, which makes it hard for candidates to make plans that will fit around joining the judiciary in a part-time capacity.

20.

Is the level of funding for the judicial appointments process adequate and appropriate?

Given that every Government department needs to curtail expenditure, a large saving could be made by recruiting Circuit Judges from the lower ranks of the judiciary. It is not necessary for all recruitment campaigns to be thrown wide open, so long as it is possible for all suitable candidates to get on the first rung of the ladder. It may be that higher office needs to be treated in a different way, but all appointments up to circuit judge could be made from the lower ranks, so long as District Judges, Tribunal Chairs and Recorders are recruited from an open campaign.

21.

Are there any constitutional objections to confirmation hearings for the most senior judicial posts?

The Executive, Legislature and Judiciary need greater separation not greater inter-twining. Having recently made headway with the Supreme Court, it would be a retrograde step to take this proposal forward. Respect for politicians is at a low ebb. The judiciary should be held apart from the battleground of Parliament, no matter what the tabloid press or politicians may occasionally say about the sentences they pass or the laws they uphold. We should not assume that this particular segment of the press speaks for our nation, and while we must assume that politicians do speak for our nation, they will be better able to do so freely when dealing with judicial decisions if they have no relationship whatsoever with the judge concerned.

30 June 2011

The Chancery Bar Association

1. This is the response of the Chancery Bar Association (ChBA) to those of the 22 questions in the call for evidence on which we feel able to contribute evidence of some value. This is not the evidence of any one of us, or of the Chairman, but reflects opinions of committee members and of those individual members who responded to our call for contributions.

2. In view of the invitation to submit ideally no more than 6 pages of evidence, we have limited the questions to which we respond and kept our evidence succinct. We are happy to elaborate on our evidence in writing or orally if so requested.

Question 1: current operation of the judicial appointments process.

3. The central characteristics of the process that currently operates are: open competition, supported by publicity and encouragement of a breadth and diversity of applications; substantial independence from the executive; lay participation; and obscured decision-making processes.

4. The consequence of the open competition is that a large number of applications are received, up to about ten times the number of posts advertised. This in turn necessitates some form of initial sift to reduce the applicants to a number that can realistically be investigated and assessed in detail. For competitions below the level of High Court Judge, the initial sift is by way of written examination. We have real concerns whether that examination is being conducted by the JAC in a balanced, fair and transparent way. (See Q13 below.)

5. For there to be such a problem with the process by which more than two-thirds of the applicants are eliminated from the competition casts a heavy shadow over the performance of the JAC. In our view, the JAC is in principle an appropriate way to continue to make judicial appointments, in view of the constitutional role of the judiciary; but the JAC's processes must be significantly improved (see Q2 below), and more weight should be given to the assessments of the judicial representatives both on the Commission itself and those on panels conducting the interviews of the candidates. Although lay representation is to some degree beneficial in maintaining the integrity of the system, and in making it politically acceptable, we very much doubt whether a lay member of the Commission or of a panel is best placed to assess the very particular and special qualities required to make a lawyer a good judge. We would wish to see greater involvement within the JAC given to the judiciary.

Question 2: transparency and accountability

6. A resounding "no" to this question. Neither the initial sift nor the final selection is transparent. The identity of those who make the decision is concealed. Although the Committee as a whole takes responsibility for appointments, it is self-evidently the case – and was confirmed by Jane Andrews of the JAC at the 2009

ChBA Annual Conference – that usually it is the unidentified panels who make the selections.

7. Although the JAC offers feedback to unsuccessful candidates, this has been found to be entirely unspecific and of no value. Candidates are not told what score they achieved on the sift; what the pass mark was; or what they did wrong or failed to do in interview or role play. This important information, which would assist unsuccessful candidates to consider whether or not to apply again (or indeed to find out whether or not a mistake might have been made in their assessment), and to assist successful candidates to know whether they stand a real chance of applying for a more senior appointment later, is withheld.

8. The JAC publishes statistics of mind-boggling detail on the background of applicants and their success or failure rate as a group (e.g. BME solicitor candidates) after the completion of each competition. It is clear that a huge amount of money must be spent compiling this. But it is of no actual value to successful or unsuccessful candidates or to aspiring candidates in future competitions. After all, if the success rate of female BME candidates is 14% and there was one successful candidate out of seven, what does that tell the unsuccessful six or the ten new candidates contemplating entering the following year's competition?

Question 4: constitutional principle of independence of judiciary

9. In general, we would agree that the system of appointments of judicial posts below the Court of Appeal gives adequate regard to the principle of the independence of the judiciary; that is, independence from the executive and legislative arms of government. JAC committee members are appointed on the recommendation of an independent appointments commission, not by the executive or the Lord Chancellor. And the JAC recommends the appointees to the Lord Chancellor, subject to his limited right to ask the JAC to revisit any recommendation that they make.

10. However, the independence of the judiciary connotes its ability and willingness to stand up to the executive and the legislature and the subsidiary organs of government, by declaring their actions, decisions or legislation to be unlawful where it is appropriate to do so (and indeed its willingness to uphold government against the little man where that is appropriate). The correct and cost-effective discharge of this function depends on the very best available judges being appointed to their positions. So unless the JAC is conducting processes that are effective in selecting the best judges from the applicants, the operation of the constitutional principle is in danger of being undermined.

Question 5: effect of recent reforms on quality of judicial appointments

11. In our judgment, the 2005 reforms have not had any discernible effect on the quality of High Court appointments. The quality of such appointments can best be judged by asking senior advocates who appear before them and appellate judges who have to consider whether or not their judgments are correct, or reasonable. From our position (as senior advocates), we feel that the quality of High Court judges remains, as it has always been, uniformly high.

12. We are less sanguine about the uniformity of quality of circuit judges, recorders and (particularly) district judges before whom our members regularly appear. Undoubtedly there never has been the uniformity of quality found on the High Court bench: whereas some circuit judges are of comparable excellence and experience to red judges, others are not.

13. Our impression is that, at the lower levels of judiciary, the quality of judges has become more hit and miss in recent years. Some appointments are very strange (e.g. appointment of purely transactional lawyer as circuit judge to hear criminal trials, or appointment of specialist judge without specialist background); others are baffling in terms of the apparent inadequacy of the appointee. Changes in the process of appointment of these judges seem to have resulted in more rather than fewer inappropriate appointments having been made.

Question 6: speed and efficiency of appointment process

14. We believe that the process is too slow and therefore, presumably, inefficient. To take but one example, some of our officers were appointed Recorders in 2009. The application deadline was 21 January 2009; the written examination took place in April; the interview and role play exercise in June; informal notice of likely appointment or non-appointment was sent in early August, but formal appointment was not notified until late October. Training was then between January and March 2010. So in total at least 15 months elapsed between application and first sitting. This experience has been repeated in relation to other competitions.

15. Before 2005 there was no formal system for competitions for appointment, so comparison is not likely to be informative nor is it, from our perspective, easy to make.

16. Similarly, we have no information about the cost of the current exercise, so cannot comment on that.

Question 7: impact on diversity

17. In our view there has been some change, though not a significant one. There are apparently more women and BME appointees, but whether this is a reflection of the changes in the appointment process or simply a reflection of the increasing number of women and BME lawyers in practice today is difficult to say.

18. In our view diversity is a legitimate factor to bear in mind as part of the appointment process but only to a defined extent. It is a legitimate consideration because of the importance of the judiciary being seen to be representative of the public that it serves, thereby generating public confidence in the judiciary. However, it is even more important that the best possible judges are appointed from the pool of applicants, regardless of gender, religion, ethnic background or colour. It is not the case, nor should it be the case, that judges are "matched" with the ethnicity of

the litigants before the court. It therefore does not matter, at the level of an individual case, whether litigants of Indian descent have their case determined by a Judge of white European descent or of black Caribbean descent. But it does matter that the judiciary as a whole is seen not to be the means of imposing values and judgements of only a small (and elite) part of the population.

19. In our view, diversity is a legitimate factor to bear in mind at the stage of seeking to encourage as wide a range as possible of applicants for given judicial posts. It is clearly in the public interest that women and minority candidates are available for selection. But once available, they should be selected strictly on merit, and not on the basis of quotas or of reverse discrimination. One only has to see how cases are dealt with in local county courts to realise how important it is that at every level the best possible judges are appointed to do justice between parties.

Question 12: compulsory retirement age

20. We are not sure whether this question relates only to Supreme Court Justices – it appears beneath the sub-heading "Appointments to the UK Supreme Court" – or whether it applies to all judicial appointments. We think probably the former as only for Supreme Court justices is there no discretion to extend sitting beyond the age of 70.

21. In case it is of general application, however, our view is that a compulsory retirement age of 70 is inappropriate for judges. At a time when retirement ages generally are expected to increase, and people are expected to live substantially longer, it is wrong to force able judges to retire at 70 years of age. Such a retirement age tends also to discriminate indirectly against women and BME lawyers, whose progress through the professional ranks may be slower than others. Couples, particularly where both are professionals, tend to have children later in life than they did 20 years ago, which means that either or both of them may not be in a position to, or be willing to, contemplate a full-time judicial appointment until their mid-50s. That means that, with a compulsory retirement age of 70, they will be unable to complete 20 years' service for a full pension entitlement.

22. In our view, there should be a presumption in favour of retirement at 72 or 73, but with the possibility for a Judge to be certified (medically and by senior judiciary) fit for service for additional years (one at a time) up to a maximum of 75 years of age.

Question 13: assessment of performance of JAC since 2006

23. In our view, the JAC has lamentably failed to establish an appropriate, consistent and fair system for selection of judicial appointees.

24. It is evident that the system for appointment of lower judiciary (up to and including circuit judges) does not have the confidence and support of would-be applicants. It is believed that there are strong dissenting views among the Commissioners themselves as to the appropriateness of the written test.

25. Following the competition for Civil Recorderships in 2009, we surveyed our members on the quality and fairness of the written examination. 35 respondents were almost universally damning about the fairness of the test. (It should be added that all but two of these responses were received before the outcome of the examination was known, so responses were unaffected by individual success or failure in the examination.) We send with this evidence a copy of the Report we produced and sent to the JAC following that exercise, and draw attention to the third appendix at the end, which is a tabular summary of responses and which illustrates starkly the extent of dissatisfaction.

26. Unfortunately, this failing is not a one-off. There is substantial other (admittedly anecdotal) evidence of similar failings with other tests. There is also evidence that the tests do not succeed in selecting some of the strongest candidates on paper. While it would not be surprising if some of the strongest candidates on paper were not selected at the end of the process, it is surprising and troubling that such candidates do not even progress pass the initial sift. Only after this sift are candidates' application forms and references considered.

27. Following the debacle of the 2009 Civil Recorder competition, where the written test was far too difficult and unfair, it appears that the most recent written examination, for Family and Crime Recorders in June 2011, was too easy and heavily favoured those who specialise in that work. Anecdotal evidence suggests that experienced family lawyers outside the test room remarked that the paper would not even have tested their pupils in chambers sufficiently. It is the apparent inability of the JAC to get the standard of test consistently right, or to devise a better method of conducting the first stage of initial selection, that causes us real concern.

28. At the level of higher judicial appointment, the results of the process seem to show that the JAC is performing reasonably well. It may be, therefore, that the process for selection of lower judiciary has something to learn from the process employed for the selection of High Court Judges. If that process is more labour intensive and costly, so be it: what could be more important than money spent on ensuring that each and every judicial appointment is of someone who is (a) suitable, and (b) the best candidate for the job?

Question 16: how should the JAC's process be reformed?

29. It should be clear from what we have said above that urgent reform is needed of the way in which the JAC carries out selection exercises. We agree with the Lord Chancellor that developing a more flexible (and appropriate) set of selection activity options is urgently required.

30. We are very alarmed, however, by his suggestion that fewer references should be taken. Presumably this is suggested with a view to saving time and costs. But only 4 references are currently required, which we regard as minimal when a candidate is applying for an important judicial function. The idea that fewer references might be taken is surprising. We consider that references are extremely

important, that more weight should be given to them, and that more rather than fewer should be taken.

31. We consider that the judiciary should have a significant role and contribution in the selection of candidates for judicial appointment and welcome the suggestion that the Lord Chief Justice and the senior judiciary should be involved. Whether that is wholly at the expense of the Lord Chancellor's role is a matter on which we are agnostic. It may be appropriate, if one still believes (as we do) that the position of the Lord Chancellor is an important role in Government, that the Lord Chancellor have a part to play in the decision making, and in making recommendations to Her Majesty. But we welcome greater involvement on the part of the existing judiciary generally.

Question 20: does the appointments process cost too much?

32. One cannot easily spend too much money ensuring that each judicial appointee is suitable and the best available candidate at the time. But it may well be the case that money is wasted on aspects of the JAC procedures that can be changed for the better. We would suggest focussing on the appropriateness of the selection procedures, and then, having identified the best procedures, on how any cost savings can further be made. It would be wrong to allow cost alone to determine the procedure.

June 2011

The Council of Appeal Tribunal Judges

This is a submission on behalf of the Council of Appeal Tribunal Judges. The Council represents both the salaried and the fee paid judges in the Social Security and Child Support Appeals Tribunal. The membership therefore has both an interest in and an experience of the judicial appointments process both under the current system and its predecessors.

The submission attempts to balance the needs of transparency, accountability, efficiency, and, economy. The Council does not intend to comment on all the themes, but would make the following general comments.

One possible alteration to the present system would be for the appointment of fee paid non-legal members (doctors and disability members) to be removed from the direct involvement of JAC other than in a supervisory role. This should result in a speeding up of the appointments process and enable the SSCSAT in particular to respond more quickly should local manpower issues arise with disability and medically qualified tribunal members.

The Council is of the view that one of the best means of predicting a candidate's suitability for a salaried judicial role is how that individual performed as a fee paid officeholder in that jurisdiction.

The Council would dare to suggest that the approach of JAC might be over cautious. It would also consider the number that are selected for interview for any post, normally on a ratio of 2/2.5 per appointment, is perhaps too low and may well exclude candidates who are suitable for appointment. In addition consideration should be given to altering the present system whereby the qualifying test is the sole selection criteria for interview and that consideration should be given to the reintroduction of the "sift" where consideration was given to the application for appointment and references. Potential referees should be restricted to the category of those who can give informed comment on an applicant's professional capabilities. Personal or "social" referees are less likely to give information of relevant value. In addition consideration should be given to the formalisation of a reserve list or "slate" of those considered suitable for appointment but for whom appointments do not currently exist. It is accepted that such a list would require to have a "shelf life" but if of a reasonable length it would reduce the frequency with which costly appointment exercises require to be staged

The Council would accept that diversity is a legitimate factor. However it is of the view that the most important and overriding factor is a candidate's quality and ability to perform the judicial function. The Council is also of the view that it is important to have members of the judiciary play an active part in the appointments process. Indeed there is an argument that the judiciary should have a majority rule in such a process on the basis that being a judge is a highly skilled profession and who best can judge the ability of an applicant other than those already performing such a task.

If requested I shall be happy to supply any further information or comments on behalf of the Council.

29 June 2011

Law Society of England and Wales

The Law Society is the representative body of over 145,000 solicitors qualified in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators, governments and others.

1. How would you assess the current operation of the judicial appointments process? Is it an appropriate way to continue to make judicial appointments in view of the evolving constitutional role and position of the judiciary?

The Law Society has supported strongly the institution of an independent process for judicial appointments which is open and transparent. The Society believes that some aspects of the selection processes could be improved but the Society would

oppose strongly any suggestion that the Judicial Appointments Commission should be abolished and the appointments process returned to civil servants within the Ministry of Justice. Return to the "tap on the shoulder" through the "old boy's network" is now unthinkable.

2. Is the appointments process sufficiently transparent and accountable?

In our view the JAC has succeeded in establishing a reputation for operating an open, transparent and accountable selection processes. The only route to appointment is through open competition. It no longer depends on whom you may know with the judiciary or the professions. The fact that there are sometimes complaints from certain quarters that an individual who would be an ideal candidate does not achieve an appointment does not bring the selection process into question. Rather it demonstrates that recommendations for appointment are being submitted solely on merit as required by the Constitutional Reform Act 2005. The Society does not consider that major changes need to be made to the JAC to effect a more transparent or accountable appointments process; rather the Society looks to refinements in the selection process as a means to further improve the diversity of the range of those lawyers appointed.

3. How would you assess current public awareness and understanding of the judicial appointments system? How can it be increased?

Within the legal profession there has been an improvement in the general awareness of the judicial appointments process. However, among the broader public, understanding is considerably weaker. It can only be improved by the transmission of information about the judiciary, its role and the method of appointment. This could be achieved through a public awareness campaign. However, to do this on any large scale would require additional funding, as the JAC needs to continue to focus on its outreach work with the legal profession. Without funds for significant advertising then well placed articles in the press would be an option. However their impact would be minimal.

4. Does the appointments process give adequate regard to the constitutional principle of the independence of the judiciary?

The Constitutional Reform Act was a major step forward in enshrining the independence of the judiciary in this country. The establishment of the JAC has not been to the detriment of the principle of judicial independence. On the contrary the nature of the selection processes it has adopted has, in our view, enhanced the principle of the independence of the judiciary. The Society would be concerned if there were to be any suggestion of a return to the former methods of judicial appointment which would now seriously undermine the perception of judicial independence in this country.

5. Have reforms introduced in recent years had any discernible effect on the quality of judicial appointments? How best can the quality of applicants be judged?

It is difficult to establish whether there has been any impact on the quality of the lawyers appointed under the new system for judicial appointments. The Society is aware of anecdotal comments that certain individuals have been appointed who in practice are not fit for office. However, these comments are never backed up with hard evidence. Implementation of the recommendation in the 2010 report of the Advisory Panel on Judicial Diversity that there should be an appraisal system for all levels within the judiciary should begin to address such problems if they exist. However there may be cost implications which will impede progress against this recommendation given the current state of public finances.

The Law Society supports the specification of appropriate and clear criteria as a basis for the JAC's selection process but believes that the criteria for appointment must be kept under constant review and revised to take account of changing needs. For example, with greater emphasis on judicial control of proceedings the Society considers that there is scope for acknowledging lawyers' case management skills as a prerequisite for appointment. The JAC needs to provide applicants with clear job descriptions for posts and to keep abreast of best practice in recruitment mechanisms across the employment field.

6. What assessment would you make of the speed and efficiency of the appointments process? How does this compare with the pre-2005 systems in relation to the UK Supreme Court and the courts and tribunals of England and Wales?

The timeline of the appointments process must be broken down in any assessment of the speed and efficiency of the judicial appointments process. From publication of the advertisement, it takes the JAC an average of 19 weeks to submit recommendations for appointment to the Ministry. That achievement is commendable. There may still be scope for improvement. While improvement may have been limited, as far as the Society is aware there has been no increase in the time of the selection process itself.

In our view the stages which should be scrutinised for improvement are the period before and after the involvement of the JAC. The Society cannot accept that the Judicial Office and the Ministry of Justice cannot improve the forward planning of the need to recruit additional judges and the number required. It can take up to 8 weeks from receipt of a vacancy request to the publication of the advertisement while the selection requirements for the posts are agreed between the JAC, the Ministry and the Judicial Office. There ought to be standard requirement for each jurisdiction based on statutory requirements.

The Society also believe that the period after recommendations have been tendered to the Ministry and the despatch of letters of appointment should be reduced. Most emphatically the Society would assert that the time elapsing between the offer of appointment and the judge commencing office should be much shorter.

The Society opposes the use of section 94 lists on to which successful candidates are placed pending an available position. If no appointment has been made by the time of the next selection exercise for that post is run, the individual has to apply once again.

This results in careers having to be put on hold pending appointment and does nothing to encourage firms to support their staff applying to the judiciary. Once again better business planning ought to be able to reduce these time frames.

7. What effect (if any) have the changes had upon the diversity of the judiciary? Is diversity a legitimate factor to bear in mind as part of the appointments process? If so, what should be done to help deliver greater diversity?

The JAC and Ministry of Justice have published statistical data comparing appointments in the period before (1998/99 - 2006/7) and since (2007/8 - 2008/9) the establishment of the JAC. The overall picture is one of improvements in the percentage of women and BME appointments but a decline in the number of solicitors appointed. The picture is not as stark as that bold statement - for some posts the percentage of appointments who were solicitors has gone up (e.g. Deputy and District Judges (Magistrates' Court). Nonetheless the data does demonstrate the need to continue to strive for greater diversity amongst the judiciary.

By that the Society means changing attitudes within the solicitors' profession towards colleagues wanting to apply, encouraging more suitable candidates to apply and assisting those intending to apply. That is in line with the statutory duty of the JAC "to have regard to the need to encourage diversity in the range of persons available for selection for appointments".

The Law Society opposes to the adoption of quotas as the means to achieving judicial diversity - it would undermine faith within the legal profession and among the wider public that appointments are made on merit. However the Society accepts that the JAC is a public body covered by the Equality Act 2010 which allows it to treat a person with a protected characteristic more favourably than another person without in making decisions on recommendations for appointment. The Society suggests that the effects of the Equality Act on the JAC will need to be monitored.

8. 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?

The principal development has been the increased separation between the judiciary and the executive / legislature. This has been symbolised physically by the removal of the Law Lords from the House of Lords and the opening of the new Supreme Court. The Constitutional Reform Act 2005 also transformed the role of the Lord Chancellor including his involvement with the judiciary and judicial appointments. The Law Society welcomes those developments.

In the view of the Law Society the involvement of the judiciary with the European Convention on Human Rights has been appropriate and beneficial. The Human Rights Act requires judges to determine whether a law or practice in the UK conforms with the ECHR. The judges are not making the law. It is a matter for Parliament in the light of such a judgment to decide to change the domestic law to

bring it into conformity with the ECHR. Some of the recent cases (terrorism detention, prisoners' voting rights) may be unpopular but the judges are merely interpreting the rights of individuals in the light of the ECHR.

The ECHR has had the effect that judges appear to make more decisions which can have political ramifications and run contrary to either Government or popular opinion. However, this has always been the role of an independent judiciary. The crucial thing is for the JAC to ensure that those who are appointed have the level of experience, judgement and robustness to make the right decisions.

Human rights are now a pervasive theme in UK jurisprudence familiar to lawyers. Applicants for judicial appointments often find that the JAC's qualifying tests raise human rights issues. The JAC does not need to make acquaintance with human rights issues an additional criterion for consideration for appointment. Nonetheless judges both on appointment and on a continuing basis need training in the application of human rights.

9. Are there lessons that could be learnt from the appointments system in other jurisdictions?

Many Commonwealth and European jurisdictions have career judiciaries. A lawyer can be appointed as a judge on qualification without any experience in practice. Without rejecting the principle outright, this would involve a major change to traditions in the UK and would require very careful consideration. In countries with particular historical problems between communities, the practice of appointing on the basis of a particular characteristic has been adopted - in South Africa race, in Northern Ireland religion. The Society does not consider that to be an acceptable approach to improving judicial diversity in England and Wales.

The Society recommends that the Constitution Committee should look to the example of other jurisdictions in relation to aspects of the UK's appointment of judges. The minimum requirements for judicial appointment (the relevant period of legal experience) is often supplemented by non-statutory requirements. For example, the Lord Chancellor will specify that an applicant for a full time salaried post should have a minimum of two years' experience sitting as a part time judge. The Law Society considers requirements over and above statute can deter applicants from a broader base. Similarly the Society does not support the rule that lawyers cannot return to practice on retirement from the bench. There is no such bar in most other jurisdictions.

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

The system is working in that it is ensuring the appointment of Justices of the Supreme Court of the highest quality. Recent media criticism has suggested that senior judges interfered in order to stop the appointment of Jonathan Sumption QC. Whether or not there is substance to that allegation, he has now been appointed to the Supreme Court. The conclusion is that the process should be conducted confidentially to prevent gossip in the media.

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

Yes the Society considers that it is appropriate that the senior judiciary and heads of the devolved administrations should be consulted on prospective appointments to the Supreme Court.

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

No. The Society considers that there needs to be a retirement age for judges generally and including Justices of the Supreme Court. Not all judges want to serve without term; some retire early; some fall ill and some die early. Individuals' capabilities decline with age at different rates but 70 seems a reasonable general age limit. Moreover a number of retired judges do continue to sit to help with court case loads. If judges and Justices were allowed to serve beyond that age, it would reduce the scope for a gradual improvement in the composition of the higher judiciary through the appointment of new judges hopefully drawn from a more diverse range of lawyers.

13. How would you assess the performance of the Judicial Appointments Commission (JAC) since it was established in 2006?

The answer to this question depends upon the criterion against which the JAC is being judged. There has been a good deal of ill informed criticism that the JAC has not transformed the composition of the judiciary. The JAC is not under a duty to improve the diversity of the judiciary. It will take decades not years to effect any noticeable change. It will take time for newly appointed judges, where the number of women and BMEs appointments has improved, to work their way through the hierarchy to the more senior judicial posts.

The JAC's outreach work has been effective in encouraging members of minority groups to apply - the number of applications from all groups including minorities continues to grow apace. The JAC takes great pains to ensure that no factor in its selection process could in any way disadvantage a member of a minority group. The JAC's website is an excellent starting point for any lawyer interested in applying for a judicial appointment. It carries a lot of information about the selection process and the component tests including, for example, past written tests.

The JAC has succeeded in establishing robust selection procedures to meet its statutory duty to appoint on merit and to ensure that they are fair to all. The fact that the complaints against those processes are in the main coming from white male Oxbridge educated barristers (who are no longer guaranteed appointment) would suggest that the JAC has succeeded. The selection process is open and transparent. In most selection exercises eligible candidates must score highly in a written test which is used to select those to be invited to a selection day. There the candidates will participate in a role playing exercise and face a panel interview. The Law Society in conjunction with the JAC has produced a video of a role play exercise available for

applicants to view on both websites. The whole process, including the self assessment application form, is based on testing the abilities and performance of candidates against specified criteria. The Law Society remains critical of some of the criteria employed and would like to see them more closely aligned with the skills that a judge needs to deploy today, for example case management.

The JAC has established a deserved reputation for independence from Government. It could be criticised for over reliance upon, and therefore subject to the influence of, existing members of the judiciary but it is difficult to speculate where else they could have turned for such specialist expertise. It may be that the JAC could look towards the private sector to learn of common recruitment procedures and techniques. However the Society would not support outsourcing the entire selection process. While some aspects of the process might be appropriate for outsourcing, it is essential that no decisions are made without full consultation. Outsourcing elements of the process which require expertise and experience in this area would carry significant risk of undermining confidence in the process.

14. Is the role and remit of the JAC appropriate? How (if at all) should it be altered?

The Law Society considers that the statutory framework of the JAC (to select candidates solely on merit; to select only people of good character; and to have regard to the need to encourage diversity in the range of persons available for judicial selection) to be appropriate and not to be in need of change.

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

The Society has no view on the ideal size of the Judicial Appointments Commission. The composition of the Commission must represent a range of interests in the judicial appointments process and include lay representatives. In addition to meetings of the Commission, Commissioners are involved on selection panels and various outreach activities, reducing the number of Commissioners available for those functions will mean greater reliance upon those Commissioners remaining.

16. How (if at all) should the JAC's process be reformed? 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?

The Law Society endorses most of the Lord Chancellor's proposals for the reform of the JAC and the judicial appointments process. The Society has reservations over, for example, contracting out some aspects of the selection process. The Society is also concerned that the savings expected of the JAC may undermine its ability to continue to maintain an efficient, effective and respected selection process.

17. How would you assess the role of the Judicial Appointments and Conduct Ombudsman (JACO)? How (if at all) should JACO's role be reformed?

For the public and applicants to have confidence in the judicial appointments process there must be a robust system for lodging complaints. JACO has served that purpose. The small number of complaints lodged against the JAC, and the tiny number which have been upheld, is an eloquent tribute to the thorough way in which they conduct the judicial appointments selection process.

Consideration could be given to combining the JACO with the Office for Judicial Complaints whose remit also covers complaints from members of the public about inappropriate behaviour by judges both inside the court and in their private lives. The Lord Chancellor has already decided to move the JACO into the Judicial Office which the Society supports.

18. How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?

The judicial appointments process in Northern Ireland is significantly different to that in the remainder of the UK in that there is a statutory duty upon the Northern Ireland Judicial Appointments Board to achieve balanced representation of the two religious communities among the judiciary. The Board has had significant success in the progress towards a mixed judiciary. This involves giving weight to the religion of candidates when deciding upon those lawyers to be recommended for appointment. In principle that approach to improving diversity in England and Wales could be adopted. However the Society reiterates its opposition to the imposition of quotas as a means of increasing diversity and to appointment to the judiciary on any criteria other than merit. The situation in Northern Ireland is special. A balanced judiciary is necessary as a contribution to overcoming 400 years of sectarian conflict in the province.

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?

The draft of what became the Constitutional Reform and Governance Act 2010 had included provisions to reduce the role of the Prime Minister and the Lord Chancellor in the judicial appointments. The Law Society supported those provisions and was disappointed that in the horse trading before the proroguing of that Parliament those provisions were lost. At that time the Society pressed for further steps to separate the judicial appointments process from the executive and that remains our position. The Society has no objection to a recommendation for appointment being submitted to the Lord Chancellor so that the formal recommendation to the Queen can be made but that should be the extent of the Lord Chancellor's involvement. At present the Lord Chancellor still has too many powers to intervene and in our view that could be interpreted as compromising the independence of the judiciary and the open and transparent nature of the judicial appointments process.

20. What is your opinion of the Lord Chancellor's observation that the appointments process can cost too much? Are the funding arrangements and level of funding for the judicial appointments process adequate and appropriate?

The Society concurs with the Lord Chancellor to the extent that the time taken and the cost of the judicial appointment process could bear further scrutiny. The Society would be concerned if this exercise led to the undermining of the JAC and the selection processes that it has adopted.

21. Given the increasing role of Parliament in scrutinising nominees to other important public offices (such as ombudsmen and regulators), is there a case for introducing confirmation hearings for the most senior judicial posts? Are there any constitutional objections to such a proposal?

The Law Society would oppose confirmation hearings for senior judicial posts. Hearings would compromise the separation of the legislature and the judiciary and would infringe the independence of the judiciary. The example of confirmation hearings of nominees for the Supreme Court in the USA is a signal warning. They descend into political point scoring. Nominated judges are attacked not on their capabilities and merit but for their views on politically sensitive issues such as abortion. The correct medium of accountability of the judiciary to Parliament is via reports from the Lord Chief Justice and the President of the Supreme Court and through appearances before Select Committees.

22. Do members of the judiciary have an appropriate role in the appointments process?

The judiciary are well placed to assess the capabilities of candidates for judicial office provided that involvement in the judicial appointments process is exercised objectively and is not used to replicate the existing composition of the bench. The Society supports the involvement of judges in the JAC's selection panels and as members of appointment panels for senior judicial posts. However, the Society has reservations about the statutory requirement that recommendations for appointments are referred to the Presiding Judge of the relevant circuit. The Law Society has been made aware by a couple of solicitors whose appointment has been vetoed as a result of that consultation when the judge consulted can have little if any acquaintance with or knowledge of the legal work of the individual. This process is not transparent and the Society suspects that it lacks a proper evidence base.

June 2011

Professor Cheryl Thomas, Professor of Judicial Studies, Faculty of Laws, University College London (UCL)

Professor Cheryl Thomas, Professor of Judicial Studies, Faculty of Laws, University College London (UCL)

At the outset, I would simply like to highlight two main points as background to the discussion today:

(1) the peculiarity of the existing judicial appointments system in England and Wales
(2) the value of learning from other jurisdictions.

The current judicial appointments system in England and Wales reflects the legacy of two decades of competing demands for and resistance to change in the appointments process[175]. In the end this produced a very peculiar appointments system in the Constitutional Reform Act 2005.

On the surface the Judicial Appointments Commission (JAC) appears extremely similar to selection bodies used elsewhere. For instance, there is a:

- quasi-independent appointments body (JAC)
- made up of lay and legal members
- which nominates individuals to the executive for appointment
- the executive then appoints a nominee to a judicial post
- and the legislature has oversight of this process through reporting requirements

But in reality the JAC operates under a unique set of rules not used by any other appointments commission. For instance:

- It makes only a single nomination to the executive
- This leaves the executive in practice with only a rejecting power not any real selecting role
- The Commission also has a statutory requirement to increase diversity among those who apply for judicial posts - not those appointed

One objective in creating the JAC was to increase judicial diversity. By 2005 other jurisdictions, both common law and civil law, had been tackling diversity for decades. Their experience is valuable in two main respects.

First, it has shown that there are a number of successful strategies than can help to increase judicial diversity:

- Political leadership
- One or two high profile appointments that break the normal route to the top bench
- Requiring diversity in the appointments commission itself
- Personal and relentless encouragement to apply
- Professional career structure for judges
- Knowledge-based over experience-based appointment criteria
- Diversity as an element of the appointment criteria

And, second, there several key lessons to be learned if a country wishes to achieve greater diversity in the judiciary.

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[175] C. Thomas "Timeline of Judicial Initiatives in England and Wales" Annex iii, *The Report of the Advisory Panel on Judicial Diversity* (2010) p.58-69.

1. There's no silver bullet:
    - No single strategy or constitutional arrangement is guaranteed to produce diversity – different strategies work best in combination and at different levels of the judiciary

2. Goodwill is needed early on:
    - 1 or 2 senior appointments from under-represented groups can signal change, create goodwill and buy time, which is important because….

3. Achieving real diversity takes substantial time:
    - The process has been underway for 4 decades in the United States and 3 decades in Canada – and the process is not complete in either country.
    - It would fair to say the clock only started ticking here 5 years ago.
4. Some aspects of judicial diversity remain very difficult to achieve:
    - This is the case even in countries which have had greater success in diversifying the judiciary and which have less peculiar constitutional arrangements for appointing judges than England and Wales.
    - For instance, there remain difficulties with achieving more representation among specific minority groups in the US and Canada, a glass ceiling for women in European judiciaries, and other diversity elements in all jurisdictions (disability, religion, sexual orientation, etc.)

The experience from other jurisdictions should have made it clear that the peculiar appointments system that emerged in the Constitutional Reform Act 2005 would make the successful strategies for increasing diversity both less effective and harder to implement here.

6 July 2011

United Kingdom Association of Women Judges (UKAWJ)

1. The United Kingdom Association of Women Judges is an inclusive organisation open to all judges, male and female, at all levels of the salaried and fee-paid judiciary, in all courts and tribunals in the United Kingdom. As the UK arm of the International Association of Women Judges our aim is to promote the equality and human rights and freedom from discrimination of women the world over. Our members have experience of the current processes, as members of selection panels, referees and candidates.

General

2. It is vital that all concerned, Parliamentarians, Government and the leaders of the Judiciary, acknowledge that the current lack of gender balance in the judiciary is a serious problem and commit themselves to finding solutions. This is what happened in Canada, with enormous success, both in improving gender balance and in

enhancing quality. Women are still less than one-fifth of the full-time judiciary in the ordinary courts in England and Wales. In Canada it is nearer 40%. They have brought skills and experience which has enhanced rather than detracted from the quality of the bench at all levels.

3. The selection processes used by the Judicial Appointments Commission cannot be seen in isolation from the structure of the judiciary itself and the perceived qualifications for the jobs for which they are making the selection. Both need to be tackled.

The lack of a judicial career structure

4. There is an immediate need for a proper judicial career structure, with two elements:

(a) Vertical

Women should be able to enter the judiciary as district or tribunal judges with a real prospect of promotion to the circuit and high court bench in due course. Many very able women downsize their professional careers when they undertake family responsibilities but they retain the ability and potential to become excellent judges. Many would find appointment at district or tribunal level attractive if there were a realistic prospect of promotion in later years.

(b) Horizontal

All district, circuit and high court judges are currently automatically also judges of the first-tier and upper tribunal. Tribunal judges should likewise be regarded as qualified to sit in the ordinary courts. This would reap real benefits in the short term, since there are many more women with the required judicial skills and experience already working as tribunal judges.

5. The system of appointing or approving district, circuit and tribunal judges to sit in a different or higher court or tribunal should be separate from the system for direct entry selection from the profession. Serving judges should not have to enter the same competition as direct entrants and greater weight should be given to their existing judicial skills and experience in the selection procedures.

6. The specialist knowledge required for a particular post should be acquired, where necessary, through relevant training programmes designed by the Judicial College.

Unwritten rules and hidden barriers

7. In reality, no-one is appointed to the High Court bench without first having sat as a deputy High Court judge. But this appointment is not even acknowledged in the gender statistics. We gather that there is no list available of those approved to

sit as deputy High Court judges. The process of approval is largely in the hands of the Heads of Division and is neither open nor transparent.

8. Historically, the judiciary was seen as four quite separate benches – High Court, circuit, district and tribunal (with many different tribunal benches) – each with a different professional profile before appointment. These profiles are likely still to dominate judicial and professional thinking about who gets what job, acting as a hidden barrier to women and others whose professional profile does not fit.

9. The fact that there are so few women, especially at the higher levels, may also operate as a hidden barrier nowadays. We are long past the time when it was an honour and a challenge to be the 'first woman'. Who wants to join a profession which is so overwhelmingly male in its attitudes and practices?

10. There should be opportunities for fractional working at all levels of the judiciary. It cannot seriously be suggested that this is impracticable when the whole system relies so heavily on fee-paid part-timers.

11. The travelling requirements for High Court judges, and the itineraries for circuit judges, should be re-considered so as to take account of caring responsibilities. They are known to be a deterrent to otherwise eligible women candidates.

Selection processes

9. All selection panels must have a gender balance.

10. Everyone involved in the selection process at any stage should be trained in equality and diversity, in particular as they relate to fair selection procedures. The experience of our members who have sat on JAC selection panels suggests that some men are still displaying stereotypical attitudes towards judicial skills and abilities.

11. The application forms, references and selection processes generally must be so designed as to enable a fuller picture of the candidate's experience and abilities to emerge. They should not focus principally on current skills which are most easily displayed through advocacy or litigation. They should enable a proper comparison to be made between candidates of differing backgrounds and experience.

12. Written tests should be designed to test ability and potential rather than particular knowledge and experience.

13. Selection criteria should be tailored to the particular post.

Tie-breaking

14. It is said that the JAC has no need to resort to the tie-breaking provisions of the Equality Act 2010 because it is always able to discern who the better candidates are. We question this for two reasons:

(a) We doubt whether current selection processes in fact enable them to make a holistic assessment of the candidate's abilities, career and potential.

(b) Experience elsewhere suggests that if such an in-depth, holistic assessment is made, many more candidates will be shown to have equal ability and potential.

15. If there is a pool of qualified candidates, all of whom meet the criteria, it is legitimate to appoint those who, because of historical disadvantage and different career patterns, are seriously under-represented in the judiciary but can bring something of real advantage to the profession.

16. We hesitate to suggest the adoption of quotas, but it is essential that many more women are appointed in the very near future. We need to have a target of at least 30% of the full-time judiciary. This will create role models which will encourage other women to apply. It will also lighten the burden on the existing women judges, who are too often seen as representatives of their sex, when the female sex is just as diverse as the male. We need a critical mass before we can be taken seriously as individuals rather than stereotyped as 'women judges'. We need rapidly to reach a point where it is just as likely that a trial judge will be a woman as a man, and where appellate benches will always contain at least one and sometimes two women.

17. Unless there is a real commitment to change, we fear that our successors will be writing the same submission to the same committee in 50 years time.

14 July 2011