HOUSE OF LORDS

Unrevised transcript of evidence taken before

The Select Committee on the Constitution

Inquiry on

JUDICIAL APPOINTMENTS PROCESS

Evidence Session No. 7. *Heard in Public.* *Questions 216 - 237*

WEDNESDAY 2 NOVEMBER 2011

10.20 am

Witnesses: Baroness Hale of Richmond and Baroness Neuberger

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Rennard
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witnesses

Baroness Hale of Richmond, Justice of the Supreme Court, and **Baroness Neuberger**, Former Chair, Advisory Panel on Judicial Diversity.

Q216 The Chairman: Good morning to you both. Thank you very much indeed for coming. We are some way into this inquiry now and we have had a large amount of evidence from different individuals with different backgrounds. One of the areas which we have been concerned about is improving diversity and how that is being achieved. I should just remind you—I am sure that I do not need to, but we have had to have this conversation with some of our witnesses—that the Constitution Committee is concerned primarily with changes to the constitution that might improve matters as far as appointments are concerned, and that the mechanisms of how the Judicial Appointments Commission operates are rather outside our remit. That is not to say they are not interesting, but they are not the particular focus of this inquiry. Thank you both for providing us with interesting background material. I do not know whether either of you wishes to add to the statements that you have sent us. We have Baroness Neuberger's report and the updates to that, and we have both your

memoranda, so I do not know whether there is anything that you want to say by way of opening statements.

Baroness Hale of Richmond: I would quite like to emphasise the main points. I am here both as President of the UK Association of Women Judges and as the only woman on the Supreme Court. In both capacities, I believe that the lack of diversity on the Bench is a constitutional issue. Judges both enforce the law against the people and protect the people against the state. Everybody should be able to see the courts as their courts, there for all sections of society and not just for some. Fairness and equality are central values in the law and the courts should reflect this. We should also make much better use of the talents of all those able women who have been going into the law for decades but leading different lives from men. The UK Association of Women Judges believes that the appointments process cannot be seen in isolation from the structure of the judicial profession, and that is a constitutional issue—in particular, the unspoken officer-class mentality about who gets what sort of job. Tribunal and district judges should have much better opportunities to progress to the uniform or circuit Bench and to the High Court in due course. That is our principal point. As for the Supreme Court, my principal point is that it is a collective. The object of having five, seven or nine judges deciding a difficult point of law is to have five, seven or nine perspectives on the case. The best person for the job is the person who can best contribute to the collective mix. No one is suggesting that the quality should be diluted, but there are other people out there who could do the job equally well and who would enhance both our diversity on the court and, I believe, the public's confidence in us as a result.

Q217 The Chairman: That is a very good introduction, I am sure, to a number of the questions which we want to put to both of you. Maybe in that case, having heard that, I could ask you, Baroness Neuberger, whether you feel progress has been made since you wrote your initial report on this, now nearly two years ago.

Baroness Neuberger: I hope that you have seen the letter that I have sent to the Clerk in which I put it in rather polite terms, but the air of impatience was perhaps apparent. I think that a lot more could have happened in the year and a half since we published our report. The different members of that panel were as one on all of these things. We believe that considerably greater progress could have been made on most of what we said and that it did not require huge amounts of money, which has been the excuse given for why some of it has not happened. There is one thing that we would all want to commend which does have a constitutional relevance, building on what Baroness Hale has just said, which is that the Judicial Appointments Commission has taken one of our recommendations and gone further on the merit criterion. We were all delighted that the merit criterion has changed to an ability to understand and deal fairly, an awareness of the diversity of the communities that the courts and tribunals serve, understanding of different needs, commitment to justice, independence, public service, fair treatment and willingness to listen with patience and courtesy. I think that the emphasis on public service and an awareness of the diversity of communities is a constitutional issue. It is really important that that is one of the criteria that the JAC is taking on. We were very pleased by that, but there is a long way to go.

Q218 Lord Hart of Chilton: I should like to hear from both of you a little more about the nuts and bolts of bringing about change. When I was with two Lord Chancellors, I was sent out to try to encourage City firms to alter career paths, particularly for women. That seemed to me to be well suited to the arrangements that they had, which were that, by mid-life, they were beginning to form a view that women would look for alternative careers. I wanted City firms to try to encourage that. I met with a little encouragement from one or two, but, in many cases, the doors were slammed shut and they did not have any desire really to alter what they saw as investment in people. Large amounts of money had been spent on training them; they saw them as assets not to be freed up. They did not see why

much money should be spent only for that training to be used for judicial purposes. I should like to hear from both of you in a little more detail as to the nuts and bolts of change and how you think that could be effected. I obviously failed, and we hear from various people who have come to give evidence, including the Lord Chief Justice, that they feel that they have failed in giving this degree of encouragement to effect change. You make that point, Baroness Neuberger, in point 3 on the second page of your letter, where you regret that more progress has not been made in encouraging a cultural change and towards seeing a career that sets off in one direction changing to another.

Baroness Neuberger: It is hugely difficult. We had a group of five so-called Magic Circle firms of solicitors through one of our members, Andrew Holroyd, who was the former President of the Law Society. We got together the senior partners of five of the firms—there is an appendix in our report about that. We got them to agree not quite the point that you were making, but I am afraid that I felt a little devious about that. I felt that if we could encourage them to see the virtue of slightly older people than I think you are talking about going on to the Bench, it might have quite a powerful effect on the culture. We got them to agree out of a form of self-interest, in that they have quite a lot of people in their early 50s who they do not think are going to stay within the firm and they want to find a polite way of finding an alternative for them—I do not know whether I should put it like that, but it is true. We got them to agree to work towards encouraging some of those people to sit as judges—male, female and from different ethnic groups. Many of them would still be male, but more women are coming up to that point. We would encourage them to encourage those people to sit as judges part time in order to have the experience to apply to become judges. I think that one of the ways through some of this is to have more solicitors coming forward to sit on the Bench. Therefore, I was delighted by their agreement. They signed a letter

jointly and they were ready to do it. There has not been a lot of progress, and two of those senior partners are no longer there.

Baroness Hale of Richmond: I am very sorry that you were not more successful than you were then, but I do not think that anybody should give up. It requires a concerted effort from the professions, from the judiciary, and from government and politicians to persuade people that there is a pool of talent out there which can be tapped, provided that people are prepared to try to find it, encourage it and recognise it. It is all those things: finding, encouraging and recognising. That could be true among the solicitors and the barristers. People who have moved sideways but are very able do not stop being able to be good judges just because they have not followed the career path that, for example, Lord Pannick has followed. It does not mean that they could not be excellent judges. Another thing that women judges are interested in is the notion of transferability of judicial skills. The tribunals judiciary is much more diverse ethnically, in gender and in professional background than the uniformed branch, as they call it. We have a lot of very able tribunal judges, but the path that gets them into uniformed branch is not clear. They have to be in competition with all the private practitioners who apply for the part-time posts, without which they will not get a full-time post. That is the main constitutional, structural point that I should like to urge on this Committee, which would probably make quite a lot of difference and does not depend on persuading the senior partners of Magic Circle firms to regard their human resources in a different way.

The Chairman: If we may, we certainly want to come on to the question of the potential for a career judiciary, as we are calling it in shorthand. Lord Hart, did you want to come back to this?

Q219 Lord Hart of Chilton: One thing we get is warm words of comfort. I have not seen any specific follow-up to give encouragement and comfort to those who make these

investigations. There should be somebody who actually follows up on the specifics of what has happened. How many people? When did that happen? How many of them in cumulative terms have been produced? It should not be left to receiving words of comfort. There should be practical steps to follow them up. We asked the President of the Law Society and he is sending us some detail of its policy. Again, it was left to words of encouragement. He said that of course he could not direct firms. That is obviously true. It is getting down to more specific follow-up as to whether the words of comfort are put into reality.

Baroness Neuberger: I could not agree with you more. We have now had one report from the Judicial Diversity Taskforce, which came out in May. That is why I am rather disappointed. Clearly, if you had a Judicial Diversity Taskforce which included the heads of the different professional groups as well as the Lord Chancellor, and they held people to account against a baseline, it would be quite difficult simply to give words of comfort. That is what has to happen. It is what the Judicial Diversity Taskforce should be doing. It is difficult because they have not had the data—but they do now. The data is held jointly. It is quite possible.

Q220 Lord Pannick: Baroness Neuberger mentioned the merits criterion. The Committee has heard conflicting evidence on whether and to what extent the merit criterion allows for the gender or ethnicity of a candidate to be taken into account when deciding who to appoint. I would very much welcome the views of both of you on this important issue.

Baroness Hale of Richmond: I think I have made my views about the Supreme Court perfectly plain, both in my short, written evidence to you and in what I have just said. The Supreme Court has this quality that it is a collective court. That is what its decisions are for. The same applies to a lesser extent to the Court of Appeal. Everyone assumes that the membership of the Court of Appeal is to some extent dictated by its need for particular

forms of expertise. I simply add that in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity. I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates. Again, it is noticeable that the Supreme Court has not yet melded itself into a collective whole with a collective endeavour. It would be easier to do that if we were less a bunch of individual stars.

When it is lower down, that is a harder question. The understanding and experience of where the litigants come from is an important part of being a trial judge. You can learn from your colleagues so the greater the mix round the lunch table in the Crown Court the better you will be able to find out more about how to approach a particular problem. That is also something to be taken into account of in the general case, but it is less of a problem there.

Q221 Lord Pannick: Can I be clear on this? At the Court of Appeal and Supreme Court level, most of the evidence that we have heard has been along the lines that diversity is of vital importance for the reason that Baroness Hale touched on earlier: they are our courts and people must see people like them, in general terms, on the courts and not just a narrow section of society. I understand, Baroness Hale, to take it much further than that, that the substantive decisions being taken would or may be different if the composition of the appeal courts were different. I also wonder whether Baroness Neuberger shares that view.

Baroness Neuberger: I share that view. I have to speak personally rather than as part of the panel because the panel did not have this part of the discussion. We took some evidence informally. We met the President of the Supreme Court of Canada and Rosie Abella, both of whom said, in informal conversations, that they believed that the diversity of the backgrounds of the members of their courts made a difference to the quality of their

decision-making. I am not a lawyer, let alone a judge, but I thought that that was extraordinarily interesting and powerful.

The Chairman: We have asked to see academic evidence on that but it seems a bit scarce.

Baroness Neuberger: Yes.

Q222 Lord Pannick: I wonder if Baroness Hale might give us examples of the sort of cases where there may be a difference—if not specific cases, the types of area of law.

Baroness Hale of Richmond: It could affect any area of law. I used to be quite sceptical about these arguments that it made a difference. The more I have thought and read about it, and the more that I have experienced being in a collective court, the more I have thought that, yes, a difference can be made. I think it could be made on anything. You may be aware that there was a very interesting project recently, the Feminist Judgments Project, where some academic, feminist lawyers decided that they would rewrite from a feminist perspective the judgments in a range of mostly famous cases from all round the areas of law. Sometimes they reached exactly the same conclusion but with a different reasoning and sometimes they reached a different conclusion, demonstrating with varying degrees of success that where you start from can have an effect on where you end up. Of course, I am not arguing that you start from where you should end up. No judge should do that. A judge should start from the law, statutes, cases and principles, and reason from that. But that is the best answer I can give: go read that book.

Q223 Lord Renton of Mount Harry: I come to this from a very different background. I had been an MP for a long time before coming to the Lords. I have practically never been in a law court. All that I have heard in the past few weeks amazes me. I did not know that you were in nearly so much trouble or so worried about why there are not more women judges and judges of other colours, and so forth. That inevitably leads one to wonder how you actually judge merit. That is extremely difficult. You are always bound to be affected by how

someone personally gets the right tune with you and perhaps not with everyone else. Should the merit criterion be made more firm? Should it be more defined to ensure that, in making each appointment, selection panels must have regard for the need for the judiciary as a whole to be reflective of the diversity of the British population? Unless you have a command like that, is it really going to change?

Baroness Hale of Richmond: I have already said that that is in there anyway, so you do not need to change it. It might be a good idea to change it because there are obviously people who do not share my view. One thing you would realise if you got three lawyers in a room, Lord Renton, is that you would have three views of what a particular statutory provision might mean.

Lord Renton of Mount Harry: I have a namesake called Sir David Renton, and I learnt a certain amount from him.

Baroness Hale of Richmond: That is right. If you think something is advisable, it is better to spell it out rather than not.

Baroness Neuberger: Could I just add to that? That is why I was delighted to see the JAC change its merit criterion and why I opened with that. Anything that this Committee can do to emphasise that point would be enormously helpful and powerful. The other point that is worth making is that we all have an inclination to appoint people who are like us. I certainly found as Chief Executive of the King's Fund that an astonishingly large number of middle-class, white, rather bossy women were being appointed—I cannot think why that should be. I had to watch myself, because that is the sort of thing that human beings do. One of the reasons why this is so worrying is that that is precisely what has been happening with the judiciary, and it has changed as a result of huge efforts at what people would call the lower levels of the judiciary. It is interesting that it has done so and it has led to the wide mix that Baroness Hale has referred to, but if you talk to them privately they will all talk about being

below the salt. They feel as if they are a junior branch where it is okay to be diverse and people make appointments in a different way, but that does not apply further up. We should take that seriously.

Q224 Lord Renton of Mount Harry: At a particular point, do you think that selection panels should use the tie-break position in section 159 of the Equality Act 2010 where there are two candidates of equal merit—goodness knows how you weigh that—in order to appoint a candidate from an under-represented group?

Baroness Neuberger: The panel that I chaired was unanimous in saying yes, but we had our doubts about whether you really ever do get two candidates who are absolutely equal. Were we to do so, though, we say yes.

Lord Renton of Mount Harry: But actually people will always have a different judgment on individuals as to whether they are equal or not.

Baroness Neuberger: That is the problem.

Baroness Hale of Richmond: Particularly as you are taking so many different things into account in deciding who is a good person for the job.

The Chairman: If you expand the concept of merit, you therefore have an even more difficult question to address.

Baroness Hale of Richmond: It also depends upon the depth with which you assess the individual candidates and how you go about doing that. If you do it simply on current competences, you may end up with a rather thin view of the person because you have not looked at how they got where they are, why they are how they are and so on—someone who might have progressed to be senior partner in one of the Magic Circle firms and decided not to do that but had the ability to do so.

Lord Renton of Mount Harry: Before I pass on, I should say that I did enjoy the comment in your written evidence that 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". I am sure you do not.

Baroness Hale of Richmond: Well, I am not sure how Baroness Jay feels about this Committee.

The Chairman: I have been so used to this position for so long. We had a small sweepstake in our private session about whether one of you would raise the problem of the gender composition of this Committee, and we had only to get 10 minutes in and you did. Thank you so much.

Q225 Lord Crickhowell: I want to pursue a bit further the issue that a distinguished lawyer, Lord Pannick, has already raised. I want to ask what I call my Pooh Bear question—that is, I am a bear of very little brain and I am not a lawyer. Of course I can see and totally support our courts' reasons, and all the other reasons, for diversity, but I was struck by the words that I think Baroness Hale used twice—"perspectives on the case". As a non-lawyer, I thought that the job of the judges was to decide what the law was as it applied to the particular case. I am still a little puzzled as to why the "different perspectives" view coming from those from different backgrounds should arrive at different interpretations of the law. I wonder if you could elaborate a little further than you did in your answer to Lord Pannick.

Baroness Hale of Richmond: Yes, I will try. Of course, it depends on what sort of judge you are. The great majority of judges are deciding the facts. They are not deciding what the law is. The law that they have to apply is clear and what they are doing is either deciding the facts or directing the jury that decides the facts. Clearly, when you are deciding who is telling the truth or where the truth lies in competing versions of events, the greater and the wider your understanding of the people who appear before you, the better. I always thought that having been an academic teaching clever 18 to 21 year-olds for 18 years made me quite good at spotting liars, but of course barristers would say, "Oh no, that was useless experience."

Do you see what I mean? Different sorts of experience contribute to that. But you were also asking about the law.

Lord Crickhowell: I was asking the question particularly in the context of the Supreme Court, where perhaps we have taken things a stage further than that initial cross-examination of the witnesses.

Baroness Hale of Richmond: Absolutely. On the whole, cases get to the Supreme Court only because they are difficult and the answer is not clear because there are at least two possible answers to the question. That means that there is the difficult task of trying to work out what the answer is. As I said earlier, the one thing you should not do is say, "Oh, I've looked at this problem, I know what the answer has to be and so I'm going to find the best reasons to arrive at that answer." That is what barristers do, quite rightly. Whoever instructs Lord Pannick will have a case and an outcome they want, and Lord Pannick will find the best possible way to get to that outcome. That is his job and he is brilliant at it. A judge should be starting in a different place with the existing body of law and the principles that you can deduce from that law and the words of the statute. But everybody comes to that task with a set of values and perspectives that may lead you to pick different bits in the materials to reason towards an outcome. One always hopes not to be predictable—the great Lord Bingham always said that he hoped he was not predictable in his answers to cases—but nevertheless you bring different things to it. If you are a group who are trying to reach a common answer, different people will put in different things to that debate and, hopefully, produce a common answer. We are not very good at that at the moment but I wish we were. I wish that we could each put in our different way of getting to a particular answer and then argue things through among ourselves more. Does that help at all?

Q226 Lord Crickhowell: Yes. I still have a question about the basic point—the law. At the end of the day, I still wonder why it should be that a distinguished woman like yourself

should arrive at a different interpretation and conclusion about the law from your male counterpart.

Baroness Hale of Richmond: I can think of two occasions recently when I have. We do not want to go into specifics—that would not be sensible—but you would not have much difficulty in reading my judgment to understand why I reached a different conclusion from my colleagues. The example that I tend to give, from some time ago, is the whole question of damages of having a child that you should not ever have had and how you look upon that. Do you look upon it as a matter of financial loss or of wrongful invasion of your bodily integrity and autonomy? A woman, because she has had the experience of having a child, will probably look at it in the second way. A man might or might not. That is supposed to give an example of the sort of case but, as I said to Lord Pannick, there are lots of other sorts of cases where the same problem can arise.

Baroness Neuberger: Just one further point: we not only met some of the senior Supreme Court judges from Canada but talked at various points to other Supreme Courts around the world, and the same point was made. I support what Baroness Hale has said, particularly in difficult cases—childbirth being one, rape being another—where the actual experience and the life story of the people who are making the decision is a factor. If the law is clear, that is not an issue; it is where the law is not clear, when it comes to the Supreme Court where it is a question of interpretation of the law, that people's life experiences affect their values and therefore may well affect how they contribute to what is, after all, a debate in committee, as it might be in a committee of the House of Lords.

Q227 Lord Norton of Louth: I would like to follow that point and the point made earlier by Baroness Hale about how you define diversity. Is there not a danger of it being seen rather narrowly? If we are looking at it from the perspective of perception, it is based on what you see rather than where you come from. It might be restrictive in that sense

because you are talking about life experiences. The law profession itself might be quite restrictive in terms of the type of people who can actually be recruited into it. How do we see that breadth when we think of it in terms of diversity? Should we be looking more broadly at how we recruit more people into the profession of law itself, never mind promotion once you are within the profession?

Baroness Hale of Richmond: There may be a worry about the future, but entry into the legal profession has been very diverse for quite a long time. There have been more women than men graduating in law for some time. There have been equal numbers going into each branch of the profession—solicitors probably since the 1980s and barristers since the 1990s. It is a long time. The problem has not been entry, but what they then do and the attrition rates. Even if women start with the Magic Circle firms or at the Bar, they tend to do other things with their lives at some point to a greater extent than men.

Lord Norton of Louth: I was thinking more in terms of people from, say, poor backgrounds. You might be female, but coming into law, you are probably going to be from a middle-class family.

Baroness Hale of Richmond: I am not sure that is so. The future is a bit of a problem, with changes in higher education and the extraordinary sums of money that it now costs to qualify for the profession, but I do not think that it was so at the time we are looking at for people of the sort of age who we might be expecting to go into judging. That is the real worry and puzzle, but of course it is a problem throughout society with entry to higher education depending on A-level grades, certain types of school not being as good at producing the required A-level grades and what higher education does to compensate for that. This is a general problem. I agree with you that it is a general problem and needs attacking, but we should not say that because there is that one we do not attack the bits that we do know about and might do something about.

Baroness Neuberger: Some of this is beyond what this Committee is looking at, but it was quite clear that some parts of the judiciary and some parts of the legal profession were being quite serious about going out and talking in schools—precisely in those schools where, if you like, the kids might not have expected to go into law or, indeed, to think about becoming judges. There is movement. It is slow, but the report from the Judicial Diversity Taskforce indicates some movement towards doing more. The other thing is that I think there is a responsibility on the judiciary, who will know—it is a gossipy old world—the backgrounds of many of the people who are bright and sparky. In firms of solicitors, they will equally know that. Nobody said that having a Judicial Appointments Commission means that you cannot tap people on the shoulder and tell them to apply, really encourage them, give them support and give them mentoring. The idea of saying, "We are going to do something about this and we are going to encourage people who have not come from the most typical backgrounds to apply," really is the responsibility of the professions and of the judiciary itself.

Q228 Lord Rodgers of Quarry Bank: If I may follow the point that Lord Norton has made, the old-fashioned argument is that over 30 years the problem of diversity will be remedied. That is the proposition. It is not mine, but I am making it and perhaps you can tell me why it is a nonsense. Having said that, there must be conservative forces behind which explain the problem of attrition, of working at home and all these things. There must be something within the profession or in some other way that must not like to see the degree of diversity. Can you define, describe or explain the conservative forces within the profession and show them a little more specifically? What are the prejudices, if there are prejudices? I am really addressing Baroness Neuberger in this respect. What comparison do you make with medicine? I think there is a reference here to women forming 40% of new pupils. I think, but please correct me, that the proportion of young women doctors is higher

than that. They have problems of families and so forth, so why is law a more conservative profession, if that is what it is, than medicine?

Baroness Neuberger: It is quite difficult to answer why it is a more conservative profession than medicine, and perhaps we should ask some of the lawyers in the room, but it is true to say that many of these issues were present within medicine and healthcare more widely. What has happened is that women, who are now slightly in the majority in medical schools, have now become consultants and have reached the senior ranks, although at the most senior ranks it is still quite slow. There has been a very noticeable shift, and I would say that the noticeable shift has been in the past 15 years. That has been due to an enormous amount of work done by women doctors themselves and to a change of culture in the people who sit on those appointment boards. I would say that that is the most significant. The Lord President and I have sat on those boards on many occasions, and it is very interesting. They shifted in what they were looking for. I would say that between 15 and 20 years ago, there was a noticeable shift. There is also the question of numbers. I think you are quite right about that.

The other thing I would say is that it is true about women but it is not true about people from ethnically diverse backgrounds in medicine. It is still very slow. When you look at how the health service in this country operates, it is quite interesting how many people you have who are called career grade doctors who would have expected to be consultants, but are not. They come from a variety of ethnically diverse backgrounds, but they are mostly not white.

Baroness Hale of Richmond: I am not sure that I know the answer to your question. Outwardly, the legal profession—at least its stars—tries very hard not to appear conservative. It wants to appear go-ahead, forward looking and ready for the 21st century. That is the image that it tries to present of itself. However, especially at the Bar, it is a

profession of individuals all, until things begin to change under the new structures, acting as separate cottage industries, so it is quite hard to have a collective view that would say, "We would like our chambers to be 50% women and 10% ethnic minorities." Although they might say that, it is quite difficult when you are looking at individuals and saying, "Yes, that's the person who's going to convince that judge that that is a good answer to the case." That is one of the problems.

The Chairman: May we return, then, to the structures of appointment? I think that is really, as we said at the beginning, one of the main emphases of this inquiry.

Q229 Lord Powell of Bayswater: My question is going to be about the role of the Lord Chancellor in judicial appointments and whether it should be increased, diminished or left more or less unchanged. In the evidence that we have had so far, the general view has been that it should probably be further diminished, certainly rather than increased. I wonder what you feel about that and I wonder particularly whether you feel that he ought to be given something of a choice when it comes to senior appointments—not just a single name, but a small list to chose from—or at least the ability to comment on the candidates. What do you feel about that?

Baroness Hale of Richmond: As I said in my written evidence, it seems to me that we have gone from one extreme to the other. We have gone from an appointment system that was under the control of the Lord Chancellor, which, as I think Lord Mackay pointed out, enabled him to make a few bold decisions, which included my own appointment and that of the first solicitor to the High Court Bench, to a system where the Lord Chancellor basically is in an almost impossible position, as I think reading the evidence of the two most recent past incumbents demonstrated fairly clearly. It is not at all easy to be faced with the option of yes, no or maybe, because the maybe does not really work. There are several approaches that you could take. I do not think anyone is suggesting that we go back to the previous

position, but one answer would be to offer the person democratically accountable for the decision a choice. That might be thought too radical a change from the change that was made in the 2005 Act. As far as the Supreme Court is concerned, I think that there is a lot to be said for widening the selection panel and including parliamentarians on that panel, provided it is done carefully. That would mean senior parliamentarians, who would know what it was and was not appropriate to ask a candidate, from at least two political parties. In fact, recently retired Lord Chancellors would be excellent people to do this—one from the Commons and one from the Lords, one from one party and one from another. That would be a small step towards increasing the democratic accountability of the process, to which I attach a huge amount of importance. The larger step would be to give a choice.

Baroness Neuberger: We looked at this and as a group took the view that the system should remain as it is for the moment. That is because we felt that it was very early days for the Judicial Appointments Commission, and we did not feel that giving the Lord Chancellor a choice would necessarily improve things. We wanted to see the Judicial Appointments Commission itself take more responsibility in this area. However, we made a strong recommendation, which you will have seen, about appointments to the Supreme Court and the Appeal Court. It was not about involving parliamentarians, although I have to say that personally—I cannot speak for the panel on this—I would not object to parliamentarians from different parties being involved in a minority in the appointments to the Supreme Court. That might be something that could at least be tried. It does not have the same problem constitutionally as giving the Lord Chancellor a choice arguably does, so I think there is real merit in looking at that.

We did make strong recommendations about the President of the Supreme Court not choosing his own successor. We made strong recommendations about broadening the panel. We had absolute agreement, and the present President of the Supreme Court did not

demur when we told him what we were going to say. I know that you have had somewhat different evidence, but I think it is quite important to say that. He may well have changed his mind.

The Chairman: He confirmed that position in his evidence.

Baroness Neuberger: I think it is really important that that is done. The people who sit on the appointment panel for Supreme Court judges set the tone. That is why it is such an important issue. The panel sets the tone for the whole of the judiciary. I think it needs to be very much broadened, and it should be a diverse panel.

Q230 Lord Powell of Bayswater: Bringing you back to the specific role of the Lord Chancellor and again in relation to diversity, we have also heard the view that the Lord Chancellor should perhaps be a more active champion of diversity and should have greater power to give directions to the Judicial Appointments Commission and so on. We have often heard that view from the same people who wish to diminish his role in the appointments, which seems a bit absurd, because that is one of the ways in which he can influence diversity. What would you like to see the Lord Chancellor more enabled and encouraged to do to achieve greater diversity?

Baroness Neuberger: I would like him to chair the Judicial Diversity Taskforce personally. I would like him to insist on the baseline and on reports being made to him. I would like him to hold to account the Judicial Appointments Commission and the senior members of the judiciary, including—because I ought to declare the interest—my brother-in-law, although we do not discuss these issues any more. I would like him to be able to hold them to account, but that is not necessarily the same as giving him a choice of appointments.

Baroness Hale of Richmond: I agree with everything that Baroness Neuberger has said. It is necessary for everybody to own the problem and think that they might make some small contribution towards solving it. The Lord Chancellor is in a leadership position and he is

accountable to Parliament. If he says, "These are the policies that I would like the JAC to pursue," he can then be questioned in Parliament about whether they are justifiable and can justify them. That seems to be democratically entirely appropriate. Individual appointments are a more sensitive issue, for obvious reasons.

Lord Powell of Bayswater: Surely it would be logically consistent, given the major role in senior individual appointments, if he is going to make an active contribution to this.

Baroness Hale of Richmond: It might be logically consistent, but the two do not necessarily go together, and the sensitivity is the fear of politically motivated appointments. We have been very fortunate. It is generally believed that since World War 2 we have not had politically motivated appointments to the senior judiciary, including at the highest level. I shocked Americans when I said that I did not know the politics of my colleagues. They were amazed. Actually, I could guess in one or two cases, but not in all of them. Long may our situation be like that. It is very important that we should be seen as politically independent. The Lord Chancellor was making those appointments until very recently, so they are not necessarily inconsistent, but I could see that a directional policy-making role is distinct from an individual choice role, for the time being.

Baroness Neuberger: I completely agree.

Q231 Lord Pannick: On this subject, it is obviously vital that political independence is maintained in appointments, but it is also vital that there is some mechanism of democratic accountability for appointment, particularly at senior level. We have heard evidence, specifically from the Lord Chief Justice, that one way of trying to reconcile these two is that the Lord Chancellor should actually be a member of the appointing panel at the senior level. He or she would have a voice, but not an overriding voice, particularly because under the present system it is very difficult for the Lord Chancellor to exercise the power of referring

back a proposal that has been made. Do you think there is any substance in the suggestion that the Lord Chancellor should be part of the panel that makes the appointment?

Baroness Neuberger: I am not very comfortable with it. I prefer to see the separation. I would be much happier about some kind of confirmation hearing for those members of the judiciary who have a sort of executive role, such as the Lord Chief Justice. I can see that as being quite acceptable where it is about their managerial occupation—I am speaking not for the panel but for myself here—but I would be quite uncomfortable about a Lord Chancellor who is responsible for the system as a whole being involved directly in individual appointments.

Baroness Hale of Richmond: I read the Lord Chief Justice's evidence, and I thought it was an interesting idea, but he wanted it in substitution for the current Lord Chancellor's role. I think the current Lord Chancellor's role is the minimum he should have for accountability purposes. In other words, he should be able to veto people. It would be difficult for him to combine that with being on the recommending panel. I like my idea better, but then I would say that, wouldn't I?

Q232 Lord Pannick: In relation to the Supreme Court, you have both made it clear that the president should not be involved in the appointment of a successor and that the appointment panel should be broader. Do you think there is any value in the process being more transparent with, for example, the names on the shortlist being made public so that the public can express a view, or would that be impractical and undesirable?

Baroness Neuberger: I think it would be impractical and undesirable, but what we saw recently with the leakage was even worse. I think, broadly speaking, people should not expect to have the shortlist made public. I do not really think that one works.

The Chairman: Are you shaking your head?

Baroness Hale of Richmond: I do not really have a strong view about it. It has been a big culture shock to the profession to have a system of appointments that depends on making applications and having not interviews but conversations. Possibly the idea that the fact that you had applied or had been shortlisted would become public knowledge would be an even greater culture shock, and we would not want to shock them too much for the time being, would we? There are not a lot of advantages in it.

Baroness Neuberger: There is quite strong evidence, certainly from women and ethnic minorities, that they find it quite bad enough that when they apply at the moment—they have to ask for their referees before they know whether they have got through the first stage and therefore lots of people who are senior to them know that they have applied. They find that extremely difficult and a deterrent, so I think that although you are talking, I think, about a more senior level, nevertheless there is a quite a lot of angst about even making the fact that you have applied public, so I would be very chary of that on diversity grounds.

The Chairman: Lord Norton, did you want to follow up on transparency, or were you turning to something else?

Q233 Lord Norton of Louth: I wanted to follow up that and cover a related point. It might be transparency not in the details of who is applying, but faith in the process and being more aware of it and feeling that it was fair. I want to come back to the point about people observing who is on the Bench. There is the point about the extent of transparency but also trust in the process by which they are appointed, but of course to have trust there is then the question of how the people on the Bench actually operate. Should there be some method of appraisal for them once they are appointed to the Bench?

Baroness Neuberger: I feel hugely strongly about this. I would have felt strongly anyway from a personal perspective but the evidence that we had from all the women and all the

people from ethnically diverse groups who gave evidence to my panel was clear: they wanted appraisal. Those who do tribunals or are deputy district judges already have it and appreciate it hugely. For any kind of transparency and faith in the system, it should not just be a case of people being appointed but it has to be checked and evaluated, perhaps by their peers, that what they are doing is the right kind of thing and that they are doing it well. The women and people from ethnic minorities made it clear that it was much more likely, particularly if they were at a relatively junior level of the judiciary, that they would have applied to become more senior had they had appraisal at a more junior level and were they to expect it at a more senior level, because then they would feel that they were up to the job, but they did not necessarily fit with the majority of the group who were doing the job. I think there are two arguments for appraisal. One is that it gives the public faith in what judges are doing and therefore it is a good thing on its own. Secondly, it is also hugely important for diversity reasons.

Baroness Hale of Richmond: I agree with both of those. Appraisal should be seen as a positive and helpful thing. One has to make that plain. This is not compromising the decision of the individual judge in their decision-making and the like; it is trying to help each judge to be the best judge that they are capable of being. That is what it is for—identifying strengths and weaknesses. I was very struck, going to a meeting with the chair of the Judicial Studies Board, as it then was, of High Court judges—I think I was in the Court of Appeal then—to discuss what their training needs might be. All the men were saying, "I don't need any training; I know what my job is." The women said, "I would very much welcome mentoring and other kinds of help, particularly in the areas, the jurisdictions, that I feel less comfortable in." Once it became apparent that that was the right answer, the men started changing their minds. So once it becomes apparent that appraisal is the right answer and it is done properly, people will accept it.

The Chairman: Lord Rodgers, in our previous discussions with people you have been concerned about this issue and the mechanisms of appraisal—I think we all have. Do you want to pursue that now?

Q234 Lord Rodgers of Quarry Bank: It was not my question on this occasion, but I listened to the response with great interest. I am not sure what level of seniority of judges we are talking about; we are not talking about the Supreme Court. What I was trying to ask, but maybe you have answered it already, is whether, as we are now pursuing greater diversity and pushing on the margins from time to time for good and understandable reasons, the system of selection itself is in some way defective. If you appraise the outcome of those who have been chosen and try to make judges better as a result of appraising their performance, is there any common view to say, "We have made these men and women judges at this particular level, but maybe our method of choice is defective or not defective"? When making appointments of anyone at any time, you have to have a system to say, "That has been a great success."

The Chairman: Or a great failure.

Baroness Neuberger: Clearly, you can appraise appointments. I would say that the Judicial Appointments Commission has not been there long enough for an appraisal of the system as a whole to make much sense, particularly as it is shifting somewhat now. The point about the appraisal of judges, though, is that you can do that. In fact, I would say that there is no argument against appraisal by their peers of the Supreme Court. Again, this is the argument about the public having trust in a system, owned by the judiciary, where they are appraised by their peers and they say, "What could I do better? What am I doing too much or too little of?"—all those basic questions. It is good for us all to look at how we operate in whatever we do on a regular basis. I see no reason why it should not be at the most senior levels of judiciary right down to the most junior levels. It already happens at the most junior

levels and that is much appreciated and it is owned by the judiciary. It is positively a good thing and can give the public great faith in the way that the judiciary thinks about itself.

The Chairman: Would you go right up to the Supreme Court with that kind of appraisal, Baroness Hale?

Baroness Hale of Richmond: I certainly would not be against it. I can imagine that there would be people who were.

Q235 Lord Shaw of Northstead: What is your view of the merits or otherwise of a career judiciary in which lawyers were appointed to junior judicial roles at a much earlier stage of their careers than has traditionally been the case? Once they are appointed early, the outside judgment can be at every stage and therefore the judgment goes right through the career. Possibly this would be helpful to all concerned.

Baroness Hale of Richmond: I doubt whether there is anyone in the Anglo-Saxon legal world who would like us to go over to a continental-style career judiciary, where people qualify in law, take judging exams and go into judging at a young age without ever having experienced anything else outside judging. That is common in a lot of continental countries and I think it has some unfortunate consequences. We tend to think that it is a good idea if you have made a career for yourself outside the judiciary before you get appointed to be a judge, and there are many different careers that one can have. There are judging jobs that are particularly attractive and have been shown to be open to diverse candidates—I am talking about the tribunals judiciary, district judges and to a lesser extent the circuit Bench—that are attractive and therefore people go in for them and get appointed. It should be much easier for them to transfer and move up.

Lord Shaw of Northstead: In other words, in your view diversity would be helped by some such system.

Baroness Hale of Richmond: I think we all believe that. It is extremely hard to get the diversity statistics from the tribunals judiciary—in fact, I have not yet succeeded—but it is apparent. You can see that there are lots more women, ethnic minorities and people from diverse professional backgrounds, which I keep banging away on too.

The Chairman: Why is it so difficult to get the statistics?

Baroness Hale of Richmond: Because each tribunal, until they set up the new structure—

The Chairman: I see, so it is a mechanical thing.

Baroness Hale of Richmond: They are separate. There are the employment tribunals, the immigration and asylum tribunal, the social security one and so on. There are so many that it would be very difficult—and I am not sure that they have all collected those statistics either. It seems unfortunate, though, that people who have shown themselves to be good at judging in one context should then have to prove themselves all over again in competition alongside people who have not yet shown themselves to be good at judging, and somehow their judicial skills are not given enough weight in the selection process. I suspect that there should be two different selection processes, but that is a very radical suggestion.

Baroness Neuberger: I would like to add that we were very clear as a panel that we wanted to see people having a judicial career, as opposed to a career judiciary, so that you would go in having done something else—exactly the point that Baroness Hale made. We did not look at the suggestion of two different methods so that you could prove yourself in the tribunals or the district court and therefore should not have to go through the same system again. However, were there to be a sufficient appraisal system that was owned by the judiciary and applied throughout it, the fact of appraisal and what had come out as a result of it would be one of the things that could be taken into account as you advanced your career up the different rungs of the judiciary. We would have said that that would be the point at which

one could move towards a different method of appointment or towards taking out one or other of the components of the test.

The Chairman: We have about 10 minutes more, if you have the time. May we return to the question of parliamentary involvement? I know that Lord Crickhowell was—

Lord Crickhowell: I was going to ask about the parliamentary involvement issue and the rather interesting argument that that set off in an earlier session on this subject, but I think that we have adequately dealt with it in the responses to Lord Hart's question.

The Chairman: I wonder if we could just ask something specifically—I am sorry if I am interrupting you, Lord Crickhowell, because I know you wanted to ask something else—because we did not get from either Baroness Hale or Baroness Neuberger a response that suggested how, for example, one could have this kind of parliamentary scrutiny. It seemed to me that it might be only in terms of what one might call post-appointment conversation, or was there something else?

Lord Crickhowell: I thought some interesting suggestions had been put forward about the inclusion of two or three senior parliamentarians on the selection panel.

The Chairman: You could have it on one selection panel.

Lord Crickhowell: That was a much more clear-cut alternative to anything that we have heard in earlier evidence.

The Chairman: Maybe we do not need to pursue that, then.

Lord Crickhowell: We also had an answer to the question about the examination of the administrators.

The Chairman: Yes, that I did pick up.

Q236 Lord Crickhowell: I have a practical question for Baroness Neuberger about how the selection panel operates. When I was chairman of a very large quango and, later, president of Cardiff University, I always insisted on two things in the way that we operated

an interview process. One, of course, was that there should always be women on the panel, because they always saw things that we men did not, but I also had two interview panels meeting the candidates quite separately and then coming in to report on the result. It was an almost universal event that one panel came up with quite different views and comments from the other because the two had usually raised different questions and posed the issues in different ways. I always felt that we came to a much more solid conclusion because we had these two separate panels, not just one that might have had a satisfactory interview but not spotted something or raised some issue that might have had a critical influence. I wonder whether you have such a process or whether you always simply meet as one group and carry out your interviews in that way.

Baroness Neuberger: I have never chaired the Judicial Appointments Commission—that is not me. I simply chair the panel looking at judicial diversity. We saw that considerable attention was given to trying to get identical criteria between the panels, but in my view that is extraordinarily difficult to get. I would like the idea of two separate panels, but of course different groups of people will have seen the candidates or looked at what they have done; they have to do a written test and a lot of them have to do a role play. One of the most fascinating things was discovering that the barristers absolutely hated doing the written test because they could not bear doing exams, while the solicitors thought that the exams were an absolute doddle—though they did not always pass them—but they hated doing the role play. I thought that was quite interesting about diversity in itself.

I like the idea that you should have different groups of people looking at candidates, but in fact different people look at the role play and the results of the tests, so that exists to some extent within the system as it operates at the moment. That could be taken further, though. The other thing that should be taken further is that if we are going to say that appraisal is so

important for the judiciary, it should also be important for the members of the Judicial Appointments Commission.

Q237 Lord Crickhowell: You have touched on another point that came up at our previous session. There was a complaint from barristers—I think it was the Law Society—that the examination results sometimes produced startling outcomes because people who everyone had thought had the highest qualifications, not least the individuals themselves, find themselves failing at that point, and this was causing a good deal of anxiety. Would you comment further? I do not know if you read the evidence on that.

Baroness Neuberger: I did read the evidence. I will comment further and say that you will get that from both the Law Society and the Bar Council. Sometimes people think that someone is an absolute shoo-in and will not have a problem with the test, but then they fail. That is because of a mixture of things and it happens in ordinary life too. That mixture includes people not preparing for the test, and there are some issues about people who believe that it must be so obvious that they can do it that do not prepare. Interestingly, the Law Society has been running excellent programmes, particularly for women and people from ethnic minorities, to help them with the role play, which is the bit that they find so difficult on the solicitors' side. For most of these things, practice is quite good and helps to do better the next time. As someone who failed my driving test four times and finally passed on the fifth go, I know that you can take tests again and again, and that is not a bad thing in itself.

Baroness Hale of Richmond: The only other thing about tests is that it may be that the candidates really have not done themselves justice, possibly for the reason that Baroness Neuberger has suggested. It could also be that the test itself needs constant appraisal as to whether it is testing the right things. One of my worries is whether there is too much

concentration on current competences as opposed to the ability and the potential that are needed to become a good judge. That would be my concern.

Baroness Neuberger: There is one important thing that could happen that would make a great difference. If the Judicial College were able to offer or commission courses in judgecraft, if you like, in judicial skills, and if those were taken seriously—Baroness Hale is completely right about the test; it needs looking at and constantly refining—and if part of these ideas and, by now, quite a lot of academic work around judicial skills, the skills you need to be a good judge, were capable of being tested—they probably are but in different ways—then that would be an enormous contribution to changing the way in which the system operates at the moment.

The Chairman: Thank you both very much. This has been extremely valuable and, if I may say so from the Chair, refreshing. We are very grateful to you both. Is there anything that you feel we have not covered that you very much wanted to say to the Committee? We have covered a wide range of points and you have both made them clearly, persuasively and forcefully. Thank you very much.

Baroness Hale of Richmond: Can we thank you, particularly for the opportunity of returning to this wonderful room?

The Chairman: Thank you.