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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 members
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
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 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 796\(^{th}\) 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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\(^1\) 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.

\(^3\) 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%); BAME5 - 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 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.

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5 Black and minority ethnic.
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.  

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.

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

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4 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.
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
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 appointment 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
talent 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 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 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.
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) 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 may not be perfect but it is an improvement on the system that previously existed. There is greater fairness in the appointments process, there is more transparency and certainly it appears that it is more difficult to interfere to assist or to harm any particular applicant. We consider it particularly important that anonymity is maintained in the exam process. While the exam system itself has been criticised, we accept that there has to be some sort of sift and we believe that the exam process is fair to all applicants. There are criticisms of the exam, in particular of the recent District Judge exam, and there is a need for consideration of the policy in that area as there are implications as to quality and diversity. The very fact that there are so many applicants now from diverse backgrounds is proof that the system has been improved and that those who were put off under the previous system feel encouraged to apply.

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 Barristers, Black Solicitors Network and Association of Women Solicitors – Oral Evidence (QQ 259–280)

Evidence Session No. 9.  Heard in Public.  Questions 259 - 280

WEDNESDAY 23 NOVEMBER 2011

Members present
Baroness Jay of Paddington (The Chairman)
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witnesses

Nwabueze Nwokolo, Chair, Black Solicitors Network and Council Member, Minority Ethnic Concerns, Law Society of England and Wales, Cordella Bart-Stuart, Immigration Judge and Immediate Past Chair, Black Solicitors Network, Frances Burton, Vice-President and former Chair, Association of Women Barristers, and Joy Van Cooten, Chairwoman, Association of Women Solicitors

Q337 The Chairman: Good morning and thank you all for coming. This is a very important session for us, because we are reaching some of the conclusions of our thinking. We have taken evidence from a great number of people in the legal professions, commenting on the systems we have. As you know, this is the Constitution Committee, so we are primarily concerned with looking at ways in which aspects of the law and the constitution might be amended to change the way in which judicial appointments are made, rather than systems and machinery, although obviously we recognise that there are quite a few matters of the machinery that you may want to comment on.

Thank you all for the background statements that you made and for sending in your written reports. Some of the Committee have not had the chance to read the ones that we have received this week except for this morning, so I thought it would be useful if you would each individually summarise the written evidence that you have given us already. I ask you to be reasonably brief. We are not being televised this morning, but as this is a sound-recorded session, perhaps you would be kind enough to just identify yourselves with your names as you speak, because that then enables the recording to be identified in the future.
Association of Women Barristers, Black Solicitors Network and Association of Women Solicitors – Oral Evidence (QQ 259–280)

As I say, we are reaching a point where we are beginning to think about our conclusions, and you will all be aware of the consultation document that the Government have issued and some of the areas that we are looking at just this week. If I may, I would ask you very much to focus this morning on the kinds of proposals you would make for change. I think all of the Committee have heard some very convincing evidence about the problems that people confront and the difficulties in some of the present systems. We are now trying as well as we can to look at some of the far-reaching proposals for changing the way in which the system and the law operates in relation to appointments, et cetera. From the left-hand side of the table, perhaps you would start with a brief introduction, and then we will get into our questioning. Thank you.

**Frances Burton**: I am Frances Burton, Vice-President of the Association of Women Barristers and a past Chair. I have always been an academic practitioner, and I am also a retired judge of the Administrative Appeals Chamber of the Tribunals Service. I am not the author of our paper that has come to you. The author was Kaly Kaul QC, who is also a past Chair, with a great deal of input from the committee and of course the current Chair, Fiona Jackson.

Our particular concerns are the process for the appointment of Deputy High Court Judges. We see a very substantial improvement in the diversity figures in the lower judiciary, but Deputy High Court Judge is an important watershed for the upper judiciary. We have had the assistance of Karon Monaghan QC, former Chair of the Discrimination Law Association, in looking at that process.

We are also a little bit concerned about the fact that there does not seem to be a very significant improvement in diversity figures in the 10 years since Lord Irvine very kindly came to one of our dinners to explain his new system, soon after Labour was elected in 1997, and then came to address my students at BPP Law School about what he hoped would happen in a number of areas of reform. There obviously has been an improvement with the creation of the Judicial Appointments Commission, but we are not sure that appointments are being gone about in the right way. There is work shadowing. There are appointments that have been very successful, but we know about many appointments that are not particularly successful, whereas other people could have been appointed whom we thought would be rather good. I come from the perspective of an academic who teaches skills on the Legal Practice Course and the Bar professional training course. We feel we could also teach judgecraft, and with the creation of the new Judicial College, we feel we could probably help there.

There are other points in our paper, which you will have noted, in particular our concerns about the appointment of District Judges. Although you are a Constitution Committee, it must be of interest to you how the tools for appointing judges are actually being used. The AWB would be very pleased to help the Judicial College, or in any other way, so as to improve the pool of appointees.

Although we do not think that it would be a good idea to have a career judiciary, as on the continent, we do think that some improvements could be made if people were fast-tracked earlier. Doctors do this. They decide whether they are going to be GPs or consultants. Establishing interest at a very early stage would be a big help. That could be followed by work shadowing, training workshops and perhaps provisional appointments. We do not see any problem about assessing judges once they have been appointed provisionally. We have
Association of Women Barristers, Black Solicitors Network and Association of Women Solicitors – Oral Evidence (QQ 259–280)

had appraisal in academic life for more than 20 years. I have been appraised many times during my tribunal life. It works very well.

Q338  The Chairman: We will come back to those two points: appraisal and the career judiciary. We had very interesting evidence last week from Lady Justice Hallett, so we did hear something about the Judicial College, et cetera. That is very useful, thank you. We have of course heard some quite concerning evidence from solicitors, so I think perhaps, Joy Van Cooten, you could elaborate on that from your perspective.

Joy Van Cooten: I am Joy Van Cooten. I am the Chair of the Association of Women Solicitors, and I speak on behalf of 50% of the profession. We have taken a very keen interest in judicial appointments and have worked closely with the JAC, spearheading a campaign to encourage more women solicitors to apply for appointments. Although 60% of all new entrants into the solicitors’ profession are women, this does not seem to translate into the judiciary and is not reflected in the appointments that are being made. We have had some success in the lower courts, but when we get to the higher echelons there are no women solicitors apart from one of our members who was appointed last year as a Deputy High Court Judge.

The Chairman: Right.

Joy Van Cooten: Our main concern is that there is no adequate career path from the lower courts to the High Court. Another concern that we have is that women will continue to take time out to have children or for other caring responsibilities. This is normally at five to seven years PQE, which is the necessary time period that is taken into consideration when applying for judicial appointments. We feel that there should be greater flexibility, in particular in relation to part-time appointments. We also feel that the application process favours those with experience and detailed knowledge of the court system, which is disadvantageous to women solicitors. A lot of our members work in non-contentious areas or areas such as probate and conveyancing, and they do not have the same experience of the courtroom as their counterparts in the Bar, so they are disadvantaged in the process. We are very keen to continue working with the JAC and to increase the diversity in the profession.

Q339  The Chairman: Thank you. Ms Bart-Stuart, you have experience, obviously, as a judge.

Cordella Bart-Stuart: I do. I am perhaps what I realise is a rare breed, in that I am a black woman who is a judge, who is a solicitor and who is from a post-1992 university as well.

The Chairman: Four minorities.

Cordella Bart-Stuart: Quite a lot, and I tick most of the boxes in terms of social mobility as well. I was appointed in 2000 as a fee-paid Immigration Judge, or Immigration Adjudicator as it then was, and that in fact followed Lord Irvine’s address to the Minority Lawyers’ Conference, telling us not to be shy and to apply. I took his advice: I was not shy, I applied, and I was appointed, but I soon discovered, as I said, that I was in a minority. It seemed to me that it was not as easy for other people as it appeared to have been for me. To an extent, I have been banging the drum for diversity ever since, through the Black Solicitors Network, which I chaired last year—I am the Vice-Chair, and I was one of the founding
members. That is an organisation that was established principally to assist access to the profession.

One of the things I would like to be addressed is the support or lack of from the professional bodies, because I think the professional bodies could be doing a lot more. It is very easy to blame the JAC and the system, but the professional bodies should be doing more in terms of encouraging diversity and professional development.

The other two parts of our mission statement, as it were, are promotion and retention. Again, those are issues that mean, particularly for the higher-level appointments, that you will not find as many ethnic minority and women solicitors. This is because of the high attrition rates that exist because of the challenges of access and promotion in the profession. We have done a lot of work on access to City firms, and we have established quite a good working relationship. I know that my colleague Mrs Nwokolo has arranged for you to have access to our recently published diversity league table, which looks at the trends and what is happening in the profession.

I have tried to take a pragmatic approach to the judicial appointments process in trying to see what can be done in terms of improving the system, but also in helping the candidates to help themselves. Again, it is not always that the system is at fault. There are always things that you can do to help yourself. I have worked with the JAC on raising awareness, and the result of that has been perhaps a disproportionately high number of applications from ethnic minority solicitors, but unfortunately still a disproportionately low number of selections.

Because of my judicial experience in the tribunal, I am familiar with an appraisal system, and I think that is something that should be extended across the board. I also believe that there more should be done in terms of a career in the judiciary as opposed to a judicial career from graduate level. Once you are in the system, certainly there is not very much encouragement in moving forward.

The benefit of coming in to give evidence after a lot of other eminent people, and having seen the written evidence, is that not only have themes emerged but also there are one or two practical problems that I have seen. I am very interested in what Senior Immigration Judge Storey has to say about someone of his calibre not being able to move across even to a District Judge level, and certainly not the High Court. In terms of missing talent, those are areas that should be looked into.

Q340 The Chairman: The distinction you make between a career in the judiciary and a judicial career, as it were, is very interesting. That is an important point. Mrs Nwokolo, one of the interesting things you said in your evidence was that you subscribe to the “plateau” concept of merit, which we heard about. The phrase was used by Roger Smith from Justice. You have made some other interesting points in your written statement. Can you just, as it were, develop some of those for us?

Nwabueze Nwokolo: Thank you. I do subscribe to the plateau description of merit. It qualifies the group who are able to do a job. We do not want a judiciary that is not meritorious. We want to have the best judiciary in the world, but with a plateau as opposed to a summit description of merit. We may indeed be leaving out a lot of people who would benefit society as a whole. I come to this from information observed in another place—the medical profession, for instance. I hear doctors talking about the number of exams that doctors have to take, and it is constantly testing their academic ability, more so than
anything else. Then in conversation between these doctors, they say, “What we are ending up with are quite a lot of very intelligent people who do not have a connection to community, real life, and sometimes may well be autistic.” When we use the plateau for defining merit, we look at society as a whole. We are asserting that merit resides in many different places. We have to be trained to be able to identify merit in those places where we would normally not go to look for them—the obvious place being Oxbridge and places like that.

Q341 The Chairman: You made some other very interesting points in your paper. Are there others that you would like to highlight now? I am sure we will come back to some of the issues you have raised, but if you wanted to point some of those out to the Committee, I am sure it would be valuable.

Nwabueze Nwokolo: I said to my colleague, Judge Bart-Stuart, that we are pushing on an open door. A lot of the submissions I would have made here, others more eminent than I have already made. I do not need to say anything. I can rely on them. Baroness Hale, for example, or Baroness Neuberger: everything they have said about women is directly applicable to the black and minority ethnic solicitors.

There is a craving from solicitors who I represent to go on the Bench. As black people we are faced with many layers of discrimination, and if you are black and you are a woman and you are a solicitor, it is very unlikely that you will be successful. This is what we think in making applications to get on to the Bench. We need to expand our thinking and our links, and those people who are making the recommendations to the Lord Chancellor need to have proper equality and diversity training. I think the JAC is doing good work in raising awareness of judicial process, but as for increasing diversity in the judiciary I am afraid they have not done very well. I think that we should have a bigger commission and a commission that reflects society. We must take into account those people who are presently under-represented in the judiciary in the appointments we make to the commission that appoints or recommends those that are going to be appointed.

This leads me to the recommendation I bring to this august place. I think that a slight amendment should be made to Section 64 of the Constitutional Reform Act, where it says, “range of persons available for selection for appointments”. It should be slightly amended to say “range of persons available for appointments”. Creating a range for selection, we have seen, does not lead to appointing a diverse judiciary. This is the 21st century. This jurisdiction is looked upon by the whole world as a fount of justice, where expertise resides. We are proud of our strong tradition in supporting the rule of law, but then we have the Supreme Court with 11 men and one woman. Everyone has been to Oxbridge, apart from one, who went to Queen’s in Belfast. With respect, that is not good enough.

Cordella Bart-Stuart: May I just come in?

The Chairman: Yes, of course. Please.

Cordella Bart-Stuart: Just supporting what Nwabueze has said in terms of an amendment, I believe that in Northern Ireland the commission has a positive obligation in terms of diversity. One of the problems that we have is the quite vague concept of thinking about diversity as opposed to some sort of positive obligation. I appreciate that section 159 is now available. However, that is just in the context of looking at two people of equal merit. It does not reach far back enough in terms of that widened pool and the selection from that
pool. I think there is merit in looking at something like that, where there is an amendment so that there is a positive obligation.

**Q342 Lord Pannick:** Could I pick up on that? You mentioned that you are pushing at an open door in relation to some matters, but we have heard a great deal of evidence from senior judges in particular that they are very opposed to any dilution of merit. That means more than that the Judicial Appointments Commission should take into account, of course, not just the candidate’s IQ; they should also take into account their knowledge of society, their common sense, their empathy—matters of that sort. I think you are now going further. You are saying the JAC should positively take into account the candidate’s sex, ethnicity, or indeed whether they went to a university other than Oxbridge, and not simply on a tiebreak basis.

**Cordella Bart-Stuart:** No, with respect, I am not saying that at all. I am not saying that in the selection that is something that has to be done. What I am saying is if that were an obligation in the process, then there would be much more of an imperative to work harder at widening that pool and making sure that you are going into the non-traditional places and seeking out the best candidate. None of us around this table wants to see any dilution in the quality of our judges. It would be of no benefit to this country, and the regard in which the judiciary is held around the world, if that were to be the case. That is why none of us is supportive of quotas. There might be some arguments for it, but it is a question of perception. What I am saying is that, if that obligation were put on a firmer footing, it might concentrate the mind to do more.

**Lord Pannick:** Put on a firmer footing in what sense? In what practical sense do you want it to be put on a firmer footing?

**Cordella Bart-Stuart:** Without targets there is no real incentive to do anything. You can always say, “Well, we tried our best, but”, whereas if there are targets you will do more, because you have something to work towards and to try to attain.

**Lord Pannick:** What is the JAC supposed to do? Supposing the target for women on the Supreme Court is 50%, how is the JAC supposed to act on that when it has candidates before it?

**Cordella Bart-Stuart:** I do not know if the target would be 50%. You do not necessarily have to have a target that reflects the number of that particular group in society, but you certainly want to see a Supreme Court that is more than 10% women.

**Q343 The Chairman:** Do any of the rest of you want to comment on this concept that Lord Pannick picked up about the firmer footing? The problem is, it seems to me, that one of the things that are suggested is quotas. How are targets, in this context, particularly different from quotas? Also, there is the issue about the career judiciary as opposed to the judicial career. I do not know whether anybody else wants to comment.

**Frances Burton:** The AWB certainly would not support quotas, and would not support any dilution of quality in the judiciary. The only point we would really like to make is that there has been much comment about the pool of available appointees. I think that would be the area in which we ought to find some means of providing a wider choice among the diverse sections of the community who could be appointed as judges. We have all read Baroness Hale’s repeated comments about how it would be very good for ordinary members of the
population to be able to walk into a court sometimes and find somebody who is not white, male and from Oxbridge. With the present statistics in the higher courts, that is less likely to happen.

It is a fact that the trickle-up effect on which we used to place some hopes has not produced the diversity we wanted. While targets enable you to measure improvement, they are not necessarily the complete answer. What we need are more people of a diverse background with some experience. Some of the reasons for people not being appointed who we think perhaps should have been appointed is their lack of experience. I do not necessarily mean lack of court experience, because we have very successful academic appointees. I can think of several in senior judicial posts, not only in this country but in the Caribbean Court of Justice, for example. Professor David Hayton is there; he never received an appointment here. There is work we could do, but we certainly would not support quotas or dilution of quality, because we already have the best judiciary in the world. What we need to do is make it better.

**Q344 Lord Powell of Bayswater:** I want to pursue a bit further the same questions you have all raised. You have identified a very real problem, but it seems to me that your solutions are quite modest—timid almost. I am a bit surprised by that. Is it just because you think it is impolitic to press for more? What particularly worries me is this: you say that targets perhaps could be considered, but you do not want any dilution of quality. Why should targets equate to a dilution of quality? If you look at some European countries, they have reached the view that leaving the advancement of minorities simply to nature to take its course will take too long, and therefore they are legislating to have quotas and targets on various sectors of life, such as on public company boards. Where it has happened, and companies have appointed women to their boards, they have not actually gone bankrupt. Logically it seems to me that you should be pressing rather harder for targets or quotas, because that is really the only way that the situation will change in anything less than 20 to 30 years.

**Cordella Bart-Stuart:** Targets are what I am asking for.

**Joy Van Cooten:** The AWS believes in targets but not quotas. Our view is that to introduce quotas will give the perception that a woman solicitor or a black or ethnic minority lawyer has been given that job because they ticked the box of being black or a woman, rather than being the right person for that position, and therefore they have got the job not on merit but because of their sex or ethnicity. That is why we will not support quotas, because that perception will be given. Targets, yes, we do agree with. However, it should not be targets attached to penalties. It is something to reach for. It focuses the mind that this needs to be addressed, but if you put it in context with a penalty if you do not reach so many, then that could be seen as a quota. So there is a fine line, and that is what we are trying to get over. We are in favour of targets, but not quotas.

**Q345 Lord Powell of Bayswater:** Just to challenge for a moment what you are saying, of course there could be a perception that people were being appointed simply because of the quota and not merit. Equally there could be a perception, which I am sure you will promote, that the system hitherto has simply failed to produce a fair result that means that the judiciary properly reflects society. That is a better perception, and one which could be promoted strongly. It seems to me slightly defeatist to accept that quotas automatically mean that people are not promoted on merit. It does not mean that at all. It means that you
are correcting a balance that has long remained uncorrected. Should you not be pushing harder for that?

**Nwabueze Nwokolo:** I am not too concerned about the semantics. I am saying that, within the framework that exists now—if I get my Christmas present, the amendment of section 64 of the Constitutional Reform Act—we can find meritorious people. They are there. We do this country a disservice when we keep on appointing from a very narrow pool of people. We do not need quotas. We do not need targets. We need to be able to look properly, to find appropriate, qualified and meritorious people in the different packages in which humanity exists.

**Lord Powell of Bayswater:** I would agree with that, but it is not happening, is it?

**Nwabueze Nwokolo:** Yes. We need to get a Judicial Appointments Commission that is fit for purpose, that reflects our society, that is properly trained with regard to equality and diversity, and that is able to identify merit.

**Cordella Bart-Stuart:** I still come back to targets. As I say, I am prepared to reserve my position on quotas and, if I were pushed, I think there is an argument for quotas. There seems to be a resistance to them, and in fact, oddly, that resistance is actually from the people who are affected. I would be surprised if many men would be upset if there was a quota for men, but we seem to have a problem with that. However, as far as targets are concerned, we have a system that is not working. It was not working before. We tinkered with it in 2005. It is still not working. If anything, for ethnic minorities it is worse. It has improved for women, but it is worse for ethnic minorities. There is a serious indictment on the system that we have. There are things that can be done, but we will not have any improvement without some target to work towards.

**The Chairman:** Would that target therefore necessarily in your view have a timeframe?

**Cordella Bart-Stuart:** It should do. It should be a target in terms of percentages. Who decides those percentages is another issue, but it should be in terms of percentages and time.

**Q346 Lord Renton of Mount Harry:** Could I just ask you why you said that it has got worse for ethnic minorities? Why do you think that has happened?

**Cordella Bart-Stuart:** The short answer is that I do not know. There are a number of issues. There is now much more awareness of the possibility of judicial appointment and a career in the judiciary. In terms of the profession itself, there are a lot of challenges to the profession, particularly people who carry out public law work and legal aid work, and people are looking for alternatives. I think a combination of those factors has increased the number of people who are applying. Whether those people applying are ready and properly prepared is another matter. Whether the right people, in terms of qualification, are aware of the possibilities and seriously considering it is another issue.

We certainly know about challenges for City lawyers, although I still do not think that targeting the City in itself is the answer either. There are lots of good lawyers who have absolutely no interest in the City and are not working in the City. We perhaps need to be looking at those sorts of pressures. It is numbers. Some of the work I have been doing is in
looking at ethnic minority solicitors and seeing what the problems may be for them in terms of putting in a good application. I see a need for more mentoring.

**Q347 Lord Renton of Mount Harry:** How would you define mentoring?

*Cordella Bart-Stuart:* A lot of ethnic minority solicitors, like myself, are sole practitioners, working on our own, muddling through, often, with no one else to speak to. You do not have myriad partners to whom you can talk about your work and developing the cases you have. As for the skills, the competences as they are called, that are being tested, we are probably all using them in our daily work. It is how you bring those across—how you present them in interview and on paper. I think that is one of the problems for solicitors in the main, not just ethnic minority solicitors. We are not used to that public arena that a barrister has. We do not have the confidence to sell ourselves. Some call it arrogance, but I will call it confidence. That is what competition is about, and we tend to hold back. That is why I talk about mentoring and training in developing those sorts of skills.

**Q348 Lord Rodgers of Quarry Bank:** As I understand it, we have been talking of the non-white population in respect of the judiciary. My question is rather a factual one, but it is your own perception on this. The organisation that we are talking about is the Black Solicitors Network, and it makes clear that you do not necessarily need to be black to support the network. Nevertheless, we have talked mainly about black and Caribbean. The black and Caribbean is not one in 10, it is about one in 40, as I see it, and there are Asian black, to use the right language, which might be rather more than that, at least one in 20. My question is: are you concerned with the 10%? Is there anything significant about the difference within that 10%? For example, with reference to a judge, if a judge is perceptibly, say, a Bangladeshi or an Indian, or for that matter Chinese, what effect does that have public opinion? Does the word “black” refer to that 10%? Does it not matter whether it is one or another?

*Nwabueze Nwokolo:* It does not. “Black” is a political term that embraces all those who are not white. Indeed, depending on when one made one’s migration to this place, there are others who might be embraced by that term who are not now. The Black Solicitors Network represents probably 6,000 lawyers, mostly solicitors. We are the biggest organisation of this kind in Europe. Although our board is primarily managed by people of African descent, from the first and second diasporas, we speak for all ethnic minority people. If a Chinese judge, or a Bangladeshi judge, or a Nigerian judge, or a judge originally from the Caribbean is appointed, it reflects our society. That is what we mean. We need a judiciary that is reflective of the cosmopolitan and international place that the United Kingdom is now. The fact that we do not have it is a puzzle to those who look for leadership and direction from this place.

**The Chairman:** Leadership is something we have looked at in different contexts, and one of the issues has been whether there should be a role for Parliament. Lord Norton, did you want to pursue that?

**Lord Norton of Louth:** There is a separate point I want to pursue with Ms Bart-Stuart as well.

**The Chairman:** Yes, please do.
Q349  Lord Norton of Louth: To deal with that point first, picking up on what you were saying earlier on mentoring, I understand the point you are making. Part of the problem is obviously the selection, but there is also a problem in getting people to apply—in encouraging them. I understand what you are saying about the value of mentoring in ensuring that people are aware that they are able and can apply. It is really a technical point: which body would be responsible for making sure the mentoring was available? I do not mean who would do the mentoring, but which body would ensure that the mentoring took place?

Cordella Bart-Stuart: I think the professional bodies have a big part to play. They have the data, they know where people are and they ought to have the resources to be able to put in place a scheme. In fact, I met with the Law Society yesterday on that very point, and put that to them. They are going to go away and look at formally establishing a scheme. I understand that the Bar does some mentoring. The Law Society says it offers mentoring, but it is in fact to school students, I understand, so it is obviously not what we are speaking about. There is a big obligation on the professional bodies to look at how to keep people in the profession and how to help them with their professional development so that when they apply they have the best chance of being selected rather than being rejected and not knowing why.

Lord Norton of Louth: You said that they have the resources. The question, I suppose, would be: why have they not done more before?

Cordella Bart-Stuart: There does not appear to have been a will. I think it is as simple as that. There has not been the will, despite the noises that come out. The Advisory Panel’s recommendations came out nearly three years ago, and nothing has moved on from that. If there was a will, some of those recommendations would have been in place by now.

Q350  Lord Norton of Louth: The separate point I want to come on to is that, on the evidence that at least two of you have presented so far, there does not seem to be great support for Parliament having a role in the process. You stress the separation of powers, and that really this is very much in the sphere of the judicial element of the constitutional arrangements, and Parliament should be kept separate. Is that the case, and is there not perhaps a point simply for Parliament monitoring the process, even though it is not involved in the actual process of appointment?

The Chairman: Frances Burton, did you want to come in? I am sorry, Lord Norton. Did you want to come in on the earlier point?

Frances Burton: Could I just make a factual point? We do have a mentoring scheme in both the AWS and the AWB. The AWS’s is older than ours. It was set up by Margaret McCabe in 1995. Ours is about 10 or 11 years old. Certainly the Bar Council and the Law Society could do a bit more to help, and no doubt there could be many improvements. It does seem to me that there are some issues in relation to minority ethnic problems. Perhaps the solution to that might be some research, which the AWB would be happy to undertake. I do not doubt we could get it funded, and get a lot of help from, for example, Kate Malleson at Queen Mary, who has done this sort of thing before.

Our particular perception is that the process through the Judicial Appointments Commission means that everyone is a number, not a name, at the first sift. There is no means of identifying anybody at that stage. What needs to be looked at is the interview stage, I think, and promotion through the judicial career. Recruitment at the lower tribunal level, I
mentioned, has improved. Statistics show that it is up the structure that the problem seems to arise. I think maybe that is where we need to concentrate efforts.

The Chairman: Sorry, I intervened, Lord Norton, because I knew Frances Burton wanted to come back on that. I know you want to go back to Parliament’s role.

Q351 Lord Norton of Louth: There is that point about Parliament, but on the point you just made there, presumably there is still a problem getting them to be a number in the first place?

Frances Burton: Indeed, I think that is the case. That is my point: many people lack sufficient experience. I do not think any of us are shrinking violets. We understood Lord Irvine’s appeal not to be shy, and to apply. However, there are logistical problems, and that is what we need to tackle. I am sure that the Judicial College could help with this. As an academic and a vocational skills trainer, I naturally believe that something can be done in this area. Perhaps we should try it. That is why I am not so keen on targets. What happens when you miss the targets? You just depress everybody. It may be that even what I am suggesting will not be fast. Rome was not built in a day, but we could target things a little better, I think, rather than going for targets as such.

Q352 Lord Norton of Louth: Thank you very much. Just coming back to my point about Parliament, there may be a role in monitoring what is going on, the actual process, even if Parliament itself is not involved and does not have a role even in, say, pre-appointment hearings. I wondered whether you wanted to confirm that.

The Chairman: I would like to add something to that. You have variously referred to Lord Irvine, who has modestly not intervened, but he obviously did try, many years ago, from a position of leadership, to give some leadership on this. I imagine he is enormously frustrated, but I will not invite him to comment on that. Is there a role for Parliament, through the Lord Chancellor’s position, for example, being used to give political leadership to this, rather than just leaving it to the professions to do mentoring and training et cetera?

Nwabueze Nwokolo: I think there is a role for the Lord Chancellor, the Ministry of Justice and the JAC. It should not just be left to the professions. When it is left to the professions, invariably what happens is that it is members of the professions that end up having to pay for it. At the Law Society, we have to pay for everything now. This is an issue that concerns all of us in this society as a whole. It cannot be left just to the professions to ensure that we have an appropriate judiciary, fit for the 21st century. I would have thought that the Lord Chancellor and perhaps Parliament should be involved in creating a better bank from which selection can be made of appropriate people to populate our Benches.

Cordella Bart-Stuart: I think there is obviously a role for Parliament, because the previous Lord Chancellor set up the Advisory Panel, and we are here because of the existing Lord Chancellor. There is clearly a role, and that role is being acted on. What the problem has been is still the process, and while the Lord Chancellor might try to lead, it will still be up to the commission to carry out effectively the role it has been given, subject to that oversight.

Q353 Lord Shaw of Northstead: We have a paper headed “The Response to the House of Lords Committee on the Judicial Appointments Process” by the Association of Women Barristers. If you look on page 9, it says in paragraph 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.” Perhaps you would care to comment on that view.

Frances Burton: That is a view that is widely held in the association. The separation from the government and Parliament seems to have been successful in the public’s perception and we should think long and hard before we tinker with it. Public perception, I think, is very important.

Lord Shaw of Northstead: I agree.

Q354 Lord Powell of Bayswater: I wanted to come back on the Lord Chancellor point, because two of you, Ms Frances Burton and Mrs Nwokolo, have both referred to the possible role of the Lord Chancellor. Over the last 10 years or so the Lord Chancellor has virtually been booted out of this whole process. His role in the appointments process is now very limited. Do you think he should be given the powers to issue instructions to the JAC to achieve certain objectives, or targets, as we like to call them?

Nwabueze Nwokolo: I did deal with that. Conscious of the fact that we value separation of powers, the Lord Chancellor should be able to issue directions to the JAC with the proviso that the JAC might not be bound by them.

Lord Powell of Bayswater: I am not sure you can have instructions that you are not bound by.

Joy Van Cooten: The Lord Chancellor can give the JAC guidance, but the two should remain separate. That was the whole point of setting up the JAC: to have an independent commission for appointments. If the Lord Chancellor were to give guidance, that would be acceptable.

Lord Powell of Bayswater: Even though it obscures a bit the separation of powers, doesn’t it? If you have set up the JAC as an entirely independent body, then it is entirely independent.

Joy Van Cooten: That is why I said “guidance”, because you can issue guidance but it does not mean they have to act on it.

Cordella Bart-Stuart: It is not entirely separate in any event, because the Lord Chancellor can send it back a couple of times to the JAC, so it is not entirely separate. Issuing directions, rather than guidance—because I am going back to targets—is a right and proper thing for the Lord Chancellor to do in pursuance of the ultimate aim of seeing a judiciary that reflects the society that our judges are adjudicating on, and making decisions that affect people’s daily lives.

Q355 Lord Pannick: I was very interested in paragraph 12 of the AWB paper, which suggests that the retirement age, certainly for Supreme Court Justices, should be raised to 75. Those of us who tried to persuade the Lord Chancellor early this year that the retirement age should be raised were met with the response that it would be very damaging to diversity, because you would ossify an elderly, white male judiciary. I wonder whether others of our witnesses take a different view on raising the retirement age.
Nwabueze Nwokolo: I do. I think 70 is fine. The sooner we have change in that place, the better.

The Chairman: Let me just ask the other two witnesses. Ms Bart-Stuart, do you have a view on the retirement age?

Cordella Bart-Stuart: I think a retirement age of 70 is acceptable if you had a career structure where judges started at an earlier age, so by 70 perhaps that would be the right time. In our system, where you are usually 20 years in practice before you even start on the judicial ladder, as it were, 75 is a reasonable age in terms of achieving that level of experience and maturity in the system. It is in any event a small number, but losing that experience at what I think is actually their best time, judicially speaking, is perhaps something to be looked at.

The Chairman: Ms Van Cooten, did you have anything to say on Lord Pannick’s point about raising the retirement age and making it even more difficult to shift the make-up of the Bench?

Joy Van Cooten: There is a double argument here. If you raise it to 75, we would be able to keep experience there. My view, however, is that if you kept it at 70, and then had those 70 to 75 maybe on a part-time basis mentoring the younger ones coming up and assisting them through the system and their career path, then you have that experience still there, but they are also guiding and mentoring the ones who are now starting out in a career in the judiciary. It might be a case of, once they reach 70, they become part-time and would use the other period to help the careers of the younger ones.

The Chairman: Ms Burton?

Frances Burton: I agree with Joy about that. Indeed, that is what happened in tribunals until very recently. Those members who reached 70 and could still be useful to the tribunal, particularly in bringing along younger new appointments, were extended by the year. Tribunals have until very recently almost all have been part-time, fee-paid, with very few salaried appointments, so that was quite easy to do.

At a time when we are all being asked to work much longer, it perhaps is a little bit strange to insist on the retirement age of 70 for superior court judges. I am not sure that Baroness Hale will ever feel that she is ossified and out of date. Personally, as a family lawyer, I am delirious that we now have two family lawyers in the Supreme Court, following the Radmacher v Granatino decision, in which she made the point that she was in such a minority, and on a case that had such gender issues.

The Chairman: We are running out of time. You have all been very generous with your time. I think Lord Renton wanted to make another point, and maybe other Members of the Committee.

Q356 Lord Renton of Mount Harry: I would very much like to ask you a question about what happens after the appointment has been made. Are there any objective means of assessing the quality of work of an individual member of the judiciary after their appointment has been made? Do you think that sort of assessment should happen?

Joy Van Cooten: Yes.
Cordella Bart-Stuart: I sit in the Immigration Tribunal, where we have had an appraisal system in place for the past six or seven years. Since the system came in, new appointees are assessed annually. Older heads like me are assessed every two years.

Lord Renton of Mount Harry: How are you assessed? What happens?

Cordella Bart-Stuart: We are essentially shadowed for a whole day. We also complete a pre-appraisal form, indicating what we think our training needs might be. We also give to our appraiser a self-selected number of our determinations, because all our decisions are in writing. We give a number of determinations. Because we have a human rights and an immigration and asylum jurisdiction, often you would give one or two of each. The appraiser sits at the back of the court with you all day, and sits in chambers to see how you prepare before going into court, because a lot of the work is in preparation. The appraiser also looks at your determination after that day’s sitting, as well. You then have a consultation at the end of the day, going through the appraisal criteria, and you receive a written report that goes on your file. Unfortunately, as I understand it, that appraisal does not follow you if you then apply for another appointment, so you then wonder, “What was the point of that?” because no one is seeing it apart from your head of division.

Lord Renton of Mount Harry: It sounds extraordinary that it does not continue with you.

Cordella Bart-Stuart: So there is a method, and it is a method that could be followed throughout the Courts and Tribunals Service, but the question is what use is made of it.

Q357 Lord Shaw of Northstead: I have another point on this. The firms of solicitors that have been approached, according to some of our witnesses, have been less than encouraging in seeking to encourage some of their staff to follow a judicial career. Has that been your experience? Does the question of cash rewards in the present practice come into it, or is it a question for keeping the best for the top of the practice itself?

The Chairman: I suppose it would not apply to Ms Bart-Stuart, who is a single practitioner, but we have heard that evidence from partners of bigger firms.

Joy Van Cooten: I think it is a case of both. Firms do not want to let their solicitors go off and do judiciary, because they are not earning money, because they are fee-paying and it is bringing money into the firm. It is frowned on for a senior partner to go off in the judiciary. It may be a case of making it an obligation for firms to let their staff go, something along the lines of jury service. If you go on jury service, you have to attend. Maybe a positive obligation might be imposed that could help. However, there is also the other option. City law firms, or most law firms, are retiring partners at 50. There is no reason why they could not be transferred to the judiciary if there were some mechanism for them to use that experience.

Cordella Bart-Stuart: I have had conversations with partners in the City who would like to sit part-time. There are people who would like to do that. What they are told very clearly by their other partners is that it somehow means that they are not as committed as they ought to be to the firm. Partnership is seen as a full-time commitment, and it seems therefore that sitting even part-time somehow dilutes that commitment. I think it is more than just people shuffling off at 50 to then go and sit. Part-time judiciary brings a lot to the system, and the system relies on part-time judiciary, but people ought to be able to stay in
practice in City firms. One of the things, though, is for firms to understand that it is part of their corporate responsibility to release their partners for public service.

**Nwabueze Nwokolo:** There are 145,000 solicitors with practising certificates. Every competition is oversubscribed by solicitors. I do not feel too precious about City people who are not able to make applications to go to the Bench. That is a matter for the City to sort out. There are sufficient solicitors applying to get on to the Bench. The difficulty we have as solicitors and not getting on to the Bench is not a want of applications. You are overwhelmed with applications. Solicitors are just not succeeding.

**Q358 The Chairman:** Thank you very much. Does any other Member of the Committee wish to put any further point to our witnesses? Thank you very much indeed. That was enormously helpful, and it is very valuable also to have the written evidence, which we obviously now have in front of us. I do not know whether any of you feel that we have not covered something that you had very much hoped to raise or make a point about. Please do take this opportunity if so.

**Cordella Bart-Stuart:** There is one small point that I did want to emphasise, and it was in terms of the non-statutory restrictions. As mentioned before, there are particular career paths that black solicitors, probably black barristers and women have traditionally taken in terms of government service and the Crown Prosecution Service. I know that the Crown Prosecution Service has pressed the case in the past. I support it, because it affects so many BME candidates, particularly those who work for the Crown Prosecution Service, who can be excluded from the criminal selections, particularly in the Magistrates' Court, where they in fact have the most experience and the most to offer.

**The Chairman:** Yes. Interesting. Thank you very much indeed. I am most grateful to you, and I hope you will see some of your points reflected in our report. I am sure you will. Thank you very much for coming.
Association of Women Solicitors (AWS) – Written Evidence

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.
Transcript to be found under Association of Women Barristers
Q1. What progress has been made in recent years, particularly since the establishment of the JAC, to increase diversity within the judiciary at all levels?

We believe that the establishment of the JAC has helped to increase diversity in the judiciary for women lawyers. Women now make up about 28% of Deputy District Judges and 15% of Circuit Judges. Five of the twenty-two High Court Judges recommended for appointment in October 2009 were women and this raised the number of women High Court Judges to 17 which is the highest ever.

In January 2004, Dame Brenda Hale was appointed to the Supreme Court becoming the highest-seated woman in the judiciary.

This is a significant improvement on the situation that we saw 15 years ago and the AWS believes that since the establishment of the JAC, the whole judicial appointment system is perceived to be fairer and with less bias. The old “tap on the shoulder” system has been replaced with a much fairer system of application forms and interviews so there is much greater transparency in the system.

However although there are growing numbers of women solicitors joining the judiciary at entry level, and a few becoming Circuit Judges and recorders, very few are going up to the appellate courts. We believe that there is only one woman solicitor who was appointed last year to sit as a Deputy High Court judge but there are no former women solicitors sitting in the Court of Appeal or Supreme Court. Therefore much more needs to be done to ensure that over a period of time women solicitors are able to progress up through the ranks to the higher echelons of the judiciary.

Q2 Are there any ways in which the constitutional framework for appointing judges could be changed to help bring about greater diversity, in particular more women and lawyers from black and minority ethnic communities?

No – the AWS believes that the constitutional framework for appointing judges, since the establishment of the JAC, is fair and transparent in its principles and we would support the present regime of application forms, written tests, interviewing and role plays.

We believe that one of the best ways to increase diversity in the judiciary is with the encouragement of appropriate groups within the professions such as the Association of Women Solicitors and Association of Women Barristers. It was for this reason that in January 2009, the AWS launched its campaign to encourage more women solicitors to apply for public and judicial appointment. With over 18,000 members, we believe that the AWS is in a unique position to do so. The campaign was launched in London by Her Honour Judge Kirkham and Janet Gaymer and had 75 delegates. The campaign has since continued with specific seminars on different aspects of judicial appointments such as completing the application forms, reference etc. We are aware that AWS members, inspired by the
seminars, have put forward successful applications and gone onto be appointed. It should therefore be noted that our members can therefore make an informed decision when hitherto they did not have the practical advice that the events between JAC and AWS have provided.

However the AWS does believe that S64 of the Constitutional Reform Act 2005 (i.e. the JAC in performing its functions must have regard to the need to encourage diversity in the range of persons available for selection for appointments”) could be made a more positive obligation rather than a consideration which the JAC needs to take account of.

Q3 – Do you consider that “merit” should be understood to be only about identifying the single person who will best fill the vacancy, or a high threshold over which other criteria (such as the diversity of the judiciary being diverse) may be taken into account?

• Should the merit criterion be redefined to ensure that in making each appointment selection panels have regard to the need for the judiciary as a whole to be reflective of the diversity of the British population.

• Should selection panels use the “tie-break” provision in S159 of the Equality Act 2010 where there are two candidates of equal merit, in order to appoint a candidate from an under-represented group?

The AWS believes that the best judges based on merit are needed and no we do not agree that the merit criterion should be re-defined to include a component of diversity as they are two distinct aspects of the appointments process. In fact there may be an argument that by linking merit to diversity, one does a dis-service to women and BME candidates because this could be perceived by some that they were only appointed to the post because of their sex or ethnicity and not because they were the best person for the post.

For the above reason, the AWS does not support the use of quotas but we would support the use of (movable?) targets in order to secure more women solicitors being appointed as judges in the long run. If, for example, the JAC set a target of say having 10% women solicitors to become Circuit judges in five years time, then this would focus the mind. With no time scales presently in place, or at least to work towards, it feels like there is no apparent urgency about the situation.

In relation to S159 of the Equality Act 2010, the AWS believes that there might be exceptional occasions where S159 could be used where there were candidates of equal merit in order to appoint a candidate from an under-represented group. This is particularly the case for the higher courts where we believe that it will take a very long time for former women solicitors to be appointed to the High Court and Court of Appeal. Under the Equality Act 2010 guidance, any use of positive action will only be lawful if the candidate is appointed on merit in any event and therefore the candidate must be as qualified as any other candidate to be appointed. This should therefore overcome any suspicion that a woman solicitor was only appointed to the post because of her sex or ethnicity.

Q4 – Is it important that candidates for judicial office have previously appeared in court either as a barrister or a solicitor. Is there scope for expanding the
current eligibility criteria to include others, for example academic lawyers who are not professionally qualified.

In relation to the first part of the question, the AWS does not believe it is essential that candidates should have previously appeared in court as a solicitor (prior to making their application) because we believe that “judicial” skills are different to advocacy skills. The first is the ability to manage a courtroom and reach a decision having heard the evidence from both sides, the second is the ability to present your client’s case as best you can. Otherwise it will put our members at a disadvantage because many women solicitors will practise in areas of non-contentious law or areas where they only rarely appear in court such as conveyancing or wills/probate. Such candidates may also feel at a disadvantage if they are not already known to the bench because they do not appear in court on a regular basis.

However the AWS does agree that if our members are not familiar with a court environment (from their previous professional experience), that steps are taken to assist them quickly to be able to obtain the necessary experience such as extending the Judicial Shadowing Scheme. The scheme at present only allows participants in the scheme to shadow a judicial office-holder for a period of up to three days and generally in one jurisdiction. Could the scheme be extended to allow participants to be able do judicial shadowing over a longer period of time and in different jurisdictions.

Could the JAC introduce a mentoring scheme for potential applicants? Perhaps when senior judges wanted so wind down or retire, they could use their skills to mentor young candidates for judicial office. We also note also that the UK Association of Women Judges encourages its members to mentor those who are interested in a career in the judiciary and that the development of an informal mentoring scheme is something that the association hopes to consider in the future for its members.

We believe that there may be scope for allowing those who are not professionally qualified to sit (or those who have chosen a non-traditional path) to become judges and the obvious exception would be legal academics. However our other main concern is women solicitors who may be at a disadvantage if they have taken time off to bring up children/other caring responsibilities.

This is because for many judicial posts, if you are applying as a solicitor, you will need to have possessed the relevant legal qualification for either five or seven years and whilst holding that qualification to have gained legal experience. However there may be women solicitors who have decided to have a career break (say to bring up children) fairly soon after qualifying and therefore would not meet these criteria and so be at a disadvantage in terms of the eligibility criteria. If they have the skills, then we believe that a flexible approach should be taken towards their application where they are able to demonstrate that they have acquired the skills in another environment, for example being Chair of the School Governors. Alternatively, other pathways to becoming a judge could be considered such as allowing a solicitor who has say practised in seven out of the last ten years (although not consecutively), to be eligible to apply.

Question 5 – What assessment would you make of the role that the Lord Chancellor now
plays in the appointments process for the Supreme Court and the courts and tribunals of England and Wales?

- **Should the Judicial Appointments Commission (JAC) continue to recommend just one candidate or should the Lord Chancellor be able to comment on, or choose from, a shortlist?**

No we believe that it should remain the remit of the JAC that they just recommend one candidate for the post to ensure that there is independence and accountability in the system. The whole purpose of the JAC being set up in April 2006 was to ensure that it took over the responsibility for selecting judges from the Lord Chancellors’ Department.

We believe that the breath of the membership of the JAC (being made up of 15 members including two from the legal profession i.e. one barrister and one solicitor) should be sufficient to ensure that decisions regarding judicial appointment are made on merit and they are best placed to make these decisions. However we also believe that it is vitally important that members of the JAC do reflect society (in terms of sex and ethnicity) to ensure that issues of diversity are properly considered in the appointments process. It is for this reason that the AWS is particularly pleased that Alexandra Marks (as both a woman solicitor and judge) has very recently been appointed to the JAC.

- **Should the Lord Chancellor have the power to set targets or issue directives to the JAC?**

Yes – we refer to our answer to question 3 above and we believe that targets could be used as a vehicle to help greater diversity in the judiciary. However we do not believe that targets should be prescriptive (with penalties) or used as a measure of how well the JAC was performing in its function but simply because we believe that setting what may be possible (in terms of say women or BME lawyers becoming Circuit Judges) over a five or ten year period can focus the mind and therefore increase numbers.

**Q6 What is your assessment of the system by which justices of the Supreme Court are appointed?**

- **Is it appropriate that the President and Deputy President of the Supreme Court may be involved in appointing their successors?**

We think that we can only provide a very limited response to this as those of our members who have become judges are mostly at the Deputy District Judge or District Judge level (or equivalent in the Magistrates or tribunal service). However we understand that the present president of the Supreme Court decides who their successor will be and therefore by implication, our concern is that the present president is likely to appoint someone similar i.e. probably white male, and a former
barrister. Therefore there may be an argument for lay representation on the panel to consider the question of diversity.

Q7 – Is there sufficient transparency and accountability in the way the Judicial Appointments system currently operates?

- Are there any objective means of assessing the quality of the work of an individual member of the judiciary after their appointment has been made:

The AWS does believe that there is sufficient transparency and accountability in the way that the JAC operates but that it is very important not to become complacent in the area of diversity.

In relation to the second part of the question, we understand that once appointed judges do not always get annual appraisals and if this is the case, then we believe that they should including adequate training and updating in diversity issues. If there is a shortage of judges who can carry out appraisals, as they will need to sit in with the judge being appraised for the whole day and therefore interrupt their own list, then it may be possible for retired judges to come back to carry out the appraisals as long as they had kept their hand in.

Q8- What is your view of the merits or otherwise of a “career judiciary” in which lawyers are appointed to junior judicial roles at a much earlier stage of their careers than has traditionally been the case?

France and Russia both have a career judiciary which has resulted in a far higher percentage of women in the judiciary than in England and Wales. In France, we understand that the figure is about 55% which is due to the fact that women lawyers can train to be judges as soon as they finish at law school.

The AWS does not support such a radical change because we believe that five to seven years based in practise first provides good experience and training for then becoming a judge (although we do believe that potential candidates should be able to gain some experiences in another context e.g. being chair of a committee). However we do believe that young women lawyers should be targeted at a much earlier stage in their career to raise their awareness of the possibility of becoming a judge at a later stage. For many young lawyers, they will see the pinnacle of their legal career as being a partner rather than a judge and so we must ensure that young solicitors from all backgrounds recognize early on that a judicial career could be for them. This is in order that they can start planning ahead to obtain the relevant experience that they require.

We would like to be in a position where a newly qualified young woman solicitor does not feel embarrassed when asked at an interview: “Where do you see yourself in ten years time?” Answer:” on the bench”. It is essential that the process for becoming a judge, the career paths available, where they can turn to for help and where they can gain experience pre-application is clear. This is particularly the case because women solicitors, as stated above, may have less day-to-day contact with judges and the courts than say barristers.
They need to know about the judicial shadowing scheme/taking a “dry run” for the written tests/organisations that may be able to assist such as the AWS/AWB/Association of Women Judges. They also need to know where they can gain judicial experience such as marshalling or being a judicial assistant. Could the JAC produce a downloadable leaflet with all the information in one place for younger members of the bar and solicitors?

Q9 – What role should parliamentarians and Parliament play in the judicial appointments process? Should a committee question candidates for senior judicial posts (in particular, those holding a leadership role such as the Lord Chief Justice) before the Lord Chancellor confirms their appointment:

- What questions could such a committee legitimately ask?
- How would such hearings operate?

We believe that parliament should not be involved as this would lead to a narrowing of the candidate pool and also mean that they would have ultimate power to dismiss a candidate that has already been through the current selection process.

Q10 – We believe that there are two fundamental areas which, although not specifically raised in the questions above, the committee need to be aware of as follows:

(a) The issue of career breaks for women solicitors with caring responsibilities.

The issue here is that at a fundamental stage in the career of many young women solicitors (i.e. 5 to 7 years PQE when they first could apply for a judicial post), they will be taking time out to have children and may then want to work flexibly or part-time. Also with an ageing population, many more senior women solicitors may have to take time off or work part-time to look after their parents or other relatives. Many of these women may not return to the profession at all.

The simply reality is that if a woman solicitor take “time out” from her career, for whatever reason, then she will be losing ground compared to her male counterparts. The fundamental question here is what can be done as the AWS believes that the judiciary may be an attractive option for women especially if more flexible ways of working can be found. Some suggestions are as follows:

- Candidates may be able to undertake training or gain relevant experience whilst on maternity leave such as undertaking a Judicial Skills Court as suggested by the Report by the Advisory Committee On Judicial Appointments (Neuberger 2010)
- Candidates need to know clearly about opportunities for flexible and part-time working ahead of taking their career break.
- JAC should therefore carefully consider candidates who have taken a career break to look after children, wish to be considered for part-time appointment, or gained experience from outside the law whilst on a career break.
• JAC needs to look as to how they could assist potential applicants to consider balancing work need with the needs of their family or other caring responsibilities. One of the problems of women with young children is lack of flexibility in the system say if she is unable to sit on a particular day due to her child being sick. It may be difficult to arrange cover at short notice and then she could be letting down a whole list.
• Women with younger children may find it difficult, as a potential High Court judge, to go on circuit if it will take them away from home for extended periods of time
• Mentoring by women judges who have managed to handle family/work commitments.

(b) What are the specific barriers for women solicitor to judicial appointment/progression

There are a number of other factors which need to be looked at in relation to why women are not applying for judicial office. The following issues need to be considered:

(i) **High attrition rate** in the solicitor’s profession for women. There is a very high percentage of women leaving the profession early in their career and not returning. This is a loss not only to the legal profession but also to the judiciary as well. There are more women then men entering the women's profession but at the top of the profession, there is a much smaller number and therefore “pool” for potential judicial candidates to be drawn from.

(ii) **Demands of Private Practise** – In larger (and possibly smaller) practises as well, there may be resistance from other partners to release women from fee-earning work especially if they have previously had time off to have children. They may find it impossible to juggle childcare/full-time work and a part-time judicial post.

(iii) **Financial Incentive** – If they are a senior equity partner, they may be able to earn far more staying in private practise than taking a part-time or full-time judicial post.

(iv) **Lack of confidence** – Anecdotal evidence suggest that some of our members do not have the confidence to apply to the bench. We believe that many women solicitors, even quite senior level, do underestimate their abilities and therefore the range of seminars that we have run in conjunction with the JAC in the past should continue. The outreach work of the JAC is particularly important so that seminars can be targeted at a particular group of applicants (say women and BME) and we can encourage them to apply.

27 January 2012
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
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.8 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 experience.9 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.

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7 (1972) 12 Journal of the Society of Public Teachers of Law 22.
9 See eg. Frances Gibb, ‘Supreme Ambition, Jealousy and Outrage’, The Times, 4th February 2010: [http://business.timesonline.co.uk/tol/business/law/article7013960.ece](http://business.timesonline.co.uk/tol/business/law/article7013960.ece).
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, the practice of judgments being accompanied by a Press Summary and the televising of hearings on the Sky News Supreme Court Channel. 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.

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.

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.

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

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13 See the discussion of the appointments process, ibid at pp.519-522.
14 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.
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 2006.15

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 75.16 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 75.17 This gave rise to the bizarre situation earlier this year whereby Lord Collins of Mapesbury (first appointed to judicial office in 1997) was

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15 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.
16 See s.39 of the 2005 Act.
Charles Banner and Richard Cornes – Written Evidence

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 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). 18 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

Equality and Diversity Committee of the Bar Council of England and Wales – Written Evidence

Equality and Diversity Committee of the Bar Council of England and Wales – Written Evidence

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.


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. 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.

10. 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

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?

June 2011
Legal Services Committee of the Bar Council of England and Wales – Written Evidence

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. 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 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:

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19 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.
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\(^{20}\) 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

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\(^{20}\) CONSTITUTIONAL AND ADMINISTRATIVE BAR ASSOCIATION
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 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. 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. 21

21 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.
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].

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. 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:

22 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.
• 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:

• 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) The test

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) Role play

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**
**WEDNESDAY 26 OCTOBER 2011**

Members present

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

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**Examination of Witnesses**

Witnesses: Peter Lodder QC, Chairman of the Bar, Bar Council, John Wotton, President, Law Society of England and Wales, and Roger Smith, Director, JUSTICE.

Q193 The Chairman: Good morning and thank you very much for coming today to help us with this inquiry. It is being recorded, although not televised, so please be kind enough to identify yourselves for the record when you first speak; that would be very helpful.

We are particularly grateful to the Bar Council and the Law Society for the written evidence that we received before the session. It has been helpful in formulating our ideas about what will be useful for us to discuss with you. You will be aware that we have said in a note of guidance that, this being the Constitution Committee, we are primarily concerned with the constitutional aspects of judicial appointments in so far as one can identify those as a separate agenda. We are less concerned with the administration of how judges are appointed.

As we have about an hour, it is probably best if we begin immediately with some questions. I start by simply asking all three of you how you think the role of the judiciary has evolved in recent years. From the perspective of those of us outside the legal system, there often seems to be a more prominent role for judges in areas of public life, which would not previously have been expected. Do you think that this has in any way affected the constitutional relationship between the judiciary and Parliament? Mr Lodder, would you be happy to start?
Peter Lodder: I would and thank you very much. I am Peter Lodder, the Chairman of the Bar Council. We feel that, in some sense, the role has not evolved in any particular way. Judges continue to do what they are employed to do. However, what has happened is that there is a far greater focus on what they do and a much greater focus on how they discharge their role. Clearly we live in an age in which the activities of courts come under much greater public scrutiny than they used to, and there is far more public interest in the character of judges. We do not disagree with that, although we are concerned that sometimes that scrutiny goes beyond what is necessary for a proper assessment of how the judge discharges his or her function. We recognise that, in discharging their roles, judges are now much more sensitive to the communities over which they adjudicate, whether in terms of the immediate community and the actions that concern it or how they represent the community. Therefore, we welcome this inquiry to look at how judges may be seen by society as whole to be reflective of society as a whole. Although we recognise that, in large part and at the senior end, the judiciary is principally white and male, we see that that is changing in the way that it has evolved in recent years, and we encourage that.

We are also encouraged by the increased independence from political influence in the appointment of the judiciary; that is to be commended. I suppose that what it comes to is that it has changed and is changing gradually, but it is changing in a way that we think is to be commended.

Q194 The Chairman: We will come to the questions of gradualism and how rapidly you would want to promote change, or see that it could be promoted, subsequently. Perhaps I could get the others’ reflections. Mr Smith, would you like to comment from the JUSTICE point of view?

Roger Smith: I would point to three things that have changed over the past 30 or 40 years. The first is the extension of the judiciary downwards into the tribunal structure. When I started in practice, the people who were tribunal chairmen and so on were often not lawyers but they are now firmly within the judicial structure. That has implications for how those roles can work within the system. Clearly, one of the major phenomena of the past 20 or 30 years has been the extension of judicial review and the public law role of the judiciary. The third element is the creation of the Supreme Court, which may have more of a symbolic role and a role in relation to perception, but is a major constitutional change none the less.

John Wotton: I am John Wotton, president of the Law Society of England and Wales. I have very little to add to the comprehensive comments that Peter Lodder and Roger Smith have made. I would just add that, on the whole, the willingness of the judiciary, particularly the senior judiciary, to speak in public on matters that will help the public at large to understand the courts system and how it operates, while remaining quite meticulously outside areas of public controversy, is to be welcomed.

Q195 The Chairman: It does not seem to have stayed outside it in some of the judiciary’s evidence to us last week but that is another matter. Given what you say about this progression in the perception and role of the judiciary, do you think the balance between the judiciary, Parliament and the executive is about right now?

John Wotton: Yes, I do. The principles of judicial review are an essential element of our society and essential in order for citizens to assert and defend their rights. I think that they are applied by the judges in an objective and meticulous way. The growth of judicial review inevitably increases the areas for possible disagreement between the judiciary, the
government and Parliament, particularly over compliance with our international obligations, but that comes with the judicial territory.

**Peter Lodder**: I would agree with that.

**Roger Smith**: I think that the balance is basically right. We have a Supreme Court and a domestic judiciary that accept the supremacy of Parliament. The body is as independent as you can get, I would have thought. In his person and his judgment, Lord Bingham represents a towering figure. He has dominated the past few years and is a good symbol and representative of the best of the judicial system.

You could not have been at the Tory party conference or watched it on television, hearing the Home Secretary misrepresenting a case about cats, without feeling uneasy about the extent to which politicians were sensitively negotiating their relationship with the judiciary. In a way, the balance between the judiciary and the executive is probably all right, with the exception that politicians need to catch up with that.

Secondly, what is beginning to emerge is the issue of the executive and the legislature. It is arguable, and I would argue it, that the judiciary would be much less involved in some of these public law cases if parliamentary scrutiny of legislation going through Parliament was more rigorous.

**Q196 The Chairman**: The scrutiny of legislation is one thing but what about the scrutiny of appointments? Would there be a parliamentary role there, potentially?

**Peter Lodder**: We would be unhappy about that. It takes the appointment of judges into the political sphere, even if that is “political” with a small “p”. The changes that have been made over recent years, particularly taking the Lord Chancellor’s role away from combining being the head of the judiciary with being a Cabinet Minister, have been good steps. We fear that bringing the appointment of judges back into the parliamentary sphere potentially politicises those appointments. We are in favour of a system more akin to the one that currently applies. You may be leading on to the question of shortlists and their publication. We would not be happy for shortlists to be published. We do not see it as a positive step, nor do we see where the benefit lies, save in provoking some probably less well informed debate in newspapers.

**The Chairman**: Mr Smith, do you agree with that, given what you have said about parliamentary scrutiny in general?

**Roger Smith**: I would have no problem with it. Indeed, it would encourage greater parliamentary scrutiny of the judiciary as a whole and judicial organisation in the courts. I would have no objection to beefing up the Justice Committee or to having a Joint Committee on the judiciary, which is one thing that we suggested when the Constitutional Reform Bill was going through.

I watched, as I think you probably still can, the confirmation hearings of Sonia Sotomayor in the US. It was not an instructive experience, except in showing how a bright lawyer can, frankly, stone wall for hours on end. Even in a jurisdiction where you could argue seriously that the views of the candidate on such things as abortion are relevant—which I do not think they are here—what you got was a very competent lawyer just playing a dead bat to a whole line of questioning. It went down the avenue of attacking her for once having taught
international law because that was an implicit threat to the supremacy of American law. I do not think that that is edifying, or that Parliament would want to appoint the judiciary. It is difficult to see what power these things would have. It would be wholly undesirable to have open, or indeed closed, hearings of Parliament, either pre- or post- qualification. I do not see the point.

The Chairman: Can we now turn to the system as it exists and the appointments process?

Q197 Lord Crickhowell: Before that, let me take up this point. No doubt our witnesses read the interesting exchange between former Lord Chancellors that took place the other day and will have taken on board Jack Straw’s very strong views that Parliament and the executive, which have a clear interest in the way the system works, should somehow be involved. He was pretty tentative, and I do not think that there was broad agreement on going down the road of having pre and post appointment hearings, but he suggested that there should perhaps be slightly stronger representation of parliamentarians, or some involvement, in the selection process. He feels that this is not an issue that is going to go away and that there has to be some greater connection between Parliament, which has a legitimate interest, and the present system. What would your comments be on the case that he advanced to this Committee?

Roger Smith: It does not alter my view that it would be wrong for parliamentarians to get involved in any way or appear to be involved in any way in the appointments process. That is just a quagmire into which no one would want to go. As I say, I think that where Parliament has a role is in scrutinising the operation of the judiciary as a whole and the operation of the courts. That is the way it should go: beef up the Justice Committee; have a joint committee on the judiciary; have the senior presidents and so on talking about how they see the development of their courts and what is going on. That is quite legitimate, but being involved in individual appointments, which is unedifying when you watch the United States, will not help. I think that Jack Straw is wrong in relation to that.

The Chairman: Now, Mr Wotton, you did not comment before. Do you agree with that?

John Wotton: I do, Lord Chairman. The proper role for the Parliament and executive is to establish a suitably qualified independent commission to oversee and make judicial appointments. I think that that degree of independence from politics should tend to increase public confidence in the judicial appointments process and the courts system.

The Chairman: So, Lord Crickhowell, do you want to turn to the existing system?

Q198 Lord Crickhowell: That takes us rather neatly to the question. This has not come up before, but it was raised in the paper that we have received from the Legal Services Committee of the Bar Council, which criticises the present arrangements on the grounds that—it comes up first in paragraph 10 of the submission—the written entry tests are, for one reason or another, excluding very strong candidates who everyone thinks should get through that process. Some very strong points are made about the initial written testing and the ways that candidates are short-listed. The suggestion is that somehow, for reasons which are elaborated on a bit, very good candidates are failing to emerge and this is causing considerable concern and dissatisfaction. This is the first time that this issue has come before this Committee and it would be helpful to have the views of our witnesses on that point.
Peter Lodder: There are a number of background observations to make. The first is that the views of the Legal Services Committee are the views of one committee and there are other views. You will have seen, I hope, the submissions made by the Equality and Diversity Committee among others. There is a deal of controversy about the fact that there is a sift process, but there has to be some sort of process by which the large number of applicants that there now are for a limited number of places are in some way sorted so that there is not a requirement to interview every single one of them. The examinational test is conducted on a blind basis so that whoever marks the papers has absolutely no idea of the identity, whether in terms of gender or ethnicity, of the applicant. It is a process designed to be as fair as possible. There are a number of criticisms of the essence of the test as to whether it favours one type of practitioner over another and matters of that sort. I do not go into that. But I think that it is correct to observe that it has to be a test in which merit, and merit only, is reflected. It is restricted in the sense that some people do well in some types of test and others do not. Although I have heard many examples of individuals who one would have expected to get through it with ease but did not, the fact is that they did not. One then has to look at the essence of the test itself to see if it is genuinely exploring those things that are required of the candidates.

I have raised this with the Judicial Appointments Commission, which has considered various types of test. It had a different form of test before that was not legally based and was universally criticised for failing to look at the qualities necessary for the post. The commission has moved now to a law-based test, and that has been criticised as being overly legalistic, so I have little sympathy.

All that said, the problem is that however you examine an individual candidate, some will do better than others. But it seems to us that there must be some system. If that system is on its face fair—and this one appears to be substantially a fair one—then, although I respect the views of the Legal Services Committee, I also have to take on board the view of the Equality and Diversity Committee, which is that a sift is essential. I am inclined to support that view. Of course, it is right to observe that the fact that you apply and fail the test on one occasion does not stop you applying at a later time.

Q199 Lord Shaw of Northstead: In your article, you say that apparently, “some outstanding candidates—a figure too great to be merely random—are not passing the written entry tests”. That seems to be a serious fault. Is the written test a final test on its own? Surely, it should be linked with a personal interview? Apparently, that cannot happen because there are too many applicants.

Peter Lodder: That is correct.

Lord Shaw of Northstead: So what is the alternative? Taking a written test on its own, I have seen in other spheres myself, is quite inadequate on certain occasions and good men are missed.

Peter Lodder: I do not disagree with that, which is why I focused in my answer on whether the test actually achieves what it sets out to do. Quite by chance, later this morning I am meeting with the chief executive of the Judicial Appointments Commission to discuss with him the test in the recent competition. I agree that there are candidates who are of the highest quality who did not pass the test and one would have expected that they would do so. I do not think that there is a perfect system here. Certainly, there is not one that I am aware of. The difficulty is that there are many, many more applicants now than ever there
were before. That is for a number of reasons. First and foremost, I think it is the success of the initiatives that the professions have pursued in encouraging applicants from a wide range. Also, to be frank, it is a feature of the economy. There are now many practitioners who do not see their futures as remaining in practice and are keen to have the safety net of a judicial position. That has increased the competition to the extent that I cannot see that it would be practicable to have both interview and test. For example, in the application for Queen’s Counsel, you are not guaranteed an interview. There is a process of sift through referees and then there is a calling forward for interview of those who get through that stage. I am not aware of any competition on this sort of scale where you are guaranteed an interview as well as taking the test.

**Lord Shaw of Northstead:** Does the system put people off even applying?

**Peter Lodder:** Funnily enough, I am not sure. Yesterday morning I spent some time with a number of people who failed to pass the test in the recent competition. They are not happy about various aspects of it, but they took the view that if the test is a fair one and they fail, so be it.

**The Chairman:** I am intrigued by your idea and description of the judicial appointment being a safety net for members of the legal profession. I think it is the first time that we have thought of it in that way.

**Q200 Lord Renton of Mount Harry:** That rather makes my point, Lord Chairman. I note that in the paper that we have received from the Legal Services Committee of the Bar Council, in answer to the question whether the appointments process is sufficiently transparent and accountable the response was simply “No”. On the other hand, the Law Society said: “In our view the JAC has succeeded in establishing a reputation for operating an open, transparent and accountable selection processes”. There seems to be a considerable difference between you two on this point.

**Peter Lodder:** That is why I made reference to the response of our Equality and Diversity Committee, which is also of the Bar Council. This is one of those situations where you will get a different opinion from different people.

**Lord Renton of Mount Harry:** Why?

**Peter Lodder:** Because they have different perspectives on what the system should seek to achieve. Those in the Equality and Diversity Committee feel that there is now a greater appearance of fairness in how the system operates. The Legal Services Committee clearly has a different view. I cannot reconcile those two committees, even though, technically speaking, they come under the supervision of the Bar Council. These are the view of interested parties.

**Lord Renton of Mount Harry:** Perhaps Mr Wotton would like to say a word on this.

**John Wotton:** Thank you. This raises a number of very important points. From the Law Society’s perspective, we do not share the Bar Council’s specific concern about the written test. We do have a concern about the relatively small number of solicitors who are appointed as judges, particularly at the higher levels of the judiciary. We see our role as being to work harder to prepare our members for the application process and to make sure that people are aware about how it operates so that they can apply at the right sort of time.
and in the right sort of way and understand the nature of the selection process and how they will have to perform. Hopefully, by doing that and by devoting a good deal of that effort to, for example, the minority ethnic communities among our members, we may encourage a somewhat more diverse pool of candidates for judicial appointment.

**The Chairman:** I think that we will come back to the particular issue of solicitors, but Lord Irvine wanted to comment on this.

**Q201 Lord Irvine of Lairg:** I was wondering whether a possible explanation for the failure rate of the written test on the part of practitioners who are highly regarded in the profession may be that those who are complaining about the test may be applying a different standard from those who set the written test. The standard of the critics may well be to ask, “Is X an excellent advocate and very good in court?” That is the appropriate test for appointment as Queen’s Counsel, but it is not the appropriate test for becoming a judge, because aptitude for judging in the broadest sense gives rise to a different set of issues than the issue of skill as an advocate. Might that be part of the explanation?

**Peter Lodder:** I am sure that it is part of the explanation but, having spoken to a wide range of practitioners who have failed the test, I know that any number of reasons are advanced as to why the examiners failed to observe the qualities of the person applying. Dealing with the specifics of the most recent competition, first, as I have already indicated, the previous competition was one which was more aptitude based in its examination, although it was universally criticised. Those who went into the competition were told that it would not be law based, but in fact substantially it was. I do not know whether you have seen the paper, but it deals with aspects of character and the admission of bad character as a substantial part of the test. Those who sat it were given material to read and allowed 15 minutes in which to read it; some of them were familiar with that material, because they are criminal practitioners, while some of them were wholly unfamiliar with it because it had never come into their sphere of practice. There was a restriction placed on what you might put into your answers, which was that you were limited to the material that was there. So what a number of criminal practitioners did was to draw on their knowledge of the bad character provisions and answered the questions and gave directions that included their own material rather than that which was confined to the paper. They were penalised for so doing, because the test was based solely on the material that was made available. So there are a number of wrinkles in this situation.

**Lord Irvine of Lairg:** It does not sound to me a very good question.

**Q202 The Chairman:** That raises the broader question that we have been wrestling with from our perspective, which I am sure you have all wrestled with many times, about the definition of merit, particularly in relation to some written test of this kind. Would you like to comment on that from a slightly external perspective?

**Roger Smith:** Just on the issue of the written test, I think that the Law Society was fair enough and right in its presentation to say that there is probably no alternative to a combination of an interview and written test. You cannot interview everybody; you have to have a written test. There may be problems with the written test. It may also be that those who feel that they should be passing the written test with flying colours do not perhaps put quite the attention into it that those who feel less certain of their success do. That is a variable. The issue of merit seems to me to rest on whether merit is a summit or a plateau.
You go through an exercise to decide who gets a job. Do you pick the best, or can you identify those who could do it adequately. The kind of language that I use domestically would be the word “appointable”. Who is appointable and who is the best? If it is a summit, as it is generally taken to be, you have to appoint the person who comes out top on whatever test you are applying. If it is a plateau and you are saying that for a judge at this level you need this range of skills, knowledge and so on, it is possible that other criteria may play a part in the decision-making process.

**Q203 The Chairman:** Which do you think would be the most useful in achieving some of the broader ambitions that have already been described about diversity et cetera?

**Roger Smith:** I think that you have to go for a plateau. I think if we pull it back, it is not acceptable in this age to have a Supreme Court that has only one woman and no one from a visible ethnic minority. This is not an acceptable result.

**Lord Renton of Mount Harry:** I did not quite hear that.

**Roger Smith:** I do not think that it is acceptable to have a Supreme Court that has Baroness Hale as the only woman on it and no one from a visible ethnic minority. We are shamed by a picture of our Supreme Court when placed against the equivalents in Canada and the United States. It shows us up. We have to do something about that. We have been applying the merit test in terms of our understanding of a summit, and we have changed very much. It seems to me that we have to put some weight into ensuring the continuing quality of our Supreme Court, which I think is genuinely as good as any supreme court—with a small “s”—in that position in my 40 years of practice. You have to keep its quality but increase its diversity. The answer to that has to be the notion that merit is a plateau and we can therefore allow ourselves, or rather it may be possible, to make choices between who gets on that plateau and therefore who is appointed.

**Q204 Lord Irvine of Lairg:** But that is fundamentally to alter the way in which the merit test is understood. The merit test is understood as being choosing the best person among the applicants for the vacancy in question, having regard to the requirements of the vacancy. A plateau test—and I am bound to say that I have never heard of it before—

**Roger Smith:** I just made it up

**Lord Irvine of Lairg:** I had that feeling.

**The Chairman:** I found it very illuminating

**Lord Irvine of Lairg:** The fact that it has been mentioned for the first time is not to its discredit, of course; but what the plateau test entails is no different from qualifying. In other words, sufficient quality for the job in hand is required, but it is totally incompatible with the merit test, which means it is not good enough just to qualify, but the best among the applicants must prevail.

**Lord Renton of Mount Harry:** Is not “best” a very difficult word to define?

**The Chairman:** That is clearly demonstrated by the written test we have been talking about.
Roger Smith: In an ideal world, you are safest going for the best candidate, despite all the problems in defining that. O that we were in a world where we could agree that that is what we should do. On the other hand, we are sitting here with a Supreme Court that has one woman on it, and a Court of Appeal that is not representative either. I think that that is a problem.

Lord Irvine of Lairg: Of course, there are many women in our other courts.

Roger Smith: Yes, but the percentage is not 50, and I think that the visual impact of our Supreme Court is a problem and we have to see how we address that.

Q205 Lord Irvine of Lairg: Are you essentially arguing that diversity should be a component in merit and that the two concepts are not distinct?

Roger Smith: No, I think that appointments should be made on merit. We come down to verbal definitions. Appointments should be made on merit and no one should get a post that they are unable to carry out. You can call that qualification. I think that we are fencing in terms of words. I think that there is a minimum level of quality you need to be a Court of Appeal judge, and at that level you should be appointed on merit. Within and beyond that, I think that you can take into account various issues. The statute takes into account the positions of Scotland and Northern Ireland to ensure that they are represented, and I think that you could take into account, say, gender in the composition of the court.

Lord Irvine of Lairg: If you are at the level far beneath the Supreme Court, but where most people experience the law, such as in the district court, county court or the Crown Court—

Roger Smith: And tribunals.

Lord Irvine of Lairg: And tribunals, of course. Do you think that a litigant who is disappointed with the outcome of a case and says, “This judge was absolutely awful”, would be interested in an explanation that the ultimate appointment was made on the basis of race, gender or quota, or do you think that ordinary people want a good judge?

Roger Smith: I think that ordinary people want a good judge and they have every right to expect a good judge and should never get a bad one; but I also think that the lower down we go the more the nature of who is the judge is important. It seems to me very unfortunate if you have tribunal after tribunal with three members, all of whom are white men, particularly if that does not reflect the applicants coming through. What you want is a system in which people have confidence. That confidence first comes from, frankly, whether people have won or not; secondly, it comes from objectively whether a decent job has been done; and, thirdly, it comes from a perception of justice—the notion in the criminal system of, “It’s a fair cop, guv”. This is what you want, even if you lost.

Q206 The Chairman: We can get away from the different use of semantics in relation to “best”, “merits” and so on. If we look, for example, at the Equality Act 2010, I would be very interested in the comments of all three of you on whether, if there were a tie-break—something that is in the Act—whereby if there were two candidates of equal merit, in order to appoint one candidate, you should use the Equality Act provision that the under-represented group should be appointed. That is in statute. Do you think that that is relevant to what we are discussing?
John Wotton: I think that the judiciary in some respects reflects the legal profession as a whole, and there is considerable diversity and little evidence of discrimination on grounds of gender or ethnicity at the point of entry. However, the further one goes up the tree, the less diverse the group appears to become. It is important that one understands why it is that women or black and ethnic minority lawyers are not advancing, and it may be that some aspects of the judicial appointments process in terms of the type of appointment available—whether it be full-time or part-time—and the point in someone’s career when it becomes available, are not best designed to achieve the greatest diversity. In relation to the tie-break provision, my understanding is that the Judicial Appointments Commission is able to apply the tie-break provision and decided that it would do so. The previous chair, Baroness Prashar, said it would happen very rarely, and the Law Society makes no criticism of its decision on that.

Peter Lodder: May I agree but make a few particular observations? I share the view that it would be a very rare circumstance in which the tie-break is truly applied. I think that we will rarely have two candidates who are matched almost exactly in terms of each of their qualities.

The Chairman: Even if you apply the plateau description of merit?

Peter Lodder: I do not think it matters, because what you are saying is that you come to a particular level and there are two people who are the same, so it may be that two of them have reached the summit.

The Chairman: You are quite right.

Peter Lodder: Let me take the example that Lord Irvine was using of where people most come into contact with the courts, which is at the district judge and circuit judge levels. I have available to me some statistics from the judicial task force. One can see a growing level of representation in terms of equality of gender and ethnicity in those courts. Interestingly, in each of those courts, when one looks at the percentages for the part-time, as against the full-time, judiciary, in every case the part-time judiciary is more reflective of diversity than the full-time. That, I would suggest, is an indicator of where we are moving. I think that we have to recognise that this is a feature of chronology. This is a feature of what has happened over the years. There is a good basis for saying that there is incremental change here. Whether that is fast enough to satisfy the plateau-ists is another matter. However, as Lord Irvine observed, there are now a number of Court of Appeal judges, and you will be aware of—indeed, the Lord Chief Justice drew your attention to—the recent appointment of Mr Justice Singh. When he was interviewed, he observed that at the higher level, the judiciary is not yet reflective of a diverse society, in the way that the Queen’s Bench Division now is, but that stems from an earlier time in society, not from unfairness in our system. That is an important factor to bear in mind, because I agree with Lord Irvine that you must always ensure that the person appointed is worthy of the position and should be the best.

Lord Hart of Chilton: I would like to ask some questions about diversity and I particularly want to address a question to Mr Wotton. When I was a solicitor and a recruiting partner for a big City firm, and when I was a special adviser to two Lord Chancellors, I was sent out into the City firms to see whether I could kindle greater enthusiasm among the solicitors profession to embrace a judicial career for members of their profession. I have to say that three or four firms welcomed the opportunity to discuss the matter, and a large number of others did not even want to talk about it. The justification for not wanting to talk about it
was that the firms themselves saw a solicitor’s career as not leading to judicial preferment. They were assets that had been trained at great expense to produce skilful solicitors. That was what they wanted to keep and they did not want to release assets for any other purpose than their own. There is a general agreement that there should be greater diversity, and there is general agreement that it is not happening quickly enough. You represent a body with a very large pool of legal resource from whom one would expect more candidates—more successful candidates—to come for judicial preferment. I would like to know from you what is actually happening here. Why is it that people are not coming forward in the greater numbers that one would expect? What are you as the leader of your profession doing about encouraging more and more people to apply?

John Wotton: Thank you. I am very conscious that both the Lord Chief Justice and the chair of the Judicial Appointments Commission are very keen to see more able and experienced solicitors applying for judicial office, particularly at the more senior levels. There is no shortage of solicitor applicants at the more junior levels. The role of the Law Society in that can be to facilitate a dialogue between the judiciary, the JAC and law firms in order to see if there are ways of overcoming the barriers to becoming a judge that experienced lawyers in larger firms find. The barriers are not insuperable, of course, as Lord Collins’s career demonstrates. But it does need a great deal of commitment on the part of the individual to leave their firm in mid-career or compromise their ability to contribute fully to its activities. Ultimately, it will be for individuals to decide whether they see moving into a judicial career as something that they wish to do, rather than remaining within the structure of legal practice, as many solicitors and barristers choose to do.

I would like to see more good solicitors come through. I will be looking for ways of having a dialogue with firms, particularly larger firms and perhaps those that are thinking more creatively about ways to overcome the loss of some of their best women rather earlier in their careers than one might wish. If it is possible to achieve the necessary flexibility for a woman in mid-career to work on a flexible basis, one would think that the same would apply to the flexibility necessary for that person to become a recorder, for example.

Q207 Lord Hart of Chilton: But there is no doubt that within the solicitors profession, as you reach your 50s senior management is always looking for people to leave the partnership in order to make way for younger members to join the band of brothers or sisters. I do not understand why in that situation more people are not being encouraged to take a career path change for which many of them are ideally suited. They do not necessarily have the advocacy experience, but as we know, that does not ultimately matter for the qualities of being a judge. Lord Collins himself said that the emphasis on advocacy is overstated and that there are many solicitors who could cope with huge caseloads and manage material. I am puzzled as to why there are not sufficient numbers coming forward, and I am not absolutely clear what steps the Law Society has taken in recent years to spur people. What action has it taken, as distinct from making general comments?

John Wotton: First of all, I entirely agree that the skills that are developed by senior solicitors are extremely relevant to judicial office, particularly the skills of case management and of chairing and managing meetings and dialogues. Many people could make a great contribution. If a solicitor takes no steps to pursue a judicial career until he or she is in their 50s, that is perhaps rather late to start. That is the view of the senior judiciary as well: one needs to dip one’s toe in the water rather earlier. At that point, the individual might feel that their contribution to public life could more conveniently be made through non-judicial public
bodies, on which solicitors appear quite frequently—the Competition Commission is an example. Indeed, one might say that someone who has practised in a large City firm for many years is probably better suited to that sort of tribunal than to the judiciary. The Law Society cannot, as it were, instruct people; it can only make the opportunities more well known, and have a dialogue with managing partners and others in law firms to see if there could be more encouragement made available, and to increase the opportunities for the judiciary and the JAC to see if they can get firms to change their attitudes.

Q208 **Lord Irvine of Lairg:** Do you have a policy as yet to follow the proactive role that you have just outlined?

**John Wotton:** Yes. Our policy is to encourage our members to prepare themselves for judicial and other public office, and to assist them in every way. Our solicitor judges are immensely supportive and wish to play a role in helping.

**The Chairman:** And that is an explicit policy, not just an understanding between the members of the higher management of the Law Society, as it were?

**Lord Irvine of Lairg:** Is it published, for example?

**John Wotton:** I am not sure. I take it for granted that it is.

**Roger Smith:** Yes it is. A lot of work has gone on—including roadshows—to encourage members to apply for judicial posts.

Q209 **Lord Renton of Mount Harry:** I confess that I am puzzled by this part of our discussion. I am not a lawyer and have never been involved in the law. As I have said before, I have always taken the view that when people want to stay as solicitors, it is basically because they are better paid than judges. That is a very important point and it is perfectly fair to say so. Going back to the question of career judiciaries, would it be appropriate and helpful if lawyers were appointed to junior judicial roles at a much earlier stage of their careers than traditionally has been the case? I know that there is something like this in Canada. Would that help the situation?

**Roger Smith:** I am very keen on this. I think that it is the answer in the longer term to getting a more diverse judiciary. The notion is that, around the age of between 30 and 40, the lower judicial appointments that are now available as a consequence of the extension of the judiciary downwards provide a new career path which we should explicitly develop, so that you can come in at tribunal level in your 30s and expect to be in the Supreme Court in your 60s. That opens up the pool. I think that it would be very attractive to women to have a salaried part-time post in a tribunal structure. You can test people out and bring people through. That should be done as a matter of conscious policy. An additional role that should be given to the Judicial Appointments Commission is positively to foster diversity in that way.

**Lord Renton of Mount Harry:** So they would be very helpful when a woman wanted to go away for three months, have a baby and come back—she could do that?

**Roger Smith:** I would have thought that, generally, the judiciary is likely to be an easier place to do that than in practice, either at the Bar or as a solicitor. It might be very attractive to people, including to somebody coming back, or to a wider range of people who would not
be so scared, for whom it would not seem so presumptuous, to begin their career in the judiciary at the bottom level. I really think that that is a long-term answer that has to be positively developed.

**Q210 The Chairman:** Does the Bar Council or the Law Society have a view on this, collectively or individually?

**Peter Lodder:** Clearly, we are in favour of a structure that encourages those who will make good judges to become judges. If it can be facilitated by them starting their careers at an earlier stage or in a lower tribunal, that is something to be welcomed, but I think one has to temper that with a realism. The realism in this context is that, if someone has a particular skill and they wish to develop that skill within a practice which specialises, they are not going to be able to come out of that area of specialisation in practice and occasionally sit in a lower tribunal which is intellectually inferior to what they do in practice and has no relevance to what they do in practice. It is very difficult to see how they could pursue that. I think that there is a considerable benefit to the judiciary from drawing on those who have the experience of practice and have an awareness of the issues that crop up in particular courts and tribunals. I think there is an important knowledge base to recognise there.

**The Chairman:** Practice in court specifically?

**Peter Lodder:** Practice in court or practice in an area of law. I do not think that it has necessarily to be court based. If one looks, for example, at the commercial court, you do need someone who has an awareness of the relevant law.

**The Chairman:** Mr Wotton, do you have a view on this?

**John Wotton:** Yes, I think that the concept of a judicial career and the ability for those who join the judiciary at a junior level, if they perform well, to then move up through the tiers, ultimately to the High Court and beyond, is very important. I think that that would make a significant contribution to the diversity of the judiciary at the higher levels. I would, though, be reluctant to see a lot of people coming into the judiciary, even at a junior level, without a significant experience of practice and, indeed, of life. The fact that all our judges have significant legal and life experiences is on the whole a great advantage and I would not like to see a continental system adopted.

**The Chairman:** In which, as it has been described to us, you would have a Civil Service of judges. That has been one of the phrases used to us.

**Roger Smith:** That is a very prejudicial description. If you were to have a French person giving evidence to you, I think they would rise to their feet in outrage at that description of their judiciary.

**Q211 Lord Shaw of Northstead:** Roughly, what sort of age would you regard as appropriate for switching? You say that there must be experience in law firms. We talk about taking leave to have children. I would have thought that child-bearing age would have passed by the time people were reaching this decision. Am I wrong?

**John Wotton:** Not necessarily. One can qualify as a solicitor at the age of 24 or so—

**Lord Shaw of Northstead:** But then you need to have experience—
John Wotton: By then, five or seven years’ post-qualification experience is probably quite sufficient to make a start in a tribunal or a lower court, I suggest.

Peter Lodder: Typically, applicants for recordership commence at about the age of 35. I think one also needs to recognise that, if you bring the age down, you are simply bringing people into that realm where they are considering having children. You are just adding to their difficulties if they also have to consider judicial appointment as well.

The Chairman: An area that has concerned us in previous hearings—I think we should allow Mr Smith to expand on what he was saying about the French reaction to my point about the Civil Service—and Lord Rodgers has been particularly concerned about is, however they are appointed, how do you, as it were, judge the performance of judges at whatever level? I think you have used the word “monitor”.

Q212 Lord Rodgers of Quarry Bank: What I have in mind is to look at the success of the system, whatever it may be. Obviously, one of the measures appears to be that of diversity associated with merit. Presumably in any appointments system, people get it wrong. They go to a great deal of trouble to choose the best people but, as it turns out, they are not very good. How is the success of those who are appointed to be measured, given that you really need to know how successful they are after they have been appointed to discover whether the system is a good one?

John Wotton: Perhaps I could comment briefly. I tend to feel that a system of appraisal of judges at all levels is probably desirable. The advantage of such a system, which is well known in most other walks of life, is to enable people to recognise aspects in which they are not performing as well as they might and take steps to improve through either self-awareness, training or a combination of the two. It could be a useful tool in improving judicial performance and could also provide a basis for easier promotion through the tiers of the judiciary.

Q213 Lord Rodgers of Quarry Bank: Is there a way in which you monitor this? Who monitors the judges once they are appointed to draw a conclusion about whether those decisions were the right ones?

John Wotton: Clearly, steps would have to be taken in the relevant court or tribunal to make that work and they would need to be taken by the president or other leader of the tribunal concerned. There would need to be an element of peer review. There could perhaps be a wider feed into an appraisal process from court staff or from those who have appeared in the court as advocates or litigators. I do not think that is very different from the appraisal of the performance of senior executives, for example.

Peter Lodder: I do not think that there is a formal procedure in the sense that a resident judge at a given court centre writes an appraisal of each of the judges who are there. But there is quite an effective procedure in that, if a judge makes a mistake and there is an error in the way that that judge has summed up the law in a Crown Court, for example, there is a procedure for appeal. That means, therefore, that that judge’s judgment is reviewed by the Court of Appeal. If it is found to be wanting, that will be expressed in the judgment. There is a procedure by which, if a judge consistently makes mistakes, that will probably be reflected by an interview with the Lord Chief Justice. I am not familiar with the process personally, but I have heard of it. A judge’s performance is assessed by those means; for example, how they relate to those who appear before them, whether they are courteous or not—matters of
that sort. There are other procedures whereby these things are raised with more senior judges. For example, if a judge is being difficult in such a respect, the circuit leaders will raise it with a presiding judge and there will be an informal process by which these things are addressed. If you are looking to have a more public process, there is no such process, at least not one that I am aware of. One would have to approach that with a great deal of caution, in my view.

It is important, though, to recognise the following. In the job that I do, I travel extensively to other jurisdictions, often to sell the values of our system. Consistently—indeed, without exception—our judiciary is praised for its high standard and integrity. It is important when one is having examination of this sort to bear in mind that you are not saying, “We have a bad judiciary. How can we improve it?” In general terms, I imagine what you are finding is that we have an excellent judiciary but we have concerns over some aspects of diversity and recruitment in making sure that the process is as good as it possibly could be. Although, to come back to where we started, I do not think there is a public and formal procedure for dealing with those issues, but such procedures as there are appear from my perspective to work fairly well.

The Chairman: I am sure that we should have Mr Smith’s comments but does Lord Rodgers want to come back?

Q214 Lord Rodgers of Quarry Bank: I am not quite satisfied. I would very much like to hear what Mr Smith has to say on that. It seems to me that every head of profession says that the architects, doctors or whatever they may be are absolutely marvellous but that some may fall slightly short, and if that happens you tick them off from time to time. It is even more the case that judges feel they are rather special. I understood you to imply that it was very dangerous to be critical of a judge and risked undermining the whole system. That is a rather complacent view.

Peter Lodder: I would not want you to think that I am being complacent about it. The point I was seeking to make is that, by and large, the process does not appear to appoint bad judges. I am not saying that that is universally the case, but in general it appears to be. There are informal procedures that cater for instances when they occur. My caution is that if we have a public process by which a complaint is dealt with, a disciplinary process, as it were, we should trespass into that area with great caution. I am not saying it should not be done, but that we need to think about it very carefully.

Roger Smith: I think that the question you asked was: who guards the guards? I think that it has to be the judges. Certainly for district judges there is now a relatively organised process of appraisal. I see no problem in using the presidential structure which has been developed as one around which to base quite an organised appraisal system at, I would have thought, virtually every level, although perhaps not at that of the Supreme Court or the Court of Appeal. There is a matrix of issues on which you judge a judge, the obvious one being the number of appeals against their judgments. However, there will be other things such as the speed with which they move through cases, which would be important, their demeanour in court and their manner with litigants and lawyers. That is a fairly straightforward matrix. The systemisation of a degree of appraisal within the judiciary, as John Wotton has said, would only repeat what is happening in virtually every other area of business and commercial life.

Q215 The Chairman: Thank you. We are drawing close to the time that we agreed with you. We value your opinions on these matters and I think that we have covered many of the
questions and areas that the Committee is most interested in. Are there any matters that you feel we have not addressed which you particularly want us to be aware of?

Roger Smith: Could I just add something on section 159, which I think is logical but incredibly bureaucratic? I cannot see how it would apply. When I appoint people I use a numerical system and then I cross-check it by whether I think it is the right judgment. Section 159 is logical but bureaucratic. Section 64 of the Constitutional Reform Act requires the commission to, “have regard to the need to encourage diversity in the range of persons available for selection for appointments”. I think that it should have a direct duty to encourage diversity among the people who are appointed. I know that Lord Irvine does not like that, but that is in the section which comes after the one that says that appointments should be made on merit. I have no problem with that except that I use a different definition from him.

Peter Lodder: I come back to something we touched on briefly earlier and which I would like to reinforce. The professions, both solicitors and barristers, have made significant efforts to improve diversity within their own number. It is important to recognise that that is the seed-bed for much of the judiciary, certainly for the next 10 or 15 years. We hope that the figures, some of which I have referred to in the evidence I have given to this Committee, reflect the success of those initiatives. It is something that we have championed very positively and actively. I appreciate that this is not a political forum, but those initiatives do rest upon their being perceived by those drawn from ethnic communities or indeed under the gender initiative, as ones where they will have a career. One thing that troubles us significantly is that the government initiative to cut back, particularly in areas of public funding, will adversely impact on them. That is because those who have been attracted to the Bar and who wish to serve the communities from which they come will be deterred by the prospect of a low return when they come in with heavy debts. That will affect whatever this Committee consists of in 15 to 20 years’ time in its assessment of what the diversity profile of the judiciary is.

John Wotton: I agree with Peter Lodder’s comments. Indeed, the Law Society has published three research papers on the career experiences of women, gay, lesbian and transgender, and black and ethnic minority solicitors. We are embarking on a programme of work to see what we can do about some of the barriers to career advancement that have been identified in that research. Finally, I have been assured by my colleagues here that my description of the Law Society’s attitude to judicial appointments is correct, but if it would assist the Committee, I would be happy to provide a note describing the various steps that the Law Society has taken in pursuit of that policy, which are quite numerous.

The Chairman: That would be helpful. Thank you very much. If no member of the Committee has anything that they want to pursue, let me say how grateful I am to you all. This has been enormously interesting and helpful to us. We have covered a wide range of the issues that we have been talking about in various different ways over the past few weeks. This has helped to focus and crystallise our thoughts. Again, thank you all very much indeed.
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. 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.

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

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keeps the other organs of the state, the police and those who administer the laws, under control.25

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 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.26

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

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more diverse judiciary. Yet, as Baroness Hale had said ‘Public confidence and
democratic legitimacy are not… exactly the same thing.’\(^\text{27}\) It is perfectly conceivable
for public confidence to be enhanced 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.\(^\text{28}\)

**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.


\(^{28}\) 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.’
12. Loughlin treated Aristotle’s account, directed to the governing class and 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’. 29 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’. 30 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. 31

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 32 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. 33 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. 34

16. Plainly no technical qualification can give judges, individually or collectively, democratic legitimacy in carrying out their law-making functions. Acquiring 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

30 ibid, 71.
31 ibid, 73.
32 See ibid, 139 on the way that democracy and common law method could be formally (and pragmatically) reconciled in this framework.
33 ibid, 81-93.
34 ibid, on the administrative state, 95-108; on the impact of constitutionalism, 177-214.
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.’

35 ibid, 21-22 & 51
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 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 – Written Evidence

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 – Written Evidence

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 one's 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
Thank you for the opportunity to address you on what I consider to be a very important issue, that is the lack of diversity throughout the judiciary and as a consequence as I see it, a lack of representation of the diversity of the community that it is there to serve. I do not see it as an insuperable problem. What is needed is a will and strong leadership otherwise we will still be having this conversation in another 20 years.

There is a tendency to ask why diversity matters if the judiciary is working well. Partly it is a question of perception. Whether the majority of the population believes the justice system works well is debatable and ever closer scrutiny by traditional and new media means there is no longer room for complacency. However, even if the system is working all systems can be improved. That is how we make progress. There are lawyers from non-traditional backgrounds with fine minds who can bring perspectives because of their background and life experiences that will enhance public confidence. Finally it is an issue of fairness. There are 10 Solicitors for every Barrister. It is indefensible that the judiciary at all levels continues to be seen as the preserve of the Bar.

The Constitutional Reform Act came into being after a good deal of research including focus groups in which I was involved. Although it seems that progress for ethnic minority and female solicitors in particular has been poor, we should seek to make what we have work and work well.

Two areas I think should be looked at carefully and more work done, is the concept of a career in the judiciary as opposed to a career judiciary and the non statutory restrictions which inhibit under represented groups, who often the work in the public sector as it is traditionally a more welcoming and accommodating environment, from applying for judicial office. After all judicial service is public service. Most Judges are from a prosecuting or defending professional background. In the main we have no difficulty in avoiding actual or implied bias in our approach to our judicial functions.

I commend the work carried out by the Judicial Appointments Commission in raising awareness of the opportunities however a lot needs to be done in terms of helping people to develop and demonstrate potential. For that the professional bodies have to take far more responsibility than they have shown to date.

22 November 2011
I shall be presenting my evidence from three perspectives-
1-as the Chair of BSN
2-as a Council member of the Law Society for Minority Ethnic Concerns
3-as a dual qualified legal practitioner, my first qualification being from the Commonwealth jurisdiction of Nigeria where the legal profession is fused.

I want to give credit to Judge Cordella Bart-Steward, past Chair of BSN who has led in this work on behalf of BSN. We are indebted to her and she will speak in detail about the practical steps that BSN has initiated with the support of the Law Society and the Judicial Appointments Committee to improve solicitor engagement in the judicial appointments process.

I was privileged to be in the Chair of the Law Society Equality Committee and also on the Legal Affairs and Policy Board between 2007 and 2010. During that time we were able to refine our policy (formulated in 2003) and on this statement is exhibited a paper dated the 23rd of September entitled JUDICIAL APPOINTMENTS which was for the purpose of informing Council of developments in relation to judicial appointments. It sets out Law Society policy at the time together with documenting practical steps taken by the BSN in conjunction with the Law Society and the JAC to increase solicitor applications for judicial office. I hope you will find this document useful. Our policy on judicial appointment is constantly being updated and should the Committee require refreshment, we at the Law Society are ready, able and willing to provide you with further information and documentation in this regard.

One is in the happy position of having had the benefit of listening to evidence given by others to you. I will not be repetitive as I know you have heard it all before.
I agree with Lady Hale that equality is a constitutional issue and is within the remit of this committee.
I agree with Lady Neuberger and Lady Hale regarding their evidence and state quite categorically that everything said in respect of women is applicable to my constituency-BME solicitors.
I subscribe to the “plateau” and not “summit” merit qualification as ingenuously put forward by Roger Smith.

I draw the attention of this committee to an article written by Jennifer Macleod which appeared in the Guardian of the 3rd of November, an extract of which I quote-

“As in every profession, increasing access and diversity to the top of the profession ensures that those who reach the top are the best for the job. Unless one believes that not one lawyer of ethnic minority and only one female lawyer has ever matched the academic calibre of the remaining justices of the House of the Lords and the supreme court, then it becomes clear that our appointed justices through out history, with respect, have simply not been the best possible in terms of traditional, intellectual merit.
This point underscores the fact that much of the resistance to increasing diversity is misguided. In the interview with Owen Bowcott, Lord Hope stated that while he is in favour of increased diversity, it must not prevail over merit, and that “the system depends on skilled people who can actually do the job and we can’t afford to have passengers here, just in the name of diversity”.

Increasing diversity is not, however, merely for diversity’s sake. Not only do different judges from different backgrounds potentially bring different viewpoints to the table, and thereby alter the outcome of cases, as suggested by Hale and Neuberger, they ensure that our justices remain those most qualified on whatever definition of merit is used.

Any argument that suggests that diversity will affect the quality of decision-making is regrettable; it risks being offensive to the highly qualified people of minority status that are unable to access positions in the supreme court. Only when women, ethnic minorities, people of all sexual orientation and people with disabilities are both officially and practically able to become justices of the court we will be able to be sure that we are appointing those most qualified for the job.

The importance of this general point is exacerbated in the case of the judiciary. As Lady Hale states “fairness and equality are central values of the law, and the courts should reflect this. Everyone should be able to see the courts as their courts, there for all sections of society and not just for some.”

Lady Neuberger offered concrete suggestions as to how diversity could be increased, suggesting increased mentoring, and appraisals of judges of lower courts.

What is clear is that regarding the issue as constitutional heightens the importance of guaranteeing that the upper echelons of our judiciary are accessible to the best candidates, regardless of their background, and ensuring our judiciary is reflective of our society.” (the highlights are mine)

Jennifer MacLeod is a Harvard Law School Holmes Public Interest Fellow, currently working in South Africa. I share her viewpoint.

I qualified in 1978 as a barrister and solicitor of the supreme court of Nigeria which is a commonwealth jurisdiction. In my generation this was the order women were expected to conduct their lives-God, family then career. It was felt that the hurly burly of private practice was not for the prospective mothers of future generations. Although upon qualification I took the initiative and secured work in a prominent law firm in Lagos, my father took a rather dim view of this move and advised me to seek employment within the civil service. He would not be moved and I had no support from my mother. I joined the civil service and commenced work at the Ministry of Justice as a pupil state counsel. At the end of pupillage one could be sent to one of four places-the Solicitor General’s Department dealing with civil matters, the Director of Public Prosecutions, the Administrator General’s Department (Probate matters) and the Chief Magistrate’s Department-the inferior bench. Many women chose the bench and worked their way up the rungs with some content to
remain in that division but with many, by merit moving upwards into the superior bench as High Court judges.

Indeed, there are two women Supreme Court judges in Nigeria. One of them is Justice Mary Odili who was a year my senior at university and law school. She obtained the best result in her year of qualification from university and bowed to tradition by joining the civil service as a magistrate. Her talent was not lost to the profession. She had appropriate work life balance at the start of her legal career and rose through the ranks to achieve the summit based upon her merit and ability.

This system was introduced to Nigeria by the colonial British administration. It is not the French style but a thoroughly British innovation. I commend it to this committee as it will satisfy the needs of not just women but also BME solicitors.

As a consequence of this pattern, the Nigerian judiciary is more evenly populated by both men and women, from the Magistrate Courts through to the Supreme Court. Appointments are made from private practice and from within the civil service. Men tend to go into private practice (my brother is in private practice and has always been) and a significant number of women choose the civil service for the reasons set out above. I think that solicitors and barristers five years post enrolment/call can choose the bench. We already have the system of competitions for the bench from that point. This could be built upon. The move from one level of our judiciary to the next should become smoother for those who are already within it and with the ability and will to progress upwards. We are achieving more diversity at the base of our judiciary and can build upon what has been achieved. We cannot afford to wait for the filter through and I believe that leadership must come from the top too—there must be more appointments that reflect society at the upper echelons of our judiciary.

I offer up three suggestions for your consideration.

1-the amendment of section 64 of the Constitutional Reform Act 2005

Encouragement of diversity

   (1) The Commission……..must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

My suggested amendment is

……..must have regard to the need to encourage diversity in the range of persons available for appointments.

2-Membership of the Judicial Appointments Commission (JAC) should increase to include significantly, all the under represented categories within our judiciary including BME.

3-Periodic equality and diversity training for members of the JAC and the production of annual statistics of all diversity strands for the whole of the judiciary
ANSWERS TO QUESTIONS

1. Awareness of the judicial appointments process has increased. This has not resulted in the increased diversity of those appointed to judicial office. This is why I have suggested the amendment of Section 64 of the 2005 Act.

2. Yes—equality and diversity, fairness and equity go to the root of our constitutional framework. A starting point would be the amendment of the Act as set out above, increasing the number of BME people and women where decisions are made and by ensuring that decision makers are constantly mindful of equality and diversity.

3. Our bench is highly regarded internationally and many look to this jurisdiction not only for intellectual excellence but also for leadership in all matters pertaining to the rule of law. It is a travesty to suggest that merit resides in only certain places. Appointments must always be by merit but those who look for merit must redefine their quest to include the diversity of society. Section 159 of the 2010 Equality Act is enshrined in our constitution and should be implemented and embraced.

4. The system we have presently and pragmatically takes into account academics, albeit, academics that are also professionally qualified like Lady Hale. I do not think that it is too onerous to expect an academic with aspirations to the bench to also have a familiarity with our courts and to be qualified professionally as a solicitor, barrister or ILEX Fellow.

5. The Lord Chancellor’s present role is appropriate. The JAC should continue to make one recommendation to the Lord Chancellor so long as the JAC is modified as set out above. The confidence my constituency has in the JAC will be greatly increased if these changes are made. The Lord Chancellor should be able to direct the JAC only within constraint and limited to issues of general policy by way of recommendations which are not binding on the JAC.

6. Modern practice appears to be disinclined to participation of a retiring officer in the appointment of the prospective successor. So long as the appointing panel is increased to include at least one judge from each branch of the judiciary and in so doing, the achieved panel reflect society, I am content for the President and Deputy President to be part of such a newly constituted panel. Current lay representation on the appointing panel is appropriate.

7. No. The published statistics are obscure and difficult to find. There is no feedback to unsuccessful candidates. The lower bench has a system of appraisal which could be developed to include the superior bench. There is merit in periodical horizontal and vertical review/appraisal.

8. I agree in principle—please see above.

9. I support the principle of separation of powers. The judiciary must robustly maintain its independence from both the legislative and executive arm of government. Experience of legislative involvement in judicial appointment (USA and Nigeria) leaves a lot to be desired. The Lord Chancellor’s participation in the process suffices although account must be taken of the fact that the Lord Chancellor may not always be an elected member of parliament.

23 November 2011
Black Solicitors Network, Association of Women Barristers, and Association of Women Solicitors – Oral Evidence (QQ 259–280)

Black Solicitors Network, Association of Women Barristers, and Association of Women Solicitors – Oral Evidence (QQ 259–280)

Transcript to be found under Association of Women Barristers
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%).

<table>
<thead>
<tr>
<th>Year</th>
<th>Transferred cases</th>
<th>JAC cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Upheld or partially</td>
<td>Not upheld</td>
</tr>
</tbody>
</table>

113
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
Sir John Brigstocke, Judicial Appointments and Conduct Ombudsman – Written Evidence

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 – Written Evidence

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 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

<table>
<thead>
<tr>
<th>Forecast 10/11</th>
<th>Tribunals – 510</th>
<th>Courts – 163</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total 9/10</td>
<td>Tribunals – 411</td>
<td>Courts - 284</td>
</tr>
<tr>
<td>Total 08/09</td>
<td>Tribunals 226</td>
<td>Courts 213</td>
</tr>
<tr>
<td>Total 07/08</td>
<td>Tribunals 147</td>
<td>Courts 295</td>
</tr>
</tbody>
</table>

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

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

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
Lord Collins of Mapesbury – Written Evidence

Constitution Committee: Solicitors in the Senior Judiciary

1. This note is intended to be a summary of the points I would have made had I been able to give evidence to the Committee in person.

2. The senior judiciary as a whole comes, and has always come, almost exclusively (with a handful of exceptions) from a very narrow group. I am not here talking of gender or social class. I am referring to the fact that the English judiciary consists almost entirely of those whose whole career has been spent in the Inns of Court and the Royal Courts of Justice (or the equivalent for those whose career has been spent on Circuit), and much of whose social life has revolved around the Inns and their professional colleagues.

3. I can only speak from personal experience of the City of London, but in the City there are many outstanding solicitors (men and women) with fine legal minds, with huge managerial experience and understanding of people. The method of selection, and the requirements for selection (or perceived requirements), of judges inhibit applications by solicitors for the High Court bench.

4. Since my appointment to the Chancery Division in 2000, there have been no direct appointments of solicitors to the High Court bench. The only other former solicitors to have become High Court judges were promoted from the Circuit bench: the late Sir Michael Sachs and Sir Henry Hodge, and currently Sir Gary Hickinbottom.

5. Before my appointment I sat as Deputy High Court judge in the Chancery Division. At present some judicial experience is a pre-requisite for high judicial office. I am prepared to accept for present purposes that that is desirable. But it should not be assumed that this is so – many distinguished judges have sat at trial level and on appellate courts in the United States without prior judicial experience.

6. So far as members of the bar are concerned the normal route to the bench is through appointment as Queen’s Counsel, and then sitting as Recorder (mainly, but not exclusively, in criminal trials) or Deputy High Court judge. There are now only 5 practising solicitors approved to sit as Deputy High Court judges. There will of course be others who sit as Recorders.

7. I am aware that efforts to persuade solicitors in the City to seek judicial office have not been successful. In my view that is because what is held out to them is extremely unattractive in the light of the way the City works. The likely candidates will be specialists in company and commercial law, working under great pressure to meet billing and time targets set by their firms. They have the standing, ability and income, of top Queen’s Counsel.

8. They will not have the advocacy experience which is perceived to be necessary for high judicial office. In fact there is no reason to believe that advocacy experience or skill is a necessary pre-condition. Some knowledge of court craft will ultimately be necessary, but this can be acquired with a modicum of training or part-time sitting.
9. They (and, more important, their firms) will not be attracted by a proposal for them to sit for several weeks as a recorder in criminal trials, with only the prospect of a Circuit bench appointment, and only the possibility of promotion from Circuit judge to High Court judge.

10. While prior judicial experience remains necessary (which is open to question), what I think is necessary is for the best talent to be given the opportunity to sit as Deputy High Court judges in the Chancery Division (Companies Court), the Commercial Court and the Administrative Court (not necessarily for as much as 4 weeks a year), and for the quality of their work to be monitored with a view to appointment as High Court judges.

Lawrence Collins (Lord Collins of Mapesbury)
High Court (Chancery Division) 2000-2007;
Court of Appeal 2007-2009;
House of Lords 2009;
UK Supreme Court 2009-2011

November 17, 2011
Lord Carswell – Written Evidence

1. General

1.1 The paramount consideration is the attainment of the highest standard of administration of justice, which is a constitutional necessity. It is vital in maintaining public confidence in the legal system. It requires the appointment of the persons best fitted to carry out judicial functions, which in turn necessitates a clear commitment to the principle of appointment on merit. Proper regard should be paid to the maintenance of judicial independence.

1.2 All propositions put forward about judicial appointments should be tested against these important principles. Transparency and diversity are desirable features, if consistent with them.

1.3 The appointment process should be focused, with clearly identified responsibility for making each appointment. The process should be easily understood and as simple and expeditious as possible.

2 Appointment Process

2.1 Appointments made by HM The Queen are on the ordinary constitutional principle made on the recommendation of a government minister.

2.2 The LC should continue to be responsible for recommendation of all appointments to The Queen, but his function should be limited, on the lines of the provisions in the Justice (Northern Ireland) Act 2002, to acceptance of the JAC nomination, subject to any reconsideration requested by the LC.

2.3 The JAC should recommend a single candidate for each appointment, not a shortlist.

2.4 There does not appear to be any compelling reason why the Prime Minister’s part in appointments should remain.

2.5 Arrangements for appointments to the Supreme Court, including the appointment of the President and Deputy President, are unsatisfactory in their present form and require reconsideration. I do not have firm suggestions about the composition of a revised commission, but I would put forward the following tentative views:

2.5.1 The President should not be a member of the commission, but his opinion is important and he certainly should be consulted. There is a case for retaining the membership of the Deputy President (unless he is a candidate for the Presidency), as he or she will have first-hand knowledge of the ability of the other Justices.

2.5.2 The usefulness of representation of Scotland and Northern Ireland on the commission is doubtful in principle, except in the case of an appointment from either jurisdiction.
2.5.3 The JAC representation is designed to recognise the public interest in transparency and satisfies that requirement.

2.5.4 Other members of the commission would be required, but I do not have firm suggestions about who they should be. There may be a case for the Lord Chancellor’s participation in the appointment of the President.

2.5.5 There should be a single nominee, not a shortlist.

3 Transferability and Promotion

3.1 A degree of flexibility is important. Most people appointed to the different tiers of the judiciary come in at a level appropriate to their ability and can properly remain in that tier. But experience has shown that there are exceptions, and it is necessary to be alive to the possibility of spotting such people and promoting them to make best use of their talents.

3.2 Where a career system operates, people opt at an early age either for the judicial ladder or for legal practice. There has been a tendency in such jurisdictions for the abler people to choose practice and its higher remuneration, while the judicial path is often followed by people of lesser ability. The UK pattern has meant that the most able lawyers remain in practice until their 40s or 50s, then migrate to the Bench, which confers the advantage that both branches contain members of high quality and judges have considerable practical experience. I would be slow to consider changing this pattern, so long as due flexibility is maintained.

3.3 Where there is a career judiciary, there is some risk that members of lower tiers may be inclined to want to please the establishment in order to enhance their prospects of promotion.

4 Role for Parliamentarians

4.1 It would be undesirable for a committee of Parliament to question candidates for judicial office at any level. It would give rise to a perception that political preferences had a role in the appointment of judges.

4.2 The analogy of the US Supreme Court is incomplete: that court is a constitutional court, its sole charge being the interpretation and application of the US constitution, whereas UK courts, including the Supreme Court, have the duty of ascertaining and applying the law in all its aspects.

4.3 It is not a useful process in the US. Candidates are coached to a high degree of skill in stonewalling when asked difficult and pertinent questions. There is a high likelihood that members of such committees would ask inappropriate questions.

5 Diversity

5.1 Diversity in public appointments is to be welcomed. Its converse, discrimination, is deeply deplorable.
5.2 A distinction should be drawn between elections to the legislature and local councils and appointments to public boards on the one hand and judicial appointments on the other. A proper mixture of both sexes and different elements of society is important in the former, if citizens are to feel adequately represented. The same consideration is less important in the composition of the Bench, where the prime requirement is that citizens should feel that their cases are properly understood and fairly decided. If that is attained, then the social objective has been reached, irrespective of sex, social or ethnic mix in the judiciary.

5.3 Diversity is material in judicial appointments in (a) ensuring that the judiciary contains enough members with understanding of diverse elements in society (b) enhancing public confidence in the legal system.

5.4 Diversity may be more important in multi-member appellate courts, to the extent that it may be required to achieve these aims.

5.5 I am strongly opposed to positive discrimination/affirmative action in judicial appointments:

- The basic requirement of the process is to obtain the best persons to carry out the work of deciding cases. The selection of the best person can be prejudiced by the introduction of unrelated value judgments of this kind.
- It gives a justified sense of grievance to those passed over in favour of less well qualified candidates.
- It is patronising and demeaning to persons properly appointed on merit.

5.6 Merit is a concept that applies to the individual. Diversity is not a component of merit. It may require consideration in determining the composition of the court, in the way that the appointment of a candidate skilled in a particular area of law may be desirable to assist the effective work of the court. It is wrong and misleading to attempt to incorporate it into the concept of merit.

5.7 It is facile to prescribe the use of diversity as a ‘tie-breaker’ in the case of equality of candidates. It is rare to find candidates who can truly be described as equal. They all have different qualities and attributes, which one assesses and values according to the requirements of the particular appointment. One may find that any one of several candidates would fill the post satisfactorily, but one stands out in terms of ability to carry out the duties of the post. Where there is no outstanding candidate, it may be legitimate to take into account the need for particular skills or experience, or to appoint a candidate from a minority group if it is considered that that is necessary to enhance public confidence.

5.8 I have in the past found it difficult to get suitably qualified women for consideration for appointment – either their qualifications are insufficient or they are reluctant to put themselves forward. This is the result of two factors (i) career breaks, where children or parents have needed care (ii) the incompatibility of full-time judicial work with their lives and responsibilities. I should like to see re-entry to the profession after career breaks encouraged and facilitated. Part-time working could usefully be assisted; this is
only really viable in lower-tier posts, but appointors should be ready to give women in this position the opportunity to advance when their circumstances change.

6 Retiring Age

6.1 The reduction of the mandatory retiring age to 70 was a serious mistake and the former age of 75 should be restored.

6.2 People are living longer in good physical and mental health and general retiring ages are being increased. It is wasteful of resources to compel healthy and active judges of 70 to retire on pension.

6.3 The 70 limit acts as a deterrent to some candidates. The critical age for appointment to the higher courts is the early 50s, when many candidates are ready for a change of work and pace and are in a position to afford the drop in income. If they have to serve for 20 years for a full pension, they cannot complete it by age 70, a factor which tends to deter possible applicants.

6.4 The statutory embargo on engaging in any judicial work after 75 should be repealed. Many retired judges of that age could make a considerable contribution and it is again wasteful to bar them from doing so.

November 2011
WEDNESDAY 30 NOVEMBER 2011

Members present
Baroness Jay of Paddington (The Chairman)
Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Shaw of Northstead

Examination of Witnesses

Lord Woolf, former Lord Chief Justice, Master of the Rolls and Justice of the Supreme Court, and Lord Carswell, former Law Lord and Lord Chief Justice of Northern Ireland

Q281 The Chairman: Good morning. Thank you both very much for coming this morning. This is one of our sessions that are sound-recorded but not televised. For the purposes of the tape recording, therefore, it would be very helpful if you could kindly identify yourself when you first speak. It helps the subsequent analysis of the tape. As you will realise—and I have had the opportunity to talk to Lord Woolf about this—we have taken evidence from a large number of witnesses in the last few months on this subject. Within the last few days—last week, anyway—we have had the publication of the consultation proposals on judicial appointments from the Ministry of Justice, which clearly impact on the inquiry. One of the things we were discussing, Lord Carswell, when you arrived earlier was whether and how we should incorporate that, which is obviously directly relevant to our inquiry. But we are trying, as you know, to focus, as the Constitution Committee, on the constitutional aspects of this, and trying to, perhaps slightly artificially, distinguish those from some of the more mechanical matters of appointment and organisation. I am sure you will both be aware of that, because I am sure you will have seen the previous evidence we have taken. I just say that in order to be helpful in terms of guiding the discussion. I hope that is useful.

The questions we have are very much in the context of, and overlap quite a lot with, the consultation proposals from the ministry, but are not exclusive to those consultations. As I said in private conversation with you, Lord Woolf, we are at the stage of the inquiry where we are hoping to get some positive proposals for ways in which the existing system might be improved. Of course, the Ministry of Justice is focusing very clearly on legislative changes that it feels might be relevant to this. Ours is a slightly broader inquiry, and our report will be slightly broader. Perhaps we could start with talking in general terms about the transparency and accountability of judicial appointments, particularly in the senior courts, but right down through the whole system. I wondered, Lord Woolf, if you would start on that.

Lord Woolf: Can I first of all apologise to the Committee for not having the courtesy that Lord Carswell has shown in preparing a note to make your task easier. I saw this very much as a moving feast. As a former member of the Constitution Committee, I welcome the fact, on behalf of my former colleagues in the judiciary, that you are undertaking this task. Appointing judges is a very important and sensitive task. I had the good fortune when I was Master of the Rolls and previously Chief Justice and when I was a presiding judge, to be involved in the appointment system.

The first thing I would say is that fortunately the effort put into trying to make the right appointments was hugely impressive. We all tried our best. I would suggest this is a situation where the system can certainly be improved, but one wants to go forward with great caution. Everything possible must be done to preserve the virtues of our system. You have heard evidence about those virtues, and I am not going to go over that ground.

Certainly on an international scale, the standard of our judiciary is admired immensely. Since I have retired I have been a beneficiary of that, so I can speak from personal knowledge. Can I just say this, because I was involved in the process? When the Constitutional Reform Act was being created, it was being done in close consultation with the judiciary, who I was representing, and Lord Falconer. We worked very hard on trying to strike the correct balance. It is a very difficult thing to do. Before Lord Falconer, I had worked with two Lord Chancellors and I was a beneficiary. My belief is that if I had really stuck my heels in with regards to any particular appointment—and I say this with deference to Lord Irvine—the probabilities are that if I was representing the views of the judiciary, Lord Irvine, or his predecessor, Lord Mackay, would be extremely reluctant to go against what was communicated as the views of the judiciary. Although our system technically meant that the Lord Chancellor’s word was in practice the final word, he worked very closely with the judiciary in an informal manner.

The unfortunate thing—and this goes to what you were putting to me—was that I knew that the system was apolitical and I knew that it was extremely important to those two Lord Chancellors with whom I worked that that should be the situation. I was equally conscious that those outside had no means of knowing this. There was a complete lack of transparency. There had to be a lack of transparency if we were going to preserve what we had. On the basis of my experience, I would say letting outsiders—those outside the judiciary and the Appointments Commission—play a further role would be a step that would need very careful prior consideration. I say straight away that because the Lord Chancellor had ceased to be the Lord Chancellor of the past and had become a minister, a Secretary of State as well—he was not a judge—I do not think he could have performed the role that he performed hitherto. It would be inappropriate, and I would say that was accepted at the time by Lord Falconer. What we were trying to do: we were trying to achieve separation of
powers. If the lack of transparency is unavoidable, it is none the less very desirable there should be no suspicion that it was politics influencing appointments. As the system has been drawn up, it has the great virtue that it makes clear—in a way that is not made as clear in other jurisdictions—that there is separation with regard to the political influences and the appointment system. There is also clarity that there is a clear divide between the appointment system and the judiciary as a whole. What we have tried to produce is an independent appointments system being the best way of maintaining the independence of the judiciary.

Q282 The Chairman: There is one specific point, if I may, Lord Carswell, before asking you to comment on it generally, that I wonder if I could put to you, Lord Woolf; you will have seen from the MoJ consultation document that it, for example, would suggest that a useful way to extend the JAC role would be to change the system of appointing Deputy High Court Judges. What would be your feeling about that?

Lord Woolf: I fear I am appearing as a bit of a dinosaur: I would treat that with a certain caution. Deputy High Court Judges, in their position, are there to fulfil a purpose; it is not to run the system. I personally did not like Deputy High Court Judges treating themselves as though they held an appointment. This was just a means of meeting the needs of the system at a particular time. The deputy appointments system was to be, therefore, very informal. It did serve a useful purpose in introducing the judicial process to those who had not become recorders or in another way had experience of that process. But I do not think it is, by itself, something that should be the subject of a more formal system. I do not think we should burden the Appointments Commission further by making it such. It is letting both sides have a good look at the individual concerned, as well as getting the benefit of those individual purposes. If a person is only helping, he is acquiring experience of how he copes as a judge. We all know that even the most skilled solicitor or barrister may not be judicial material.

Q283 The Chairman: Thank you. Lord Carswell, thank you so much for giving us your previous note, which has been very helpful and which the Committee has had the chance to read. We have read it, of course, but would you like to comment on the general points I put to Lord Woolf at the beginning about transparency and accountability in the present arrangements?

Lord Carswell: Yes. My experience connected with appointments was seven years as Lord Chief Justice of Northern Ireland, before the Judicial Appointments Commission was created. I worked very briefly with two Lord Chancellors, Lord Mackay and Lord Falconer, and for a long time with Lord Irvine. I underline exactly what Lord Woolf said about the care, thought and integrity of the previous process. If that is maintained, that is a very valuable asset indeed in public terms. I never found it a problem to come to a fairly clear conclusion on any of the appointments with which I was concerned as to which candidate to recommend at any level, and so I formed the practice of preparing a fairly detailed and lengthy letter containing information and recommendations, narrowing it down and explaining exactly why I had elected to recommend one. That then went to the Lord Chancellor. He would consider it, and sometimes come back and ask me further things, which is entirely the right way to do things. Then he made his decision. In fact, I believe he always accepted mine, but I would not have been dropped on if he had not.
Perhaps I may just mention one thing about Deputy High Court Judges. In Northern Ireland we did not generally have them, because in a small society it is very difficult for practitioners to be one day in front of the people that they are going to be sitting beside the next day, and then the next day sitting on the bench adjudicating over cases, argued by members of the Bar. It is possible, but it is difficult. What we did was to get a member of the Bar who had decided to retire from practice early but would like some occupation, and we appointed him ad hoc to sit as Deputy. That worked very well. But it reinforces what Lord Woolf was saying, and this is really what I am getting at: that a deputy post should not be looked at as something to be aimed for and a stepping stone. I have, anecdotally, heard senior members of the Bar here saying a little wryly that it is a public service, as far as they are concerned, because they could make a lot more money elsewhere.

Q284 The Chairman: We have certainly heard that.

Lord Carswell: It should be regarded primarily as that, and also as a means of getting experience. As to whether the Lord Chief Justice should continue to do it, I would defer to Lord Woolf; I would not add anything on that.

Transparency is obviously desirable because the public cannot know, and the tenor of people’s thoughts these days is that they feel they have a right to know. This is not to be gainsaid. This was the whole mainspring of the Judicial Appointments Commission that had been discussed for years and years. I have no experience working in it, and so I will not attempt to comment upon whether it could be done better in different ways, but I would simply say yes, maintain transparency. Try to maintain simplicity, because that helps for quicker appointments. The longer it drags on, the more difficult it is for candidates and the more off-putting it is to candidates. I think Lord Kerr mentioned to you a most unfortunate case recently in Northern Ireland about an appointment which went sadly wrong. It dragged and dragged and dragged and in the end the candidate was not appointed. There is now no chance he would renew his application.

The Chairman: The Committee is obviously very interested in the present role of the Lord Chancellor, and you have made some interesting points already.

Q285 Lord Pannick: Lord Woolf has already mentioned the importance of ensuring that politics is not involved in the appointment process. Now we have a Secretary of State for Justice—a different animal from the traditional Lord Chancellor—is there any continuing value in having the Lord Chancellor being part of this process? Would it not be more sensible to transfer his functions to the Lord Chief Justice?

Lord Woolf: Again, I am going to say no. What was behind our proposals in the Constitutional Reform Act was to keep the separation while giving the Lord Chancellor and Secretary of State a clear but very limited role. It is important that that connection should be maintained. It is important. It may be one that is very limited, but it does mean that the Government cannot entirely wash their hands of what is happening.

My hope would be—and I am sure this would be the case—that there is a great deal of opportunity, if he or she thinks it is necessary, for the Lord Chancellor to influence the
views of the judiciary, not directly the Appointments Commission. I suspect that that indirect influence is very important. I would also consider it perfectly appropriate for the Chairman of the Appointments Commission—whereas there should be no power direct to them—to have informal conversations with the Lord Chancellor, and pay real attention to his or her views, while at the same time not having the Lord Chancellor back into his former position where he could dictate the situation. We should keep what we have, and I would even go so far as to say that we should be cautious about removing his responsibility to recommend to the Prime Minister. In my view it is not just a formality. There are situations where it is important the Lord Chancellor should express his concerns about a particular appointment, and the system allows that. My view is that the real difficulty, where we should be striving to make progress, is not in matters of machinery of that sort but in the question of how we adjust the system to eventually produce better diversity.

The Chairman: I am sure we will want to return to that, but Lord Pannick, did you want to follow up?

Lord Pannick: Shall we hear Lord Carswell’s thoughts?

The Chairman: Yes, indeed, but I wondered if you had a subsidiary question?

Q286 Lord Pannick: Can I just follow up on that point? We heard evidence from Jack Straw that if publicity was given—as there was in a particular case—to a decision that he has taken, asking the Appointments Commission to think again, there is a very real political price that the Lord Chancellor has to pay. I am concerned that that factor or concern about such publicity will inhibit the Lord Chancellor, because of his other political role, from playing a full part in this process. Therefore might it not be better to have the Lord Chief Justice performing this role without having to pay a political price?

Lord Woolf: I do not think we should allow the risk of publicity to affect what I think would be a better system. If publicity is a problem, cut out the opportunity for publicity. We want to discourage the Lord Chancellor being in a situation where the information about his views comes out. He can have this role without it becoming a public issue.

Lord Carswell: I am doubtful about the wisdom of retaining the power of the Lord Chancellor to reject an appointment. As I pointed out under the Justice (Northern Ireland) Act 2002, the Judicial Appointments Commission produces one name; that cannot be rejected, although the First and Deputy First Minister can ask the JAC to consider it again. If it does and comes to the same conclusion and sends the same name back, it has to be accepted. It might form a model that may be considered. It is difficult for a Lord Chief Justice, because there must be an intermediary as well somewhere. Appointments are made by the Queen on the recommendation of the Minister. Is the Minister to be a cipher? The Minister was a cipher in the old, old days in Northern Ireland before Lord Irvine, when Queen’s Counsel were nominated, virtually, by the Lord Chief Justice. After consultation the name was sent to the Prime Minister who put his name to it, and it went to the Governor, who issued the patent. Whether that is a good idea or not, I leave it with you.

Q287 Lord Renton of Mount Harry: I understand where you are both coming from, but I find it very difficult to refine and define appointments in the way you would like to. I was an MP for 24, 25 years; I come from that background. I think it is very difficult for

something like the Constitutional Reform Act to come along, to go through Parliament if in fact a committee of Parliament of some sort has not had much knowledge in advance. You, Lord Woolf, are very hesitant, I understand, of politicians having any say in how judges are appointed, but it is not easy to keep Parliament totally out of it. I feel that possibly the judiciary in this sense has to move on in some way.

Lord Woolf: Confidence in the judiciary depends also on confidence in the appointments system. Unless one can be sure of doing that, one is making the system weaker, not stronger. What I am saying is that we do not think that Parliament should be kept out of it entirely. We think that the Lord Chancellor should have a responsibility. He is entitled to say to Parliament, “My responsibility is very limited, so do not blame me, blame the Appointments Commission”. I think he would be much better defending the Appointments Commission, because it often has very good reasons for doing what they do, although that may not be obvious. I agree with you, Lord Renton, that it is very difficult to achieve, but I think we are still in the early days of seeing how the Constitutional Reform Act changes are settling down. At the moment, I think they are working remarkably well, considering the scale of the change. There is room to make changes, but the principle behind them should be retained.

Q288 Lord Renton of Mount Harry: You are, then, always looking for a Lord Chancellor who can be two characters not one, are you not? He has to be a politician; he has to be able to explain what is happening to his party, to the Commons and Lords; and yet also, in a sense, he has the final choice of the judges. That is inevitably playing two parts.

Lord Woolf: Forgive me, but I do not think he is the final arbiter. That is why I am in favour of the system now, because he has a limited power to require a second name to come forward, but he cannot initiate a name himself. It has to come through the appointments system, and he has this ability to get a second choice. That is the only power he has. The second name still has to be put forward by the Appointments Commission. If he does not like the second one, he is stuck with the first one.

Lord Renton of Mount Harry: Does the Prime Minister have any part to play?

Lord Woolf: No, but in this country, as I understand our constitutional system—and you are in a much better place to judge it than myself—even though the role, in practice, is merely symbolic, I still think it is very good indeed that we have the symbol from a constitutional point of view. Why have Her Majesty? I can tell you that junior judges, for whom I used to be responsible, were not ones that she used to make. They were very anxious that the monarch should still make their appointments, because the nature of the office is elevated by the fact that Her Majesty is involved. I think the same is true about the Prime Minister and the Lord Chancellor. We should not be too cavalier about interfering with these symbols. The symbol has got meaning.

Q289 Lord Crickhowell: Like Lord Renton, I am not a lawyer, I am a former Member of Parliament. We have been listening to a lot of evidence about this issue; Jack Straw believing
that in order to get more accountability for the executive role there should be a greater involvement in some way. We have also heard very powerful arguments about not having an interview system, or even rejected one suggestion that we should have perhaps the chairman of two committees, this Committee and a Commons committee, on the appointments panel. But I have been listening to Lord Woolf’s cautionary words and trying to reconcile them with the letter we have just received from Kenneth Clarke and the consultation document that has just been issued. His words are, “Giving the Lord Chancellor a more meaningful role in the most senior judicial appointments”. It says, “Given the importance of these roles, I believe there is a clear case for providing accountability of the executive to express a view in terms of its accountability for public and Parliament for an effective justice system”. Then the consultation document asks, “Should the Lord Chancellor’s role in the most senior appointments be made more meaningful by allowing him an opportunity to comment on the shortlist of candidates before the interview stage?”. There is this pressure for a more meaningful role, and yet I think I understood Lord Woolf to suggest that he would be very reluctant to go much further than we have already gone. I am left uncertain about how we reconcile these two positions: the cautionary position, and the position being expressed by Kenneth Clarke and the consultation document. Can you comment and give me some guidance?

Lord Woolf: Lord Crickhowell, I would like to be able to help you. I see a conflict between the position that the present Lord Chancellor is taking and that taken by Jack Straw. Jack Straw says, “It is very difficult for me to express any view, as it becomes known and then my status is adversely affected because the Appointments Commission do not take any notice of me”. Mr Clarke is saying what he would like to be able to do is to make more comments. There are occasions when they would really like to change what is proposed by the Appointments Commission. It has only limited power to do that, but he does have some power and it is confined. I think it has to be confined, because once you open the door to greater involvement, the door will be pushed further and further, and we will be back in the situation where there is a risk, one way or another, of the political system determining who should be the judges. That would be unfortunate, not least because they have not an opportunity of knowing the full picture that the Appointments Commission knows. I understand why it must be frustrating for the Lord Chancellor to be in the position he is in now, but where his approach leads to is a situation I would not like to see.

Q290 Lord Crickhowell: Sorry, if I could just follow up: it is surely not just the feelings of the Lord Chancellor we are concerned with; it is the feelings, rightly or wrongly, that the great public outside suddenly sometimes sees the judiciary as somewhat detached, and feel that the executive and elected Parliament must have some ultimate responsibility for the effective working of the judiciary. We are groping somewhere in the middle as to how you would achieve that without compromising the very important principles you have spelled out.

Lord Woolf: What I am saying is that there is a tension; there is no doubt about it. I would be very happy to consider some other line that would seem logical and achieve what we are seeking here: that the appointments should not be able to be dominated by the political process.

Lord Carswell: If I could just issue a side note to that, I would be strongly against the suggestion that has been made by some people that the appointor—be it Lord Chancellor or whoever else—should have a shortlist of three candidates. You may be aware that that or
something similar has been done in the Republic of Ireland for years; it results in a political appointment, unquestionably. It has been done there, and I fear the same over here. It would be very unfortunate. I just want to emphasise that.

Q291 Lord Goldsmith: The debate that has been going on in relation to the role of the Lord Chancellor has led me sometimes to think that the one thing that seems to be common ground is that we are not in right place. Either there should be less involvement for the Lord Chancellor, which is probably Jack Straw’s position, or there should be more, which seems to be what Kenneth Clarke is coming out with. I wanted to ask a question in relation to not the totality of judicial appointments but, as Kenneth Clarke has done, on whether there is a role for a different position in relation to certain appointments. I particularly wanted to ask about that and the Lord Chief Justice both because of the great experience you both have in relation to that in two different jurisdictions. That is the job that carries with it more responsibility for the administration of justice than any other in the judiciary, certainly more than the President of the Supreme Court. Is there therefore a case for a greater role for a government minister in the appointment of that position, because of the legitimate interest the government have in the running of the system as opposed to the illegitimate interest in the decision of individual cases?

Lord Carswell: You have put your finger on a difficult one, Lord Goldsmith, because—I am not sure about England and Wales, I would not comment at all—this may have reared its head elsewhere. As one of the witnesses said, if you had a Lord Chief Justice who was anathema to the government of the day it would not work. One does not like to think that that would simply mean the candidate to be appointed Lord Chief Justice agrees with the government politically, but if you have a situation—which I hope would not develop too readily—where the Lord Chief Justice proposed simply could not work with the government because his or her ideas were so far away from the trend of government as a whole, then there would be an impasse and room for a lot of dispute. The administration of justice would suffer. It is right to say that in some carefully balanced and thought-out way a government at the top end should have the possibility of looking at the appointment and say, “No comment”. I think that does happen in Northern Ireland; it is not spelled out, but I think it does. I wonder whether it had an adverse effect at one time, a long time ago—I am thinking of a particular case, which is history.

Lord Woolf: There has to be a working relationship between the Lord Chief Justice and the Lord Chancellor. It is absolutely critical that that should be the case. In my own view—and the others may not take this view—because of the responsibilities the Home Secretary has, it is also important that the Home Secretary has a good working relationship with the Lord Chief Justice. Whereas there can be a different position—and I know that Lord Bingham took a different position with regards to the President of the Supreme Court—I do not believe that applies to the Lord Chief Justice of the day. There is a very close relationship.

Lord Carswell has given you a warning about what happens about lists—if you provide a list of names. I can see a very real difficulty about lists of names going to the Lord Chancellor. But what we have now is the situation of the Lord Chancellor being able to accept, in effect, one of two candidates: he can reject the first candidate, and then a second candidate goes through. I was wondering whether I am absolutely right on that: I have the Constitutional Reform Act in mind here. It is always necessary to check your facts; I may be wrong. If I am wrong, I would not be adverse for the two, the Lord Chancellor being able to get a second
name. That should surely avoid confrontation that is being speculated upon by Lord Goldsmith, as I understand what he was putting. The number of candidates that would seriously be considered for the role of Lord Chief Justice at any particular time is going to be limited. It is usually going to be limited to the very most senior positions below the Lord Chief Justice. If the system is working, the wriggle room that was being looked for to avoid that situation is built into the system now in practice.

**Q292 Lord Shaw of Northstead:** The only point I wished to make goes rather differently. There is no suggestion in our discussion that Parliament itself, by way of a Committee or something like that, should have any authority or any power of guidance on the appointment. Is that agreed?

**Lord Woolf:** As far as my position is concerned, I would agree with you.

**Lord Shaw of Northstead:** Voices have been raised in earlier meetings.

**Q293 The Chairman:** Lord Carswell, you made your point in your written evidence; would you want to make it here?

**Lord Carswell:** Yes; I have set out as briefly as I can the reasons I think a committee hearing would be most unfortunate. What are they going to ask? One starts with that: are they going to ask, as in the United States hearings, their views on particular issues, and what would they seek to get? In the United States, it is very clear what they seek to get: they seek to get somebody on the liberal side or somebody on the conservative side, which is basically the divide between the two parties there. It is a lot more complex here. But what would politicians be seeking to find out, and in the nature of things would they be seeking to find somebody who held views similar to their own? The other thing is you can coach people; you can coach them to play a dead bat to those things. Justice Sotomayor did that with extreme skill, I understand. But the possibility of inappropriate questions is very serious and very high, I am afraid. I think it was Professor Brice Dickson who slightly delicately expressed a degree of horror at the idea of the Assembly members in Northern Ireland having a say in it, which I have to say I understand.

**Q294 Lord Renton of Mount Harry:** I find that a bit unfair; I saw it in the note you sent us and I put a cross against it. You say there is a high likelihood that members of such committees would ask inappropriate questions. Is that really so? If you had a bunch of senior MPs, for example, on a committee, would they not be able to ask some very intelligent questions? For example, asking why are there not more women judges at the moment; why are there not more black judges; why has this taken so long, and so forth? I find there is still almost a wish for secrecy within the judiciary, and hence this unwillingness to expose yourselves a bit to a parliamentary committee. I do not think it would be harmful, and I do not think the questions necessarily would be stupid.

**Lord Carswell:** Lord Renton, I hope you forgive me for saying but I think your example does tend to point to some of the problems. What is it to do with the candidate for the High Court about ethnicity, transparency and the appointment of various types of people? This is my problem: what areas could they properly look at, and how can you stop a member who is less responsible than the members of this Committee I am sure are from getting into areas that should not be explored?

**Q295 Lord Irvine of Lairg:** Lord Carswell, my experience of committees in Parliament is that there is no controlling them at all; that any individual members will ask any questions that they choose. Do you not think that if there were to be some kind of parliamentary hearing into the suitability of an appointee to high judicial office, inevitably there will be questions to the candidates as to how they would decide future contentious cases? Would that be desirable?

**Lord Carswell:** That is exactly what they ask in Washington, and I cannot see that being other than the case here.

**Lord Woolf:** I would just add if I may that once they are appointed Chief Justices now will accept proper invitations to come and explain what is happening within the judiciary and answer the questions of committees. Indeed, you have heard Lord Judge. There is no difficulty about that. There is a difference in finding out why things are not happening more and being able to influence what has happened so as to achieve an end from being involved in the appointments system. It is very good that the message we have to the world outside is in this sphere of jurisdiction, unlike the great majority of jurisdictions, that there is clear water now between the executive and the judiciary.

**The Chairman:** I am very aware of the time that you are kindly giving to us, and there are certain other major topics so I think you might have to abandon—the controversy of Parliament and parliamentary hearing—for the time being, but other proposals have been put to us of one kind or another for change.

**Q296 Lord Norton of Louth:** It is perhaps appropriate I now follow up my asking about diversities, and this is perhaps the more appropriate forum for doing it, and how you encourage career progression within the judiciary. Lord Carswell, in your paper you mention the problem about women being able to progress, not least since they take career breaks. One of the points you made was perhaps part-time working, but you point out it would only operate at lower tiers. However, in the consultation paper we have, the prospect is raised of salaried part-time work being extended to the High Court and above. Would you have a view on that?

**Lord Carswell:** A very clear view; I think Lord Woolf can follow it up from his very wide experience here, but I know that a lot of High Court work requires, let us say, a six-week, or even a six-month, trial. If one portion of the judiciary is unable to undertake that, it causes obvious difficulties. In the lower tiers, it is possible to do quite a good deal of part-time working. I would be strongly in favour of women who are able, who have had experience and practice and have had to leave it for family reasons, but who would like to get back in as soon as possible, to accommodate them in that, and, as I said to Lord Woolf in
conversation, put a star against their name. When their situation changes in their family and
they are able to undertake full-time work, have a look at them and see whether they should
not really be in a higher tier. I would be all for that.

We ought to be more ready, more adventurous and more open, in that respect. We have
had no women High Court Judges in Belfast: we have had some excellent county court
judges and below, and a very satisfactory proportion. I would have liked to be able to
appoint women in my time, but as I told Lord Irvine more than once, there was not one.
That is historical, because the women started to come through in Northern Ireland much
later than in London. They have now reached the stage where there are women with
sufficient experience and ability to be considered. I understand, and I maybe should not get
into detail about this, but I understand from my successors that they have put out soundings
and for reasons of family, security and where they can live and where their families live, he
has had refusals. It is regrettable, but there are factors that do not necessarily affect male
candidates. Having said that, I would have been very pleased if I had been able to do that: to
make an appointment.

Q297 Lord Norton of Louth: I take it Lord Woolf agrees.

Lord Woolf: I do agree, and what I would say is there probably is scope for the best
assistance to maintain the links with those female members of the legal profession who take
a break from the profession, which will avoid them getting into a position where they are
naturally, after a few years, worried about being out of touch. First, we should identify,
earlier on, those who might well be suitable for appointment—if of course there are already
judges and they leave for a time that should be possible. That is much easier to organise than
flexible or part-time working, because that is a problem with the senior judiciary. Sadly,
when they take a break, we lose them for good. That is something we cannot afford.

Q298 Lord Norton of Louth: Is there something in addition to part time, anything else
that we should be considering that would facilitate progression for women or others within
the judiciary?

Lord Woolf: What I am really saying is the continuation of training during their absence is
what it comes down to.

Q299 Lord Powell of Bayswater: I was going to briefly ask about retirement ages. Lord
Carswell’s paper expressed a strong view on that. I just wanted to test out Lord Woolf on
the same subject—as to whether, at a time when 70 is regarded as late middle age and the
pension age is constantly advancing, it is sensible to automatically put out judges with the
rubbish at 70?

Lord Woolf: I would strongly support the same position as Lord Carswell, as indeed I
campaigned when there was a particularly obvious candidate who would be adversely
affected by the 70, for the age to be raised to 75.

Lord Carswell: The other half of that is the inability to ask a retired judge of 75 upwards to
sit. There have been so many examples we all know in recent years, and I am sitting beside
one, of retired judges who are 75 who have immense potential and could make a very
valuable contribution, and it would also be economical.
The Chairman: If we may take a few minutes more of your time, we should specifically ask about the Supreme Court, because that comes up in many of the inquiries we have undertaken in the consultation.

Q300 Lord Hart of Chilton: A quick question first of all: do you agree that the President and Deputy President of the Supreme Court should not be involved in appointing their successors?

Lord Carswell: In principle, it is regarded as a bad thing for one person to be directly involved in a successor’s appointment. But he must have a very valuable opinion, because the President knows better than anyone else what the job involves; he or she has worked closely with the other 11 members of the Court and has obviously a very well-informed view of their abilities. But I would agree that the President should not sit. As to the Deputy President, I have not a strong view on that. The Deputy President may be a candidate for President, in which case it is obvious, but somebody should be on the appointing committee who has worked for a serious length of time with the other justices, because the other justices are the most knowledgeable about how useful and how well X, Y or Z would perform the job of President. You must have somebody from the Court on the appointing commission. Where you go after that I do not have a very strong view, but I think the chairman of the JAC should certainly be there. That is valuable and it assists the question of transparency, so the public have a window into the process and it is not a closed process. After that, I would not express a dogmatic view, except to say that I do not think it has worked to put on the chairman or the nominee of the two other appointing commissions for Scotland and Northern Ireland. They do not know anything about the particular candidates, unless it is one of their own, in which case they should have a role somewhere. But I think the whole question of the makeup of that appointing commission should be rethought.

Q301 Lord Irvine of Lairg: Do you think the requirement for some Supreme Court expertise on the body that has to decide who is to become a new Supreme Court Justice could be served by having a recently retired Supreme Court Justice on the appointing body?

Lord Carswell: I do not see why not.

Lord Woolf: I do not see why not.

Q302 Lord Hart of Chilton: There have been one or two other observations in relation to this. For example, the suggestion that there should be more lay representation on the panel for picking new justices of the Supreme Court. There have been suggestions that the Lord Chancellor himself should play a part on the panel. I rather gather from what you have said earlier that that would not meet with your approval, but what about more lay representation on the panel?

Lord Carswell: It depends what you are asking them to contribute. The difficulty that any lay member on any judicial appointing committee has is they do not know the people, so they...
are dependent to a large extent on paper and interviews. We all know how misleading interviews can be. Track record is really the most useful thing, and people who really know the track record of the person, their strengths and weaknesses. But who are the best persons for this? The Lord Chancellor should at least be consulted. Whether he should be a member, I have not got a strong view on that.

Lord Woolf: Perhaps I may just take the last point mentioned by Lord Carswell. What might be an improvement, having listened to the discussion going on, is if the Lord Chancellor was thought to be appropriate he would know who the candidates were likely to be for the Presidency and so he should have an ability to express a view on the appointment, and that would be taken into account by the body that appoints. I see no difficulty in other Supreme Court judges being on the panel who would not be appointing their successors, so to speak. We should observe, so far as we can, the correct appointing principles: not appointing your successor is generally accepted to be that. I know that Lord Phillips does not think it is appropriate for him to be there, and that carries great weight with me. But I do think we might perhaps look at having some others on the panel. What do you mean by a lay person: do you mean not a judge? I would say there is plenty of room for a senior, very respected academic lawyer being on the panel, because they are in the position, as well as the others to whom we have referred, to assess the judgments that have been given and the activities of the candidates. That would be something that could be done if it is thought that this is necessary. That is as far as I would go.

Q303 The Chairman: Thank you both very much, you have gone a very long way and we have taken a great deal of your time. It has been very valuable indeed. Were there any last points that you felt we had not addressed at all that you had hoped you would be able to make?

Lord Woolf: If you forgive me, I will just take one minute to say something I do think is important. In the Constitutional Reform Act there is a very close relationship between the fact that merit has to be the prime consideration, and diversity. When you are making an appointment, even when you are applying merit, diversity can be part of merit. Speaking for myself, you want the best person to fill the vacancy. In order to fill the vacancy, if it is one of the High Courts, which sit in bank, it improves the merits of, for example, a woman candidate, or a black candidate if the Act itself requires the appointments to take into account the need for a woman on the bench, or the need of somebody from minorities.

Lord Carswell: May I detain the Committee for two minutes longer on the same point, because I do have very clear views? I cannot quite agree with Lord Woolf: to call diversity an element of merit is incorrect in principle, but diversity has an important role to play in two ways. One, you need the skills, knowledge and experience that diverse members of society can contribute; you need it less than in Parliament, or a deliberative or legislative body, for obvious reasons, but you still need it. The other is the public perception. When I had 12 judges in my team it would not have mattered to me one button whether 11 of them had been from one community and one from the other. I would have trusted them all to do the job perfectly well. The general public might not have, and it was important—without making appointments deliberately on community grounds—to keep an eye to the overall balance. It so happened in my time it was satisfactory and the situation never arose at all. But it is something you cannot neglect from that point of view. Therefore, if the public confidence requires an element of people other than the traditional type of person, then you have to
look at that. But I do not think you call it merit. If you get a situation—we had this in
appointments to the Lords—where sometimes when you are being consulted about the next
appointment, A is so clearly the most able person that you could not appoint anyone else.
That has happened; I have known that happen. Another occasion you might have A, B and C;
you cannot call them equal, but they are all very appointable, though they have different
qualities, but one fills a need for a particular skill. I did see that happen at one appointment
because we had exactly this situation; we appointed A, because A filled a need that we had.
So do take it into account, but do not call it merit.

Q304 The Chairman: We have come full circle to where we began about transparency
and perception, so I think you have very clearly circled our arguments. I am very grateful
indeed; thank you very much.

Lord Carswell: Thank you for your courtesy, my Lords.

Lord Woolf: Thank you as well. Sorry we were not able to be more concise.
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
Chartered Institute of Legal Executives – Written Evidence

Introduction

1. This response represents the views of The Chartered Institute of Legal Executives as an Approved Regulator (AR) under the Legal Services Act 2007.

2. We welcome the opportunity to respond to the House of Lords Select Committee’s call for evidence on the Judicial Appointments Process. Amongst other things, increasing the diversity of the judiciary to reflect our communities is vital in the need to continue to deliver effective justice. The Chartered Institute of Legal Executives applauds the various commitments by the government and other stakeholders in the pursuance of this important initiative.

3. The Chartered Institute of Legal Executives is focused and committed to equality and diversity in relation to the members it represents, the staff it employs and its stakeholders. The Chartered Institute of Legal Executives has already been recognised by the Ministry of Justice (MoJ) as a diverse organisation which has an “all are welcome” approach to its members, turning away no one via subscribed mandatory requirements but ensuring progress is achieved through vigorously tested capability. The Chartered Institute of Legal Executives has thrived over the past 40 years in recruiting those interested in pursuing a career in law and yet at the same time ensuring across to all, regardless of social background or status.

Greater Diversity in the Judiciary

4. The Chartered Institute of Legal Executives is of the view that diversity and quality go together. The higher the pool from which lawyers are selected the higher the quality of the profession (and the bench).

5. Judicial legitimacy rests on public confidence in the courts, in the judiciary and in their judgements. Public confidence in the court depends upon judges; and in their selection, the court is dependent upon the selection process of the judiciary. It is therefore incumbent that the judicial selection process does not prevent meritorious candidates with different backgrounds or characteristics from being adequately considered for appointment. Otherwise, there is a very real risk:

“That an unrepresentative judiciary may result in a loss of confidence in the system, all the more so when judges are called upon to apply community standards as part and parcel of their daily work. Once that is acknowledged, as it must be, it is important that efforts be made to ensure that the judiciary is more representative than it is at the present time and that its composition is fairly balanced”36

6. In view of the above, The Chartered Institute of Legal Executives supported the inclusion of the term “diversity” as part of the Judicial Appointment’s Commission’s (JAC) amended merits criteria in the appointments process.

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36 Mason, Bastion 7
7. Although the need for greater diversity in the judiciary is now generally accepted, there is no real consensus as to what is the right system for judicial appointments. Therefore any changes to the existing arrangements should be judged against the fundamental principles for making judicial appointments, and against the doctrine of the separation of powers as exists in Britain.

8. The fundamental principles should continue to be:

- An independent judiciary
- Appointment on merit
- Equality
- Openness and transparency
- An efficient and effective system

9. Section 63 (2) of the Constitutional Reform Act 2005 (hereinafter “the 2005 Act”) enshrines the important principle that appointments ‘must be solely on merit’. Merit and diversity are not mutually exclusive objectives. Baroness Prashar observed “there is no question of compromise in the name of diversity, because there is no need to compromise. Merit and diversity are not incompatible. For us the diversity is the search for merit”37.

10. The Chartered Institute of Legal Executives is of the view that diversity will widen the talent pool from which to appoint talented applicants regardless of their ethnicity or background. Indeed, this was evident in the talent pool being widened to include Chartered Legal Executive lawyers and the appointment of the first Chartered Legal Executive judge in August 2010.

11. 90 Chartered Legal Executives applied for judicial posts in selection exercises concluded between April 2009 and September 2011; 43 for deputy district judge (civil) positions; one to be a district judge (magistrates’ court); and more than 40 to be tribunal judges. We were encouraged by the high number of attendees who would consider a judicial career following attendance at our recent judicial workshops.

12. However, while our already diverse membership - with 74% women and 24% of students from BAME groups - could help improve judicial diversity, Chartered Legal Executives face the same problems as solicitors in that their primary duty as fee earners is considered by some firms to be incompatible with a judicial career. This requires a change in law firm culture that sees a judicial career as benefiting a firm similar to barristers chambers.

37 Baroness Prashar speech at the LSE, Student Law Society, 22 February 2007.
13. Evidence also appears to suggest that candidates would like to see the appointments process expedited. A long delay not only undermines a candidate’s prospects with their employer but also becomes an endurance test.

14. Save for a number of changes to the appointments process as per the recent Ministry of Justice proposals in its recent consultation on judicial appointments, the 2005 Act really needs more time to “bed in” and there is no evidence that major change is needed. As such, we continue to support the general principles of selection, but with greater transparency and accountability.

38 Appointments and Diversity: A Judiciary for the 21st Century
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.” 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.  

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. Greater communication might in turn promote greater understanding and comity.

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. 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

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40 Id.
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.43

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; 44 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). 45 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.” 46 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

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,

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.

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
Commercial Bar Association (COMBAR) – Written Evidence

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 – Written Evidence

Submission to be found under Charles Banner
Council of Appeal Tribunal Judges – Written Evidence

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
Nicholas Davidson QC – Written Evidence

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.

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
WEDNESDAY 6 JULY 2011

Members present

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

Examination of Witnesses

Witnesses: Professor Cheryl Thomas, Professor of Judicial Studies, University College London, Dr Erika Rackley, Senior Lecturer, Durham Law School, University of Durham, Professor Alan Paterson, Director, Centre for Professional Legal Studies, University of Strathclyde, and Professor Brice Dickson, Professor of International and Comparative Law, Queen’s University Belfast.

Q1 The Chairman: Good morning and thank you all very much for coming. This is the first oral evidence session of this particular inquiry. You have all had a copy of our attempt to work out the parameters of this inquiry, which could obviously be extraordinarily broad or fairly narrowly focused. As the Constitution Committee, the constitutional implications of judicial appointments are obviously our priority, although we realise that this is an area that is difficult to define and confine. You may also have seen, for reasons that may have nothing to do with this inquiry, that this has hit the front page of the Times this morning, but I do not want that to distract anybody from the realities of the inquiry. We have probably until about 11.45 am to take evidence, to give you a guide about how much time there is in terms of your contributions. I would like to invite all those who would wish to do so to make a brief opening statement, but that is certainly not an obligation. After that, because it is part of our Code of Conduct, those Members of the Committee who have declarations of interest to
make will do so before we start the questioning, to give you an outline of the procedure. I think, Professor Thomas, you have an opening statement that you would like to start with.

**Professor Cheryl Thomas:** I would simply like to highlight two main points as background to discussion today. The first is the peculiarity of the existing judicial appointments system in England and Wales and the second is the value of learning from other jurisdictions. The current judicial appointments system in England and Wales reflects a legacy of two decades of competing demands for, and resistance to, change in the appointments process. In the end, this produced a very peculiar appointments system in the Constitutional Reform Act. On the surface, the Judicial Appointments Commission appears extremely similar to selection bodies used elsewhere, but in reality it operates under a unique set of rules not used by any other appointments commission. One objective in creating the JAC was to increase judicial diversity. By 2005, other jurisdictions had been tackling diversity for decades. Their experience has shown that there are, first, a number of successful strategies, and, secondly, several key lessons to be learnt if a country wishes to achieve greater diversity in the judiciary. This experience should have made it clear that the peculiar appointments system created in the Constitutional Reform Act would make these successful strategies for increasing diversity both less effective and harder to implement here. I would be happy to elaborate on any of those points in the discussion later.

**The Chairman:** That is very helpful, thank you Professor Thomas. Dr Rackley, do you wish to say anything at this point? Professor Paterson, do you want to?

**Professor Alan Paterson:** No, thank you.

**The Chairman:** Thank you very much, Professor Thomas. I ask those Members of the Committee who have declarations of interest to make them.

- **Lord Irvine of Lairg:** I was Lord Chancellor from 1997 to 2003.
- **Lord Goldsmith:** I am a partner at an international law firm, practising law. I am chairman of the Access to Justice Foundation and president of the Bar Pro Bono Unit. I was Attorney-General between 2001 and 2007. I was previously chairman of the Bar Council and had involvement in judicial appointments. I am still a Crown Court recorder and authorised to sit as a deputy High Court judge.
- **Lord Pannick:** I am practising member of the Bar and I write occasionally on these topics.
- **Lord Hart of Chilton:** I am a solicitor, although non-practising. For 35 years I was a partner in a firm called Herbert Smith and thereafter I was a paid special adviser to two successive Lord Chancellors: Lord Irvine and Lord Falconer. My wife is a practising solicitor and a former recorder.

**Q2 The Chairman:** Thank you all very much. As I said at the beginning, this is the opening session of what is clearly a very broad-based inquiry and one which will, I am sure, go on for several months—probably until Christmas. I think we should start with basic principles. Maybe I could ask Professor Paterson first: what are the fundamental constitutional principles that should lie behind judicial appointments?

**Professor Alan Paterson:** I am not sure whether I am the best person to answer that. You need to have an appropriate balance between judicial independence and judicial accountability. If, as in this jurisdiction, we have, over the last 30 years, conferred more and more powers and responsibilities on the judiciary—and they have played a role in that—and if we have pushed for a separation of powers in place of the older balance of powers, then
we have created a more powerful judiciary. Therefore you have an accountability problem that goes with that in a democracy, which of course has to be balanced against the paramount need for judicial independence. So you have to hold these two in tension. The best way of getting accountability involved in that tension is at the judicial appointments stage. So you need a balance between accountability and independence; it has to be a fair, open and transparent procedure and it has to be equal-opportunities appropriate.

Q3 **The Chairman:** Professor Dickson, would you like to add to that?

**Professor Brice Dickson:** I would endorse what Professor Paterson has just said and add that, broadly construed, we are talking here about the rule of law. Principles like transparency and giving reasons for decisions are, to my mind, all part of the rule-of-law principle. I think that should be very evident in any good judicial appointments system.

Q4 **The Chairman:** Professor Thomas or Dr Rackley, do you want to add to this general point?

**Professor Cheryl Thomas:** We also need to consider legitimacy. We are not just talking about constitutional principles—we are really talking about democratic principles. In a constitutional democracy, the legitimacy of unelected individuals—judges—to adjudicate on the laws passed by elected officials requires that elected officials are in some way involved, particularly in the appointments process. I agree with Professor Paterson there. There are no agreed rules for democracies about the nature of that involvement by elected officials. It is for each jurisdiction to make that determination.

**Dr Erika Rackley:** I would add, in relation to what Professor Thomas has said, that part of that legitimacy is that the judiciary is diverse and that the people wielding its power are diverse and representative of the society itself.

Q5 **Lord Goldsmith:** Professor Paterson, you said, intriguingly, that the best way of getting accountability is through the appointments process. Could you elaborate on that? It ties in with what Professor Thomas said as well.

**Professor Alan Paterson:** I agree entirely with what Professor Thomas says about legitimacy, and it is in my written evidence. The tension between accountability and independence means that every accountability measure that you try to bring forward also runs into the bulwark of judicial independence. You have to come up with accountability measures that do not threaten judicial independence. To my mind, that is most effective at the appointments stage because I do not think that that does threaten judicial independence. Trying to make judges accountable for their decisions later on is very difficult and rightly we make it very difficult to remove a judge for misbehaviour or anything else. It is very difficult to bring in accountability in that strong sense at a later stage. There are other forms of accountability. Transparency is very important. Andrew Le Sueur has written about the various accountability mechanisms. The most powerful one is at the appointments stage.

Q6 **Lord Goldsmith:** This ties in with what Professor Thomas said about the need for elected officials to be involved in the appointment process, which I understand to mean a greater involvement of elected officials than at the moment. We have a system that, broadly speaking, is supposed to be relatively independent and non-elected. Are you talking about political appointments in the sense that elected politicians decide on the qualities and indeed the views of the people they want to see appointed?
**Professor Cheryl Thomas**: I certainly did not mean to say that there should be greater involvement on the part of elected officials because there is something wrong with the system now. I am suggesting that every jurisdiction decides the extent to which their elected officials are involved in the appointments process. That usually takes the form of the executive playing a significant role, usually in the final selection of nominees that are put forward by a quasi-independent body. That member of the executive is accountable to the legislature. Usually the independent body is in some way accountable to the legislature as well. I want to correct any misperception that I was suggesting that there should be more involvement on the part of elected officials. There are many opportunities for involvement.

**Lord Goldsmith**: Professor Paterson makes the point very clearly that over the years for a number of reasons the judiciary has become more powerful and has more responsibilities. One of the areas resulting from the expanded jurisdiction of the courts is the responsibility to make decisions in key areas of political and social policy. To what extent does the increased role of the judges lead you to the view that there needs to be a process of appointment in which either elected or executive members are more involved or we know more about the views and politics of those who are up for appointment?

**The Chairman**: I believe that Lord Shaw wants to make a supplementary point in this area. Perhaps the two could be addressed together.

**Q7 Lord Shaw of Northstead**: This raises a fundamental point which appeared in Dr Rackley’s paper. She said, “The judiciary is stronger, and the justice dispensed better, where its decision-making is informed by a wider array of perspectives and experiences”. Does that not militate against a career judiciary? I think that that is one of the basic starting points.

**Professor Alan Paterson**: That is about four questions in one.

**The Chairman**: I am sorry, we may have slightly defocused. It is important to take the general points together and I am sure you have them clearly in your mind.

**Professor Alan Paterson**: The school of thought is that the judiciary has acquired more power over 30 years primarily through Parliament itself conferring more powers on it, but it is not just that because the judiciary has pushed for more control or influence in the running of the courts. It is now responsible for running them in Scotland. Further, the transformation of judicial review as a remedy has taken place largely at the hands of the judiciary. To my mind, there has been a shift in the balance between the different branches of government, with a small “g”, which raises questions—for example, the push for a separation of powers and to take the executive out of judicial appointments created a vacuum. It was perfectly understandable that the judiciary thought that it was the best group to fill that vacuum, and in many senses it was. The judiciary knows most about what the qualities of a judge are, the best systems for judicial appointments and so on. The problem comes from us being a democracy. In a democracy, one branch of the state cannot have too much influence over the judicial appointments process, and you cannot have one branch becoming effectively self-replicating. Tom Legg, the former Permanent Secretary in the Lord Chancellor’s Department, stated that it has nothing to do with disrespect for the judiciary to point out that in a democracy: “No branch of government should be effectively self-replicating”. That is the difficulty.

There is an argument for a slightly increased role for the executive, and I shall come back to that when we talk about diversity, but there is also a role for parliamentarians to get...
involved in pre-appointment confirmation hearings, which presumably we will come on to as well.

The Chairman: I think Lord Shaw wanted to say something about a committee so we might, as it were, park the question about the career judiciary. I am sorry, I interrupted you. I wondered whether you had that point in mind; namely, that you were talking not about Parliament in general but a specific committee.

Q8 Lord Shaw of Northstead: That is right. Should a committee question candidates for judicial appointment? That is one of the great questions. Are we in Parliament going to get involved, and before the final appointment is made, should the appointee be presented to a committee for approval?

Professor Alan Paterson: As you know from my written evidence, my answer is yes. There are many ways of doing that, and indeed it is already being done in relation to about 60 different officers, including the chair of the Judicial Appointments Commission. There is a question about the stage at which it should come in—whether at the shortlist stage or when there is only one nominee. There are arguments both ways on that. You could even have it after the nominations come forward. You could also have a process whereby the questions might be filtered and presented by one of the legal advisers to the committee. However, the questions would come from the parliamentarians if such a buffer would make people happier with that approach. But in my view there is a strong case for parliamentarians being involved in a pre-appointment process.

Q9 The Chairman: Is there a strong view the other way on the panel?

Professor Cheryl Thomas: I would certainly like to raise a question: which judges are we talking about in terms of parliamentary hearings? I assume that perhaps we are only talking about Supreme Court appointments, but perhaps not. There are some practical realities in terms of the time and costs attached to committees questioning the hundreds of judicial appointments that are made every year. Is that something this Committee or Parliament generally wants to get involved in? The main point is that it is completely your prerogative. You can decide the extent to which you have greater involvement in the appointments process.

Professor Brice Dickson: My view is coloured by the fact that I come from Northern Ireland, but I am against having politicians involved in the selection process of judges. I do not think it follows that just because the powers and jurisdiction of the courts have increased in recent years, the executive must be more involved in the appointment of judges. There are other mechanisms you could put in place for holding judges to account for the decisions they take. Given that we live in a system where parliamentary sovereignty reigns, politicians in Parliament are at liberty to change any decisions that judges take. So I think it would be very dangerous, even in England and Wales, to involve elected politicians at the appointments stage.

Q10 Lord Pannick: Could I ask you, Professor Dickson, whether you think that politicians—the Lord Chancellor—should have no role in the appointments process?

Professor Brice Dickson: I think it probably does follow that that is the case, except perhaps in a purely formal capacity. I do not think that the Lord Chancellor should have any substantial role.
**Q11 Lord Pannick:** Could I also ask Professor Paterson and the others who have spoken on this whether in relation to a committee of Parliament having some role pre-appointment, what sort of questions would we ask the prospective justices? Presumably we cannot ask them what they are going to decide in particular types of cases, so what is the purpose of this?

**Professor Alan Paterson:** Can I pick up a point made by Professor Thomas? To begin with, I would confine this to Supreme Court appointments, although I can see the argument for the Court of Appeal. Those courts make the key decisions referred to by Lord Goldsmith, so to begin with I would focus on them. What kind of questions? We already have committees to ask Supreme Court nominees what they think the role of a Supreme Court justice is in a democracy. I see no reason why the appointments panel could not ask that and I see no reason why a parliamentarian could not, through a lawyer as I have suggested, ask it. Indeed, it could ask about the judge’s view on parliamentary sovereignty. We know that there is a split among some judges in their views on this. I do not see why one could not elicit views in general terms on that sort of thing.

This is a delicate area, but as I am sure you are aware, Lord Steyn wrote extra judicially on things like Guantanamo, and when the Belmarsh case came up, the Government wrote to Lord Bingham and suggested that Lord Steyn should recuse himself from that decision on the grounds that he expressed a view in general terms about government policy. In the end he did, but I am not quite sure why he should have done. All judges are allowed opinions and just because he had expressed a view on Guantanamo Bay, it did not necessarily mean that he had expressed a view on the indefinite detention of foreign nationals in this country.

I think we can ask these questions by having protocols about the kind of questions that would be asked. They should not be about someone’s personal life. They can also be dealt with by having chairs who are prepared to intervene if questions become unruly. Lastly, you can use a legal adviser to put the questions.

**Q12 Lord Powell of Bayswater:** It was precisely those points of practicality that I was going to ask you about. First, having a committee of parliamentarians put questions through a lawyer does not exactly add much to transparency or democratic legitimacy. It just does not look right. Secondly, I do not know what your experience of parliamentary committees has been, but the idea that questions can somehow be restricted by invisible borders is not one that will last for long. You would very soon be into questions on everything because it would be simply impractical to limit them. Thirdly, would this not be a big first step towards the American system, which would then become very hard to limit? We would be moving into a full approval process of politicians quizzing judges. Is that really what we want to see happen?

**Professor Alan Paterson:** I accept that there is always the argument that one step might lead to the slippery slope.

**Lord Powell of Bayswater:** A big step.

**Professor Alan Paterson:** Yes, but other jurisdictions do it. South Africa does it successfully, Canada has begun doing it with its Supreme Court, so it is not just America. A myth has grown up about the American senatorial hearings in relation to Supreme Court appointments. Only two of those hearings went possibly badly wrong in quite a long time. In fact, the biggest accusation about these hearings is that they are rather anodyne and far too long. But you do learn from them and from the very detailed questionnaires that have to be
filled in. Everybody gets to see everything about candidates’ writings and views on legitimate questions. They can be quizzed on them, and most would-be Supreme Court justices have found it very easy to deal with these hearings, which backs up the argument that they might be too anodyne. But by the end of the process, the American public know far more about the people who will be wielding power and influence in judicial decisions than our people know about our appointees. Further, South African judges or American judges, when asked about the process, say they feel a bit uncomfortable but that by the end they feel that they have a democratic legitimacy which they did not otherwise have.

**Dr Erika Rackley:** I want to raise a slightly different but related point on the presence of parliamentarians in any form, whether in committee or otherwise, in relation to the appointments process. It must be recognised and acknowledged that this in and of itself will not lead to a more diverse judiciary unless the people involved in the process have a strong political commitment to it. So if we are looking at this as part of adding legitimacy to the judiciary, if it does not become more diverse it will remain less legitimate than it needs to be. A note of caution needs to be sounded about changing the system in order to get diversity. Without strong political will, this might be slightly problematic.

My second point relates to what Professor Paterson said. We have some evidence—it is not strong—that non-traditional candidates may have a harder time engaging at these types of hearings or processes. This needs to be acknowledged in the way they are set up so that they do not serve to discourage such applicants from coming forward, or ultimately biting against diversity. The example is the Supreme Court Justice, Sonia Sotomayor. When she was asked about her comments on bringing her experience as a Latina woman to her judgments, the criticisms then made of her reinforced the notion that it was not something judges do. My argument about diversity is that it is about bringing different views into the judiciary and thus making the justice dispensed stronger as a result. So a cautionary note has to be sounded on diversity.

**Professor Brice Dickson:** I just want to make the point that one difference between the UK Supreme Court and the other top courts in South Africa, Canada and the United States is that those courts sit en banc; that is, all members of the court sit on every case. In the UK usually five, or sometimes seven or nine justices will sit. If we had a system of appointment hearings in which politicians are involved, and therefore the political views broadly construed of the people appointed are known, that would put tremendous pressure on the individual or individuals responsible for selecting the five or seven people to sit on any particular Supreme Court case. Usually that will be the president of the Court. He or she will inevitably bear in mind the views of the justices that have been exposed by the appointments system.

**Professor Alan Paterson:** The counter to that argument is that the Supreme Court has decided to sit far more often with seven or nine justices. One of the reasons it has chosen to do that is because it was concerned that towards the end of the Bingham era, key 3:2 decisions, the Chagos Islands being one such case, turned on which judges were hearing the case. If you think the result turns on which judges are deciding a case and it is therefore a matter of competing judicial philosophies—I do not believe it is in any sense a question of party politics—the argument goes slightly against Professor Dickson on that point.

**Q13 The Chairman:** When you, Professor Dickson, talked earlier about other methods of accountability which are not what we would consider to be the conventional democratic ones, what were you particularly thinking of?
Professor Brice Dickson: One can think of processes such as annual reports issued by courts, the right of Parliament to change the law, as I mentioned before, and the ability of judges to make speeches after the end of a case if they wish to comment or expand upon what has already been said by them or others. I respect the convention that judges do not publicly engage in discussions about their cases ex post facto, but that does not preclude them, in an academic environment at least, making speeches or giving lectures addressing some of the points at issue.

The Chairman: Shall we turn to other members of the judiciary?

Q14 Lord Powell of Bayswater: My question is whether you think they have an appropriate role in the present appointments process, or whether they have too big a role? From your written evidence, I may have the answer some of you will give. How do you think it might be changed and improved?

Professor Cheryl Thomas: Again, I should like to distinguish between the Supreme Court appointments we have primarily been talking about and the vast majority of other judicial appointments, for which the JAC is in effect the selecting body. We need to bear in mind that it recommends only one name for appointment to the Supreme Court to the Lord Chancellor, which provides a really limited scope for choice. On the JAC, the judiciary has a very significant role. Lawyers and judges form a large majority of its members, so I do not think there is any lack of involvement on the part of judges in terms of the appointments made by the JAC. When it comes to the Supreme Court, there is an argument that the size of the selection panel should be increased. A very small number of people are involved in making a significant decision, for all the reasons that my colleagues have pointed out. There is a very strong argument for the Lord Chief Justice, as the head of the judiciary now, to be involved in that selection process. It seems particularly odd that he does not have a defined role.

Q15 Lord Powell of Bayswater: Would you take others out of it?

Professor Cheryl Thomas: No, I would increase the size of the panel.

Lord Powell of Bayswater: Is the influence of the judiciary too powerful?

Professor Cheryl Thomas: If the influence of the judiciary is too powerful, one option can be to remove some members. The other option is to simply increase the size of the panel and bring in other individuals who are not in the judiciary—I mentioned the Lord Chief Justice, who is—perhaps increasing the role for lay members on the selection panel. There is no reason why there should not be a parliamentarian on that selection panel as well. That is another route to providing the involvement of Parliament in the selection process—as opposed to hearings, which I am not in support of. I will very quickly raise my point on that as I know we are not going to go back to it. In the United States, Article III judges go through a very strenuous hearings process, for good reason: they are appointed for life; therefore, they generally serve a much longer term than the President who appoints them, and they also have very significant appointing powers for judges below them. Those are all extremely good reasons for there to be a legislative hearing process for those judges that does not apply to judges in this country.

Q16 Lord Powell of Bayswater: I have one last, small question. What criteria would you set for lay members—what degree of legal experience would you wish them to have?
Professor Cheryl Thomas: That is a very good question. I would be very much in support of lay members who do not have legal experience. We are not lacking in individuals with legal experience who are involved in the selection process. In other jurisdictions, where there are similar judicial appointments commissions or selection commissions for senior appointments, there is a strong commitment to non-legal lay membership: not members of law schools or members of the Bar, but members of non-governmental organisations and community groups that have a direct interest in the delivery of justice.

Professor Alan Paterson: I have made my views clear in writing on this. I agree with Professor Thomas that at the Supreme Court level it is inappropriate to have a panel of only five members, of which two are the president and the deputy president of the Supreme Court. It is nothing personal to them at all, it is entirely institutional, and I think that the panel is far too small for the reasons that Professor Thomas has given. I do not see why you could not have academics or parliamentarians on that panel. Academics have an interesting role to play because they are neither fully lay nor fully legal. They are actually a bridge between the two camps, and sometimes that can be a positive force. I definitely agree that at Supreme Court level we need to deal with the small size of the panel and the fact that it breaches the Tom Legg “self-perpetuating oligarchy” argument. It is not just who is a member of the panel. All judicial appointments involve the taking of judicial soundings. In the past that process was not entirely robust, as Professor Colin Campbell’s Commission on Judicial Appointments found. I have no doubt that it has improved dramatically. None the less, the feeding-in of the views of every Supreme Court Justice’s on every candidate inevitably means that the Supreme Court is appointing, or playing a very large part in the appointment of, their successors. Again, it is nothing personal; it is institutionally problematic for that to happen in a democracy.

Q17 Lord Pannick: I would like to press Professor Thomas in particular on this question, and also Professor Paterson. Is the logic of this, certainly at the Supreme Court level, that judges should not be sitting on the panels at all? As you say, it is two out of five, but any Supreme Court Justice who sits on the panel is plainly going to have a very considerable influence over the other members. Would it be sufficient for the appointment committee to consult with the president of the Supreme Court, the deputy president and other judges, but for the panel itself not to contain any judges because of the danger, with all the good faith of those involved, of the panel looking for persons like themselves?

Professor Cheryl Thomas: Just to clarify, you are suggesting not having any judges whatever, not just Supreme Court judges?

Q18 Lord Pannick: I am asking for your view. At Supreme Court level, that is what I am putting to you, but I would also welcome your view at the lower level as well.

Professor Cheryl Thomas: Logically, there is a good argument for having some judges involved at both the JAC level and Supreme Court panel level. I take your point about the ability of the non-judicial members to stand up to and perhaps disagree with those members of the Supreme Court who will say, “We know much more than you what the job involves and we know what qualities are needed”. Personally, I am not concerned: if you choose your lay members correctly, you will get people who are more than capable of having their own view and a strong voice. It is in the selection of the individuals, it is not in the form of the panel. There is a strong argument for judges to be involved in this.

Q19 Lord Pannick: Would you have a larger panel as well?
**Professor Cheryl Thomas:** Yes, absolutely. That is the key, that we should expand the size of the panel and certainly increase the involvement of lay members. I agree with Professor Paterson that academics can provide a useful contribution. I would also strongly recommend what is done in Canada, the US, Australia and other places, where senior members of community groups for whom judicial decisions have an impact—which would probably include most community groups—should be the type of people to be the lay members on those panels.

**Professor Brice Dickson:** I will just make a short point to raise an anomaly in Northern Ireland. It may exist in relation to Scotland as well, I am not sure. The Northern Ireland Judicial Appointments Commission is asked to nominate somebody to sit on the panel to choose a Justice of the Supreme Court. In practice, I understand that that nomination is made by the chairperson of the Northern Ireland Judicial Appointments Commission, who at any particular time is the serving Lord Chief Justice. That nominee then sits on the panel and one of the candidates whom that panel may have to consider is the Lord Chief Justice.

**The Chairman:** We will return to the specific points about Northern Ireland and Scotland after finishing these general points.

**Dr Erika Rackley:** Following on from Professor Dickson’s point, with a contrasting rather than opposing view, I would like to draw the committee’s attention to the Advisory Panel on Diversity, chaired by Baroness Neuberger, which reported last year.

**The Chairman:** We will be hearing from her.

**Dr Erika Rackley:** Right. She will tell you this, too. The panel recommended that only one Supreme Court Justice should be involved in the appointments process, and also that no Supreme Court Justice should be involved in choosing their successor, which can be the case at the moment, particularly when the president or deputy president are retiring. It also highlights the importance of having a gender balance and an ethnicity balance on that panel, wherever possible. I am glad you are going to hear from her and I would just like to emphasise those points.

**Q20 Lord Goldsmith:** I want to come on to the question of present role that the executive plays in the appointments process. I was rather struck by the fact that when Professor Thomas talked about the differences between the US system and why a confirmation process was justified, it may have simply been oversight or lack of time but you did not mention that the judges are appointed by the executive and so there may be a stronger argument for scrutiny. But the question is: is the role that the executive plays at the moment in the appointments process too much or too little? I am also going to take the opportunity factually to note in regard to Professor Paterson’s comment about Lord Steyn, that it was not that Lord Steyn expressed general views about Guantanamo, it was that he expressed a specific view about the case. We will leave that to one side. On the role of the executive: is it too much or too little?

**Professor Cheryl Thomas:** I will jump in on that one. There is a point I would like to make about the current role of the executive. We should confine ourselves to the JAC appointments to a large extent because that is the new process. Under the Constitutional Reform Act, the Lord Chancellor now has the ability to select the judges. Going back to my initial comment about the peculiar system that has been created by the Constitutional Reform Act, under that system the executive cannot wield any significant power—it no
longer has a selecting power, in practice it only has a rejecting power. That is unique in relation to appointments commissions in most other jurisdictions, where the standard form is that you have an appointments commission that does exactly what the JAC does here but its requirement is to send a list of nominees to the executive from which the executive chooses three to five individuals. In that respect, the executive retains far more power. Briefly looking at the issue of diversity, one of—

**Q21 Lord Goldsmith:** Do you prefer that system?

**Professor Cheryl Thomas:** We have the system we have. Obviously you are looking at whether you want to change that.

**Lord Goldsmith:** That is one of the reasons we are meeting.

**Professor Cheryl Thomas:** The point is that if you are concerned about diversity, for instance, the system that exists now has in effect removed one of the potential successful strategies for increasing diversity that has been proven in other jurisdictions, which is political leadership. Where you have a strong executive in charge of appointments or at the receiving end of a list of nominees and that political leader makes the decision that they want increased diversity in the judiciary, they have that lever of power to do that. That is what happened in the United States, first with Jimmy Carter and then with President Clinton who said, “I want a judiciary that looks more like America”. He sent out a very clear signal to those individuals charged with recommending nominees that they needed to present a group of nominees from which the President could make a selection that would increase diversity. That really does not exist in our system: the power of the Lord Chancellor to make a political statement in calling for a more diverse judiciary, if he or she so chose, no longer has that much influence.

**Q22 Lord Goldsmith:** Would you give the executive more power, for that reason?

**Professor Cheryl Thomas:** I am not certain that you actually need to change the system. If your objective is to achieve greater diversity, this is one element. I also have a note of caution on increasing the power of the executive, which was also the experience of America. When the executive has that power and it is intent on increasing diversity, that is fine. But when a President comes along and says, “I am not doing that any more”, which is what Ronald Reagan did, there was a sharp drop in the selection of women and minority candidates for the judiciary. So it is a double-edged sword.

**Professor Alan Paterson:** I can pick that up. One of the less understood differences between judicial appointments commissions and the Lord Chancellor was that if the Lord Chancellor wanted to appoint an ethnic minority candidate or a woman, he or she could do that straightaway. It was very easy. Of course, the institutional weight of all the arguments came in but in practice it was much easier for the Lord Chancellor to make diversity appointments than it is for judicial appointments commissions. Judicial appointments commissions are given definitions of judicial merit—which we will come on to, I hope—and with it all the arguments about appointing essentially on merit but having to take diversity into account or at least trying to expand the pool. That all causes complications for judicial appointments commissions and it is very difficult for them to change the basic elements in relation to diversity. You either believe that the trickle-up theory is going to work and that in 30 years’ time we are going to have roughly 50:50, or you do not. There is a lot of objective evidence to indicate that the trickle-up theory simply is not working and will not
work in any foreseeable period. It might work in 30 years’ time. Therefore, the question you have to ask is: how can we break that log jam? You cannot expect judicial appointments commissions to break that log jam; it is not feasible for them to do it. The only group that can do it is politicians. This is true at the lower level, at the High Court and other levels. In Scotland, it is possible for the executive to give guidance to the judicial appointments board, as can the chief judge. If both agree that diversity is a very significant factor, they can say, “We want you to pay even more attention to diversity”. In Canada, federal judicial appointments were transformed in a relatively short period because the politicians said, “When we get lists of applications and nominations from judicial appointments commissions we would like to see at least one female candidate and one ethnic minority candidate who can do the job—they have to be able to do the job, and do it well”. However, the politicians said, “Give us that and we will encourage the appointment of female candidates”, and that is what they did. I am aware of the risks that Professor Thomas has alluded to but I do not see how we are going to solve this problem otherwise.

The Chairman: Lord Hart, do you want to raise the principle of all of this?

Q23 Lord Hart of Chilton: Certainly over the last few years that I have been involved in things, there has been a very great desire to widen the pool of candidates for judicial appointment. The issue is always a question of ensuring that the choice was made on merit alone. The pool has not widened in any significant way, partly of course because of the dual nature of the professions and the difficulty of persuading solicitors to come forward for judicial appointment. What I would like to know first of all, as a basic principle, is how you establish the constitutional grounds for saying that there should be a more diverse judiciary. What is the constitutional reason for doing that?

Professor Alan Paterson: I think it is part of democratic legitimacy that any branch of government, with a small “g”, or the state should reflect the society that it is appointed to serve. Perhaps I may quote from the Judicial Service Commission, the body that appoints the South African Constitutional Court, which says: “Diversity … is not an independent requirement superimposed on the constitutional requirement of competence. Properly understood, it is a component of competence. The Court will not be competent to do justice unless, as a collegiate whole, it can relate fully to the experience of all who seek its protection”. This is a statement that merit includes elements of diversity, and that is my view.

Professor Brice Dickson: To a large extent, I endorse that. We should be focusing on the life experiences of the candidates for these posts, and if a candidate’s life experience is greater than another’s because of his or her gender, racial background, disability or whatever, that should be taken into account as part of the merit of that individual, given that we need a judiciary that is reflective of society. Again, I draw on my Northern Ireland experience to point out that several bodies there by statute have to be composed in a way that reflects the community of Northern Ireland. That is achieved usually quite uncontroversially. If it can be done in that context I do not see why it cannot be done in this context as well. In fact, over the years in Northern Ireland, even during the Troubles, there was success in creating a judiciary which did reflect the community by and large. If it was done then, uncontroversially, I do not see why it cannot be done today. I am not sure why that does not pan out on the gender front, but that might be because it is men who are basically responsible for the appointments.
Q24 Lord Hart of Chilton: Moving on from that, I would like to hear your practical suggestions for making alterations to the way things are done currently in order to achieve what are obviously your aspirations.

Professor Alan Paterson: Merit is sometimes thought to be an absolute and objective factor, but in my book it is not. I believe that it is a cultural thing. If it was not, we would still be doing what Lord Halsbury did, which was to appoint his relatives because being a relative of the Lord Chancellor was then part of the definition of merit. Later, merit became being politically experienced. For a while it was thought to be a good thing to have been involved in politics before you were appointed to the House of Lords. We have gradually changed the notion of merit.

At the moment, the argument that not enough solicitors are coming forward or being encouraged to do so is partly related to the fact that in the current notion of merit, you have to be very good at advocacy. While it is desirable, I do not think, certainly at the level of the Supreme Court, that it is necessary in order to be part of the Supreme Court justice. If we could establish that non-standard candidates—non-standard in the sense of the traditional current notion of merit—are to be given equal standing provided that on every other factor they could be seen as able to do the job well, they would be encouraged. There are elements we could deal with in relation to training. For example, increasingly we have judges who are generalists recruited from practitioners who are specialists. The problem is that lawyers are specialising, but not all judicial posts are specialised. How are the two married together? The answer is that you have to encourage judicial training and put more effort into candidates who have potential, and in every other respect have the qualities to do the job well. We should broaden our notion of suitable candidates, and this applies at the Supreme Court level as well.

There is a strong body of thought that Supreme Court candidates, at least English and Welsh ones, ought to come from the Court of Appeal. The most recent appointment has broken away from that, but I suspect it took a huge effort and is not going to happen very often unless we begin to accept that a broader interpretation should be made of merit in relation to the appointment of candidates.

Q25 Lord Pannick: Can I go back to the issue of principle? I understand and am very sympathetic to the idea that diversity is an important aspect of democratic legitimacy. But is it really the case that the need for diversity can be subsumed within the concept of merit? If you have a statutory appointments criterion that says “appoint on merit”, can you really say that we are going to select between different candidates by reference to whether the candidate is female or from an ethnic minority? My question is whether subsuming this within merit does not actually avoid difficult questions of principle that have to be confronted.

Professor Cheryl Thomas: Perhaps I could respond to that. You ask whether it can be done. Yes, it has been done in numerous jurisdictions. Several provinces in Canada, states in the US and other jurisdictions beyond North America have appointments commissions rather than elected judges. They work on the principle that one of the criteria for merit is that the judiciary should be generally representative of the society over which it adjudicates. That has been done in those jurisdictions and the sky has not fallen in. Very meritorious judges have been appointed and those jurisdictions have increased diversity in the judiciary.
Professor Brice Dickson, Professor Cheryl Thomas, Dr Erika Rackley and Professor Alan Paterson – Oral Evidence (QQ 1–39)

Where the real uneasiness comes from, and I have some sympathy for it, is that most of the criteria that are identified as meritorious for judicial appointment relate to the individual—their individual legal skills and so on. When we get to merit, a different approach is required, one of looking at the judiciary as an institution and saying that it needs to be generally representative of the society over which it adjudicates.

The main argument is that of legitimacy. Research shows that public perception of the fairness of courts is increased when people see that the judiciary is more representative of the society over which it adjudicates. I know you asked in one of the questions whether there is actual and empirical evidence that diversity among the judiciary alters decision-making, but perhaps we could raise that another time.

Q26 The Chairman: It would be helpful if you could address the point.

Professor Cheryl Thomas: There are two aspects to looking at whether diversity is part of merit. If you are coming down on the side of “yes”, the logic is that diversity will increase the fairness of the judiciary both in terms of public perception and the fact that there is some limited empirical evidence that diverse judges can improve the decision-making process. I shall try very briefly to summarise what that is.

First of all, virtually all the research is from the United States and involves appellate judicial decision-making. Usually that means three-judge panels. These are very large empirical studies looking at decision-making by courts of appeal on particular issues over a number of years. It involves thousands of cases and looking at the backgrounds of the three individuals sitting on the panel. The best that can be said is that there is some evidence that the existence of one minority member on a panel of three increases the probability that the other two panel members will decide a case in favour of affirmative action. That is probably the most reliable research.

There is no research in this country, in part because we do not have a diverse judiciary at the senior level on which to conduct it. But we do have a research study coming out at the end of this year which is the first to look, on a very large scale, at the impact of the background of judges on tribunal panels.

The last thing I would like to say about this is that some of the previous research is very simplistic. There is now a move to recognise that judicial decision-making is a complex business and just saying that if you are a white judge, an Asian judge or a female judge means you are going to decide in a certain way is not enough. As I say, judging is a complex business and many factors come into it. Background may be one of them. But the point about diversity is the public perception of the fairness of the judiciary, and it is the strongest argument in its favour. Again, there is some limited evidence on whether it actually affects judicial decision-making.

Q27 The Chairman: That is extremely helpful. I said at the beginning of this conversation that the inquiry is going to last through this year. If you were able to keep us in touch with the findings of your research, that would be very valuable. Does any other member of the Committee want to pursue at this point the question of diversity or shall we turn to training?

Lord Pannick: Does Dr Rackley want to assist on this because she has special expertise in the area?
**Dr Erika Rackley:** I do, but many of the points have already been made and I do not want to take up too much time. I shall make just one point. Merit and diversity look as if the two are pitted against each other and pulling in opposite directions. My understanding is that in so far as the arguments for diversity are based on equal opportunities and legitimacy, there is an inevitability about that tension. One of them may have to win, so it might be the case that the person best placed to redress, for example, a gender imbalance will not necessarily be the person who will do the job the best, which is an understanding of merit.

What Professor Paterson raised was that if there is something more to diversity, if we think that diversity is important because a diverse judiciary will do its job better, then there is no tension and the pursuit of merit and the pursuit of diversity will move in the same direction. I wanted to provide some context because these are arguments that do bite, so it is important not to dismiss them. However, merit and diversity can still be allied.

**Q28 Lord Irvine of Lairg:** The merit principle basically means that the best person is chosen to fill a vacant appointment. Surely to assert that diversity is a component of merit is sleight of hand, and not a very skilful one at that. A more diverse judiciary is a desirable social objective, but surely the merit principle should be paramount. If, for example, you are a disappointed litigant and you say, “That judge was awful”, perhaps with some justification, I doubt that you would be satisfied if you were told that it was the man’s turn on this day, the ethnic minority’s turn on that day or the lady’s turn on another day. If you were an ordinary litigant, you would want the best possible judge. Do you accept that while diversity is a desirable objective, the paramount consideration should be the best person for the job in question?

**Professor Alan Paterson:** I was going to make a different point.

**Q29 The Chairman:** I am sorry. Professor Thomas.

**Professor Cheryl Thomas:** You have raised an aspect that we have all been going round and round on for many years. I cannot imagine that there is any intention on the part of individuals appointing judges to appoint someone they did not feel was completely qualified to do the job.

**Q30 Lord Irvine of Lairg:** Not qualified, the best. Surely it is not sufficient just to say that X passes muster. You must appoint the best.

**Professor Cheryl Thomas:** What we are usually talking about is a number of individuals who are perfectly qualified and capable, so in one respect they are all the best for the job. I am sure that this difficulty arises on the appointments commission. As Lord Chancellor, you probably had similar situations where several people were more than good for the job and you had to make a choice. So we are not talking about diversity allowing someone who actually is not capable of doing the job to be chosen because they would somehow create a more diverse judiciary, it is a question of saying that you need to consider a whole range of factors. If you have three people who in effect are all pretty much the same so that there is not a lot to choose between them, this is the point at which the political leadership lever in other systems would come in. You are not going to have an American President who says that he has three names. Two of them are white men and they are better than the African American woman. He is not going to choose the African American woman just because that would tip the scales. He wants three individuals who are all outstanding candidates for a
judicial post. Then there is a choice to be made. What impact will that choice have on the overall composition of the judiciary as an institution of the state?

**Professor Alan Paterson:** I am happy to endorse that. Diversity is related to the institutional form of merit. We expect the whole judiciary to be reflective of the society it is appointed to serve. When the Canadians, at the federal level, decided to appoint more female judges, I did not hear a widespread outcry about the quality of their federal judges. What we are talking about is candidates who not only can do the job, but can do it well. When you refer to “the best candidate”, that is not an objective criterion. It is a question of assessing all the various criteria and how you weigh them up. If by “the best” you mean the person with the most advocacy experience, you will go one way. If you mean someone with all the other qualities and lots of potential, but is “non-standard” because they are a top-rated City solicitor, I would weigh that together and, as part of diversity as a whole, I would say, “That candidate could do the job and they come from a section of the community that is not reflected well in our judiciary”. That should be a plus factor.

I think I can say this from a particular contest I was involved in on the Judicial Appointments Board for Scotland. We had five candidates rated at 70 and who were all going to get appointments. We asked who was going to get the first job to come up and decided that geography was part of merit. We needed judges for a particular area of the country, and since we had one candidate from the area, we said, “Why not go for that candidate?” There was a female candidate, so we said, “Why not choose a female candidate for the first or second appointment?” At that level it was possible to make the distinction because the additional factor came in.

**Professor Brice Dickson:** I was going to say to Lord Irvine that it really does depend on what you mean by “the best”. I used to think, as I suspect Lord Irvine and Lord Pannick still think, that you should draw a strict line between merit and diversity even if there is an issue of principle. But my experience is in Northern Ireland where obviously we have a divided society. It is very important that institutions reflect that division. I have come to realise that it is important, when defining merit, to take account of a person’s ability to reflect, understand and work with the experiences of different sectors of the community. If someone happens to be of a certain religion or race, or they have a certain disability, you have to consider that to be part of the merit principle.

**Q31 Lord Goldsmith:** Professor Thomas was asked before about the empirical evidence that diversity produces better results, and gave a very helpful answer. It was focused on a particular example, that it was more likely that the result would fall in favour of affirmative action. But it might be said—I do not dismiss it for one moment—that that is quite narrow and specific. Is there any further evidence on the judgments made in other sorts of cases, although I do not know how that would be done?

**Professor Cheryl Thomas:** There have been lots of attempts—there is a whole industry in the academic world in the United States of people trying to do large-scale correlational studies between the individual personal background characteristics of judges and case outcomes. The point I was trying to stress is that the academic community and people who work in judicial decision-making now are trying to get away from that because increasingly the research has shown that if you try to reduce an individual to a particular characteristic, it is a very simplistic way of understanding the judicial decision-making process.
Q32 Lord Goldsmith: Is there anything further you might tell us that would be worth our while reading on the subject? I do not want to have a debate about it because I appreciate there is not enough time.

Dr Erika Rackley: Perhaps I may draw the Committee’s attention to an article in the American Journal of Political Science in 2010—I can forward the reference to you—in which an overview of the results of over 30 qualitative studies found that one-third pointed to a clear difference, one-third pointed to no difference at all and the other third pointed to some difference. So if you wanted a single article that gave you an overview of the US position, I found that one quite helpful.

Lord Goldsmith: I would find that helpful. Thank you very much for offering that.

The Chairman: That would be very helpful. Perhaps we may turn from this obviously important aspect of the discussion to the question of training of the judiciary. I know that Lord Rodgers wanted to raise this.

Q33 Lord Rodgers of Quarry Bank: Training is perhaps not the right word. Let me put it this way: I am a lay man and I want good judges. Once upon a time, I thought all doctors were good doctors. As time goes by, you discover otherwise. Every profession has 10 per cent who should not practise at all and 5 per cent become a disaster. Is it not the case among judges, who have been appointed on merit or diversity or whatever, that 10 per cent of them really are not up to it and 5 per cent of them are a disaster? Therefore, my concern is how good they should be. A further point is that other professions try to find ways of getting rid of, train or improve those who perform badly.

The Chairman: Sorry, I used the word in a rather practical way. You are making a rather more sophisticated point.

Lord Rodgers of Quarry Bank: Not training them, then, but trying to overcome their own problems, and those who are not very good should be got rid of. Professor Paterson referred to excellent judges and track records. Leaving aside the question of diversity, now or in the future, how do you measure a track record? If the record is not good enough, what should be done? Appointment by itself is not sufficient.

Professor Alan Paterson: You raise a very interesting question that is beginning to face the legal profession, that of revalidation. The medical profession is already going down that direction and I think eventually lawyers will go down that direction. Will judges ever go down that direction? It is very difficult to say for a whole variety of judicial independence reasons. Related to your question is the issue of judicial appraisal. I recall an incident on a judicial appointments board, when a captain of industry asked one of the judicial members, “Are you really telling me that there is no form of appraisal whatsoever and nobody has any objective information about how well a judge has done?” The judicial member had to say, “Yes, and we think this is in the public interest”. The captain of industry’s answer was blank astonishment and I think he was right. We do not have an effective judicial appraisals system in this country. England has done better than Scotland, I have to tell you. It is usually resisted on the grounds of judicial independence and I understand that argument. But if you sit on a
judicial appointments board and you appoint people to be part-time judges, two or three years later when they come before you wishing to get a full-time appointment, the first question you ask is, “How well have they done?” and the last question you will get any objective information on is that very question. There is nobody who has that objective evidence because senior judges are not involved in the appraisal of other judges. In a career judiciary, they are—I am eventually coming back to your point. In a career judiciary in foreign countries they do have judicial appraisal and the world does not grind to a halt. The independence of the judiciary has not been threatened. It would cost money and that is one of the problems: we do not have it. Secondly, you have to have protections. I would have lay ombudsperson oversight of the appraisal process, and it would be done by judges in relation to judges. It would have no involvement from non-judges. We really have to move to a situation where judicial appraisal is taken as the norm and we can begin to get some objective evidence about how well candidates are doing, as opposed to taking judicial soundings, which are subjective.

Lord Rodgers of Quarry Bank: What is a measure of “how well done”?

Professor Alan Paterson: What, appraisal?

Lord Rodgers of Quarry Bank: You used the words “how well done”. What is the measure if somebody has done well?

Professor Alan Paterson: That is a complex question about which we can develop criteria. In another area, we appraise tribunal members. In England and Scotland the performance of tribunal members is appraised according to a series of criteria. I do not see why these criteria could not be applied to judges. I think it is at district court level in England and Wales that the judiciary developed their own appraisal scheme and it worked very effectively. So it can be done.

Q34 Lord Rodgers of Quarry Bank: Perhaps I may finish this point and get it clear in my mind—maybe others are clear. They are chosen, and I repeat myself, on merit, the old-fashioned methods or whatever it is, diversity, but at some point they conclude that they have not quite been up to it. On merit at the time they were at the top; diversity was a factor. But in a year or two they are really not up to it after all. What do you do?

Professor Cheryl Thomas: That raises a related issue, which is that if someone has been made a full-time judge, what happens not just if the judge is not up to it but if the judge decides that the job is not what they thought it was going to be? There is no return to practice, in theory, but some have managed to get round that. That is another anomaly in this country in terms of the judiciary: you are asking an individual to do gown a route for which there is no exit if they themselves decide that they do not like it, or, in your scenario, if they are really not up to it. If we have an appraisal system and someone has been appraised and perhaps has been given guidance on how to improve and has been provided with training, but still for whatever reason they just cannot get to grips with the job, what happens to that individual?

Q35 Lord Hart of Chilton: I would simply like to say that when I left the department an embryonic appraisal system had started to come in for recorders. That meant that the appraisal system could be used in evaluating the performance of somebody who was to be promoted. I think that there was a paper about return to practice, but the judiciary itself did not want that to happen, which has led to the individuals that you have mentioned finding
ways round that. I think an appraisal system has happened at recorder level and is used for promotion purposes, as to whether they get to the next level, and that at least is a measure of usefulness in terms of people deciding whether or not they are cut out for it. For example, solicitors come from a very collegiate family, whereas the advocate comes from a fairly lonely existence. The transfer from a collegiate existence into a lonely existence presents cultural problems for some.

**Q36** The Chairman: Lord Hart mentioned moving from one level to another within the judiciary, which again raises a question that has been touched on but has not really been addressed head on, which is your assessment of career judiciaries and particularly examples from overseas.

**Professor Alan Paterson:** I do not see anything wrong with a career judiciary. We have elements of it in England and Wales as well as in Scotland, where you apply to become a part-time sheriff, then to become a full-time sheriff, and from there you could be promoted to the High Court. As to which body is involved at each stage, in Scotland it would be the Judicial Appointments Board for Scotland. But, as I have said, what it does not have at the moment is objective information about how well a candidate has performed at the lower stages, and that is where appraisal would come in. It would not be entirely definitive and there would have to be checks and balances. It is not unknown for senior and junior judges not always to get on. But the system can work, and it works abroad.

**Q37** Lord Shaw of Northstead: Dr Rackley said that a judiciary is stronger and justice dispensed better where its decision-making is informed by a wider array of perspectives and experiences. If people get a career judiciary system going, would not their experience be very limited when compared with someone coming in from outside?

**Professor Alan Paterson:** I can briefly deal with that. I had more in mind the Dutch model. The Dutch have a career judiciary, as do the Swedes and other continental jurisdictions which you can join straight from law school. But the other Dutch model I have in mind is that of someone who spends 10 to 15 years in practice and then applies to become a judge. They go before a judicial appointments board and, if they are appropriate, they will be deemed to be appointable. They are then trained, which takes a significant period of time. That seems to be a good model. I do not see why promotion could not be achieved thereafter.

**Q38** The Chairman: That is helpful. Given the time we have left, it would be sensible to ask each member of the panel if there are particular matters they want to draw to our attention.

**Professor Brice Dickson:** I would like to say that although the Northern Ireland Judicial Appointments Commission has been up and running for some time, what I hear from those on the Bench and others is that it has not made a great deal of difference, certainly in terms of the diversity of the Bench and in terms of gender diversity on the senior Bench. It is true that the commission has done good work in explaining to potential candidates what being a judge is like. It has engaged in objective testing and defining competences, but I get the impression from senior members of the profession that they are put off from applying not just because they have little experience of applying for jobs—barristers may never have actually attended an interview for any job—but also because the system itself is ponderous and time-consuming. Further, although it is meant to be confidential, in practice it is not. Some steps need to be taken to ensure that applications are kept more confidential.
We have had a recent example of this in the past few weeks, which is now public knowledge. A candidate, having been proposed by NIJAC for appointment to the High Court, then found that the Lord Chancellor vetoed the appointment. This has been very controversial in Northern Ireland where the feeling is that devolution truly means just that. That part of the country should be responsible for its own judicial appointments. Things were made worse by a lack of transparency in the system. The letter from the Lord Chancellor never reached the candidate, but the gist of it was explained to that candidate by the Lord Chief Justice of Northern Ireland. As I said earlier, the Northern Irish system has worked well as regards ensuring that the Bench reflects the community background, but it has been very bad at the senior level on gender. We have still never had a female High Court judge in Northern Ireland. There is something wrong there.

Q39 The Chairman: Thank you. Professor Paterson, you have made some interesting comments about the Scottish situation. Is there anything you want to add?

**Professor Alan Paterson:** The Scots had the first Judicial Appointments Board, which operated for five or six years without becoming statutory. I think it is to the great credit of then Government who introduced it that, against quite a lot of pressure, it insisted on a 50:50 lay-legal split with a lay chair. It is a good model which has worked very well. Because of a shortage of resources there are areas where we have not been able to do as much as the English or, indeed, the Northern Irish in terms of objective testing. We have not been able to push as far on the use of assessment centres as I would have liked. There is also a slightly unfortunate provision in Section 13 of our legislation which gives the legal members of the board a veto over decisions on the legal competence of candidates. That does not exist in the other judicial appointments commissions. It has the potential, if it went wrong, to split the board. I do not think that that should happen. The other jurisdictions have got it right. The message I have heard is that all the judicial appointments commissions have had slightly different experiences and have learnt a lot from each other. That is a good thing.

**Dr Erika Rackley:** One of the questions that I found interesting is that there is now a convention for a woman judge in the Supreme Court. I do not think that there is a convention. Just because we have had one does not necessarily mean that we have to have another one, although the question has arisen because we recognise the value in having a woman on the Supreme Court Bench and that it should have a wider range of perspectives and experiences. It certainly would be a backward step if we found ourselves in a position where there was no gender representation in the Supreme Court. I hope very much that we will not get to the stage where we replace a single woman with another single woman, which happened in the recently announced Court of Appeal appointments.

This is my last thing to say. Lord Pannick asked about a practical way of doing this. We have a convention about having representation from Scotland and Northern Ireland. The way that is phrased in the Constitutional Reform Act is: “In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom”. The Committee will be familiar with it. I wonder if we could strengthen the requirement for diversity by moving it away from the level of the applicants in the pool and having something along the lines of appointments to the Supreme Court, where the commission must take into account “the need for the judiciary broadly to reflect the diversity of the UK population, including traditionally un- or under-represented groups”. This is not about saying there must
be someone there, but it is about strengthening diversity requirements. That would be a practical way to mirror the Scotland and Ireland argument.

**Professor Cheryl Thomas:** I shall try to be brief and I shall go back to my initial point about the value of learning lessons from other jurisdictions. I shall focus on the diversity issue, which colours all of this. There are basically four lessons to be learnt from other jurisdictions. First, there is no silver bullet and no single strategy or perfect constitutional arrangement that produces a diverse judiciary in all circumstances. But good will is needed early on when you have created a new appointments structure. That has usually been achieved in other jurisdictions by one or two high-profile diverse appointments to the senior Bench that usually break the normal route to appointment. Moreover, good will is important because it buys time for the appointments commission. The third point is that real and lasting diversity takes time. It has been an ongoing process in the United States for over four decades and in Canada for three decades. To be fair to the JAC, the clock only started ticking in 2007 after it had established its criteria for appointments, so we are looking at four years. Finally, some aspects of diversity in the judiciary are very difficult to achieve. Even in the United States and Canada, and in European judiciaries which are now comprised of over half women, there are still some aspects of diversity that are very difficult to achieve. Minorities find it difficult in the US and Canada, and there is still a glass ceiling for female judges in Europe.

**The Chairman:** We have covered an enormous amount of ground. As you know from our original requests for evidence, this is a broad inquiry which we are trying to narrow down. I am sure that you will keep in touch with the other sessions that we will hold. You have mentioned, for example, Baroness Neuberger. We are due to have a whole series of meetings with members of the judiciary and other experts. If there is anything more that you would like to contribute, obviously we would be delighted if you would let us know. In the meantime, thank you all very much for an interesting session.
Equal Justices Initiative (EJI) – Written Evidence

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.

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.

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.

47 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/.
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. The gains of BME candidates as a group have been even smaller (currently 4.8% of the judiciary overall).

6. These ‘diversity statistics’ and others reproduced in the Diversity Taskforce report present an inaccurate picture of the representation of women in the judiciary. In particular, the statistics do not distinguish between fee-paid and salaried judges. This is a crucial distinction as women are more likely to be found among the fee-paid (non-salaried, non-permanent) judges. The failure to distinguish between judicial appointments in this way gives an inflated impression of the presence of women within the salaried judiciary. As at 1 March 2010 (the latest figure available on the Judiciary’s website), the percentage of women in the salaried judiciary was 18.2% and the percentage of judges from a BME background was 2.8%.

7. In addition, women and BME candidates are more likely to be found in the lower echelons of the judiciary. Evidence shows that the changes in the judicial appointment process since 2005 have been most effective in increasing the diversity of the judiciary at entry level, that is, at the level of deputy district judges, district judges (magistrates courts), deputy district judges (magistrates courts) and fee-paid tribunal judges and recorders. There have also been slight increases in the numbers of women at Circuit judge and High Court judge levels.

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.

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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 decision-making, particularly on collegial courts at appellate level.50 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.51

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

50 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.

51 Reported in House of Lords Hansard, 17 March 2011.
16. Artificial barriers, hurdles and dead-ends in current judicial career paths must be removed. For example, experienced tribunal judges and district judges should not have to complete the same selection exercise as someone without previous judicial experience to become a recorder; there should be a mechanism to facilitate transfer between these positions. (As for all newly-appointed recorders, the induction course is capable of equipping such appointees to sit in the criminal courts.) These judges should also be directly eligible for appointment as Deputy High Court judges.

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

17. The anomalous position of Deputy High Court judges must be addressed. These appointments are not made through JAC selection exercises and no information is publicly available as to either the 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.52

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.\textsuperscript{53} This volume contains 23 ‘alternative’ judgments in leading cases, written from the perspective of an imagined feminist judge sitting on the original case or an appeal from it. Six of these judgments directly concern the interpretation of the Human Rights Act 1998 or the rights protected by the European Convention on Human Rights, while others deal with other important issues in family, commercial, criminal, public and equality law. These judgments powerfully demonstrate the potential effects of having a more diverse judiciary – sometimes in the results of cases, but always on the way judges from different backgrounds understand the factual and legal issues and employ different reasoning that enriches and deepens the judicial conversation. We urge Committee members to read for themselves this practical illustration of the value of greater diversity in the appellate judiciary.

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

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

\textit{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.

\textit{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
WEDNESDAY 13 JULY 2011

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 Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witnesses

Witnesses: Lord Kerr of Tonaghmore, Justice of the Supreme Court, Lord Justice Etherton, Judge of the Court of Appeal of England and Wales, Her Honour Judge Plumstead, Secretary to the Council of HM Circuit Judges, and District Judge Tim Jenkins, Secretary to the Association of HM District Judges.

Q40 The Chairman: Well, good morning, and thank you all very much for coming and for taking part in this very important inquiry. We are just beginning on judicial appointments and, as I said, I am very grateful to you all for coming as a group. One of the issues we have discovered in looking at the volume of evidence that has already been sent in is that there is a very large number of people who want to contribute to this inquiry, which is enormously valuable, but it does sometimes mean that we need to speak to people in a group circumstance, which I hope you accept and understand. Thank you very much to Judge Plumstead and Judge Jenkins for contributing to the Judicial Executive Board written evidence, which we have all found very useful—we have that written evidence before us.

It would be most helpful if we just plunged straight in with questions, and we will go round the Committee pursuing various points that we want to raise with you either individually or as a group. When you speak for the first time, would you kindly indentify yourself? The session is being recorded and that enables the people listening to the tape to be absolutely sure whom they are listening to. If I may begin with the fundamental question within the perspective of this Committee, being the Constitution Committee, what constitutional
principles, apart from the obvious one of independence, do you all feel are the ones that lie behind an effective and successful judicial appointments system? Lord Kerr, perhaps I could begin with you.

**Lord Kerr of Tonaghmore:** Brian Kerr, Justice of the Supreme Court. Well, you have mentioned independence, Madam Chairman, and I have to say that it is of the first importance that the independence of the judiciary should be maintained and anything that would imperil that must be eliminated. Judges need to feel and to be confident that, in the discharge of their judicial function, they may act fearlessly, independently and free from any external influence. That is no less than a cornerstone of our democracy. The confidence that judges should have in the way they may discharge their judicial role extends also to the process by which they are appointed. They should have confidence that the system that decides whether they are to become judges is operated in a manner that will safeguard their independence. In order to achieve this, the system itself should be wholly independent of external influence that might be transmitted to candidates for judicial office.

The system should also, of course, be operated in a manner that is entirely free from the taint or suggestion of unfairness or inequality; it should be open to all who can fulfil the exacting demands of being a judge, irrespective of their race, background, religious affiliation, gender or sexual orientation. While it may not be a constitutional principle, the system should be operated, in so far as it is possible, in an openly transparent way. I will have more to say about that in response to some of the later questions that I anticipate will be coming from the Committee.

**Q41 The Chairman:** Thank you, and I am sure we will want to pursue the question of widening the pool. Lord Justice Etherton.

**Lord Justice Etherton:** Lord Justice Etherton, Court of Appeal Judge. Of course the separation of powers is an important underlying factor in the appointment and operation of the judges, but that principle cannot be an absolute one in relation to the appointment of judges because the judges cannot be purely a self-appointing body. At some point and in some way the executive or Parliament, or both, must be involved, if only, and at the very least, in the appointment of people other than judges who themselves undertake the selection.

For my purposes, what is more important for today’s meeting is the principle that the judges must carry legitimacy within society. One of the defining features of our constitution and what we might call Britishness is the application of the rule of law. Underlying the rule of law is the issue of compliance. We cannot have an effective rule of law unless the law is complied with by virtue of respect for the law and those who administer it. Unless we wish to live in a dictatorship or other form of tyranny, respect and compliance cannot be based solely on powers of enforcement. Accordingly, the appointing of judges, their composition, must be such as to command respect for them and for the law.

**Q42 The Chairman:** Thank you. I will come back, if I may, to the changing relationship to the other parts of the constitutional framework, particularly the one with the executive, but perhaps I may ask Judge Plumstead to comment on the general principles.
Her Honour Judge Plumstead: Isobel Plumstead. I am a Circuit Judge, therefore I sit in the Crown and County Courts. I do also sit as a Deputy High Court Judge from time to time. I would echo that which Lord Justice Etherton and Lord Kerr have said, but public trust and confidence must be in the whole of the judicial system and not just the top layer, as it were. Certainly over the last few years, the jobbing judiciary, in which I include myself and District Judge Jenkins, feel somewhat under siege as a result of political criticism, and there must be a revived compact as to the constitutional propriety of interfering with justice. The rule of law, as Lord Justice Etherton says, is a matter of consent on the part of the public; if they feel that they can undermine the workings of the judicial system, then that consent would be eroded. I am very concerned that there should be a structure that enhances confidence, but does not give the impression of political interference in the judiciary.

Q43 The Chairman: The political interference, in the context that you are speaking of there, is related at the local level to the County Courts, as you were describing, or are you talking about a national political interference?

Her Honour Judge Plumstead: I think at all levels. It has to be said that the judicial appointments system, which is still new and still evolving very much, is a big step towards taking politics out of judicial appointments. There is a sense that, despite the appearance of the independence of the Judicial Appointments Commission, there has been a wish, from serious politicians, major politicians, to have their say in what the Judicial Appointments Commission recommends, not simply at High Court level but also at other levels.

District Judge Tim Jenkins: District Judge Tim Jenkins, sitting in the County Courts. Really all I think I need to do is just confirm that I agree with the points made as to independence and confidence. That confidence, as has been said, has to be felt by the judiciary—that their independence is being respected and that there is no interference with that judicial independence and their decision making. Equally, there has to be a confidence in society that there is that independence. The point made about respect, other than through enforcement, is very important, particularly sitting, as I do, in the County Court, where the make-up of the room into which the litigants come is very often not what people would imagine a court room to be. They have to come in knowing and having a great degree of respect for the institution before which they are appearing—not necessarily the individual, but the institution. They need to be very sure and certain that there is independence in that institution and they have respect for the process that has appointed that individual.

Q44 Lord Norton of Louth: This really picks up on what Judge Plumstead has already said about the relationship between the judiciary and the other parts of the political process, the executive and, for that matter, Parliament. Judge Plumstead, you implied that there had been significant changes in that relationship and from what you were implying it was at all levels of the judiciary. We tend to focus on the top in the relationship, but you were implying that it applied to other levels as well.

Her Honour Judge Plumstead: I am really glad that Tim and I are here because numerically we are the judiciary, albeit that the High Court Bench and above have a great deal more public power than we do. It is very important and I really feel that since 2005 we have been feeling our way. The 2005 changes were precipitate and required a lot of thought after
introduction, as opposed to before. We are feeling our way, but there is this sense, and it
 goes with this sense of the use of the word “accountability”, which, of course, is bandied
 about left, right and centre. Traditionally, judges are accountable because, if we say
 something or do something that is wrong, if it is wrong as a decision it can be appealed, and
 if it is wrong in behaviour terms then we can be disciplined. The idea that every judicial
decision should be debated, as if it were only a factor in the decision, as opposed to the
decision, strikes me as quite worrying. I am particularly concerned about defamation, which
is outside my ken because we do not do that in the County Courts.

Q45  Lord Norton of Louth: I want to invite comments from other members of the
panel on this, but it strikes me that, picking up on what you said, in distinguishing the
judiciary and those who form the judiciary, there is a perception that perhaps politicians
have been more likely to criticise the judiciary and even particular decisions, and therefore
there is more tension in the relationship, but at the same time the process—particularly the
reforms in 2005—by which individuals are appointed has perhaps improved.

Her Honour Judge Plumstead: I think we all agree with that, yes.

Lord Kerr of Tonaghmore: Can I just pick up on the question of accountability? It is very
important that we have a clear-sighted view of what we mean by accountability. On one
view, judges are far more accountable than many members of other professions. They must
give reasons for their decisions; they conduct their work in public; they have a well-
developed and well-used complaints system; their judgments are subject to appeal, as Judge
Plumstead said, and I can vouch personally and painfully from my experience that those
judgments are subject to the most searching and scrupulous analysis. Judgments are available
to the press, and in the Supreme Court we even prepare press summaries for journalists to
save them the work of condensing the sometimes lengthy judgments. There is a live
television broadcast of the Supreme Court hearings. There is every opportunity for an
interested citizen to examine how well we are doing our work. I believe that we are
accountable to the public.

Q46  Lord Norton of Louth: On that very point, could one distinguish between
transparency and accountability?

Lord Kerr of Tonaghmore: Yes.

Lord Norton of Louth: Because one can see what the courts are doing, but none the less
you are still detached from the public and necessarily so because your judgments are purely
within the judicial process.

Lord Kerr of Tonaghmore: I am not sure that I would completely agree with that. We are
members of the public after all: we have families; we lead normal lives; and we have the same
concerns and anxieties as any other member of the public. We are exposed to the public as
much as, dare I say it, politicians.
Q47 Lord Norton of Louth: My point is that, if you take accountability, there is nothing that the public can then do in the light of what they see.

Lord Kerr of Tonaghmore: I do not agree with that. The public can complain if they consider what has been done to be inappropriate. I do not see that as a deficit in the system because parties are very keen to make their views known if they do not feel that they have been properly dealt with by the courts.

Lord Justice Etherton: Can I input a slightly different perspective on this? There are two different issues here: one is accountability in the process of appointment; and the second is the role played by judges once appointed. A third and underlying aspect is that there is a fundamental difference in my view in this context between the Court of Appeal and the Supreme Court on the one hand, and the courts below that on the other. The reason for that fundamental difference is that, of the top two courts, the Supreme Court in particular is now primarily a policy-making body over a much wider area than it ever was. Professor Bogdanor has referred quite rightly to the “New British Constitution”. Over the last 60 years we have seen a new British constitution in this respect. It is the combination of the extraordinary growth in public law; the accession of the United Kingdom to what is now the European Union; the Convention on Human Rights; and the Human Rights Act. This has totally changed the relationship between the policy-making judiciary in the highest two courts and Parliament. The judges are not accountable in relation to that policy-making element. This is what is critical. The fact that they are making policies quite legitimately or exercising policy-making powers conferred upon them by Parliament means that there has to be a much more intense focus on the appointments process for those higher courts in order to provide constitutional legitimacy for them within a democratic society. What we are talking about when we are talking about accountability, in my view, is the transparency and the accountability of the appointments process. I should make it clear—I would have made it clear earlier on—that my primary interest and expertise, such as exists, is in relation to the study of the top two courts and not the lower courts. I am therefore directing my comments primarily to those.

Q48 The Chairman: I think you touched on a point that Lord Norton may have been coming to—and I apologise if I am interrupting—which is the question of the parliamentary or the executive involvement in the appointments process, as opposed to the commentary on the outcome of judgments, etc, that Judge Plumstead has been referring to. Do you have a sense that that is changing—the pressure from Parliament to be involved in that?

Lord Justice Etherton: I am not sure whether I am conscious of a pressure from Parliament, but I do believe myself for a variety of reasons that a greater involvement of politicians in the appointments processes primarily to the Supreme Court and to a lesser extent the Court of Appeal is important. I am afraid that I am completely on my own here so far as my colleagues are concerned and maybe the rest of the Committee. My view would be at the moment that, because of what I said about the policy-making role—in that sense unaccountable—of the top two courts, particularly the Supreme Court, it is quite unacceptable to my mind for constitutional legitimacy for judges to have a definitive role, or a conclusive role effectively in practice, in making those appointments. In the way that the appointment system is currently framed, in my view they do have a conclusive say because of their standing, the small nature of the committee and the limited representative element within that committee.
Q49 The Chairman: Before I invite your colleagues to disagree with you, and I know Lord Pannick wants to come in, could I ask you just a quick follow-up on that? As you know, there is a lot of suspicion in this country about, for example, the United States confirmation hearings for Justices of the Supreme Court there, but there have been other ways of dealing with this—for example, the Canadian way of enabling Ministers to appear before committees like this one to discuss appointments. Do you have any ideas yourself about how parliamentary involvement could be expanded here?

Lord Justice Etherton: Yes, I do. I think it is extremely important for the Committee, in considering what conclusions it should come to, to look at comparative systems because we can derive many lessons from comparative systems. My own knowledge, I am afraid, extends only to three: Canada, South Africa and Israel. They are interesting examples because they are examples of vibrant democracies and independent judiciaries that confront, when it is necessary, Parliament, the relevant legislature and the executive. In all of those jurisdictions, we are dealing with committees that are set up; sometimes they are appointing committees, and sometimes they are advisory committees for the eventual appointer. They all comprise, to some extent: politicians who are members of the executive; other politicians who are not members of the executive; judges; academics; and lawyers, for example from the solicitor side and from the barrister side—it all depends on the particular constitution.

We can learn a number of things from those examples. First, in those cases diversity is much greater than it is in a system like our own—again I am talking about only the top two levels—and the evidence seems to be that the politicians are the ones who primarily drive that issue of diversity in those areas. Secondly, in each of those three systems, there is much greater transparency. In all those cases, the shortlisted candidates are made public; the interview hearings are public; and indeed in South Africa the transcripts of the interviews are available publicly. In my view, there is no reason whatsoever why all those developments should not be available here. Of course, we have a cultural difficulty here with any kind of openness, I am afraid, when it comes to the upper echelons of our society, but in my view there is no good reason why there should not be and very many good constitutional reasons why there should be greater transparency. That is a form of accountability as well.

The Chairman: May I invite Lord Pannick and then Lord Kerr to speak.

Lord Kerr of Tonaghmore: I certainly want to comment on that.

The Chairman: I appreciate that you do. Lord Pannick, do you want to ask your question first?

Q50 Lord Pannick: Shall I ask my question first? I would be very interested in Lord Kerr’s answer as well. I was provoked by Lord Justice Etherton’s comments that we need a political role in the appointment process primarily because of the policy-making function of the judiciary that has developed over the years. The arguments against that would be that Parliament has the last word anyway; a decision of the Supreme Court, even on human rights, does not have to be followed under the Human Rights Act. More importantly, the judges are exercising the powers that they enjoy in order to control what might otherwise be perceived as the excesses of politicians who are trampling on human rights. How do you
reconcile the greater involvement of politicians in the appointment process at Supreme Court level with the fundamental value of judicial independence? Are you not, following your approach, going to be encouraging politicians to look for Supreme Court judges who will reflect their views and their approaches?

**Lord Justice Etherton:** First of all, I certainly would not want to correct Lord Pannick on human rights, but I would say that we are not just dealing with human rights here. If you take EU legislation, for example, regulations and some directives are directly effective in this country and they involve the overriding of our own legislation by the judges in appropriate cases. It is nothing to do with human rights. It casts on judges the obligation to interpret and apply those directly applicable laws from the EU on a wide range of subjects, and that includes also some directives as well. We are not just concerned with human rights. We are concerned with policy-making roles and interpreting all sorts of legislation, not merely the Human Rights Act.

So far as concerns any dichotomy between the independence of the judiciary and politicians playing a role in their appointment, one of the aspects of the appointment process is to ensure independence, and indeed, as we know, there is a growing practice in this country of senior officials being interviewed by the House of Commons select committees precisely to ensure that ministerial nominations are going to stand up to government and the executive, so I see no dichotomy there. In any event, what is important here is the composition of your appointments or advisory panel, provided that politicians do not have a significant bloc, and that goes for the judges too. Provided that the balance is right between lawyers, judges, politicians, academics and others, I see no difficulty whatsoever in the involvement. What you want is an appointments committee that together is a collegiate body and is sufficiently representative in order to come to a good conclusion and to provide legitimacy for the process.

**The Chairman:** Lord Kerr, you must come in.

**Lord Kerr of Tonaghmore:** I think I must and regretfully I have to register my profound disagreement with Lord Justice Etherton, and I am very sorry to say that that disagreement exists at a number of levels. Let me start where he began. He suggested that the Supreme Court is principally preoccupied with creating policy; it is emphatically not. Of course there are cases where there are competing policy issues at stake, and we, by intellectual analysis and examination of the issues, have to choose between those competing issues. That is not the creation of policy. We are not creating law; we are applying the law. That is an absolutely fundamental misunderstanding on his part.

Secondly, I have to acknowledge his anticipation that he would be disagreed with because it is my firm conviction that his view is, if not unique to him, certainly very much a minority view. It is one that I have never heard expressed by any colleague throughout my experience both as a lawyer and as a judge. I firmly believe that the vast majority of judges would greet with dismay the prospect of Parliament interfering with the appointment system in the way that he describes. I would regard that as a most unwelcome and, more importantly, a most unwise step to take. It is widely acknowledged, for instance, among many commentators that the system of confirmation hearings in America is a most unhappy one. Candidates are briefed by the Justice Department officials and the answers that they produce during confirmation hearings are anodyne to the point of blandness. That is not a criticism either of the questioners or of the candidates. In my view, it is the complete antithesis of the preservation of judicial independence to permit candidates for appointment to be quizzed by
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parliamentary committees. It will not produce the answers that are solicited; it will act as a massive disincentive to meritorious candidates, and I think it would be a most retrograde step.

**Lord Justice Etherton:** Let me just clarify that I am not promoting or suggesting confirmation hearings as in the United States. I hope I made that quite clear.

**Lord Kerr of Tonaghmore:** No, no, I did realise that.

**Her Honour Judge Plumstead:** If I may add my two penn’orth here, I think what Lord Justice Etherton suggests is actually divisive within the judiciary itself. The idea that one level of the judiciary should be regarded as policy making and the rest not is, to me, inimical to our task, which is to uphold the law in the context of today. There is clear research evidence that judges do change the way they think in the light of observation of the world around them. Years ago the Home Office established beyond peradventure that the moment that a Home Secretary announced in Parliament that the tariff for such and such an offence or the maximum penalty for such and such an offence should be raised, the judges unconsciously raised the tariff themselves pretty smartly. We know we are subject to public inference. We know that we are in the context. I very much echo what Lord Kerr said in that we are basically quite ordinary people, albeit that we are able enough to be considered appropriate to be judges, but we do get on buses and ride bikes and the like—that is perfectly the case. Being part of the whole, I think the bulk of the judiciary would not agree with Lord Justice Etherton’s analysis of the Court of Appeal as a policy-making body; we have to interpret directly applicable European legislation in everyday cases every day. It is a question of interpretation and of course we have learnt new techniques of statutory interpretation since the decisions in Strasbourg, and what have you, have become more relevant to the work we do. I do not think that that makes us into a policy-making body and, if we are, we are on a real head-to-head clash with Parliament, which is the policy-making body.

**Q51 The Chairman:** I think we have understood that point, but I do not think we have pursued the questions about the mechanics of appointments and talked perhaps about the operation of the Judicial Appointments Commission and your understanding across the board of its effectiveness and the way it works. I was interested, for example, in the evidence, which you contributed to, from the Judicial Executive Board. You said both that, in your opinion, it has proved to be too slow and that the work of the appointments body should be subject to the scrutiny of Parliament. Obviously that is very different from what we have just been discussing. Would you like to expand on that and would other members of the panel like to give their views?

**Her Honour Judge Plumstead:** Certainly, slowness is inimical to diversity. It is quite a big step to apply to be a judge. If it becomes known that you have applied to be a judge, it can be very damaging to your professional career otherwise, principally for solicitors but also for barristers. A clerk will lose interest; a firm will say, “Sorry, you’re not pulling your weight,” etc. But to be held in limbo for 10 months as to whether or not you are going to be appointed, and then having been told after 10 months that you are suitable for appointment but you may have to wait six, seven months thereafter for an appointment, means that in terms of the ordinary person, with their mortgage, their children’s costs, their spouse’s or partner’s or dependant’s needs, it is an almost intolerable delay.
Q52  **Lord Renton of Mount Harry:** What was it like before 2005? Was it much quicker, much more effective, in your view?

**Her Honour Judge Plumstead:** I have been around a long time, Lord Renton. At first, it was very, very quick; you would simply be asked to come down here and speak to the Lord Chancellor to be a Circuit Judge, and you would be packing your bags and on your way the following day. I do not think anybody wants to go back to those days, least of all women who do not belong to the established clubs. In the last few years before the JAC was concerned, the Department undertook very similar exercises to the JAC: they invited applications, you filled in forms, you gave references, various people stuck bags of ice on their heads and looked at the list and picked a number. That process also took a great deal of time.

**Lord Kerr of Tonaghmore:** Could I say something about my experience as chairman of the Judicial Appointments Commission in Northern Ireland? Ex officio I was chairman because I was Lord Chief Justice. It was not my idea and I was not particularly enthusiastic about it at the time, but it proved to be a very steep and worthwhile learning curve for me. The point that I would like to make relates directly to my experience of diversity. I was extremely concerned by the fact that there was no woman on the High Court in Northern Ireland. It was a matter of acute embarrassment to me. We spent a great deal of time and energy discussing the problem within the Northern Ireland Judicial Appointments Commission. I came, as did indeed all my colleagues, including all my lay colleagues, to the firm conviction that there is no quick fix to the problem of diversity. It is something that has to be tackled on a long-term basis. What we have done in Northern Ireland is to talk to possible women candidates at all levels and from both sides of the profession, and we have examined with them what the disincentives are, discussed with them what being a judge entails, and tried gradually to dismantle those disincentives. They are obvious: the working patterns, the working hours, the fact that there is no job sharing in the judiciary, the fact that for the most part there are very few part-time posts. All of these problems need to be tackled in a measured, long-term way. Quite honestly, if someone believes that by introducing some form of parliamentary dimension you are going to increase diversity magically overnight, I think that is most misconceived.

Q53  **Lord Crickhowell:** I am going to ask two related questions and perhaps preface the question by saying, one, I am not a lawyer and, two, I was immediately struck by the opening texts: Lord Kerr’s “the appointment system must be independent of external influence”; and Sir Terence’s “judges cannot be a self-appointing body”. I thought we were going to be in for some interesting conflicts. We have already had some comments on the appointments. I was also struck by the evidence received at the last session, where I must say as a layman I was astonished to discover that the panel that appoints the Supreme Court consists of only five members, of which two are the President and the Deputy President of the Court. Having been involved in appointing distinguished academics and so on, I cannot conceive of an appointment panel that is that narrow. With that preface, do you think members of the judiciary have an appropriate role in the appointments process? If not, how should it be altered? Is the system by which the Justices of the Supreme Court are appointed appropriate? How can it be improved?
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Lord Kerr of Tonaghmore: I was appointed through that system so I can hardly be heard to complain, but I recognise that there is a very respectable argument for increasing representation of lay people. When I said that the appointments system should be independent of external influences, I did not wish to imply that there should not be lay representation on the appointments commission—far from it. In Northern Ireland, we have very vigorous lay representation drawn mainly from human resources backgrounds. They, I can assure you, assert their independence trenchantly. Therefore, I value lay representation, but once you appoint a sufficiently robust, independent appointing body, it should be free of external influences.

As for the representation of judges on these appointing bodies, that seems to me indispensable. It is very difficult to convey to a lay person exactly what the job of a judge demands. While chairman of the JAC in Northern Ireland, it was my policy to require all of the lay members to attend for several days judicial hearings for each of the tiers of the judiciary. All of them were astonished by the intensity of the work and the intellectual demands, but they became steeped in what was required of the judges. But they depended upon judicial members for an explanation of the work that we undertook. There may be a debate as to the composition of the panel that appoints Supreme Court Justices, but it seems to me that there must always be judicial representation on it.

Lord Justice Etherton: I think I have already answered that question in a way. It seems to me that the present appointments panels for both the Supreme Court and the Court of Appeal, though arguably less so for the Court of Appeal, are constitutionally inappropriate. I want to emphasise that my comments in this regard are not directed towards any of the personalities who are involved in the process. Mine is a purely institutional and constitutional commentary. I want to perhaps qualify, out of some cynicism, the suggestion that if you have powerful, knowledgeable judges and lay members only, it is possible for those lay members at the very highest levels to exercise a decisive influence. In a sense the reason for that is illustrated by what Lord Kerr has rightly said, which is that lay people are dependent upon the judges for an explanation as to their merits—their judicial merits. It would be fair to say that the overwhelming view of the judiciary—I hope I am not the only one dissenting but I may be—is that judges know best, and the constitutional format reflects that. That is why the appointments panel for the Supreme Court has on it the President and the Deputy President of the Supreme Court and three others, and you have to remember that those three others could all be judges. As it so happens, at least one of them at each time has been a judge, because the judicial appointments commissions of Northern Ireland and Scotland can send anybody. In one year, Scotland sent a judge, and last year Northern Ireland sent a chief—no, I do not think Scotland did send a judge, and I am not sure about Northern Ireland, but they can be judges. You can see there the difficulties of the dynamics of having a junior judge on the United Kingdom Supreme Court appointments panel with the President and the Deputy President. The dynamics there are very, very difficult. If somebody comes along and says, “All my colleagues think X is marvellous,” what are those lay people going to do? They are going to say, “Why do they think they are marvellous?” They are not going to say that they are not marvellous. That is why in my view, at these higher courts, you should have an expanded panel; you can and should have judges on it. I am not suggesting that there should not be any judges. I am querying whether they should be both the President and the Deputy President, but I do not feel strongly about that, provided that the rest of the composition is sufficient in practice to challenge and to question. This is one of the reasons why I say that politicians can do that because, unlike lay people, politicians have the legitimacy of being elected. That provides their role, in my view.
Lord Kerr of Tonaghmore: It may be ambitious for me to attempt to allay the cynicism of Lord Justice Etherton, but I would like to relate an experience that I had as judicial appointments chairman in Northern Ireland. The Senior Lord Justice and I comprised, with three lay members, a shortlisting panel. Two of the applicants for the appointment were women. The Lord Justice and I wanted them to be shortlisted. We were outvoted by the three lay members, two of whom were women.

Q54 Lord Crickhowell: Can I just pursue this a little? I mean, my experience is rather different. I was substantially responsible in the academic world for the appointment of a Vice-Chancellor. Quite clearly, we wanted to have every possible view about the academic qualifications and excellence; just as quite clearly there must be judges giving their expert views. We had quite a large panel. I always insisted that there should be women on the panel because in my experience they always perceive things that we men do not perceive, and secondly I always split the panel into two for separate interviews, because it is quite extraordinary how, if you have discussions, one panel will pick up on an aspect that the other panel never touches on, and they can come in together. Surely there is everything to be said—of course having the judges—for having a considerably wider panel, including academics, perhaps politicians, but people who can weigh up the abilities and character having heard all the evidence.

Lord Kerr of Tonaghmore: Of course there is, but do not assume that academics are not represented on the Appointments Commission. In Northern Ireland, we have three academics on the Appointments Commission.

Her Honour Judge Plumstead: I think one misreads it a bit, because in the JAC the commissioners are part judges and part rather patronisingly called lay, but these are very powerful people with strong backgrounds in business, politics or what have you. The experience has been that they have been highly influential in how the candidates have been selected from the available interview pool. One of the difficulties the JAC has is that it is absolutely swamped with applicants, and one of the greatest problems is simply how to sift down to a reasonable number of likelies for interview and further inquiry.

Q55 Lord Powell of Bayswater: I have just a couple of points. One is on the role of the executive generally in this process. My recollection of the written evidence from the Judicial Executive Board is that you saw a role for the Lord Chancellor in the senior appointments, but you did not see any role for the Prime Minister. Speaking personally and remembering the increasingly tetchy correspondence between Lord Hailsham and Margaret Thatcher in the 1980s, I think you are going to miss a fine historical record by eliminating the Prime Minister, but that is your view. Judge Plumstead, I got the impression that you felt that the executive was trying to encroach too much on appointments lower down the scale. Is that the case?

Her Honour Judge Plumstead: It is very difficult to say that because it is a matter of anecdotal evidence, rather than hard evidence. There is a sense that, on occasions, Lord Chancellors before our present Lord Chancellor have been very concerned about the content of lists prepared by the Judicial Appointments Commission for people for appointment to High Court Bench, District Bench, Circuit Bench and, indeed, the Tribunals.
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Bench. So, there we are. It is very difficult. I am not sure. You know the process of these consultations and this is the final put-together by the JEB. I had a slight wonder what on earth it meant that a politician who is the Lord Chancellor is okay, and a politician who is the Prime Minister is not, because we have not had an apolitical Lord Chancellor for quite some time now. But on the other hand, the Lord Chancellor still holds that office, and with the office go a great deal of duties that he—or she, for that matter—has to exercise quasi-judicially as opposed to politically as a member of a Cabinet and a member of the particular government in office at that time.

Q56 Lord Powell of Bayswater: Your overall view, then, would be that the role of the executive should certainly not be increased; possibly it should be diminished but may be just about all right now.

Her Honour Judge Plumstead: Too right.

Lord Powell of Bayswater: Too right.

Lord Kerr of Tonaghmore: I agree with that. The whole point of the Constitutional Reform Act of 2005 was to take from the patronage of the Lord Chancellor the power of appointment and give it to an independent commission. I would regard it as a very retrograde step if we increased the role of the Lord Chancellor. At present, the Lord Chancellor is consulted about the appointment, he can invite the commission to reconsider and, indeed, I think, in England and Wales, he can reject the candidate. In Northern Ireland, of course, his role will disappear shortly—perhaps it has already disappeared—but he could invite a reconsideration of the candidate. If the commission adhered to its choice, he was obliged to accept it, and I thought that that was an extremely healthy balance and one that worked very well in practice.

Q57 The Chairman: Judge Jenkins, I think you wanted to come in.

District Judge Tim Jenkins: Yes. Thank you. I think there has to be a role for the executive but I think, perhaps, that role is during the selection process in terms of being aware of who, perhaps, the candidates who are being nominated for appointment are. I am not sure it is particularly healthy for the JAC to have completed the process and made a nomination and then for that individual to be considered. I am not sure if that is not too late in the whole process. If the executive is involved earlier on, it gives a much more coherent entity to the whole process, but I would not see that it is appropriate for the current extent of executive involvement to be substantially increased.

Let me just make an overall, general point. We have heard an interesting discussion on the senior courts. I think it is a mistake to think that what affects the superior courts does not have an effect lower down, particularly, in my interest, in the County Courts. Obviously, at some stage, decisions that are made in the Court of Appeal, in the Supreme Court, have an effect on our day-to-day staple work in the County Courts. If there are to be changes to the way in which those courts are constituted, that clearly must have a very real effect on the way in which the County Courts will operate, and so I think it would be wrong to just think of them as almost two distinct entities. We are very much one.
Q58 **Lord Powell of Bayswater:** I just wanted to come back on a second point, which was in relation to parliamentary process and the idea that candidates for the most senior offices should appear before some sort of parliamentary body. One could debate what it might be. We discussed this with academic witnesses last week and they were quite keen on the subject, but they thought that possibly either you could put limits on the sort of questions the parliamentary body would ask or even have it ask questions through a lawyer, which seemed to me to be eminently unpractical. Do you really think it is possible to appear before a parliamentary committee and yet there to be limits on what can legitimately be asked? On the whole, parliamentary committees do not take kindly to being told what they can and cannot ask.

**District Judge Tim Jenkins:** I am not sure if that would render the whole thing pointless.

**The Chairman:** What—the limitation on questions?

**District Judge Tim Jenkins:** Yes. Either it is a good idea and it should be done, or it is a bad idea and should not. To try to have a halfway house, it just seems to me, would be a waste of everyone’s time and would not achieve anything at all. I think that the proper approach would be not to enter into the process at all.

**Lord Kerr of Tonaghmore:** Once we embark on this journey, we invite the experience in America, with candidates being briefed to the eyes by human resources experts and being told to avoid answering controversial questions. I really do believe that, quite apart from the disincentive that it would operate, it would be a worthless exercise.

**Lord Justice Etherton:** I am not, myself, in favour of a process by which, either way, by pre-affirmation or post-affirmation, there is an appearance of judges before select committees. I was merely answering Lord Pannick in relation to that issue. As I think I made clear, my own preference would be for an expanded appointments committee in which a number of sectional representative interests are represented, including representatives of the executive and Parliament, but I do not favour appearing before a parliamentary committee, partly for the reason you have mentioned, which is controlling the questioning. In South Africa and Israel, where they do have this process, it has worked extremely effectively and very well, producing high-grade candidates and high-grade judges. There are rules governing the sorts of questions that can be asked and should be asked within that committee. It allows searching questions in relation to some matters, but there are certainly some matters that are off-limits.

Q59 **Lord Pannick:** Would you have the same hostility to a different form of parliamentary supervision, which would be regular appearances by the chairman of the Judicial Appointments Commission, particularly the person who is responsible for the Supreme Court appointments, coming before a parliamentary committee and being asked questions about the process that has led to a particular selection?

**Lord Kerr of Tonaghmore:** No, I would not.
Her Honour Judge Plumstead: I see no problem with that.

District Judge Tim Jenkins: Provided that it was not dealing with specific appointments—"Why did you appoint that person?"—but if it was the process generally, then I think that would be an appropriate method of accountability.

The Chairman: Could we turn, if we may, from the process of appointments to the way in which continuing activities on the Bench—the performance, as it were, of the judiciary—are assessed? Lord Rodgers, I think you wanted to pursue this.

Q60  Lord Rodgers of Quarry Bank: Whatever form of process we have, there ought to be means to assess afterwards the success of choosing candidates. I assume that, when people are appointed, some of them turn out to be very good judges, some average judges, perhaps poor judges and even some very bad judges. In order to decide what the formal process should be, what is the way in which you measure the performance of the successful appointees and what to do about it?

District Judge Tim Jenkins: Perhaps I can start, because I have practical experience of judicial appraisal. Deputy District Judges are appraised by full-time District Judges, and that is a system that works very well. There are difficulties around the fringes of how often you should appraise particularly experienced Deputy District Judges but, as a matter of principle of part-time judges being appraised by full-time judges, I think it is a principle and a practice that works extremely well, and certainly the District Bench would welcome that to be extended to full-time judiciary.

Q61  Lord Rodgers of Quarry Bank: Perhaps I have not made it absolutely clear: I am thinking that the decision has been made. I am not challenging the process at this point, but once you have made your decisions and once the judges have been appointed, they are not all equally good—that is what I am saying. In what way do you measure the success of the performance and, therefore, what is the lesson back to the process? Do you say that the process is not working adequately or, alternatively, would you just say that you could never get them all very good? How do you deal with those who do certain things? Perhaps you have to weed them out if they turn out to be a failure, despite the process itself.

Her Honour Judge Plumstead: One of the problems that we have is that a judicial appointment is essentially a one-way street. Once you have become a judge, there is no turning back, and there are good practical reasons, as well as the judicial independence reason, why that has been considered appropriate. We had a pilot project in the Northern Circuit a few years ago for appraisal of recorders. It proved very popular with those who were appraised. They found, as a professional development tool, that it was extremely helpful to them to have an experienced judge look at their work, sit in for part of their hearings and so on and so forth, and give them feedback. I think the Circuit Bench is very keen that there should be an appraisal system for recorders, so that a recorder, before taking that big step of full-time appointment (a) can demonstrate that they are doing the judging bit effectively and (b) can make their own decision as to whether it is for them.
Odd judges are sort of meat and drink for the after-dinner circuit, if I can put it that way, but we all know people who find the duty of decision making incredibly onerous; it leads to huge stress among some judges and, in some cases, mental illnesses. It is not something that should be taken lightly at all. I would be very keen at least to get that going. The problem is the cost. Effective appraisal, as the people who have the human resources experience will tell you, is a skilled job. Those who are going to do it need to be carefully trained. Those who are going to be appraised need to be fairly appraised, involving a sufficient cross-section of what they have done and sufficient hands-on discussion with the appraiser. It ain’t cheap, and the Northern Circuit experiment, in those heady days when money was being spent like water in government, foundered on grounds of costs then.

I do not know how we are going to persuade the purse-string holders in the Ministry that this is a cost-effective exercise. I think it is and I think most judges think it is, but it is a question of persuading them that this is a good way of using money to get a more effective judiciary, as well as weeding out, before appointment, those who, however brilliant they are, simply do not have the personal qualities to be effective judges.

District Judge Tim Jenkins: I think it should be extended to those judges post-appointment as well. I have often thought, on a very basic level, after having done it for the number of years I have, that there are probably things that I do when I am sitting listening that send out all the wrong signals, and it would be very good for someone to say, “Just sitting like that is not very helpful. It gives the wrong sign.” The extent to which that appraisal process could be used to determine poor judges and poor judging, I think, is an incredibly complex discussion, because judges operate within an exercise of discretion and, of course, nine judges may well disagree with the decision the 10th judge has made, but that is not to say that it was a wrong exercise of discretion. Dealing with—if I can wrap it up this way—poor performance, and I understand the point that, perhaps, you are making, is very difficult and complex, and would need more than just an annual appraisal system, but it may be an issue that needs to be looked at.

Q62 Lord Rodgers of Quarry Bank: Is this unique to the law and the judiciary? In other professions, there are ways in which people make appraisals and they do reach conclusions. There are some who are good and some not good. Why should the profession be unique?

District Judge Tim Jenkins: It comes back, I think, to where we started: the independence of the judiciary has to be recognised and understood. If you have a system that pinpoints a particular judge for a particular reason, the process would have to be so robust as to ensure that, at some stage, it was not an interference with that judge’s independence in their decision-making process—that they really were a judge who could not do the job.

Q63 Lord Irvine of Lairg: I would be interested to hear from Judge Jenkins, on the basis of his own experience, what the actual content is of the appraisal by District Judges of Deputy District Judges, how it is carried out, to what level of intensity, and at what expense.

District Judge Tim Jenkins: The expense is paying for two judges when, normally, there would be one.
Lord Irvine of Lairg: For half an hour, for an hour?

District Judge Tim Jenkins: A day.

Lord Irvine of Lairg: A day. For those of us who do not know how the system works, it would be helpful, I think, if you could tell us how the appraisal is conducted in practice by District Judges of Deputy District Judges.

District Judge Tim Jenkins: Essentially, I carry out appraisals. I will sit in the courtroom and watch the Deputy District Judge doing his or her list for the day. I do not interfere. I sit there, hopefully very quietly, making notes, and observe the way in which the judicial business is done. I will look at the files to note the orders that have been made. There hopefully will be some paperwork that has been done and I will look at that. The list will have been specially constructed so it will allow the deputy to display a range of judicial skills: short hearings and perhaps a short trial in the afternoon; some civil work; some family work. It can only ever be a snapshot, but it is the best illuminated snapshot that we can take.

At the end of the day, I will sit down with the deputy and we will talk through the day. A post-appraisal discussion would then be conducted; we would discuss why certain decisions were made and whether there were options for doing things differently and we would end up with an agreed plan for the deputy to move forward perhaps aspects where they might need some further help, perhaps some strategies and ideas for dealing with difficult litigants in person, perhaps how they might better explain a certain set of circumstances.

Q64 Lord Irvine of Lairg: Could I ask one further question? Let us suppose that, having been appraised and appraised favourably, the Deputy District Judge secures a permanent appointment. Would these procedures that you describe for the appraisal of deputies translate to those who get permanent appointments?

District Judge Tim Jenkins: Yes.

Lord Irvine of Lairg: But without compromising their independence.

District Judge Tim Jenkins: I think so. I would be very happy for one of my District Judge colleagues—I think, with respect to myself, it should not be for a day—just to sit in with me perhaps for a morning and for me to sit in with someone else. I do not think it needs to be formally recorded or reported in any way, unless either of us thought that there was a serious ongoing problem. But I think that I would benefit, I am sure, from one of my colleagues saying, “Yes, that was good, but that was not perhaps such a clever way of doing that,” and I would hope to be able to give that benefit to full-time colleagues as well. It would have to be, to use the phrase, owned by the judiciary. We are very certain on that. We would be very happy, as District Judges, to be appraised by fellow District Judges, but on the basis that it applied to all levels of judiciary as well. Being very parochial, I am not sure we would want to be singled out in any particular way.

The Chairman: I think it is interesting that, in the points that Lord Rodgers and Lord Irvine have both raised, and Judge Jenkins and Judge Plumstead in your answers, you have brought us to the point of raising the question about a career judiciary, and I think Lord Shaw was anxious to pursue that.
Q65  **Lord Shaw of Northstead:** This was raised in our earlier meeting but it was also raised, I think, by Judge Plumstead at the start. At our last meeting, Professor Paterson explained that the Dutch have a system of career judiciary. Under their system, you can join straightaway from law school or, alternatively, somebody can go ahead and practise for, say, 15 years or so and then apply to become a judge. There, he comes before an appointments board, apparently, and, if approved, he is then trained, and that training takes a significant period of time. I cannot see this being a practical way, because somebody must be at the height of his profession and suddenly switch and then go in for a period of training and so on and so forth, with an uncertain future ahead of him. What is the position? Is there a chance of looking at that?

**Her Honour Judge Plumstead:** You have, in fact, three career judges in front of you, because each of us on this side of the room joined the judiciary at a level that we are no longer at, but it is rather different: in the civil law countries, the tradition is that law graduates decide they are going to go down the judge path and they sign up for judge school—a postgraduate qualification. Perhaps most significantly, in most countries—in Europe particularly but also in South America, which I have some experience of—the judge school graduates shift into and out of the judiciary. They go and sit as a magistrate in a small village in northern France for a couple of years. They then move to be a juvenile judge—I mean a judge of juveniles rather than a juvenile judge—in Paris, and they are bunged out to become a member of the prosecution service and so on and so forth, and then return to the judiciary at a different level. That is the purest form of a career judge. It is a civil service cadre, which exercises judicial functions at various points in their career.

On the other hand, when I was first appointed a registrar of the Family Division, I had absolutely no intention or ambition to do anything else. I was particularly pleased to get that, but as time goes on sometimes somebody comes and whispers in your ear, for instance, “Look, why don’t you apply for the Circuit Bench?” or “Why don’t you apply for the High Court Bench?” and then you say, “Maybe I will.” Then one becomes transformed from a non-career judge to a career judge, within the Anglo-Saxon meaning of the word.

Q66  **Lord Shaw of Northstead:** Does that involve specialist training that will divert you from your career outside the judiciary?

**Her Honour Judge Plumstead:** Yes, once I became a registrar, that was it—I had ceased to practise as a barrister. I was not going to turn back. On the other hand, I then specialised in family law and the most abstruse aspects of it for the time I was a District Judge in the Family Division. Beside that, as an assistant recorder and recorder, I was trained to sit in the Crown Courts and to do civil cases, and gained experience before I applied to join the Circuit Bench.

Q67  **Lord Shaw of Northstead:** Are solicitors and practising solicitors tempted to become judges?

**District Judge Tim Jenkins:** I was.
Her Honour Judge Plumstead: It depends on how much you earn. Looking at Lord Hart, I
do not imagine that many partners in his firm would fancy what a Circuit Judge earns.

The Chairman: Lord Hart, do you want to pursue that general question? I am aware,
incidentally, and thank you all very much for your great generosity of time, that we are going
to try to end somewhere between 11.30 and 11.45. I just say that to the members of the
Committee rather than the members of the panel, who are being very generous with their
comments. Lord Hart?

Q68 Lord Hart of Chilton: I will start off with a rather more general point, which is
that, for many years now, there has been a desire for greater diversity in the judiciary and
there has been a corresponding sadness that it has not really been achieved in any great
measure. Lord Kerr has indicated, of course, from his point of view, in his experience, that
he sees it as a long-term programme; others, including those who gave evidence last week,
see it as a much more urgent programme of activity to take and embark upon, but there is
not any real agreement as to how you actually achieve it. I would like to start with the first
question, which is to ask you, from the Constitution Committee: what is the constitutional
basis for wanting to have a more diverse judiciary?

Lord Kerr of Tonaghmore: I do not know that there is any obvious constitutional basis for
it but, from a societal point of view, it is plainly desirable. When I said that it was a long-term
process, that does not mean that I do not regard the problem as anything other than urgent;
it is urgent. It does need to be addressed, but my essential message to you is that it cannot
be fixed quickly. As I said, it was a matter of acute embarrassment to me that we did not
have a woman on the High Court Bench in Northern Ireland, and you may be sure that I
regarded the appointment of a woman as extremely urgent and necessary, but when we
tackled the problem, when we talked to women who might make the application, we
realised that there were deep-seated problems that operated as a very active disincentive to
them, particularly the working patterns.

Many of the women who might have aspired to judicial appointment were the mothers of
young—or youngish—children and they simply could not commit to the type of work
pattern that our system at present requires of them. It seems to me, therefore, that instead
of thinking about how you change the appointment system, we should be thinking about how
we accommodate the difficulties that they have articulated. That is a far more effective way,
in my view, of ensuring that young women of merit will come forward.

Lord Justice Etherton: I certainly agree with the last comments of Lord Kerr, but I do think
there is an obvious constitutional significance in diversity, and it relates to the points that I
opened on, which is that, if you are to have confidence in the judiciary, then there is an
expectation, I think, by society that, in some broad way, as an institution it is capable of
dealing with the experiences of people and, to some extent, reflects them.

For my part, this raises the whole question of what merit means. We do not have a
definition of merit in the statute. The JAC has formulated its own definition, which has
recently just changed slightly, but I would like to suggest that merit in terms of also diversity
has to be seen in two ways. First, we have to look at the merit or diversity—I like to call it
the merit or competence—of the court itself, whether it is the judiciary as a whole or my
particular interest, the Supreme Court and the Court of Appeal. Then you have to look at
the merit of the individual. Those two, obviously, are not identical but they fit into one another. For example, if you are looking at the competence of the court itself, I would suggest, as in the South African model and the South African constitution, that it should broadly reflect various elements within society to give it legitimacy, but it must also be sufficiently diverse in its expertise to be able to deal, as a body, with the work that it has to deal with, so there are two elements there.

So far as individual merit is concerned, I think we have to be very careful about what we mean by diversity. For my part, I think it is somewhat narrow and perhaps unrealistic to talk about diversity simply in terms of gender, sexual orientation and ethnicity. When we are talking about diversity—and this goes back to a question that was asked about how we can ensure that the judges appointed are the right ones and the most competent ones—it all depends what you mean by competence.

In the Supreme Court and the Court of Appeal, the judges are analytically excellent—one hopes, in any event, that they should be excellent—but the most analytically and intellectually intelligent of judges is not necessarily the best judge, and I think most people would agree with that. We can identify through generations who are the most intelligent but not necessarily the best judges. What we expect of our judges, then, is to bring to bear on a difficult subject, on which jurists of equal ability may disagree, some additional qualities and I would say that that is to do with experience—life experience—and a sub-category of that life experience, but not necessarily the overwhelmingly important one, are the elements of ethnicity, sexual orientation and gender. It is, however, a much wider thing than that, because what studies in America have found is that people's life experience affects their whole approach to their judicial office. I would like to suggest there are two elements to merit, and that diversity must be seen in a much wider context than the narrow ones in which we have been talking about.

**Lord Kerr of Tonaghmore:** I am delighted and relieved to be able to express agreement with Lord Justice Etherton. He is unquestionably right. I think that there is a good case to be made for not defining merit too closely, because ideas about merit change all the time. Lord Justice Etherton is unquestionably right: the attributes of intellectual rigour, powers of analysis and so on, while they are indispensable to the judicial office, have to be complemented by an understanding of society, insight into people’s problems, compassion and humanity. I also happen to believe that gender, sexual orientation and background should contribute to the debate about merit, so I fully agree with Lord Justice Etherton.

**Lord Justice Etherton:** I just want to add one other thing. One of the questions that you asked was whether there had been any studies that identified whether or not diversity in the wider sense actually makes a better judgment, or has an effect on the judgment. This is a very important and hotly debated issue. I would just like to say that, so far as bodies of judges are concerned, where they are sitting in constitutions, not individually, there have been studies in the United States where you can identify people who have been appointed by Republican or Democrat Presidents, so you can tell their political affiliation. It is quite clear that your background does affect the way the constitution reaches its conclusion, both in its reasoning and its outcome.

The other thing I would say about looking at specifically judicial studies—and to some extent this is the point when you are dealing with constitutions of judges—is that the way in which individuals react within a body of people is a very well-established part of social psychology, and there are plenty of studies that indicate how people's individual views feed in, how
diversity feeds in terms of diversity of experience, and how you get a better result, and a much better reasoned result, at the end of the day. I would, then, urge, to some extent, that looking just at judicial studies is taking too narrow a view.

The Chairman: We were encouraged because one of the academics who gave evidence to us last week suggested that they were in the middle of a project that might be useful to us, which is coming, I think, to fruition at the end of year. Lord Hart, I think you wanted to go on, and then Lord Pannick.

Q69 Lord Hart of Chilton: We have not heard from Judge Plumstead, have we?

Her Honour Judge Plumstead: A couple of things: the first was Professor Cheryl Thomas, who spoke to you last week, I think. The difference, of course, is that those studies were in the United States into Benches of judges rather than single judges and, of course, below the appellate level, judging is a solo job. Speaking as a woman, I very much resent the sort of girlie theory of jurisprudence—that I am going to bring my softness to the task, as it were.

The Chairman: You should try politics.

Her Honour Judge Plumstead: I can imagine it. Indeed, there is a sense, first, that women particularly have felt patronised by the system in the past and we do not feel that is appropriate. One thing that we could do now soonest is to change the way that people who interview candidates for judicial appointment are trained. I have taken this up from Mrs Justice Dobbs, whom you probably all know. She says that there is very good training available to allow interviewers to recognise when they are seeking to prefer mirror images of themselves, and I think that is a very important step that could be taken without much delay, without much cost, but which would change the way in which the judiciary replicates itself, if that is the criticism. I think that is a very valuable thing.

The Chairman: Lord Hart, did you want to pursue this point?

Q70 Lord Hart of Chilton: Do you think that there is a political will amongst all the judiciary, top to bottom, that greater diversity should be achieved?

Her Honour Judge Plumstead: Despite the snorts that you might hear from the old dinosaurs, I think there is.

Q71 Lord Hart of Chilton: From a practical point of view, you have given us one or two tips as to how that could be achieved. Are there any more practical steps that could be taken to widen the pool?

Her Honour Judge Plumstead: That is the problem, and I agree entirely with Lord Kerr that it is a very slow process. The pool is of lawyers who have been doing the job for 20 years or more and, of course, to get to that point, those who are less advantaged have to get over a lot of hurdles. I think I should also remind you of what Lord Judge said not so long ago about the pool. Legal aid is a very important factor in the career structure of
Strangle legal aid and you strangle the capacity of those people to reach the level of seniority and maturity to be the sort of people we want on the Bench.

**District Judge Tim Jenkins**: I was just going to add, if I may, that I would agree that much of this is tied up with how one might define merit, but whilst I appreciate fully the dangers inherent in following a trickle-up policy, I think to change the current view of what merit might be so as to—if I can express it this way—improve the diversity figures almost overnight would be a dangerous step to take.

**Q72 Lord Pannick**: Can I just pick up on this happy agreement between Lord Kerr and Lord Justice Etherton as to what the concept of merit means, both for the court and for the appointment of individual candidates, and pick up on Lord Kerr’s recognition that this is an urgent problem for which there does not appear to be any short-term solution? Do all of you think that part of the solution may simply be in a clear articulation of this principle to which you have all subscribed, so that potential candidates understand what merit actually means and those who are doing the appointment clearly understand what is required? It is not just confined to intellectual brilliance or having been at the Bar for 30 years. That is not a panacea but it may actually make a significant contribution to bringing forward the candidates who, I think, are there. There are many very able women candidates and candidates from ethnic minorities who perhaps are still deterred by believing that the criteria are rather different from the criteria that you have agreed on.

**Her Honour Judge Plumstead**: There has been some research on that. When one looks at the body of practising lawyers of between 10 and 20 years’ experience, who are the target market, as it were, a considerable number of them did not understand how eligible they were. Of course, Lord Irvine started with, “Don’t be shy, apply,” several years ago. A huge amount of money has been spent trotting round the country by successive Lord Chancellors, successive departments of whatever the Ministry of Justice is called this week and so on and so forth, trying to encourage people to apply. It has had a limited success but I think the analysis of the candidates, which the JAC does every time, has shown that most pools of, as it were, not-white-and-male—please do not include Oxbridge, because I do not think it is fair on those who went to Oxbridge—turn out to be underrepresented.

**Lord Kerr of Tonaghmore**: If I may say so, self-evidently you are right—of course you are right. It is better that people be informed. I hate to harp back about my experience in Northern Ireland, but it is the one that informs my thoughts for these questions. We conceived it as our obligation to proselytise: to go out, to meet groups of people, not even necessarily lawyers, to tell them about how we set about appointments and to give them the very message that you suggest should be conveyed to them. But it needs to be reinforced and it needs to be repeated, so that people understand that they can bring a range of skills that are quite different from the traditional skills set, which may make them very worthy candidates.

**Q73 The Chairman**: May I just ask Lord Kerr specifically about the Supreme Court and the relationship with Northern Ireland and Scotland? Is it your understanding that there is
still the convention that there should be one justice from Northern Ireland and Scotland and, if so, does not that, in a sense, undermine the principle of merit?

**Lord Kerr of Tonaghmore:** It is not a convention so much as a requirement of the Constitutional Reform Act itself. Section 27(8) requires that the appointing commission ensure that there is an appointment of justices who have not only expertise in the practice of law but actual experience in the practice of law in each of the jurisdictions. The convention, of course, if it exists, is not of all that great longstanding. The first Lord of Appeal in Ordinary from Northern Ireland was the then Mr Justice MacDermott, who was appointed in 1947 and, in 1951, in what many would regard as the more correct route, he stopped being a Lord of Appeal and, in fact, became the head of the judiciary of Northern Ireland as Lord Chief Justice. From 1951 until 1988, there was no representative from Northern Ireland at all until Lord Lowry was appointed. There has been consistently since then, a Lord of Appeal from Northern Ireland.

It is for others to say whether the contribution that one makes from one’s experience in Northern Ireland is valuable, but I do not, if I may say so, believe that there is any undermining of the merit principle. Each of the applicants from whatever jurisdiction goes through exactly the same selection process as those from England and Wales, and one hopes that there will be people of merit coming forward. Certainly, it would be my view that if, unfortunately—although I do not foresee this at all—more meritorious candidates from England and Wales presented themselves, they should be appointed at the expense of the experience that Northern Ireland should provide.

**The Chairman:** Thank you, that is helpful.

**Q74 Lord Hart of Chilton:** There should not, then, be a convention that there should be at least one female in the Supreme Court.

**Lord Kerr of Tonaghmore:** I do not know of such a convention that there should be at least one female.

**Her Honour Judge Plumstead:** It is absolutely extraordinary that, just because we have only just got one women in the Supreme Court, it should suddenly be elevated to a convention.

**Lord Kerr of Tonaghmore:** I fully anticipate that there will be further female appointments to the Supreme Court, and I look forward to that day, but it would be very unfortunate, in my view, if that appointment was perceived to be the product of a convention.

**Q75 Lord Irvine of Lairg:** Do you not think, Lord Kerr, that there is a stronger case to be made for Scotland, because Scotland is a separate legal system?

**Lord Kerr of Tonaghmore:** Northern Ireland is a separate legal system, but not quite as separate as Scotland, I acknowledge. There is a compelling case—of course, Lord Irvine, you are absolutely right—for representation from Scotland, and I have had the great privilege of
Lord Justice Etherton, Lord Kerr of Tonaghmore, Her Honour Judge Plumstead and District Judge Tim Jenkins – Oral Evidence (QQ 40- 77)

serving with two very distinguished Lords of Appeal in Ordinary and members of the Supreme Court, Lord Hope and the late Lord Rodger.

Q76 Lord Renton of Mount Harry: Could we, before closing, simply ask you whether there are other jurisdictions from other countries that we perhaps should be having a look at in this inquiry of ours? We have talked about Israel and South Africa particularly, and I wonder whether the fact that those are both, in a sense, new countries is why they are able to have a good mix in this issue of “Where are you a barrister? Where are you a solicitor? How are you a judge after all of that?” Are there any countries that you think it would be wise for us to have a think about or to ask to come and see us?

Her Honour Judge Plumstead: I would look at Australia and New Zealand.

Lord Renton of Mount Harry: I wondered, yes.

Her Honour Judge Plumstead: Because they have their differences but also we have areas in common, and they struggle with exactly the same issues as we struggle with. I find South Africa quite difficult, because there is so much turmoil and, after the idealism of the mid-1990s and so on and so forth, the pressures on the judiciary recently have been very high. It is not pressures that we feel, I have to say.

Lord Renton of Mount Harry: New Zealand has, in a number of issues, been looking for change—looking to move forward in the new century.

Her Honour Judge Plumstead: Yes.

Lord Renton of Mount Harry: Perhaps we should think of following this up.

The Chairman: I mentioned Canada earlier in relation to the parliamentary committee involvement, but that may be the old Commonwealth as opposed to the newer countries, which would be useful. Thank you, all of you, very much. Is there anything further that any of you feel we simply have ignored that you very much wanted to say, or is there any member of the Committee who feels that some burning point that they wanted to put to our distinguished panel has been omitted? Lord Norton.

Q77 Lord Norton of Louth: This issue derives from our looking at the perspective of trust in the judiciary in respect of appraisals. We talked about appraisals very much in the practical perspective of helping the individuals, and although one can see better judges would perhaps enhance trust, it was more the fact that, if you have appraisal, not only should there be a process of appraisal but there should be seen to be a process of appraisal; in other words, there should be awareness out there that, in fact, that does actually occur, because I presume most people would be totally unaware that there was even any element of it.

Her Honour Judge Plumstead: Yes, and I should add that there is, in most branches of judiciary, at least informal—in some cases formal—mentoring, which is another way of supporting personal development, and perhaps more appropriate when people are in post as
opposed to appraisal, which is a suitability look. I have a number of mentees and I have found what I do—and they seem to find what I do—helpful.

**District Judge Tim Jenkins:** Yes. I think, if it is thought appropriate that there should be a system of appraisals, it must be appropriate that people know about it.

**The Chairman:** And see the results, presumably, in some sense. Thank you very much. I have not got any obvious demonstrations of wish to say anything in conclusion from any member of the panel—is that correct? Thank you all very much indeed. It has been enormously interesting and very valuable to us, and we are most grateful to you particularly for the different perspectives. They have been very helpful indeed.
WEDNESDAY 12 OCTOBER 2011

Members present
Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Lord Hart of Chilton
Lord Norton of Louth
Lord Pannick
Lord Renton of Mount Harry
Lord Shaw of Northstead

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Examination of Witnesses

Rt Hon Lord Mackay of Clashfern, Rt Hon Lord Falconer of Thoroton and Rt Hon Jack Straw MP.

Q121  **The Chairman:** Good morning and thank you all very much for attending this meeting of the Committee. As I said in the corridor outside, we are a slightly reduced number because of the continuation of the marathon Health and Social Care Bill and other matters that are delaying and holding colleagues up. We are most grateful to you for attending together. Thank you indeed for coming.

I wonder whether any of you have a brief opening statement. Mr Straw, you kindly provided us with a note, which I know that the Committee has read. Maybe you might like to introduce that.

**Jack Straw:** Thank you very much. The note, which I shared with my two colleagues, boils down to this. My observation was that the old system of judicial appointments, which was supervised and overseen by the Lord Chancellor, worked satisfactorily; certainly, it had done so for the past three or four decades without any suggestion that partisan considerations were interfering with judgments about quality and suitability. However, optically, it was plainly time-expired. The old-style Lord Chancellor, who embodied in one person this holy trinity of Speaker of the Lords, a senior member of the Cabinet and head of the judiciary, could not go on. As a member of the Government, I acknowledged the case for having a Judicial Appointments Commission, and supported that.

Lord Falconer began the implementation of the 2005 Act and I continued it. In my view, the JAC arrangements should continue—with improvement, let me say. The principle of the JAC
arrangements should continue for all judicial appointments up to and including Court of Appeal judges—a Justice of Appeal in Ordinary. For reasons that I spell out in my memorandum, the pool of talent is very much wider than it used to be. Somebody has to do the filtering. However, there was concern about the output of the JAC, certainly when I was there, in terms of diversity and speed. The system needed some considerable improvement. A lot of potential candidates for judicial appointment, and a lot of judges, said and continue to say to me that the value of the previous system was that if, say, there was a woman who had, bluntly, all the problems of being a woman in a man’s world, or somebody who was black or Asian, they could be given encouragement to apply with some certainty that they would not be knocked back. That has been lost. I do not know how you replace it, but we have to think that through.

On the senior appointments—the heads of division, Lord Chief Justice and the Supreme Court justices—my view is that what Lord Falconer intended—that there should have been a partnership between the Lord Chancellor and the very senior judiciary—has not worked. The way that the sections of the Act are constructed and the expectation of people within the system effectively exclude the Lord Chancellor from the process.

This became public through absolutely no wish of mine or my department. There was a head of division appointment. I wished to exercise my powers, and no more than my powers, under the Act, because I felt that there were other candidates who deserved consideration. What is more, I know that there were other candidates who deserved consideration, because that is what people were saying to me, even though they had been writing in Delphic terms the formal letters to the head of the commission that was holding the competition. There was certainly one person who, in my judgment, should have been considered but who was unwilling to put their name forward if they were going to get knocked back; it would have been, as it were, a left-field appointment. This went on. What was then preposterous was that some of the parties against this appointment leaked the whole process to the *Times*. I had taken every step to ensure that this could not be construed as a partisan move. Colleagues here are familiar with the need actively to consult one’s opposite number in the run-up to a general election, but it had been turned into a political issue, so I pulled it and made the appointment.

However, that is not satisfactory and the system is still less satisfactory for the Supreme Court. I genuinely have huge respect for the President of the Supreme Court and the other justices but, effectively, we have ended up with a system where the President of the Supreme Court is appointing his successors. That cannot be satisfactory. It defies every constitutional principle.

**Q122 The Chairman:** We will come back, if we may, to what other parts of government should perhaps be involved in those, particularly Supreme Court, appointments. Let us stay with the post-2005 assessment of the way in which the Act is working in terms of the role of the Lord Chancellor. Lord Falconer, did you envisage it as a partnership, and has the partnership, in your view, been successful?

**Lord Falconer of Thoroton:** I did not quite envisage it as a partnership in the way that Jack Straw describes. I envisaged the initiative in relation to the appointment of judges, including the heads of division and the Supreme Court, going in effect either to the Judicial Appointments Commission or to the small committees that were set up to make the senior appointments, but with the Lord Chancellor as, in effect, the guardian of the process with a long-stop responsibility.
His guardianship of the process has three aspects. First, in practice, he appoints the JAC. Secondly, he answers for it in Parliament. Thirdly, he can say no to appointments if necessary, including very senior ones. I am disappointed in Jack Straw’s description of what happened in relation to the particular appointment, which I do not want to discuss in any detail. It seems to me that where the Lord Chancellor has a view that a particular person is inappropriate for a number of reasons, he or she should be willing to pursue that and come to a conclusion.

My experience of dealing with the judges was that they are fantastic. They cannot bear to be said no to. Ultimately, that is the way they work. If you want to say no to a particular decision that judges have made, you have to think it through and then pursue it. If there were good reasons for saying no to a particular appointment—and I think that should be very rare—then the Lord Chancellor should stick to his guns. That was how it was going to work—not quite partnership, but responsibility. I think that that responsibility is very important because the executive has to have a stake in the judges. The executive has to be, in effect, properly and in practice responsible in some way for the system that appoints them so that, if there are attacks on the judges, the state is able to say, “Well, we have set up this system. We are responsible for it. You are attacking us as much as you are attacking judges.”

Q123 The Chairman: Specifically on the role of the relationship between the JAC and the Lord Chancellor, should there continue to be only one candidate recommended, or should there be, for example, a shortlist?

Lord Falconer of Thoroton: I think that there should only be one candidate. I put it as much more important than simply “optically”. The role of the judges in our society has become much more important. They defend our rights in a much more meaningful way than previously. If you look at the way in which politicians have behaved in the past 10 years, the Prime Minister and the Home Secretary when I was Lord Chancellor sought political advantage from attacking the judges. The current Prime Minister and the current Home Secretary have done precisely the same. The idea that a member of the Prime Minister’s Cabinet, who is appointable and fireable by the Prime Minister, should be the person who appoints the people that the Prime Minister and Home Secretary are appointing—

Jack Straw: Attacking.

Lord Falconer of Thoroton: Attacking, sorry. That is, in effect, a sort of unthinkable situation. So you need a situation where it is not just optics, but where it is clear that the appointment of the main judges is effectively beyond the reach of the Prime Minister and the Home Secretary, save in exceptional circumstances.

Q124 The Chairman: Lord Mackay, what is your assessment of the post-2005 role of the Lord Chancellor in the way that Lord Falconer and Mr Straw have been describing it?

Lord Mackay of Clashfern: Needless to say I have no experience of it except as an outsider watching it happen. I must say that I am disappointed that details of the process seem to be subject to leakage in a way that was not true before. During my time as Lord Chancellor we had no leaks whatever in relation to this matter, so far as I could judge, from the Lord Chancellor’s Department. For certain senior appointments we had to refer to another department, and occasionally when that happened you read about it in the newspapers. It is very important, I think, to preserve this. It must have been extremely difficult. As Jack Straw said, it became a sort of political issue in relation to one of the heads
of division—and needless to say, I got to know about it, apart from the article in the Times. I think that that is sad, and I am not sure exactly how one can deal with that.

Q125 The Chairman: Is there anything around the Lord Chancellor’s present role that you think could be altered, beefed up or whatever one wants to do to make those kinds of difficulties less likely?

Lord Mackay of Clashfern: I think that the Lord Chancellor’s role needs to be fairly strong in relation to this matter. Also, once he has taken up a position, on the whole, he needs to stick to it. I would imagine, and I am sure that this is true of my colleagues, that once they decided what was the right thing to do, they thought that that was the right thing to do. If so, one ought not to deviate from it.

Q126 The Chairman: Following that point, should the Lord Chancellor be able to take positive action, for example setting targets or making directions, not necessarily formally but in some way which was understood by the previous system?

Lord Mackay of Clashfern: I am not sure. Targets are very difficult in this area. I do not think that the appointing authorities now—the JAC—has the necessary powers to deal with the underlying problems that arise from the way that the professions—I distinguish between the barristers and the solicitors in this respect—are organised. There is quite a lot that needs to be done at that level. For example, when I was Lord Chancellor, I had some authority that could help to mould the way that chambers were run. I think I am right in saying that when I first came, there was a tendency for ethnic minority people to group in the same chambers, and I thought that was a hindrance to their getting on. I think that that has gradually changed and that people of talent can now be in chambers that are more general and not so specialised in the sense of ethnic minority. Of course, I am delighted that ethnic minority people have reached the High Court. The same applies, to some extent, in relation to women. I think there is a point in what Lord Falconer said earlier, about being able to encourage particular people to go forward with reasonable certainty that they will be chosen. Of course, in the old days, there was no question of applying to be a High Court judge. It was a question of encouragement and invitation and, if necessary, a certain amount of persuasion for some people. That, of course, has changed, and I do not think that it is easy to see how to bring that back. Although, as Jack Straw said, it might be desirable, it is not easy to see how you can do that with an open system like the one that the JAC has.

Q127 Lord Pannick: I have two questions about the role of the Lord Chancellor. Do you think that once we have an independent JAC putting forward one candidate, any exercise of the reserve power of the Lord Chancellor, if leaked, is inevitably going to be perceived as politically partisan? Secondly, can we really justify, in the modern world, a system that, if I am right, can only work by confidentiality being maintained? Is that defensible—that the Lord Chancellor makes a decision of this sort but does not publicise it or why he has taken it?

Jack Straw: Lord Pannick, I do not accept the premise of your question, which is that the moment the Lord Chancellor intervenes it is going to be “political”. In my period, I dealt with scores and scores of equivalent very senior appointments—Permanent Secretaries, commissioners of police, head of the Prison Service and, when I was Foreign Secretary, senior ambassadors. I was sometimes offered one candidate, sometimes offered two; but I would then have a debate with senior officials and others involved and come to a judgment. It was never suggested that because I had chosen X rather than Y I had acted in a partisan political way. If those who had claimed that had known the extent to which I had sought to
Rt Hon Lord Falconer of Thoroton, Rt Hon Lord Mackay of Clashfern and Rt Hon Jack Straw QC MP – Oral Evidence (QQ 121-161)

ensure that there was a bipartisan approach, they would have known that it was utter nonsense. I do not think that anybody is going to be appointed to this job if they are going to, as it were, wear their party card on their sleeve in pursuit of their office.

I think I disagree with Lord Falconer. He wants a system where the Lord Chancellor can say no to an appointment. The problem with that, and with the drafting of the current sections, is that you can only say no to an appointment, or “hang on”, on grounds, and the wording is pretty contorted, you have to be convinced that, in your opinion, the person is not suitable for the office concerned. You can ask them to reconsider if there is evidence that the person is not the best candidate on merit. I have knocked back recommendations on the sort of evidence I was receiving. In this case, it was people coming up to me in the corridors and saying, “I don’t think this person is the best person for the job”. The problem was that their letters said, “On the one hand—but, on the other”. There were threats that I was going to be JR-ed for this. It was outrageous. My view is that if you want to do what Lord Falconer is proposing, you have to have a real facility to say no to appointments.

My last point is that I think that for these very senior appointments—heads of division, Lord Chief Justice of the Supreme Court—you need two recommendations.

On Lord Falconer’s point, one thing that I did in the 2008 Act was to exclude the Prime Minister altogether from the appointment process. He does not even sign the warrants that go to the Palace. I did not discuss this process with any other Minister. I would never. If the Prime Minister had asked me for a discussion about it, I would have told him to get lost. I think that Lord Chancellors are there partly to resist that kind of pressure.

**Lord Pannick:** Let me make it clear that I am not suggesting that there was any element of political partisanship; I am suggesting how it would be perceived.

**Jack Straw:** Of course; I understand.

**Q128 Lord Pannick:** Does your point not come to this? Let us leave aside this particular case, but there may be cases in which the Lord Chancellor takes the view that the JAC has not done a particularly good job. But surely the remedy for that is not to confer a power on a politician; it is to make sure that the JAC does a proper job by improving its appointment and methods.

**Jack Straw:** With respect, the posts I am talking about are all subject not to the formal JAC process, but to a separate commission. You are talking about, typically, the President of the Supreme Court with a panel, if it is the head of division, with the Lord Chief Justice or somebody else and some outsiders. The problem is that the way in which the system is weighted at the moment, it can go to the lowest common denominator and for the easier appointment, which is comfortable in terms of the politics—with a small p—of the senior judiciary, so you will not necessarily get people from outside who may not have had direct experience in the field or people who are, say, senior judges but who plainly have the talent to be double-promoted, applying or, still less, being appointed.

One of the truths about these senior jobs is that of course they involve strong judicial skills, but they also involve strong administrative and executive skills. That is unavoidable. It is just there. It is true. They are running a big administration and working with the Courts Service. It seems to me entirely legitimate that those considerations, based on the observations of the Lord Chancellor and those of the Permanent Secretary at the Ministry of Justice, are
relevant. Okay, at an early stage, one is asked one’s opinion about candidates, but that is no substitute for a judgment at the end of the process.

Q129 The Chairman: Lord Pannick, do you want to pursue those points you raised with Lord Mackay and Lord Falconer?

Lord Pannick: I would be very interested to hear their views on these matters.

Lord Mackay of Clashfern: I think it is important that the Lord Chancellor has a role in the ultimate confirmation of an appointment before it goes to the Palace. That is important, apart from anything else, for the reasons that Lord Falconer mentioned. But I also think that government as a whole is responsible for the judicial system. It is true that the judges are responsible for running it, but the elected government and the people—the democracy—have an interest in seeing that the judicial process will be properly run and that the people in it are proper for that job. Therefore, I think it important that the Lord Chancellor should continue to have a role.

For my part, I never objected to the Prime Minister having a role because, in my experience, Prime Ministers exercised their role in the way that you would expect—namely, they accepted the Lord Chancellor’s view on the position. It gave a kind of government approval to the appointment and I think that that was quite a good thing. In fact, in Northern Ireland, as it happened, the Lord Chancellor dealt with the appointment and he consulted the Prime Minister before he made his recommendation. That was an interesting reversal in Northern Ireland.

I never had any difficulty in operating that system. However, now that the Prime Minister has been taken out of the equation, I think it is very important that a senior member of the government should have a part in ultimately intimating to the Queen whom she should appoint. She is supposed to take advice from ministers on these matters and therefore I think it is important that a minister should have a part. If the minister has a part, he must, unless he is an automaton, have a right to say, “I don’t agree with this”, and if that becomes public, that is just too bad. On the other hand, I think that steps should be taken to do what can be done to prevent that happening. In any appointment process—you see it in the papers on business matters continually—leakages do not do any real good in getting to a really well balanced appointment. So I would do what I could to eliminate leakages, although I agree that that may be a task too much for me.

Lord Falconer of Thoroton: Lord Pannick raises two points. First, would an exercise of the veto power or the kick-back power not always be regarded as partisan? No, I do not think so. We should remember the context. As Lord Chancellor you are not able to say, “I don’t want Lord Pannick; I would like to have Lord Howard as the Lord Chief Justice”. All you can do is say no. From my experience, the circumstances in which this would arise have nothing to do with partisanship; they are to do with issues such as having a choice between Lord Justice X and Lord Justice Y to be the head of a division. Lord Justice X is a very well respected ex-type of lawyer and has been doing that for 20 years. It would be fair to him or her to get the job. Lord Justice Y is the person with all the ideas and with dynamism. He or she is the person who would provide the leadership. We think it should be X because he has done so much for the system, but I think the Lord Chancellor should be able to say, “No, I think in the current circumstances you should go for the dynamic one”. The nature of the choices will never be party political because the whole of the initiative comes to the JAC, so I think that your worries about partisanship are completely misplaced.
As to the second point on publicity, what Lord Mackay said is absolutely right. The Lord Chancellor’s Department is absolutely like the grave as far as leaking is concerned. I do not know what the Home Office was like when Lord Mackay was Lord Chancellor. They were incredibly unreliable when I was Lord Chancellor, although not as much of a source of leakage as the judges themselves, who cannot stop talking to the press. We behaved like people who had had their tongues cut out; it was everybody else who was the problem.

Q130 Lord Renton of Mount Harry: Lord Mackay twice used the phrase that it was right that the government should know who was being considered. What do you mean by “government”? Do you mean just the Prime Minister and the Lord Chancellor or the Cabinet?

Lord Mackay of Clashfern: No, I mean the Lord Chancellor primarily in the case of appointments, as it was. Now, the Prime Minister is out altogether. My understanding of the position now is that the Lord Chancellor is the person in the government who has the authority to approve the appointment as a senior member of the government, and that is what I mean. I do not mean that other people are consulted—far, far from it. It is purely the Lord Chancellor, in his personal capacity as Lord Chancellor and with a very special responsibility for the judiciary, who approves the appointment.

The Chairman: Let us go on to talk about the JAC as it is at the moment.

Q131 Lord Hart of Chilton: This is a very quick question. Is the current state—the size and composition—of the JAC right or should it be in any way changed?

The Chairman: Who is going to lead on that?

Lord Falconer of Thoroton: I am reluctant to express any view about the detailed working of the JAC. When it started, I received complaints all the time about the way it worked—in particular, that it was too slow, that it was bureaucratic and that a lot of time would be taken in reaching decisions. The difference between the way in which the old-style system and the new-style system worked was that inevitably the new-style system added an extra layer to the Judicial Appointments Commission, and the commission itself added a whole range of processes. It has always been vulnerable to attack because it will inevitably be slower than, for example, the Lord Chancellor appointing a Lord Justice of Appeal or a High Court judge. I think there needs to be a review as to whether or not it could improve its systems. One should aim off a bit on the attacks that come, in particular from lawyers and judges, but I do not rule out the possibility of making it more efficient.

The Chairman: It is not really the role, or indeed the intent, of this Committee to talk about a review of the JAC per se, particularly on the administrative side. We are really looking at the interplay of the different constitutional aspects.

Lord Falconer of Thoroton: I am rather averse to criticising it. If there is going to be any suggestion that it should improve its administrative procedures, that might be done through a review, but I am happy to hear that the Committee is not very interested in any of that.

The Chairman: We may be interested when wearing a different hat, but that is not the purpose of this particular inquiry.

Lord Hart of Chilton: I think that Mr Straw might want to say something.
Jack Straw: There are 15 members in the Commission and I think that is too large. It has improved its administration. Also, when it began, it was hampered by the fact that there was a great deal of second-guessing by the division inside the Ministry of Justice. Even for district judge and circuit judge appointments, it was second-guessing because the old process was still going on. That has all been eased, not least because I took the Lord Chancellor out of the process altogether, up to and including circuit judge level. Frankly, it was ridiculous. I was expected to sign a piece of paper saying that I had considered the merits of these candidates, when there was no way that I could have done so. Therefore, those decisions are made by the JAC from beginning to end. My sense is that the financial pressure on government departments, not least in the Ministry of Justice, will lead to improvements in efficiency. My concern is more about the diversity of their output than about the process, which was bound to be slow to begin with, although it improved.

Lord Hart of Chilton: We will come to that.

The Chairman: Lord Crickhowell.

Lord Crickhowell: I think that all the points I was going to ask about the role of the Lord Chief Justice have now been dealt with pretty thoroughly.

The Chairman: Let us move on to the current interplay between the Lord Chancellor, the JAC and Parliament.

Q132 Lord Renton of Mount Harry: Our Chairman has just mentioned the interplay of constitutional issues. Should Parliament in any sense have a greater effect and place in the consideration of who becomes a judge? I can easily guess what your answer will be, but I would very much like to hear your thoughts on the subject.

The Chairman: Let us start this time with Lord Mackay.

Lord Mackay of Clashfern: I think that in the system that we have at present—subject to questions about the top of it, which is rather different from the JAC—it would not be desirable to have any further involvement of Parliament. One has seen these various systems working in other parts of the world. On the whole, I think that our system proves itself to be better. As the note of what we might be dealing with says, if you have some kind of parliamentary interview for these posts, the question of what can be asked is rather important. It is very difficult, as you will know much better than I, to circumscribe the questions that parliamentarians on these committees might ask. I think that there is a great danger in that kind of public interview of the future judge being committed in some way to something that will embarrass him when he comes to try to do justice in a case later on. That is certainly the position so far as the United States is concerned: that can be verified. The judicial process and the appointment of judicial officers should be distinct from the workings of Parliament. The judges who are appointed are not really in the same category as most of those who are now interviewed at senior level by Members of Parliament.

The Chairman: Lord Norton, perhaps you would like to follow that up.

Q133 Lord Norton of Louth: I would like to ask Mr Straw about his submission in relation to the Supreme Court. You suggest that there is a potential role for Parliament, and that both Parliament and the executive should have an interest in the appointments. You clearly perceive a problem. You make clear that you do not have the answer, but I would like to tease something out.
The Chairman: You say that the current model is not sustainable.

**Jack Straw:** Perhaps I might explain why. I have thought about this a good deal. I have not got to the point where I have a solution for the Supreme Court, although certainly I have an analysis. I distinguish between the appointments of the Lord Chief and heads of divisions in the Court of Appeal, and of the Supreme Court. For the Lord Chief and the heads of divisions, my view is that the executive should be involved through the person of the Lord Chancellor; there is no role for Parliament. For the Supreme Court, I think that the reverse is the case; there is a direct role for Parliament but not for the executive. Why do I say that? Certainly it is unsustainable to have the Supreme Court effectively appointed by the current President of the Supreme Court, with a small panel. The model of an incumbent appointing their successors in that way would not be acceptable anywhere these days. Why do I say that the system is unsustainable? There is plainly a lack of mutual confidence between the senior judiciary and this place in respect of the role of the senior judiciary and its broadening authority into areas that are inevitably political. This is not soft soap; I have huge regard for the senior judiciary. Like my two predecessors, I spent my life beating up fellow ministers—metaphorically—for daring to criticise judges who could not answer back.

Also, I spend my life now trying to educate people—not least people on your side, my Lord—that the decisions that the Supreme Court and the Court of Appeal have made on key issues such as prisoner voting, DNA and everything else, including the decision they would like to make on Article 8, are ones that most people would agree with and that are deferential to this place. Their problem is that they are tied by Convention jurisprudence. However, judicial activism over the past 40 years has widened the scope of the role of the courts. Now, under Section 4 of the HRA, the senior courts can declare an Act incompatible with Convention rights. Here is the bind. I suspect that under both parties, there will be a gradual detachment of our system of law from the European Court in Strasbourg and Convention jurisprudence, whether or not we stay within the Convention. That will happen in practice. That will make the UK Supreme Court more powerful, not less. It is all very well saying that section 4 is very elegant because all it does is provide for a declaration of incompatibility. That is true; legislation can be overruled—but, by God, the moment that happens, there is an unexploded bomb in the middle of a minister’s room and you have to work out what to do with it. So there is a legitimate role here for Parliament to be concerned. How would you exercise that role? Off the top of my head, I would not suggest having public hearings—certainly nothing like the kind of obscenity that happens in the US—but instead having a small panel drawn from both ends, perhaps this Committee and the Justice Committee at the other end, which would hold hearings and endorse or otherwise an appointment. I think that we have to do something like that—or maybe even, heaven forfend, the Chair of this Committee and the Chair of the Justice Committee should be involved in the panel to begin with. Why not?

Q134 The Chairman: Lord Falconer, would you welcome that?

**Lord Falconer of Thoroton:** No, I would not welcome that; I am strongly against it. I completely agree with what Jack Straw said in his note; many decisions of the Supreme Court are politically controversial. The Belmarsh decision and the decision about the sex offenders register are right at the heart of political debate. But it is clear under our system that when the Supreme Court decides that sort of issue, we want it to be decided on a judicial rather than a political basis. If you bring in the politicians in a significant way as described—other than the role of the Lord Chancellor—you are inevitably putting them in a...
position where they will express a preference for the type of person they want to appoint as a judge. I could imagine a situation where, if you were on the left of society, as it were, you would like Baroness Kennedy of The Shaws appointed to the Supreme Court; and if you were on the right, you would want Lord Campbell of Alloway appointed. Whether private or public, the consequence of that would be that the Lord Chancellor, who has veto power, would be put under pressure about saying no to a particular appointment.

We have a real and unique strength in this country; our senior judges are perceived to be completely free of political bias in the nature of their appointment and the nature of the job that they do. That has three critical effects. It means that our civil liberties are completely safe in the hands of the judges. Secondly, it means that the quality of the judges is never diluted by political influence. In the federal system of the United States of America, appointments to some extent are driven by political feeling. Thirdly, because the quality and independence of judges are so high, the courts system benefits through commercial parties wanting to resolve their disputes in the United Kingdom. Do not mix politics with the appointment of the judiciary. If you do—and you will, the moment you start to have pre-hearings, whether private or public—you will lose those three things.

I have one more point. Jack Straw’s point that there is distrust between politicians and judges is absolutely true. I strongly favour many more occasions where judges, post-appointment, come to explain what they are doing to select committees—but not pre-appointment.

Q135 Lord Crickhowell: We have come to what to me has been the nub of the whole inquiry. We interestingly had the lawyer and the politician taking different positions. The gulf is not just between the judiciary and this place. The real danger is the gulf between the view of the general public and the judiciary. There is a serious problem here. Because the judiciary is seen to appoint itself and, worse, seen to be a particular type of people without yet the diversity and so on that people would like to see, and because their decisions are not always adequately explained, there is, I judge, a considerable lack of confidence in the general public, which of course will be addressed and magnified by the comments of certain sections in the media—not just the more extreme sections. I read Jack Straw’s comments with particular interest and sympathy, because I think we need to find some way. His suggestions were very limited—not that there should be open hearings and examinations but that Parliament should be seen in some way to be involved, perhaps by involving chairmen of the appropriate committees in the process so that we get away from the suggestion that a sort of self-appointed oligarchy runs the whole thing, does not understand and the general public are detached. That seems to be a pretty central issue, which this Committee has to address. We need to probe it a little further.

Lord Falconer of Thoroton: Can I attack the central premise of that, which is that the general public think that the judges are a disconnected self-appointed oligarchy? I am sure that many people have the view of a judge as someone who does not travel on the Tube and does not understand things, but they have huge respect for the judges as being independent.

Q136 The Chairman: How do we know that?

Lord Falconer of Thoroton: The fact that the politicians always reach for a judge whenever there is a real crisis, like when they reached for Lord Justice Leveson in relation to the hacking scandal because he probably has more respect than other people. Judges are always going to be lawyers. By and large, lawyers tend to be upper middle-class people who in some
respects will always be disconnected from Lord Crickhowell’s view of the public. It is that issue that you have to address. You do not resolve that problem by saying that politicians should influence more who become judges.

Jack Straw: May I disagree with my friend Lord Falconer on this? He is setting up a series of Aunt Sallies to knock down what is otherwise not the strongest argument that he has ever advanced, if I may say so. You can get opinion survey material about the British public’s view of the judiciary. I think that it is very ambiguous. On the one hand, there is extremely high regard for the integrity and professionalism of individual judges, especially when dealing with instant cases. There is no question about that, and Lord Falconer is right to say that the moment there is a really serious problem in British public life we reach for a judge. On the other hand, much to my regret—after all, I was the Minister who sponsored the Human Rights Act—for all sorts of complicated reasons there is declining support for the social policy that they appear to be pursuing. Okay? This is my point in reply to Lord Falconer. I do not believe that any Prime Minister is going to appoint somebody to the position that we have held who is a going to adopt a narrow partisan approach to their job, and if they were to do so, they would be found out very quickly and they would be off. You are trying to find an interface between the executive, the government, the legislature, and the judiciary. That interface exists. It is just there. The Supreme Court has developed a social policy. It is part of their jurisprudence. I do not blame them for doing this, but if you look at one area of law after another, certain questions arise. Were the Law Lords are making decisions in those areas four years ago? No. Are they now? Yes. They have a much more expansive view of their role. That is fine. It has given people more rights, but it has consequences. Moreover, Lord Falconer says that we should not have any politics in this, but he knows that we have personality. Perhaps I may through you, madam Chairman, ask this question: why has the approach of the now Supreme Court to the interpretation of Section 2 of the Human Rights Act, which is about the degree to which you should take account of the jurisprudence of Strasbourg, changed? It has changed because when Lord Bingham was in the chair, he had one view. Now there is another lot, and they have a different and rather narrower view, which I personally welcome. It is not to do with their politics—I have no idea about their politics—it is to do with their approach. It seems to be entirely legitimate for Parliament to ask through the intermediary say to the chair of this Committee or the Justice Committee, “We would like to know what your view is about how far you feel that the Supreme Court should, as it were, be legislating in areas of social policy”.

Lord Falconer of Thoroton: There is a perfect, brilliant example there from Jack Straw. You have Lord Campbell of Alloway and Baroness Kennedy of The Shaws. The committee has interviewed them and asked, “Will you take the Bingham view on incorporation or the extent to which you rely on Strasbourg jurisprudence, or will you take the Phillips view in relation to it?” If you take the Bingham view—I do not know what that was, but whatever it was—we would be very keen to support you. But if you take the Phillips view, we would not be so keen to support you. That would be a shocking basis upon which to—

Jack Straw: Why—

Lord Falconer of Thoroton: You are not deciding—

The Chairman: I am going to intervene from the chair, not to stop this fascinating conversation but because other members of the Committee need to ask some questions. Lord Crickhowell, did you want to pursue the particular point that you raised, or can I turn back to Lord Norton?
Lord Crickhowell: No, I think that we have had a very interesting debate, which we will come back to many times.

The Chairman: Many times. Lord Norton, you wanted to come back yourself.

Q137 Lord Norton of Louth: In Lord Falconer’s point in response to Mr Straw, you challenged his conclusion—the prescription that he arrived at. However, did you agree with his analysis that there was a problem with the appointment process as presently pursued for appointment to the Supreme Court, and if there is a problem what would your solution be? Couching this in a broad question addressed to all three of you, what should the interface be between Parliament, the executive and the judiciary relative to what it is?

Lord Falconer of Thoroton: Yes, if and in so far as the position is that the President of the Supreme Court has an undue influence in relation to the appointments, I agree that it should be diluted. The way I had thought that might be done would be to increase the lay representation on the panel. The way I would envisage that could be done would be for the chairs of the JACs—the Scottish JAC is represented in UK Supreme Court appointments—to appoint somebody of stature for every one of those appointments. I would envisage that, for example, it would be appropriate to appoint, say, Jack Straw or Lord Mackay—they would be very appropriate appointments, because they are retired—to sit and form a view about it. That would then have a diluting effect, because I broadly agree with what Jack Straw is saying: that the idea of the outgoing chief or the chief of the organisation deciding his or her successor is ultimately not a good thing. In relation to Parliament, I am not in favour, as I have said, of pre-appointment discussions; I am in favour of more interface between Parliament and senior members of the judiciary after appointment.

Lord Mackay of Clashfern: I wanted to underline the problem that Jack Straw has mentioned. Some months ago I went along to one of the committees of the House of Commons on prisoners’ rights. It was pretty apparent by the time the session ended that there was grave doubt among quite senior members of the Committee about the wisdom of being bound by Strasbourg decisions. That is fundamental to this issue in the Supreme Court. There is a problem with the Bill that Jack Straw sponsored. The Human Rights Act says that you must have regard to the decisions of the human rights court in Strasbourg if you are sitting in a court in the United Kingdom. But—and this is an important “but”—if a decision of the Supreme Court in this country goes to Strasbourg and Strasbourg goes in the opposite direction to the Supreme Court, this country is bound by the convention to give effect to the Strasbourg decision. That is where the problem arises. In a sense, it is a political problem and has to be resolved at that level. It would not be appropriate for me to suggest a solution, but it is a political problem that has nothing to do with the judiciary.

Q138 The Chairman: That is an extremely interesting illustration, but do you want to respond to Lord Norton’s general points about changes in the balance of the role between the executive and the judiciary?

Lord Mackay of Clashfern: There is something to be said for having some other chairmen on the committee that decides at the Supreme Court level. There is a point, which I am sure you have in mind, namely that the Supreme Court is the supreme court for Scotland and Northern Ireland as well as Wales. So far as any parliamentary interviews are concerned, you would have to be extremely careful that Mr Salmond and his people were given proper consideration, whatever that may be.
Q139 The Chairman: We were going to ask that as a separate question, so may I come back to you, Jack Straw, about the general point that Lord Norton raised about the role of the devolved Administrations in appointments to the Supreme Court?

Jack Straw: The United Kingdom Supreme Court is the only UK-wide judicial body, so it arises only there. We would have to work into these arrangements. Maybe I am now widening this Committee, but there could be an arrangement involving the chairs of the Constitution Committee and the Justice Committee from this place, the Justice Committee from the Scottish Parliament and the equivalent in Northern Ireland. We should hope that in Northern Ireland they would agree to one person and not require two to be in the room. We should bear in mind that these appointments do not arise all that often. There are not a huge number of Supreme Court appointments.

The Chairman: But you cannot make ad hoc decisions.

Jack Straw: No, if people say that it is bureaucratic and all the rest of it, it would not be. I guess that, in practice, there is one appointment a year. It does not happen that often.

Q140 The Chairman: Lord Mackay, do you have a view on that point, which relates specifically to the devolved Administrations?

Lord Mackay of Clashfern: One way of viewing that is to assume that there is a question over whether we should still have two Scots and so on. On the assumption that that is the rule, there is something to be said for having the chairman of the JAC for England and Wales presiding over the selection of a Supreme Court justice from the English jurisdiction, the chairman of the Scottish JAC presiding in the event of a Scottish judge being appointed, and something similar for Northern Ireland. Something like that might be worth considering.

Lord Falconer of Thoroton: That is rather a good suggestion from Lord Mackay. The critical thing in relation to this is the role of the politician. Jack Straw is right; this is a UK-wide appointment. The veto power is given to the Lord Chancellor, who is part of the UK government. However, what the UK Supreme Court decides will affect the Scottish and Northern Irish legal system. There should be more meaningful consultation between the Lord Chancellor and the First Ministers of both the devolved Assemblies. The Lord Chancellor should be willing to say, “This is why I am doing this. These are my considerations. What do you think?” Mostly, I do not think there would be any problem in relation to it, but they should be involved. Ultimately, this is an appointment to the UK judiciary. If there is to be this “ownership” by the politicians of the appointments system, it should involve—meaningfully—the devolved Assemblies. My experience of it is that there would generally be very quick correspondence, because the First Ministers did not, I suspect, see it as a particularly high-priority issue.

Q141 Lord Norton of Louth: Lord Mackay made the point that it was based on the assumption that one should continue with two Scottish judges and one from Northern Ireland. Should we continue on that assumption? Does it challenge the basic principle of merit appointment?

Lord Mackay of Clashfern: I do not think that it challenges the basic system of merit appointments because it is a question of what the necessary qualifications for the Supreme Court are. It is essential in the present circumstances—even more essential than it was—
that there should be two Scottish judges in the Supreme Court. It is hard enough, as you know from the recent debates on this, to be sure that we have complete security in the Supreme Court as far as Scotland is concerned. It would be terrifically damaging if there were not two Scottish judges in the court. The merit in question is merit within the capabilities that are being examined, so you do not pit an English judge against a Scottish judge and see which is better; they are distinct. When I was Lord Chancellor, although I was a Scottish lawyer myself long ago, in the appointment of Scottish judges it was always my practice to consult the Secretary of State for Scotland about the matter. Of course, the appointment was ultimately put to the Palace by the Prime Minister, who represented both.

Q142 The Chairman: We are going to move on to the concept of merit, which Lord Mackay has raised. Lord Shaw, did you want to make a general point? You have caught my eye; I am afraid we moved on to the devolved Administrations.

Lord Shaw of Northstead: The only point that I should like to make is that a specific question was asked, in the various questions that have been put, to which I have not yet heard a direct reply. Should a committee question candidates for senior judicial posts before the Lord Chancellor confirms their appointment? Yes or no?

Lord Falconer of Thoroton: No.

Lord Shaw of Northstead: Good.

Jack Straw: Do you mean a committee of this place?

Lord Shaw of Northstead: No, of Parliament.

Jack Straw: Only in the circumstances that I have described.

Q143 The Chairman: May we continue with the point about merit, which Lord Mackay has raised, and come back to the other point that Lord Shaw wanted to make? However, I think we might move on to Lord Hart.

Lord Hart of Chilton: There is a twin aspect to this. The first is that everybody has made attempts to widen the pool for appointment to the High Court and above. It has not really succeeded. There is evidence that more candidates are coming through from ethnic minorities and women. Real attempts have been made but they have not been successful. This links to the question of the merit test.

I would like to hear from each of you: first, how you think that further action should be taken to increase the pool; secondly, how you think we should approach the issue of merit. Should we widen the concept of merit so that more appointments can be made? In that respect, of course, the two professions have different approaches to their training and career paths. In my experience, that has had some element of failure to create more women because there are far more women in the solicitors’ profession who are candidates but who do not make it through. I should like to hear what each of you thinks.

Q144 The Chairman: Perhaps I may ask Lord Mackay to start, simply because I am aware from the annunciator that Lord Winston is now speaking in the debate. He is about four speakers before Lord Mackay, so this may have to be his final contribution.
Lord Mackay of Clashfern: Thank you very much. My view is that the widening of the pool depends on the arrangements in the Bar and the solicitors’ profession. One of the difficulties is that the JAC, as such, is not really involved in that at all. Under the old system, I was able gradually to alter some of the arrangements and to accommodate people with special needs—for example, married women and the need to resolve issues about their domestic responsibilities and be flexible in what was required of them, particularly at the district judge level. It was not so easy for trials, particularly prolonged trials, and so on. But at the district judge level, that was possible. In a sense, the separation that has taken place does not easily add to the possibility of doing that. I think that that is part of the difficulty.

My second point is on merit. It is essential that the people we appoint as judges are able properly to carry out the functions of judges. I need not tell you that that is not an easy function. For the most part, you are on your own. It is very public and if you make a mistake, even with an aside remark, you are apt to be pilloried severely. The qualities required for a successful judge are demanding and I would not wish these to be compromised in any sense. On the other hand, I do not for a moment think that there are no women and ethnic minority people with these qualities—if they are available to come forward—and have a certain amount of experience that would carry them forward.

As you know, the first lady Lord Justice of Appeal was appointed a judge in my time and so was the only woman to reach the Supreme Court. When you say that it has not been successful, I of course accept your judgment on that. However, I do not think that you can do this suddenly because you really have to make sure that the necessary progress is taking place within the framework of what is required in the way of merit.

Q145 The Chairman: But do you think there are changes within the existing constitutional framework that would make it easier?

Lord Mackay of Clashfern: I doubt it. I do not think that changes could be made perhaps at the level of the constitutional framework. They could be made at the level of the practical arrangements made for women in particular in the professions. They are moving but, needless to say, not particularly fast. But they are moving towards making it easier for women. For example, there are more women silks than there were and more women at the top of the solicitors’ branch. I do not recognise Lord Hart’s point about a distinction between solicitors and barristers from the point of view of merit.

Lord Hart of Chilton: I meant that there were different career paths.

Lord Mackay of Clashfern: There are, but there is equal need for the sort of merit that I mentioned as well as equal availability among solicitors. Towards the end of the time when I was Lord Chancellor, some senior City solicitors had come to feel that their work as City solicitors was becoming more demanding than they wished to have at their age. They became willing to become High Court judges. One of these, sadly, had a domestic tragedy and decided to go to the circuit Bench for a while. The opening of the branches of the profession to the judiciary is progressing, not perhaps as fast as some people would like, and requires to be nurtured.

Q146 Lord Pannick: Lord Mackay, do you think that if two or more candidates for appointment to the High Court Bench rise up to the very high level that you have explained, it should be relevant in selecting between them for the one post that is available that one of them is a woman or one is from an ethnic minority in order to promote diversity?
Lord Mackay of Clashfern: I think that that is for consideration. It is questionable whether you ever get absolute parity. When you look at two candidates, that aspect of the difference between them is an aspect to be taken into account in considering their qualities.

As to the idea that the two are absolutely the same, the whole thing about judgment of merit is a bit subjective anyway. If two candidates seemed pretty like each other and one would widen the diversity of the Bench, on the whole I think I would be prepared to go for that one.

Q147 The Chairman: Does any other member of the Committee have a particular point that they would like to put to Lord Mackay, given the problems of his competing timetable? Thank you Lord Mackay, I am very grateful. I think we have given you more time and you might even be able to have a cup of coffee.

Jack Straw: I apologise, Madam Chairman, but the House will be starting shortly. As I think the Committee will be aware, I appointed Baroness Neuberger to run a panel on improving diversity among the judiciary. She and her colleagues produced an excellent report probably at the beginning of 2010.

The Chairman: She is coming to see us.

Jack Straw: Excellent. All sorts of efforts are being made. On the appointment of silks, one of the nice functions of the Lord Chancellor—I am sure that Lord Falconer felt it too—is to preside over the annual silk ceremony. While doing that, I used to make a mental note of who was a woman and who was black or Asian. For the three years I did it, the numbers stayed depressingly static. It was about 20 per cent women and about 5 per cent black or Asian.

If you want to crack the problem of diversity at the senior level in the judiciary, you have to get more black, Asian and women candidates being successful and coming forward for silk appointments. It is not the only route but the bulk of people who go on the High Court Bench are silks. That then runs into all the problems with which Madam Chairman will be familiar about how to bring women forward.

The other thing that I would add is that in the Civil Service for many years it appeared that the system was treading water and the number of women Permanent Secretaries was not changing. But the consequence of a lot of work going on underneath that is that that glass ceiling has now started to be broken through and a lot of people at the senior level are women. It is worth looking at that example.

Q148 The Chairman: I think there is a specific point in relation to the judiciary. I am sorry, Lord Hart, if I am jumping the gun as far as your point is concerned. You could try to redefine merit in a way that enables you to embrace diversity. Do you think there is a future in that?

Jack Straw: You could, but to pick up the implication of Lord Pannick’s point, you would have to ensure that both were plainly above the line. You could then say that at that point they should take into consideration the fact that they are women or black or Asian. I reflect on the fact that when my party originally proposed all-women shortlists, there was a huge hullabaloo about how people who have no merit but who happen to wear a skirt—I quote
Rt Hon Lord Falconer of Thoroton, Rt Hon Lord Mackay of Clashfern and Rt Hon Jack Straw QC MP – Oral Evidence (QQ 121-161)

directly—would come into this place. What has been really interesting is how that process and system has been adopted by the other parties as well.

Q149 The Chairman: Not in quite the same way.

Jack Straw: It is getting that way, in the Conservative Party, with singular success there, but, for other reasons, not in the Liberal Party. My observation is that, notwithstanding the fact that they have had to put up with being criticised as recipients of the assisted-places scheme and all that stuff, overall the quality of the women MPs in this place on both sides is actually higher than that of the men.

Q150 The Chairman: I know that you want to raise the question of the career judiciary, Lord Shaw, and I think we might raise that with Mr Straw, who has to go. Are you all right for time, Lord Falconer?

Lord Falconer of Thoroton: I am fine.

Lord Shaw of Northstead: The question of career judiciary has been raised in the past: people coming in at a much earlier age as a career, aiming to be a judge. It struck me that this is particularly important with regard to whether we get more women or more coloured people in because they may take up a job at a very early stage in their career and work their way up to it in that way. What is your view on the merits or otherwise on a career judiciary, in which lawyers are appointed to junior judicial roles at a much earlier stage in their careers?

Jack Straw: I would not be in favour of that. I was in Ukraine recently, where I learnt that the judge who was presiding over the case of the former Prime Minister, Tymoshenko, was a career judge, aged 28, and lived with his mother, and previously had been trying what we know as “either way” cases at best—burglary, aggravated vehicle taking and other serious matters of state. I think that to have a career judiciary would be to have to start afresh with the whole system. I think there are many advantages in having people on the Bench who have done the job of those who make the arguments to the Bench. In terms of career paths, however—a point brought out in Baroness Neuberger’s report—it is not only self-employed practice, which is the only career route into the judiciary. For example, the CPS has been very successful in employing a lot of very good black and Asian people and women. Many of those would be good candidates for judicial appointment. There is then an issue about how they can be part-time recorders, and there was quite a debate, not least between myself and the senior judiciary, about the difference between somebody who is at the referral Bar and does nothing but prosecution work, who can be a recorder in that area and sit on criminal cases, and someone who is a senior prosecutor, who is a High Court advocate, who does nothing but prosecution work and at the moment cannot. I never got a satisfactory answer to that. The CPS, for example, is one pool of recruits for the judiciary that is neglected at the moment.

The Chairman: Lord Hart, did you want to come back? I know that Lord Norton wants to come in.

Lord Hart of Chilton: We have dealt with the question of merit that I wanted to ask about.

The Chairman: Lord Norton.
Q151 Lord Norton of Louth: Just to follow up what Mr Straw was saying, I wonder whether the experience of Baroness Hale perhaps provided some indication of a route that could be pursued as well, because hers was very much a non-traditional route.

Jack Straw: Yes, and also Baroness Butler-Sloss, who started off as a district judge. It is quite striking, in contrast, say, to the Civil Service, that class-to-class transfers are rare among the judiciary. You can measure on the fingers of one hand the number of circuit judges who get on to the High Court Bench. That needs to change, in my opinion.

The Chairman: Thank you very much. You have been very generous with your time. Lord Falconer, we now have the pleasure of your sole representation. You can now command the attention of the Committee.

Jack Straw: Madam Chairman, if Lord Falconer says things which I think need correcting—

Q152 The Chairman: You will receive a transcript and we are always delighted to have follow-up comments, so thank you very much. Lord Falconer, we are pursuing the question that was originally raised by Lord Hart about the potential redefinitions of merit and any possible constitutional changes which could create a more diverse judiciary, and then there is the point that Lord Shaw raised about whether one of the ways into this would be to have the concept of a career judiciary looked at sympathetically.

Lord Falconer of Thoroton: Lord Crickhowell raised this in another context. There is not really much dispute that the judiciary is insufficiently diverse, and that that has an impact, to some extent, on people’s perception of the judiciary. It is insufficiently diverse both in gender, sexual orientation and race. The argument that it will happen over time, that it will become more diverse, has proved to be wrong over the years. Lord Mackay, my predecessor bar one, was a genuine champion of seeking to make the judiciary more diverse and did significant things in that respect. He became Lord Chancellor 24 years ago and ceased to be Lord Chancellor 14 years ago. Although I can give other statistics, the balance of the number of women and men in this country is 50:50 but the number of women judges in this country is something like 25 or 30 per cent, which is massively behind the gender balance of the country.

My third proposition is that I have absolutely no doubt that there are sufficient candidates from all the categories that I have described—BME, sexual orientation and women—who have the merit, as used in the Act, to be judges. It is obvious that something needs to be done. I think the answer is that the Act should be amended to say that in considering the merits of a candidate we should have regard to the diversity of the judiciary. I appreciate that that is rather a loose way of putting it, but what is wrong with saying, “We have five or six candidates who have the merit to be judges, but we need more women, or black and minority ethnic groups or more homosexual judges, so we should appoint someone from those groups.”

I was incredibly struck by what Lord Mackay said, before he went—I am sorry I was not able to comment then. He said you can never get absolute parity. One of the things that really drives lawyers and judges is the sense of a sort of league table of brilliance—perhaps I can call it the Jonathan Sumption effect. He is always regarded as number one, with the possible exception of Lord Pannick, I hasten to add. There is the most brilliant lawyer, who is number one, and then number two is the next most brilliant, and it is all league tables. No other profession regards merit in this top-10 sort of way. There will be 20 people at any one time,
all of whom would make excellent judges; one may be a better black-letter lawyer than another who has much more insight into the motivation of human beings. They all bring different qualities.

We need to be much less top 10-ish about merit and much more understanding of the fact that there will be a range of people appointed. Without setting targets we need to make it clear that the Judicial Appointments Commission and the Lord Chancellor have to drive actively diversifying the Bench because it is the absolute Achilles heel of our Bench that it is so undiverse by comparison with practically every other country. I do not know quite where this takes one, but we have always had two Scots in the Supreme Court of the House of Lords. There has never been any question but that the quality of the Scots has been second to none. That seems to me to illustrate that there is absolutely no problem about getting people of merit from any group that you like. I completely repudiate what Lord Mackay and Mr Straw are saying—that it will take time; let us do it slowly. It just has not happened.

Q153 The Chairman: I know that the Equality Act 2010 is not necessarily everybody’s favourite piece of legislation, but within that Act there is a tie-break clause, as it is called. If you have two people who you consider on merit to be equal, in so far as you can do that, you can as it were positively advantage one from a particular group. Is that something that should be applied to the judiciary?

Lord Falconer of Thoroton: I think it should be and that it should be done in a broad way. If there is an extraordinary coincidence that A and B are the same, suppose you have 20 or 30 people who you think are appointable, you should be able to promote more from the group who are underrepresented on the judiciary. It should not be just one against one.

Q154 Lord Pannick: Were you suggesting that to achieve this objective you needed to amend the legislation or do you think that merit, as it is currently understood, would be broad enough to cover your suggestion?

Lord Falconer of Thoroton: My own view is that it would probably be broad enough to cover it. Currently, in relation to the definition of merit, if you want to appoint a High Court judge and you are of the view that heavy crime experience was required, that is a legitimate consideration to be taken into account, even though it does not go to “merit” in the traditional sense. Probably it would be okay to say that you want a woman or someone from a black or minority ethnic group. It might be enough. Why have a doubt about it? Is not the way that you drive this particular agenda, which I think is shared by all in the sense that nobody wants the quality to go down but everybody wants the diversity to go up, would it not be better to make it explicit?

Lord Hart of Chilton: It is just that legislative time is then a question and there are significant numbers of appointments coming up.

Lord Falconer of Thoroton: My view is that that is already covered.

Q155 Lord Renton of Mount Harry: I understand totally what you say, Lord Falconer, and I sympathise to a degree with your passion over this. But because something is in an Act does not make people change their minds. Surely what is really at the heart of what we have been talking about, and I have no particular knowledge of this at all, is that actually most senior men who are judges in some way think in their own minds that another man is going to be better, more intelligent or more satisfactory than a woman? That is really why it
happens. How do you change that simply by saying that there is a phrase in an Act that tells you to do so? It does not change your mind if you are the one who is actually making the decision.

**Lord Falconer of Thoroton:** I agree very strongly with the first part of your analysis. What Lord Mackay and Jack Straw were saying in effect was well of course at the moment all the best are bound to be men because the profession has not changed enough to accommodate enough women. I think that is to some extent underlined by the use of the word “merit” in relation to who is best. It is changing the belief that at the moment the profession favours men at the top because of the way people come into the profession. It means, I think, making it clear that there are sufficient people of merit to be appointed, rather than saying, “You’ve got to go down the top 10”. I put that very unclearly. I am trying to say that I think the reference to “merit” in the Act shores up the sense that Lord Mackay spoke about. He was reflecting a strongly held view in the profession that because of the organisation of the profession it is likely to be men who have the best experience and the best qualities to become judges at the moment because you are judging it on “merit”, which puts into people’s minds the idea of there being a top 10 of lawyers. I am sorry that I have not put that very clearly.

**Lord Renton of Mount Harry:** I thought that a lot of the argument was that women go away for months to have babies and men do not.

**The Chairman:** Probably not at the age when they become High Court judges.

**Q156 Lord Renton of Mount Harry:** I do not believe in this at all, but is not that often the reason why it is explained that there are more men at the top than women? Women have children and so forth so they have broken their career structure within the courts.

**Lord Falconer of Thoroton:** That sort of view is quite widely held. Merit is regarded as coterminous with having been a junior and a QC at the Bar for 30 years—a person who has gone through the whole process. If you go away for a period of time, that reduces your “merit”. There would be no difficulty in finding people who are from the group that is underrepresented with sufficient merit to be judges, but you have to make “merit” an above-and-below-the-line process rather than a top-10 process.

**The Chairman:** That is very clear.

**Q157 Lord Norton of Louth:** You were saying above and below the line. I was just thinking that there is a slight difference between experience and quality, because that was the point you were making. You can look at it in a slightly different way—vertically rather than horizontally. You are saying that somebody is better than somebody else in terms of quality, whereas the real distinction is between experience and what may be intellectual qualities. They may be a brilliant judge but they have not been through that particular experience. If you strip the two out that could make an awful lot of difference.

**Lord Falconer of Thoroton:** I agree with that subject to this point. You are appointing judges from people who have very little experience of being judges, generally. You are appointing them from being lawyers. They have had part-time experience as recorders or deputy High Court judges, but by and large you are appointing people who move from one profession to another, which should make it easier to reach beyond traditional groups.
Lady Norton of Louth: That is why I suggested Baroness Hale.

Lord Falconer of Thoroton: She is a very good example of an academic. We have been incredibly timid about moving sufficiently into the solicitors’ profession to appoint more senior judges. We have been incredibly timid about going to government lawyers, prosecution lawyers, in-house counsel, academics, people who work in law centres—there is a whole group of places you could reach. We tell these people that they can apply, but you are never going to convince people that they will be appointed unless you start making appointments from this diverse group. By and large, most people would assume that they would not get through the process, and they are right.

The Chairman: That involves the sort of leadership that you described. But you were earlier very hesitant about the particular concept of political leadership in this area. If you look, for example, at the Canadian experience, which is not necessarily one that we would wish to see any more than the US one, it is the political leadership that has driven precisely what you are describing—the expansion of the pool into different areas.

Lord Falconer of Thoroton: There are three elements. The first is the Lord Chancellor, who must provide real, persistent leadership. He does that in his role as the guardian of the process, for the reasons that I gave at the beginning. The second element is the chairs of the Judicial Appointments Commission, who should in effect be campaigners for more diversity without in any way compromising their need to be objective. The third is the Lord Chief Justices of the three jurisdictions, Northern Ireland, Scotland, and England and Wales, who should say that there is a problem about our judiciary not being diverse enough. You will get no clearer signal to the JAC if the Lord Chief Justice says that he wants a more diverse judiciary. So it is the three of them who need to be doing it. That would make it something other than a partisan party political thing.

Q158 The Chairman: Does any member of the Committee want to pursue the question of merit and these issues which Lord Falconer has very kindly set out? May I pursue, then, the point that Lord Shaw raised, about whether you have feelings about the notion of the so-called career judiciary?

Lord Falconer of Thoroton: I am not in favour of starting as a judge right at the beginning of your career, though I make it clear that living with your mother does not appear to me to be a bar.

The Chairman: I was somewhat surprised by that.

Lord Falconer of Thoroton: In order to be an effective judge in an adversarial system, which is the predominant theme in ours, you have to have operated a bit as a lawyer to have some understanding of what the adversaries are saying and how they operate. I would not be averse to having a system where it was much clearer that you could go in much younger, say in your late 30s, and expect to be promoted through the judicial system.

So I say no to a career judiciary from the start, with a much more explicit sense that you could become a district judge, with prospects if you did well to move to become a circuit judge, then a High Court judge and then whatever may follow. That would provide an option for people that may be much easier for them. I do not think that it would in any way dilute the quality; it might increase it.
Lord Shaw of Northstead: Do you think that that might be to the advantage of getting the merits situation sorted out better?

Lord Falconer of Thoroton: Yes, I think that it would. For example, many people quite enjoy being a lawyer for a period of time and then want to go off and do other things. They might be attracted by coming back to be a judge, which has great responsibilities but in many respects fewer pressures. They might be particularly attracted to that if they thought that there was a career path in relation to it. At the moment, if you become a district judge or a circuit judge, generally, with very few exceptions, that is where you remain.

The Chairman: Our specialist adviser, Professor Le Sueur—

Lord Falconer of Thoroton: He was the special adviser to the Select Committee on the Constitutional Reform Act 2005, so it is hard to imagine a better qualified specialist adviser.

The Chairman: This is why he has asked that we should ask you why under the 2005 Act the deputy High Court judges were left out of the remit of the JAC.

Lord Falconer of Thoroton: Because the Lord Chief Justice at the time, Lord Woolf, with whom I agreed, said that flexibility was needed in the appointment of deputy High Court judges. For example, he said that he would frequently be rung up from courts outside central London, with people saying that they were sitting in a particular case, often family cases, and that they needed to be a High Court judge to deal with a particular jurisdiction. He said that you therefore needed flexibility. I was happy to be persuaded by that. I remain of that view, but if the current Lord Chief Justice thinks that the flexibility is no longer required, I would not be averse to changing it. But that is the reason.

The Chairman: But you would not promote a change on that scale in terms of the Lord Chief Justice’s role?

Lord Falconer of Thoroton: No. If the Lord Chief Justice says, “We don’t need that flexibility any more”, then the reason why I accepted the arguments of Harry Woolf, which seemed to be sensible, would have gone. I also have no sense that it is causing a difficulty; it is not leading to people having unfavourable advantages in becoming permanent judges and nobody is complaining about the quality of deputy High Court judges. Professor Le Sueur might have in mind the fact that a certain number of cases are decided by deputy High Court judges on the High Court Bench, which might be too high, but I do not know what the statistics are.

The Chairman: I think the Committee would allow Professor Le Sueur to comment.

Professor Le Sueur: There has been some comment in the written evidence that the Committee has received that the process is insufficiently transparent and that there are diversity issues, or rather a lack of diversity, in the appointment of deputies.

Lord Falconer of Thoroton: There are more profound diversity issues in the appointment of full-time judges, it seems to me. It is a totally untransparent process, I agree, but it is there to meet a particular need.
Q161 Lord Renton of Mount Harry: I have often been told that the reason why more solicitors and barristers do not aim or apply to become judges is quite simply that they are much better paid as a solicitor or barrister. Do you think that is a fair comment?

Lord Falconer of Thoroton: There is a part of the Bar, the commercial Bar particularly, where one is paid vastly more as a practitioner than as a judge. That has an effect on some people, who will not want to become judges. It is not without significance that probably the highest-paid barrister in the United Kingdom has just accepted an appointment as a member of the Supreme Court. Even though it may involve a reduction in money, that is not a bar to everybody. There are parts of the Bar, the family Bar and the criminal Bar, where the difference between being a judge, whether it be a circuit judge or a High Court judge, and being a practitioner is not nearly as great, but money has its impact.

The Chairman: Thank you very much, Lord Falconer. We are enormously grateful. You have given us a great deal more time than we had reason to expect. I hope that you have found it useful. We shall certainly return to these matters in the course of a rather long inquiry.
Introduction

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 triggered 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.

2. 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’. 54 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

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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 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. Neither 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
The Rt Hon Lord Justice Goldring and The Hon Mrs Justice Macur DBE – Oral Evidence (QQ78-120)

**WEDNESDAY 20 JULY 2011**

Members present

Baroness Jay of Paddington (Chairman)  
Lord Crickhowell  
Lord Goldsmith  
Lord Irvine of Lairg  
Lord Norton of Louth  
Lord Powll of Bayswater  
Lord Rodgers of Quarry Bank  
Lord Shaw of Northstead

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**Examination of Witnesses**

Witnesses: The Rt Hon Lord Justice Goldring, Senior Presiding Judge, and The Hon Mrs Justice Macur DBE, High Court (Family Division) and Presiding Judge for the Midland Circuit.

**Q78 The Chairman:** Good morning to you both and thank you very much indeed for coming and attending the Committee. I think we are not being televised this morning, but we are being sound-recorded so, when you first speak, could you just kindly identify yourselves for the purposes of identify on the tape? I will ask you whether you have any brief general introduction that you want to make and, if you do not, we will plunge straight in with questions.

As you know, this is an early stage of our inquiry into judicial appointments. Before the summer recess, which begins tomorrow, we have been having some very interesting conversations, with members of the judiciary and with people who work in the academic field related to this, about the general constitutional principles of judicial appointments; so many of the questions we will be talking about this morning are broad and general. Our perspective is trying to focus very much on the constitutional concerns that we may have. If the questions look rather open-ended, that is deliberate, because we are, at this stage of the proceedings, trying to get an overall picture of where we are in relation to this general aspect. Have you got an opening statement that you would like to make, Lord Justice Goldring?

**Lord Justice Goldring:** I have not, except obviously to introduce myself. I am John Goldring, Senior Presiding Judge, and I was formerly a commissioner at the Judicial Appointments
The Rt Hon Lord Justice Goldring and The Hon Mrs Justice Macur DBE – Oral Evidence
(QQ78-120)

Commission and I was on the Neuberger Panel, so I have done quite a lot of work in this field. I was part-author of the JEB submission, which I know you have had.

The Chairman: Yes, we saw that last week, thank you. Mrs Justice Macur, do you have an opening statement?

Mrs Justice Macur: I do not, thank you. I am Julia Macur; I am a High Court Judge assigned to the Family Division, but also Presiding Judge for the Midland Circuit, which means that I deal with statutory consultation issues and assist the Senior Presiding Judge in consultation on judicial appointees.

Q79 The Chairman: Thank you very much. We will of course be hearing from Baroness Neuberger, just to go back to your previous point, later in the discussion. Let me begin with a very general question. What constitutional principles do you both feel should really be borne in mind when we are examining the process of judicial appointments? Perhaps you would like to start, Lord Justice Goldring.

Lord Justice Goldring: Certainly. I suspect what I have to say you have heard quite a bit before. I would say obviously judicial independence, separation of powers, the fundamental importance of judges acting independently and without outside influence, and the fact that their appointment should, it seems to me, be free of political influence that might affect their independence. That should be in fact and in appearance. Fundamentally, the independence of the appointing body, in so far as you are concerned, seems to me very important.

Mrs Justice Macur: I agree totally. The public perception of independence of the judiciary is vital.

Q80 Lord Norton of Louth: Looking at the judiciary generally, how would you say the judiciary has evolved in recent years, and particularly what impact has that had on the relationship between the judiciary, the executive and the legislature? Coming back to your point, Lord Justice Goldring, about those constitutional principles, has the relationship changed in a way that impacts on those principles?

Lord Justice Goldring: I am not sure that the constitutional relationship has changed. There has no doubt been a great increase in judicial review. That preceded, as well as followed, the Human Rights Act. In short though, Parliament enacts the law. In the context of judicial review, the administration or the executive has to obey the law and the judges interpret and decide whether or not the executive has obeyed the law. I do not think constitutionally the fact there has been an increase in the number of such cases makes any difference.

As far as the Human Rights Act is concerned, it obviously has had an effect. Perhaps I can summarise it in this way. Courts as public bodies are obliged to act consistently, if they can, with convention rights and interpret legislation consistently, if they can, with convention rights, and ultimately, if they cannot, declare the legislation as incompatible. Constitutionally, what the courts are doing there is no more than Parliament has asked them to do. In the final analysis, Parliament can say, “We are not going to change this incompatible law,” or it
can legislate to deal with what it regards as a wrong interpretation by the courts. I do not think constitutionally there has been a change.

Q81 Lord Norton of Louth: Do you think that, none the less, the consequence of the Human Rights Act has had some impact on the relationship between the executive and the judiciary, even though the judiciary is working within that constitutional framework?

Lord Justice Goldring: There is no doubt that, from time to time, the executive comments about decisions—which obviously are decisions within an area of discretion that the court has—in a way that can be very critical of the court’s view of the law. But it is, in the end, interpretation of the law.

Q82 Lord Norton of Louth: In so far then as there has been any change in the relationship, with a bit of tension coming in, would it be fair to say that is principally at the level of Court of Appeal and Supreme Court, and when it comes to the High Court, there has not been a significant change?

Lord Justice Goldring: Yes. Obviously a lot of the judicial reviews at first instance, by definition, will be at the High Court level, but fundamentally the decisions of the Court of Appeal and obviously the Supreme Court are the ones that have attracted comment, to put it neutrally.

Q83 Lord Norton of Louth: Dame Julia, have you noticed any difference in the relationship or has the position of the court not changed significantly in recent years?

Mrs Justice Macur: The position of the court has changed in so far as the interest of the media in creating tension sometimes, between judiciary and government, can lead to claims of lack of transparency in court proceedings, particularly in the Family Court. The Court of Protection can receive very hard comment from those who do not know the full facts of the cases before the courts. The change has come, I think, by a greater public perception introduced by media interpretation of events, which certainly the Family Court is looking to address with greater openness.

Q84 Lord Norton of Louth: If I could just pursue that briefly, does that therefore have an impact on the type of person who one should be looking for to be on the court, given that need for transparency and, if you like, having a public face of the court?

Mrs Justice Macur: No. I think that the qualities that are sought in appointing a judge to the High Court or a Circuit Bench include a degree of thick skin. That is looked for, in terms of courage in the conviction of doing the job properly regardless of criticism from others and always striving to do right by all manner of men, as the oath that you take requires.

The Chairman: We will certainly come back to the qualities but, Lord Goldsmith, did you want to pursue the human rights question?
Q85  Lord Goldsmith: I want to focus a little bit more on the question of the difference in functions and what impact, if any, that may have on the appointments process. You have mentioned judicial review and the Human Rights Act. It can be said that the difference between the two is that traditional judicial review, even the way it was developing before the Human Rights Act, was still deliberately not a merits review. It involved principally a review of the procedures that had taken place—what the legislation required. The only time one got into the merits was in that area of whether this was a decision that no reasonable tribunal or executive authority could have taken. The Human Rights Act requires a different approach, because it does require, even if the senior judiciary say it is not supposed to be a merits review, something that looks very much like a second-guessing or at least a fresh review of policy decisions and considerations. Now what I really wanted to ask your views on is whether there is force in the argument that that function has changed and, if so, whether it has an impact on the appointments process. Some people say, in those circumstances with much greater power given to the judges, and nobody complains about that—as you rightly say, that is what Parliament has decreed—then it is right that somebody should know a bit more about what the judges believe in these areas and what their values are before they come on to the Bench in order to make those decisions. That is what I would very much like your views on.

Lord Justice Goldring: Accepting for the sake of argument your hypothesis, the problem is that, once you go down asking what the values are and what sort of person you are, you are very quickly on a slope to a political judgment as to whom you appoint. After all, what values would you be seeking? What would you be asking? In theory, it is quite easy to say that this might happen because judges are involved in issues that have social policy implications. Actually they did of course before the Human Rights Act. The moment you actually say, “What do we want to ask the judge?” it becomes very difficult, because you assume, “Judge A said he had this opinion and Judge B said she had that opinion. We need to balance that opinion with this opinion.” It is a very slippery slope.

Q86  Lord Goldsmith: Can I just ask this question? What do you say to the public, if there is such a single entity, who say, “This is all very well, but we have no idea of this judge’s attitude to issues that are very important to us—penal policy, sentencing, privacy and all of these things”—privacy may be a particularly good example—“yet this person is going to be making important decisions that will affect our lives”? What do you say to them?

Lord Justice Goldring: You have to say to the public, “This person is appointed and chosen on the basis of merit,” and the public will know how that assessment of merit is made. It requires good judgment and common sense, which would be an issue of merit. In the final analysis—let us take privacy as an example—if I were being asked about privacy as a potential judge and expressed a view, what happens when the first case involving privacy is in front of me? What will the litigants think if they look back at the interview that I gave and the newspaper says, “He expressed himself in favour, rather Article 8 sympathetic,” for example? I completely see what you are driving at, but I think in the end it has great dangers. What the public has to have faith in is the system of appointing people. There is an interest that people are appointed from as wide a background as possible, assuming they have the merit to do the job. We may touch upon merit in due course, I imagine. Otherwise, it is a very slippery slope that we would begin to go down.
Q87 Lord Crickhowell: We heard that this is not really constitutional—that the judges are simply interpreting the law and sometimes have to be pretty tough and robust about it. By chance, I opened my post while we were waiting for some documents relating to this, and came upon the quotation from Charles Clarke in 2007: “The current relationship between the executive, legislature and judiciary is not as it should be and the tensions between them could seriously erode public confidence in the ability of the State to uphold the rule of law in practice. Too frequently there are very public contradictory judgments by senior ministers, police and judges, which give rise to confusion and a lack of confidence both within the criminal justice system and in the public.” It seems to me that, if that situation continues, it could lead to circumstances that do have constitutional implications. Towards the end of your comments, you said appointments have to be made on the basis of merit and there has to be public faith in the system of appointments, which of course takes us straight into the whole basis of the inquiry. The trouble is that what we are looking for is how you create faith in the public’s view if this raging controversy is going on. It is not enough just to say, “We are interpreting the law,” if the public does not have faith in the way that judges are appointed and the nature of their appointments.

Lord Justice Goldring: I am not defending everything. I am not from the Ark, as it were, in all this. I am not defending every aspect of it, but I think that you are inevitably going to get the sorts of tensions that Charles Clarke refers to, in whatever way that judges are appointed. It is in the nature of things now, and I am not sure, for example, taking Lord Goldsmith’s suggestion would make any difference to that.

Q88 Lord Goldsmith: We are having an inquiry into it; I am not making a suggestion. It is important because we really want to know what you think and particularly whether there is an issue there but it is too difficult to deal with, or there is not an issue there. That is what I was trying to get at. Forgive me; I am interrupting Lord Crickhowell.

Lord Justice Goldring: I am sorry. I do think—well, you only have to open your paper to see—there can be an issue there. The problem is that there is no simple solution in dealing with it, whether you involve Parliament or whatever means you take. In the end, if for example government decides to legislate in security matters in a particular way, somebody is going to say that that cannot lawfully be done and a judge is going to decide whether or not it can. I do not see a simple way around it myself.

Q89 Lord Irvine of Lairg: You started off, Lord Justice, by stating a principle, which I have to say I agree with, which is that judicial appointments should be free of political influence, both in fact and appearance. If you are going to go down the route of having parliamentarians and politicians involved in the appointments process, would not questions inevitably be asked of those considered for appointment or promotion of how they would decide particular issues that could arise in front of them? I do not think that politicians involved in an appointments process could resist that temptation, and that therefore would bring in the appearance of political preferences having a role in the appointment of judges and therefore would be objectionable.
Lord Justice Goldring: I agree. Yesterday afternoon, when I was thinking about this Committee, I tried to picture the questions that could properly be asked that did not bring politics into it. I do not mean party politics, but politics. I cannot see what meaningful discussion you can have without asking the sorts of questions that immediately would result in independence being attacked, making it impossible for a judge to try a particular sort of case. All sorts of things would arise. I just do not see how, in practice, it could work.

Q90 Lord Irvine of Lairg: It would be inevitable that politicians or parliamentarians would want to know what the judge’s preferences in matters of future decision, in controversial areas, would be. Would that not inevitably give rise to the appearance of political preference being part of the appointments process and also give rise to questions about the independence of judges when they actually come to decide such issues in practice?

Lord Justice Goldring: Yes, it would. It unarguably is the case. That is my view.

Q91 Lord Powell of Bayswater: I suppose this leads on quite naturally from what you have both been saying. You say that appointments should be free of political influence, yet the executive has a role in the appointments and the executive is, by definition, political in this country. Do you think the role of the executive in judicial appointments is still too large? Should it be further reduced? If so, would you reduce it to involvement only in certain very senior-level appointments, say the Supreme Court or the Court of Appeal, and not have any executive involvement lower down the scale?

Lord Justice Goldring: In our JEB response, we suggested that the Lord Chancellor could have a greater role in Court of Appeal and Supreme Court appointments; query High Court appointments. I would myself have thought that it would be Court of Appeal and Supreme Court appointments. I think we accepted that it could be that the role at the moment is insufficient. For example, I suppose it could be that the Lord Chancellor was at or was represented at the interviews for the Supreme Court, or submitted a document that would be considered by the panel looking at possible appointments to the Supreme Court. We accepted that there should be a greater role. Can I just give this warning? Historically, Lord Chancellors have always been lawyers, and it is perfectly possible that the next Lord Chancellor will not be—he or she will be a party politician. Any changes that take place need to bear in mind that that could well be the case.

Q92 Lord Powell of Bayswater: What role do you think the Lord Chancellor would in practice play? What would his locus standi be? Would you see it in terms of his personal knowledge of the merits and performance of particular judges? Do you think he might even be slightly tinged by preferring people with more conservative views or more progressive views?

Lord Justice Goldring: I am looking at one Lord Chancellor who I think was involved in appointing me. In some cases, the Lord Chancellor, certainly if a lawyer, would know or there is a fair chance that he or she would know the candidate. Otherwise, there would be the input on the same basis as many of the other people on the panel—the lay members, for
example. He or she would have just the same information and express a view on the basis of it.

Mrs Justice Macur: I have similar views. I think it is very difficult to envisage that a Lord Chancellor who did not have a legal background may appreciate more than a lay member of the committee those qualities that were essential, other than independence of the judiciary and the integrity of the judiciary being maintained, and the public perception of independence.

Q93 Lord Powell of Bayswater: You would accept also the concept of having a dividing line, where the Lord Chancellor might be engaged in the most senior appointments but the executive as a whole should not be involved below, let us say, the Court of Appeal level.

Mrs Justice Macur: I think there is an argument to say that there should be an executive interest in the lower judicial appointments to signify the import that is placed upon all tiers of the judiciary. Whether it would need to be at the level of the Lord Chancellor or the Lord Chancellor’s representative, certainly I think there should be interest indicated and shown. They are important appointments. Obviously, given the number of appointments in the lower tiers of the judiciary, you could not have representation at the highest level.

Q94 The Chairman: You are both, as I understand it, quite happy to endorse a system in which there are different levels of appointment at different levels of the judiciary. Is that your overall position?

Lord Justice Goldring: That is certainly my view.

Mrs Justice Macur: And mine.

Lord Justice Goldring: Can I just add one thing to what Julia said? I think that the Lord Chancellor could have an enhanced role, for example in relation to oversight of the process, without being involved in the individual appointments. It could also be the case that Parliament has an enhanced role in relation to the operation of the appointments system. At the moment, the Judicial Appointments Commission chairman or chairwoman gives evidence to the House of Commons Justice Committee. I think there could be an enhanced role there—dealing not with the individual appointments but with the system that operates.

The Chairman: Lord Norton, did you want to pursue the question of any parliamentary involvement?

Q95 Lord Norton of Louth: I was going to ask about Parliament’s role, but Lord Justice Goldring just dealt with that latter point, because I inferred from what you were saying earlier that there was not a role for Parliament, other than in overseeing the process of appointment, but not actually interviewing the candidates themselves, even if it was only to check—this is Dame Julia’s point—that they were actually quite thick-skinned in taking up their positions. I take it from what you said that you see no role at all for Parliament, other
than in respect of making sure that there is an independent and transparent process of appointments. That would be the view of both of you for all levels of the judiciary.

**Lord Justice Goldring:** That is certainly my view.

**Mrs Justice Macur:** Yes.

**The Chairman:** May we then return to the whole concept of merit, which you raised earlier? Lord Irvine, did you want to take this up?

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**Q96 Lord Irvine of Lairg:** We have struggled in our hearings so far, and will no doubt struggle further in hearings to come, with the issues that arise out of the interaction of the merit principle with the aim of promoting a more diverse judiciary. We do not start in a vacuum of course, because all committees that have previously considered this issue have come out in favour of the primacy of the merit principle. I have been struggling in my own mind to find a way of reconciling the merit principle with the aim of promoting diversity. I was wondering if I could have comments from both of you on the way that it appears to me at the moment, which is that the merit principle must have primacy in the sense that, if a number of persons are being considered for a particular appointment, and one plainly has more merit than any of the others, that person should be appointed, regardless of the aim of promoting diversity. But, as will quite often happen, if it is impossible to distinguish on the grounds of merit, however the components of merit are defined, among a range of candidates, then, for the sake of the argument, they must all be treated as of equal merit, and diversity can trump, but then and then only. In other words, if there are candidates of equal merit, then you can regard the aim of promoting diversity—I want to correct what I said—not as trumping merit but as being determinant in the particular selection.

**Lord Justice Goldring:** I absolutely agree. That is what the JEB suggested. We describe them as the tipping provisions of Section 159 of the Equality Act 2010, which should apply. That is my view.

**Mrs Justice Macur:** My only concern is that there will be, with the ultimate view of creating a diverse judiciary, a tendency to find equal merit where in fact there is none. I am afraid that I believe that there are very few occasions when you can say all candidates are equal. I think that there have been appointments where diversity has trumped merit, and it has trumped merit on the basis that these candidates are not equal, but one is under-represented and therefore will win through.

**Q97 Lord Irvine of Lairg:** Pausing there, diversity would not be trumping merit in that situation because, *ex hypothesi*, they are all of equal merit. Therefore, the objective of promoting a more diverse judiciary would be determinant. I think your real point is that you are sceptical about the proposition that it is impossible, in many cases, to distinguish among people on merit. Are you saying that it is always possible to distinguish on merit?

**Mrs Justice Macur:** Yes.
Lord Irvine of Lairg: You do not accept that, sometimes, candidates will be of broadly similar merit.

Mrs Justice Macur: I do not for individual posts. If you are looking for a generic appointment system, where you will then allocate or deploy according to particular characteristics that are required, you can then say, “These characteristics are apparent in all 10 candidates for the role.”

Q98 Lord Irvine of Lairg: I just wonder if I can ask Lord Justice Goldring to comment on my last question and Mrs Justice Macur’s reply.

Lord Justice Goldring: I was thinking about sitting on the selection committee, as one often did as a commissioner on the JAC, and I believe there are situations in which, to all intents and purposes, the candidates are equal. It can sometimes be agonisingly difficult to choose between one and another, particularly if they are individual posts, often possibly higher-profile posts. I therefore think that the tipping provisions would have a part to play in this. Obviously what Julia is describing as, as it were, self-delusion—pretending that somebody is as able as somebody else—has to be avoided. That is obvious. I am assuming the whole thing is done with absolute integrity. I believe that can make a difference. Of course, it does involve, if I can just say this, the appointing body, assuming it is the JAC, gathering huge amounts of information about each individual who applies, because you otherwise will not know whether that individual is from an under-represented group.

Q99 Lord Irvine of Lairg: To ensure that the merit principle remains the primary principle, you really have to address merit first. If you can arrive at an honest view that a number of candidates are of broadly equal merit, then and only then do you move on to an appointment on the basis of promoting diversity.

Lord Justice Goldring: I agree. This is exactly what the Neuberger Panel suggested.

Q100 Lord Goldsmith: The problem with this whole debate is the assumption that we know what merit is. We know what demerit is. It is easy enough to find people who we think are not up to the job. I think it was Chief Justice Beverley McLachlin of the Canadian Supreme Court who was the first woman member of that court. The composition of the court changed afterwards. She explained this, I remember, by saying that it was not that people were now being appointed not on merit; it was just that the perception of merit was changing because, up until then, merit had been perceived to be those people who looked like the people who were doing the appointing. Once you start to have a group of people who were not, she was frankly saying, white middle-aged men—

Lord Justice Goldring: Like me.

Lord Goldsmith: And like me. That group will see people and say, “This person is like me. This person is highly meritorious,” and start to realise there are different characteristics there, you then end up with a different composition, still based on merit, without having to
go through contortions about whether people are equal on merit, and you are taking account of diversity. I wonder what views both of you might have on that proposition.

**Lord Justice Goldring:** It slightly depends on what you insert into the definition. For example, I am thinking of the definition that the JAC presently has, and Neuberger, where we considered all of this and came to the view that with a slight amendment to the definition of merit, that was satisfactory. Obviously you have to guard against simply appointing in your own image, but I think an independent appointments commission is perfectly capable of doing that. I do not think it requires a huge change in the definition of merit. I believe that the JAC does its very best to avoid that. If I may say so, one of the criticisms or observations that one could make about the Supreme Court selection system—

**Lord Goldsmith:** The Supreme Court here?

**Lord Justice Goldring:** Here. The criticism is that it involves the President and the Vice-President of the Supreme Court, and perhaps that is not entirely desirable.

**Q101 Lord Goldsmith:** If I may, without inviting Mrs Justice Macur to criticise or not to criticise the present system for the Supreme Court, I just wonder what your view is on this basic question of whether it is that easy to identify what merit is and whether that is part of the issue.

**Mrs Justice Macur:** I think that the definition of merit will remain as it should be but will be applied in different circumstances. One of my real fears is that the selection process, which of course has to be independent, fails to recognise merit if it perceives that the merit is displayed in those who are over-represented already, and therefore discriminates against merit. It is attempting to adapt the word to fit the aim in mind that creates the difficulty. If merit is broadened to mean that it has got to encapsulate an applicant ticking the box of an under-represented part of society in the judiciary, then you are changing the concept of merit whole-scale.

**Lord Goldsmith:** You are against the concept of procrustean merit.

**Mrs Justice Macur:** Yes.

**Q102 Lord Powell of Bayswater:** I just wanted to pursue the same point, because one could interpret your answers as being that the judicial system should somehow be exempt from the general policy goal accepted in most of society that we need to be more proactive in achieving diversity in a reasonable timeframe. In various parts of society now, you see a much more proactive policy—for instance the idea that many more women have to be appointed as non-executive directors on company boards. That is now actually mandated in parts of Scandinavia and France. I would not be surprised to see it eventually mandated here, yet it sounds as though, in your utterly understandable desire to protect merit as the criterion, you are saying that the judicial system cannot lean any further towards being proactive in promoting diversity.

**Mrs Justice Macur:** I think it would be dangerous to do so.
Lord Powell of Bayswater: Why is it not dangerous for boards to do so?

Mrs Justice Macur: You are comparing apples and pears, I suggest. If a member of the public was asked whether or not they would wish their particular case, of whatever jurisdiction, to be tried by a judge who was female or male, or black or white, the informed would say, “Well I would like my case to be tried by a good judge.” They would not be concerned as to whether or not they were representative of a particular part of society. It is as difficult to be tried and found wanting by a female as a male or to be the subject of intrusive family proceedings with the presiding judge being from an ethnic minority. People want to be judged by good judges.

Q103 Lord Powell of Bayswater: Investors want to have their investment looked after by good directors and yet it seems to be acceptable to mandate greater diversity in the appointment of company boards.

Mrs Justice Macur: You mentioned non-executive positions.

Lord Powell of Bayswater: That is perfectly fair; I did.

Mrs Justice Macur: That in itself suggests that there is positive discrimination for no real reason, other than to bring up a particular profile.

Q104 Lord Powell of Bayswater: I suppose the phrase “for no real reason” might be contested to some degree. A lot of people would say that there is a reason and that is that everything else has failed, in the sense that the absence of proactive policies has failed to produce diversity. I am talking not solely about the judiciary, but in all sorts of areas of life.

Mrs Justice Macur: There has to be a greater appreciation and there is a greater appreciation—I think a growing appreciation—that the pool of candidates, which is now providing for judicial appointments at all levels, is growing in diversity itself. What you cannot do is undermine the gradual process, which will increase in speed, by having window dressing. Window dressing by appointment of those who are from under-represented groups of the judicial or quasi-judicial family means that you are deterring those meritorious candidates of the same minority background from applying, because they want to be appointed on merit and not because they tick the boxes. I think you can rush it; you can rush the gates.

Q105 The Chairman: I wanted to ask you, Dame Julia, specifically about the Family Division, because I am surprised that you say that there is no particular advantage. I think you said there was no obvious reason for creating a more diverse judiciary in general terms, but you also said in your response to an earlier question that you did think it was advantageous sometimes, in terms of individual appointments, to deploy according to particular characteristics. This is not a question about gender or particular minority groups. This is a question about the nature of people dealing with specific areas of the law. Do you
The Rt Hon Lord Justice Goldring and The Hon Mrs Justice Macur DBE – Oral Evidence (QQ78-120)

not feel that there is any particular characteristic advantageous to the Family Division, for example?

Mrs Justice Macur: None beyond a knowledge of life, and I do not think that that is gender-specific. I do not think it is ethnic-specific.

The Chairman: No, I am not suggesting it would be.

Mrs Justice Macur: As with all judges in all divisions, that which is required is good common sense and an appreciation of a diverse society, whether or not you are a member of ethnic minorities or gender minorities in the judiciary. I have male colleagues in the Family Division. It is the one division that, as most of you will know, has the higher proportion of female judges, and that is because it is traditionally a field where female barristers find their practice, whether it was because it was urged by their clerks or a natural association with the subject matter. There is a high percentage of women in the division. It is still not 50:50, but there is certainly no distinction drawn in the cases that were allocated, whether it be child care, financial or Court of Protection, as it is now, within the division.

Q106 The Chairman: It does suggest that other elements than merit—as you said, it may be simply history of the particular barrister’s cases—have come into play.

Mrs Justice Macur: I think perhaps in the past there was a tendency to think that a female would be better suited to a post in the Family Division than elsewhere. I think that the main reason for the higher proportion of the female judiciary in the High Court Family Division is the higher number of female barristers who practised to a high level in that division. This is why I think that the pool is changing now. There is an increasing number of female advocates in the criminal, civil and specialist courts, and recent appointments to the High Court have increased the percentage of female appointments in the Queen’s Bench Division and the Chancery Division.

Q107 Lord Crickhowell: I want to ask two related questions. Do members of the judiciary have an appropriate role in the appointments process? Is the system by which justices of the Supreme Court are appointed an appropriate one and could it be improved? It certainly came as a surprise to me to discover that the panel appointing the Supreme Court was so narrow, and so totally dominated, as already has been indicated, by the President and Vice-President. There was an acceptance in some of the evidence that we had last time that perhaps it would be advantageous to have more lay members involved in that process. So my question is on the role of the judiciary in the process and whether the balance between lay and judicial members is right, particularly in the case of the Supreme Court.

Lord Justice Goldring: Looking at it in general, first of all, putting the Supreme Court to one side, I think that the role is broadly right. One has to remember that the Judicial Appointments Commission consists of a lot of lay commissioners, as they are called—a majority of lay commissioners. Each individual exercise—for example, an interviewing panel—will consist of one judicial member and two other members. Final decisions are taken, subject to the Lord Chancellor’s approval, by the commission as a whole. I think that broad balance is correct.
As far as the Supreme Court is concerned, there is a good argument that there is an over-representation of the existing members of the court and that that ought to change. It is difficult sitting here to devise exactly how that should be done, but the problems we touched on before are relevant. That should be changed.

Q108 Lord Crickhowell: If you widen this, are you talking about other judges or some more lay members as well?

Lord Justice Goldring: I would certainly have other judges. I would, for example, have the Lord Chief Justice in some way represented, perhaps with some other judge—Court of Appeal, possibly Queen’s Bench judge—and possibly a greater lay input. It needs a more balanced panel than currently is the case.

The Chairman: We move on to the question of assessment.

Q109 Lord Shaw of Northstead: We have been talking very properly about the appointments but are there any objective means of assessing the quality of the work of an individual member of the judiciary after their appointment has been made?

Lord Justice Goldring: The short answer is that, apart from appeals looking at the substance of decisions—obviously if somebody generates many successful appeals, at least you can see that something is going wrong—there is no structured system for assessing the success of the appointments that have been made. There is no system, in other words, of appraisal. I personally have always been in favour of some sort of entirely judge-run, wholly answerable to judges, system of appraisal.

Q110 Lord Shaw of Northstead: Would you agree with that?

Mrs Justice Macur: Not entirely, no. I think that, first of all, the appeals system often distinguishes not merely decisions that are wrong in law but also bad case management, and associated implicit and overt criticism of the judges. There is also a system of public appraisal, because there is now handed out at court centres a pamphlet telling people how they can complain about barristers and judges. There is a judicial complaints scheme, which I know filters very many complaints as to the ultimate judgment, but also deals with brusqueness, rudeness, discourtesy and all of the matters that will concern someone appearing before a court.

To appraise is necessary, but I think that the appraisal that is necessary needs to be at a stage when a person is embarking on their first steps towards a judicial career. There needs to be greater appraisal then. It could be better employed if we went back to a system that I encountered. When I became an assistant recorder, I had to prove my worth before I became a recorder. The fee-paid experience, which is sometimes missing with applicants now coming before the JAC for appointment, was an appropriate means of appraisal by experienced judges. There was also peer appraisal. There were undoubtedly soundings taken from those who appeared as customers before the court in professional roles.
I do not think that judicial appraisal would necessarily work at the upper levels. It may work when you have a presiding judge appraising one of their circuit judges. I certainly know that the district judges are appraised by their peers, but I wonder whether peer appraisal is totally effective if there is a collegiate atmosphere that one wants to preserve. It would be very difficult to implement.

**Q111 Lord Shaw of Northstead:** As a pure layman in these matters, can I ask what sort of official appraisal committee, if you would like to call it a committee, should be set up to deal with this matter?

**Mrs Justice Macur:** With appraisal generally of the judiciary?

**Lord Shaw of Northstead:** Yes, and what action could be taken?

**Mrs Justice Macur:** I find it difficult to imagine that it could be effectively organised. The number of the judiciary means that it would be a very big task to contemplate an annual or biannual appraisal of all judges. It would be extremely costly. You would have to have a consistent approach, so the nature of the panel appraising would have to be limited in number and expertise. I think it would be extremely difficult.

**Lord Justice Goldring:** It would obviously be difficult and very expensive and I would have thought that, as a matter of practical politics in the current environment, it would be a non-starter for those reasons. What we are trying to do is see if we can devise a system to appraise recorders to feed in proper information to the Judicial Appointments Commission, so that they can make better appointments than the already excellent appointments they make.

**Q112 Lord Rodgers of Quarry Bank:** If I may follow that up, and perhaps repeat it in rather a different way, both of you referred to a “good judge”. By implication, there are some not good judges. After they have been appointed, can you measure the performance? Unless you can measure the performance, you cannot reach any conclusions about improving the process.

**Lord Justice Goldring:** You can. This is a very big question. One of the changes in the judiciary, I suspect really since the 2005 Act, is the increased responsibility on the Lord Chief Justice for the efficient running of the courts. That therefore involves the judges who have leadership responsibilities seeing that their courts and their areas of work are working properly, and the presiding judges are also checking whether Court X, Y or Z is functioning properly. It soon becomes apparent, because there are statistics that make it so, if a particular court is not or if there are particular problems. You can pick up, and I personally regard this as very important, where things may be going wrong and try to put them right. This is not individual appraisal obviously, but it is looking at the overall performance. You do not have to dig very far to get to an individual who may not have been performing.

**Q113 Lord Rodgers of Quarry Bank:** You have reached a conclusion or you have perceived performance that has fallen short. My question really is: over a period of time, can
you reach a conclusion that, having made decisions, you made them not on an individual but necessarily about the measures that you put into the original decision? I am still not being sufficiently clear.

**Lord Justice Goldring:** Do you mean whether you can relate back to the inadequacy of the individual appointment the failure that you subsequently see?

**Lord Rodgers of Quarry Bank:** That is right and the process itself.

**Lord Justice Goldring:** Certainly when I was on the JAC, it was one of the things that they really wanted to do to see; how well the Commission was performing. It is not really done, other than in the very rare instance when one, with hindsight, might say, “Perhaps this person should not have been appointed.” No analysis is presently done as to how it came about that that happened. Although it is wrong to think that it has not always happened, because no appointments process, whoever carries it out, is foolproof. The difficulty with judges is that, to all intents and purposes, once you are appointed there is no going back. That is what makes the system of appointments so very important.

**Mrs Justice Macur:** Also, it is very important to realise that a judge who turns out to be a poor judge may not necessarily have been a wrong appointment. Things could have happened to that judge in the course of a long career. We are now appointed for 20 years, and many judges get weary and tired. Sometimes they do not take the hint that it is time to go.

**Lord Justice Goldring:** It is not unique to judges, I think I heard.

**Q114 The Chairman:** This is an ignorant layperson’s question. In many professions—the medical profession is one of the most recent ones to adopt this—there are what are called colloquially MOT tests, which ask, “Are they still up to speed? Are they actually in need of some kind of refresher course or however one wants to describe it?” Is there any such system with the judiciary?

**Mrs Justice Macur:** There is an informal MOT test. In the delegated powers that resident judges, presiding judges and the Senior Presiding Judge have from the Lord Chief Justice, we are concerned with the efficient administration of justice in either a court centre, circuit or nationally. If concerns are raised, and certainly I have experience of this with John, about a particular judge, there is the facility to say, for example “I require him to be retrained in serious sexual offences.”

**Q115 The Chairman:** You can require it? It is a non-voluntary activity?

**Mrs Justice Macur:** It would be a very unwise judge who resisted an invitation from the Senior Presiding Judge.

**Lord Justice Goldring:** They normally agree, but in the final analysis judges have, for very good constitutional reasons, security of tenure.
Q116 **The Chairman:** I appreciate that. Thank you both very much. We have covered most of the questions that we discussed before you arrived. There was only one residual one but, given the answers that you have given on some of the matters we have discussed, I can guess what the answer is. In some of our discussion about whether we learn anything from overseas jurisdictions, one of the matters that has been raised is the question of a career judiciary. I do not know if either of you would like to comment on that.

**Lord Justice Goldring:** I personally am not in favour of a career judiciary, the objective being to increase diversity, I assume.

**The Chairman:** Or to have a regular system, so that if you have a universal system of appointment—you have both said that you prefer one that is separated by the level of appointment—you would be able to progress through the ranks in a more structured way.

**Lord Justice Goldring:** I am not in favour of it for a number of reasons. I question whether you would attract to a career judiciary the quality of people who you really want. I am not in favour of a sort of civil service judiciary, which would, I suspect in practice, be much less independent than the present judiciary is. What I am in favour of is more of a judicial career, in the sense that there should be the ability to move from one part of the judiciary to another. For example, the tribunal judiciary is much more diverse than the court judiciary. There are many very able tribunal judges. If, by deployment, one could transfer them from one area to another and vice versa, you could increase diversity. At the moment, it all has to be done through a JAC process, but you could make a difference. A single judiciary, which would involve legislation, would help in that regard.

Q117 **Lord Irvine of Lairg:** Was what you have just said one of the objectives of Lord Justice Leggatt in his report on the tribunal system?

**Lord Justice Goldring:** Yes. The sad thing is that a completely separate system was set up, which with hindsight was not necessary, and which of course is being gone back on.

Q118 **Lord Shaw of Northstead:** Perhaps I have misunderstood Mrs Justice Macur, but I understood that she is a career judge.

**Mrs Justice Macur:** No, there is a difference. The career judiciary of some countries requires an indication quite soon upon graduation that you will become a judge, rather than transfer from Bar or as solicitor to become a judge. What I am very much in favour of is that there should be fee-paid judicial experience, which is part-time judicial experience, before a full-time appointment. I think it is important from two perspectives: first of all, to enable an appraisal of the qualities of the particular person who is under the spotlight; but also to enable that person to experience a judicial role and to know, or to be able to understand better, whether or not it would suit them professionally. That is what is so important. But I agree with Lord Justice Goldring that to have, effectively, a civil service mentality of “We will become a junior judge and then a senior judge” is not appropriate. I also think that it undermines the import of realising that every degree of judiciary has its important role to play. Some people do not want to move up through the ranks. They apply to the court that they think best suits them, whether professionally or personally, so a lot of women do not
want to move away from a particular area or a particular job that would permit them to job-share. The district judges can now job-share. Circuit judges can apply for salaried part-time working. These are all important factors. A career judiciary implies that there is insignificance further down the ranks, and there is not, I do not think.

Q119  The Chairman: I do not know whether either of you wants to make any final comments. One thing that we have not specifically asked for your comment on, Lord Justice Goldring, is, having been on the JAC, how effective you think it has been in its first few years of existence.

Lord Justice Goldring: Perhaps I can just make this observation: appointing judges is very difficult. Sometimes it is easy to forget that that is so, partly because individually the applicants can be difficult, but fundamentally because you are appointing somebody for life. There is no system that is foolproof. It simply does not exist. The JAC really has tried—perhaps I am speaking slightly defensively as an early commissioner—in not entirely easy circumstances, to improve the quality of the judiciary.

If I may touch upon something that Lord Powell raised, I think it is an unduly gloomy observation that you cannot, by proper application of merit, particularly applying the Equality Act, increase the diversity of the judiciary. I simply do not believe it. What you cannot do is do it tomorrow. I really am not as gloomy as the suggestion of mandating presupposes.

Q120  Lord Powell of Bayswater: Mandating has only ever been proposed when time alone has not produced any change. Could I just add one final question on what you said? It has been suggested to us that the JAC is a shade too large and too slow-moving, and the whole thing needs to be speeded up.

Lord Justice Goldring: I agree with that. I entirely agree with that—fewer commissioners, speedier, more efficient. I agree with all of that.

The Chairman: Does any other member of the Committee wish to make any further points? No. You have both been extremely generous with your time. Thank you both very much indeed. It has been extremely interesting. We are very grateful indeed.
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
WEDNESDAY 2 NOVEMBER 2011

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” branch—the district 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 one of the merit criteria 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 meeting separately 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 both 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. It 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 have a Judicial Diversity Taskforce which includes the heads of the different professional groups as well as the Lord Chancellor, and they hold 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 mix, 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 Rosalie Abella, Canada Supreme Court Justice, 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 areas all round the 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 and 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 normal 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 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 and Baroness Neuberger – Oral Evidence (QQ 216 – 237)

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. 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 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 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 to give him a major role in senior individual appointments, if he is going to make an active contribution to diversity.

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
decisions of the individual judge in their decision-making role; 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 about 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 chaired 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 shoe-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 judgcraft, 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.
WEDNESDAY 16 NOVEMBER 2011

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 Renton of Mount Harry
Lord Rodgers of Quarry Bank

Examination of Witnesses

Lord Neuberger of Abbotsbury, Master of the Rolls, and Lady Justice Hallett.

Q238 The Chairman: Good morning and thank you very much for coming to help us with this inquiry. As you will appreciate, this is the Constitution Committee, so we are concerned with the whole issue of judicial appointments more from the constitutional than from the administrative point of view, if one can make that distinction. That is our emphasis in the inquiry.

This morning, this hearing is being televised, so it would be very helpful if, when you speak, you could first briefly introduce yourself for the benefit of the Committee and those watching the recording.

As I said, we are focusing on the constitutional aspects of judicial appointments. We are reaching a stage at which we are beginning to have some notion of the interests that we shall particularly want to focus on in our inquiry. We very much value both of you being here this morning, because it has been clear to us that one of the particular things that will be of interest in our report is the whole issue of leadership within the profession. As I said, it is particularly valuable to have people like yourselves giving us your views on that today. Could we begin by asking you both how you feel the role of the judiciary has changed in the last few years, particularly in its relationship with Parliament and with what one might call the wider civil and political society; and whether you feel that that change is exclusive to the
Supreme Court or whether it comes about further down the chain of the judiciary? Perhaps, Lord Neuberger, you would begin.

**Lord Neuberger of Abbotsbury:** I am David Neuberger, Lord Neuberger, Master of the Rolls, which means that I am head of civil justice for England and Wales and, effectively, preside over the Court of Appeal, Civil Division.

In answer to your question, what we have seen is a change of degree rather than a change of principle. In terms of private law, the role of the courts has not significantly changed. It is still there to decide disputes between parties according to the common law, that is, the law as developed by the judges, and statute, that is, law made by Parliament. In the public sphere, there has been a change, although I would characterise it as a change of degree rather than a change in nature or a complete change in character.

What has happened since the Second World War is that there has been a greater preparedness on the part of the judiciary to review and interfere with decisions of the executive. That is largely attributable to, first, greater judicial activism, one might say; but is more due to the increased power of the executive. Coupled with that, over the past 10 years, there has been the Human Rights Act. That in one sense has increased the judicial involvement in, or the judicial power to interfere—the judicial obligation, I might say, to interfere—with executive decisions when they go wrong, but it has also introduced a new aspect to the relationship between the judiciary and Parliament, the legislature.

It has not, I must emphasise, affected in principle the relationship between the judiciary and Parliament because, first, the power of the judiciary under the Human Rights Act has been conferred by Parliament and can be taken away by Parliament; and, secondly, the judiciary has not been given the power to overrule or, as it were, declare unconstitutional any decisions of Parliament or any statutes. All that it has had the power to do is, as it were, to point out to Parliament by giving a declaration of incompatibility that, in the judges’ view, a particular measure of Parliament’s does not comply with the government’s obligations under the human rights convention. It is then for Parliament to decide what to do about it.

**Q239 The Chairman:** Do you think that this matter of degree, as you describe it, will become more intense?

**Lord Neuberger of Abbotsbury:** That is a matter of prediction. I do not see any particular reason why it should. It is conceivable that it could become less intense. There is an argument that the judiciary, having been given this new power under the Human Rights Act, has become a little too enamoured with it and too keen to exercise it because it is a new power. It may be that as things settle down, the judiciary will pull back a bit from what it has been doing. It is equally possible that it will intensify. My suspicion is that over the next 10 years, there will be, if anything, a slight retreat—not a massive retreat, but a slight retreat. That is my own individual guesswork rather than any sort of informed or reason-based view.

**Lady Justice Hallett:** I have nothing to add on the question of the development of public law. The only matter I would add so far as the way that the role of the judiciary has changed is the effect of the Constitutional Reform Act.

Sorry, I should have said that I am Heather Hallett, Lady Justice of Appeal. I was vice-chairman of the Judicial Appointments Commission and I am presently head of the Judicial College.
Starting again, the role of the judiciary has obviously changed enormously since the
Constitutional Reform Act and the removal of the Lord Chancellor as the most senior judge.

That has had an impact in a number of ways—particularly, I think, the relationship between
the executive, Parliament and the judiciary. It has also had a dramatic impact upon the role
of the judiciary in management and leadership terms. It has also had another impact: judges
being now far more directly and openly involved in judicial appointments. So I think that
working out the relationship between the judiciary, Parliament and government under the
Constitutional Reform Act is still very much a work in progress.

The Chairman: Could we focus for a few moments on the question of the constitutional
framework for appointments?

Q240 Lord Pannick: My question is about diversity. I was particularly interested in Lord
Neuberger's public comments about the use of section 159 of the Equality Act 2010, a tie-
break provision: if two candidates are equal, it should be open to the selection panel to give
priority by reference to sex or ethnicity. The problem with that—would you agree?—is that
two candidates are very rarely equal. We are years behind other comparable countries in
terms of diversity, are we not? I would welcome the comments of our witnesses as to
whether we should move towards a policy that if two or more candidates exceed the very
high threshold for appointment, the selection panel should be allowed to take account of the
needs of the judiciary for more women, more persons from ethnic minorities, just as the
selection panel for, say, the Supreme Court, takes account of the need for a commercial
lawyer. Is there any strength in that argument?

Lady Justice Hallett: I am a late convert to the use of section 159 of the Equality Act. My
late conversion is based on my experience at the Judicial Appointments Commission. I do
not believe, as a result of that experience, that it is as rare as people think that you have
candidates who are equally qualified—I emphasise the words “equally qualified”. We are not
talking about appointing somebody because they are female when they are not as good as
the man; we are talking about two candidates who have different strengths in different areas. It does not mean that they are not equally qualified.

From my experience, I would say that section 159 could usefully be used and it may well
have some impact. As you say, we are lagging seriously behind other countries.

Lord Neuberger of Abbotsbury: I have no problems about section 159 applying. Equality,
in terms of equality of fitness for appointment, is a very subjective assessment. Some people
believe quite strongly that you can work out in every case whether one candidate is better
than another. I am not of that view. As Lady Justice Hallett has said, you often have
candidates who have different strengths in different areas. I think you can very often find
yourself in a position where you have two candidates who, in your view, are equally strong.
Once there is, as it were, 10% or 15% between them, is that really a significant difference? I
think therefore that section 159 has a serious role to play. I would be concerned about
saying that once you have candidates, all of whom pass the test, you should then favour the
woman, the ethnic minority, the gay, if they are underrepresented.

I was quite interested that for some reason I got this coverage, as you rightly say, Lord
Pannick, on Monday, although a number of senior judges have said that section 159 should
be invoked. Quite why my comment was alighted on by The Times is a mystery to me, but
there we are. Since then, a number of women—whether judges, barristers or, indeed, junior
barristers, including one from my old chambers who wrote rather a good letter to the *Times* yesterday disagreeing with me—have attacked me for saying that even section 159 should apply because, from their perspective, it is patronising. People do not want to say, “We have been appointed to the High Court, the Supreme Court or the Court of Appeal because we are women, because we are an ethnic minority, because we are underrepresented in terms of sexual preference”, or whatever; they want to say, “We want to feel that we have got there on our merits”. That is one of the concerns. I cannot pretend that there is not an argument for what you say—of course there is—but we have to keep merit as the guiding factor. Saying that women are underrepresented is not the same as saying that human rights experts or commercial lawyers are underrepresented.

**Q241 Lord Pannick:** But you are both very happy that merit should be understood and applied in a way that enables selection committees to identify the large numbers of candidates—women and ethnic minorities—who are available for appointment and to do all they can to search them out.

**Lady Justice Hallett:** I think that it is the way you apply the criterion of merit. I do not think you need to redefine it—it is how you apply it; it is what you are looking for. Traditionally, you would have been looking for those who have won the glittering prizes and who have written textbooks. However, if you are going to be truly fair and apply the merit criterion appropriately, you have got to look, too, for those who have not had the same advantages, who have not had the same facilities, and see whether they have not only the same potential but maybe even better potential. I think it is how you look at the question of merit. Traditionally, unfortunately, some people look to those who have followed a path similar to their own.

**Q242 Lord Irvine of Lairg:** You both of course accept section 63 of the 2005 Act, which expressly provides that appointments must be solely on merit, and that section 159 then comes in only as a tie-breaker provision. I therefore put to you, Lord Neuberger, that the criticisms of you that were expressed in the *Times*—I think you will be ready to agree with this—were misplaced because you were not suggesting that diversity should in any case trump merit.

**Lord Neuberger of Abbotsbury:** I think that that is right and I would grasp that. There is an element, however, that the more one makes of section 159 and the need for diversity, the more some minority groups feel that the message is, whether one likes it or not, that they are not going to get there through merit. I think that the important point, as you have emphasised, Lord Irvine, and with which I agree, is that we have to keep merit as the touchstone.

**Lord Irvine of Lairg:** Minority groups would have to be disabused of the notion that diversity could trump merit.

**Lord Neuberger of Abbotsbury:** Yes

**Lord Irvine of Lairg:** But we must be ready to acknowledge that there may be many situations, depending very often on the nature of the judicial vacancy or the requirements of the job that you are looking at, where a number of people could be of equal merit and then diversity could be the tie breaker.
Lord Neuberger of Abbotsbury: I quite agree. I think the other point that Lady Justice Hallett has made, which I would enthusiastically endorse, is that we have to be careful when it comes to diversity that we do not fall into the trap of trying to choose, or being biased in favour of, those who fit our preconceived ideas of what our colleagues are like and what we are like. I think that diversity training is very important in this connection. The other point is that there is nothing wrong—indeed, everything right—in considering whether one can improve the system of appointments and encourage people to apply in such a way as to make it easier for those, for instance, with responsibilities other than work responsibilities or from different backgrounds that may make them feel discouraged from applying to become judges, to apply to become judges.

Q243 Lord Irvine of Lairg: We had evidence earlier from Mrs Justice Macur from the Family Division who really was adopting the position—I am paraphrasing what she said—that you could always distinguish on merit and, therefore, you never got to diversity truly. I do not think that that is right. I think that you can identify a number of candidates who may be of equal merit, having regard to all the requirements of the job in question, and then diversity can properly trump. But you have to trust the integrity of the appointments system not to depart from the primacy of the merit principle.

Lady Justice Hallett: A few years ago before I was on the Judicial Appointments Commission I would have been one of those writing a letter to Lord Neuberger and I would have taken the stance that Mrs Justice Macur took. It is my experience, and that of other women who have also had experience of appointments, that we have moved—and we have moved because we agree with you, Lord Irvine. Provided you remember that the words of the statute are not that you have passed a bare minimum threshold but that you are equally qualified, equally meritorious, perhaps in different ways—provided you remember that—then I agree with you that our task is to persuade people like Julia Macur and many others, including the people who have written to David Neuberger, that we are looking at the words of the section, which are very clear, and that it is not positive discrimination but merely using the words of the statute appropriately.

Q244 Lord Pannick: I just want to ask our witnesses whether they think that that approach will mean in, say, 10 years’ time that the Bench will not be as lacking in diversity as it is at the moment.

Lady Justice Hallett: I have my fears about the senior judiciary for many years to come. I have a serious concern about—this may be where Lord Neuberger and I part company—the retention of women at senior levels within the profession. Those women who do survive within a profession have managed to achieve a certain status and can work out their lives and make it fit their other responsibilities. Then they say, “Why should I apply to go on to the Bench, the workload of which at the senior levels is quite intensive?” My theory is that in too many parts of society when we get to the top, instead of working hard and occasionally being frenetic, the default setting is now frenetic. The default setting ought to be hard work and occasionally being frenetic. Women, upon whom the bulk of caring responsibilities still usually lie, are voting with their feet and saying, “Life is too short”.

Lord Hart of Chilton: So what is the answer to that?

Lady Justice Hallett: I think that we have to spread the word throughout society, including to politicians—to everybody—that we should not be working too many hours of the day lest we forget the importance and quality of family life.
The Chairman: I have certainly found that across my experience in the corporate sector. It is absolutely true that the default setting is freneticism. At least in the judiciary you are not on a plane to Japan on Monday morning and a plane to New York on Wednesday. Some of the top barristers are, I know, Lord Pannick, but maybe not in the judiciary.

Q245 Lord Powell of Bayswater: I want to continue that discussion a little further but from a slightly different angle. Do you think that we are sometimes too sensitive and too conservative about promoting diversity in the judiciary compared with other walks of life? There is a slightly holier than thou attitude about it, it seems to me. For instance, in business people are actively encouraged to get out there and promote diversity. They are not going to do it at the expense of merit; otherwise your business will suffer. Why is it so wrong to actively promote diversity within the judiciary by going out and trying to find more meritorious women or more meritorious ethnic minorities? I think we are being a little bit too backward about this.

Lord Neuberger of Abbotsbury: I do not think that anyone is suggesting that we should not. On the contrary, going out to encourage women and ethnic minorities—and, one might say, anyone really good—to apply to become a judge is something that the senior judiciary have a positive obligation to do. We are not doing it enough and I include myself in that criticism. I think what has happened is this: under the old system, which operated until Lord Irvine ceased to be Lord Chancellor, it was the Lord Chancellor who made the appointments. He will correct me if I am wrong, but he relied a lot on what he was advised by the judges and the senior judiciary. The senior judiciary, normally after checking with the Lord Chancellor, or the Lord Chancellor himself—because it was always a he—would tap people on the shoulder, and they would be confident in the knowledge that they would be told yes if they wanted to do it. Now I think, with the change under the 2005 Act, the judges have felt it is out of our hands; it is done by a commission and we cannot tap people on the shoulder. Therefore they have done nothing. This has been a mistake. It is a misunderstanding. We should be able to tap on the shoulder and say to people, “Really, you should apply. And you should say on your application form that Justice X or Lady Justice Y has advised me to apply”. That would carry weight with the commission. We cannot guarantee it, but we should be out there. I completely agree with you that (a) we should be doing it and (b) we are not doing it enough.

Lord Powell of Bayswater: Should Lord Chancellors be more active in giving directions to the Judicial Appointments Commission on that subject?

Lord Neuberger of Abbotsbury: I do not think that Lady Justice Hallett can deal with that better than me with her experience.

Lady Justice Hallett: My experience on the commission is that they do everything possible as far as what is described as outreach is concerned. Of course, it all comes down to a question of resources. They have roadshows; they ask judges locally; they ask barristers and solicitors locally - they do as much as they possibly can. But they are trying to make quite a few thousand appointments every year as well and I think it is just a question of how you divide the money up.

Q246 Lord Norton of Louth: The principal argument for diversity, presumably, is one of trust in the judicial process. However, the other aspect of trust is in the appointments process. I wonder whether there is a problem there that has been identified by Lady Justice Hallett’s point. She has only recently come around to the point of view that she has
mentioned. Previously she would have been a letter writer to the *Times*. The recognition that you have come round to, presumably, needs to be a much broader recognition, and I wonder how one actually achieves that in order to maintain trust through, if you like, transparency, the broader recognition that merit is maintained and that the choice is exercised only within that context.

**Lady Justice Hallett:** As far as I am concerned, I would be an advocate of training of all of us who are involved in any kind of selection process, be it by way of giving references, be it directly on the panels or be it as a statutory consultee. I think that we all ought to be trained. The Neuberger report recommended training for everyone. I think the intention of the Neuberger report went as far as everyone who was involved on the selection panels. I would go further and say that all my colleagues who might well be asked to provide a reference should also be trained because it would help them to focus on what they are looking for. Are they looking merely for someone who has ticked certain boxes or are they looking for potential? I think training is the big thing.

**Q247 The Chairman:** You mentioned how we were falling behind, for example, on women appointments - I think that is what you were focusing on, Lady Justice Hallett—and we have had evidence about the political leadership which has been given on this in different jurisdictions, in Canada, for example. I do not know whether you wish to comment on what you felt was the relevance of that or the relevance of leadership within the profession. I know Lord Hart wanted to follow up on that point.

**Lady Justice Hallett:** It works, is I think the answer. Where you do have people who are behaving appropriately in promoting diversity—in other words, they are not arguing for quotas as such, they are not asking to dilute the merit criterion—then you can have the result, and Canada is a classic example.

**Q248 Lord Hart of Chilton:** I just wanted to follow up on the practical side. You are both role models and in speaking out of course you, Lord Neuberger, have seen what happens when you speak out. There are any number of loonies who want to join in and use the argument to beat you around the head. However, that does not mean to me that you should cease to speak out. I think that as role models, both of you have a very important role to go out and preach the Gospel in relation to diversity. I would assume that that is now accepted by almost all leading judicial figures. Is that so?

**Lord Neuberger of Abbotsbury:** I would be very surprised if any of my colleagues—heads of division and other senior Court of Appeal and Supreme Court members—disagreed with that. The main problem is the cast of mind. Most of us think of a judge as a white, probably public school, man. We have all got that problem. That is why I entirely agree with Lady Justice Hallett, as to why it is right that we should all have diversity training. We all have this mentality. Maybe the Judicial College, at which she presides, will think it is an aspect of judicial education and can manage it in its budget.

**Q249 The Chairman:** I did not mean to interrupt you but I think that Lady Justice Hallett said that there was a problem with resources in relation to the Judicial College.

**Lord Neuberger of Abbotsbury:** Yes.

**The Chairman:** But on the simple leadership point, the point that Lord Hart is making about the role models is not, presumably, a resources issue.
**Lord Neuberger of Abbotsbury:** No, that is not a resources issue. Certainly, insofar as one gets criticism, it certainly should not deter one from saying what is right. I think that the point made by Lord Powell is a very important and powerful one. We ought to be getting out there and sending the message out. Picking up on that point, there is also a problem that the judiciary does represent, to some extent, the problems of society and the problems, in particular, of the legal profession. On the whole, we take our top judges from the top of the legal profession, and if you look at the proportion of women, for example, at senior partner level and good QC level, it is not very different from the level of women in the judiciary. There may be some answers to that. We should not just sit back, fold our arms and say, “We are doing our job because we have got a fair representation of the legal profession”. We should be working round that and trying to find how we could improve. It is something of an excuse but it is also an explanation. The other point, picking up what was said about the reason for having more women, for example, or more ethnic minorities, is partly public confidence. However, at the risk of sounding smug, the judiciary has a fair degree of public confidence at the moment, I would say, but that does not mean that we should sit on our laurels and assume that it will continue. I think also that we should be trying to find ways of improving the number of women and ethnic minorities and other underrepresented or unrepresented minorities. That is a given in my mind and, picking up on what has been said by Lord Hart, it is something on which we should be giving a lead. I quite agree.

**The Chairman:** Did you want to pursue that Lord Hart?

**Q250 Lord Hart of Chilton:** No. I just want to get back to one point that has been a recurrent theme. We know that in the solicitors’ profession there is a huge pool of resource that is, in a way, under used in that sense. There are all sorts of reasons why it is under used and we have heard them. One thing that goes back to this leadership question and role models speaking out is that the Neuberger report had some support from, for example, leading firms of City solicitors, who gave it warm words of encouragement. However, when you look at it, the committee that was set up does not seem to have met. One wonders therefore whether there is a real determination and resolve to give leadership and to try to affect as many people as one can to come forward for judicial careers.

**Lord Neuberger of Abbotsbury:** I have attended one or two meetings myself with judges who were solicitors and part-time judges who are solicitors, and I think that there still is an enormous resistance among firms of solicitors to their partners even being part-time, let alone applying to become full-time, judges. The meetings that I have attended, some of which were to get across the fact that the judges were biased against solicitors and we should be encouraging them, the solicitors who were judges or part-time judges who attended identified their main problem as being their partners. In a sense, that comes back to Lady Justice Hallett’s point that their partners are not evil people; their partners are people who are looking at the hourly rate and the number of hours done. They are keen to make as much money as possible and have their partners being full-time committed to the firm. It is very difficult for them to adjust to the idea of their partners having other aims in life and giving up part of their time. I am not using this as an excuse because I think it should not stop us.

**Lord Hart of Chilton:** They do see them as investments that they have made in terms of a career structure and do not wish to see those investments evaporate. On the other hand, there are very large numbers of people who have career changes and move up a gear or
down a gear, whatever expression you would like to use. They are available for appointment, in my view, and they are being lost.

**Lord Neuberger of Abbotsbury:** It is quite true. The bigger the pool that we can fish from, (a) the fairer it is and (b) the greater the talent will be. I would be all in favour of doing everything we can do to encourage solicitors to apply. It is partly a question of experience. Barristers’ chambers are proud to have members of chambers who sit as recorders and as deputy judges, and when you become a judge your name goes to the top of the list. They boast about the fact that they have got a judge. That is because that has been the tradition of barristers for centuries. Solicitors do not have that tradition and they have to adjust to it. Like all of us, they have got to learn about the brave new world we are in.

**Lord Hart of Chilton:** But that learning process equally applies to them because, for example, if you become a recorder and you have judicial experience you then realise that instead of having 28 points you can narrow them down to four really good points, and that assists you in advising the client subsequently when you go back to your practice. There are great advantages in having people who have become recorders in a solicitors’ practice, in my view. But it does not seem to have caught on, and that disappoints me.

**Lord Neuberger of Abbotsbury:** No. But again picking up Lord Powell’s point, we have not been as good as we should have been in going out to solicitors and saying, “Get your act together for goodness’ sake. If you are all retiring young”, as many solicitors do, “all the more reason to think about a judicial career thereafter”.

**Q251 Lord Renton of Mount Harry:** Could I just come in as a non-lawyer? My father was a lawyer and I always understood from him that people stayed as solicitors basically because they could earn more money as solicitors and perhaps have an easier life. That was a very good reason. What I do not quite understand is why you all in the judiciary are suddenly getting so worried about it at the moment. If you look at the average major public company’s board of directors, you will almost inevitably find that there are many more men than women, and yet I am not aware that anyone gets worried about this; there is a thought that that is what happens and so on. What has occurred in the judiciary to make you all so suddenly concerned about not enough women, not enough coloured faces? I do not think you are saying that the result of the judiciary has been not as good as it could have been if there had been more women, more coloured faces. Are you saying that or is it just a feeling of, “Come on, it’s time we were all a bit fairer”?

**Lord Neuberger of Abbotsbury:** That is a very interesting question to which there are a number of answers. First, unlike company directors generally, judges are ultimately concerned with justice and fairness. To concentrate on one aspect, it seems unfair in a profession where more than 50% of entrants into the legal profession now are women that at the top of the judiciary and at the top of the legal profession we have such a small proportion of women. It is fair to say that that is partly explained by the fact that the top of the profession represents the entry of 30 years ago, not today. But even allowing for that, women fall away far, far more than men. To some extent that may be the women’s choice; they are less anxious to climb every ladder that they pass and they have a more holistic and balanced view of life along the lines described by Lady Justice Hallett. None the less, there is a feeling, I think, that it is simply unfair. Secondly, I think that the effect of the Human Rights Act has made us also more aware of justice, fairness and equality between the sexes. Thirdly, yes, I think we do have a very good judiciary, but it is simply unfair if a whole section of
society—again looking at women but I do not say that this applies purely to women—is heavily underrepresented. The idea that women are less good judges than men is fanciful.

Lord Renton of Mount Harry: Does anyone actually have that idea?

Lord Neuberger of Abbottsbury: No, no, they do not. But if that is right and women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges. It is also that I think that our generation of judges may have been brought up or come of age in the sixties or seventies, which was a more questioning, perhaps more egalitarian time, than our predecessors who were brought up in the forties and fifties, and that therefore we have a slightly different outlook. Then there is the Constitutional Reform Act. I entirely agree with what Lady Justice Hallett said about that at the beginning. It has given us, if you like, greater ownership of and greater responsibility for the system. To that extent we feel conscious about it. It is fair to say that I remember Lord Irvine on the “Today” programme, 10 years ago or so, on the appointment of silks making the point that he appointed more women than ever. I think that represents a trend that has been going for 15 or 20 years.

The Chairman: I think that Lord Powell might challenge the point that Lord Renton made that this was not something that was of concern to business. I know from my experience that I would, but I think Lord Powell might come in on that.

Q252 Lord Powell of Bayswater: I do not want to detain you too long with the discussion. Perhaps to add one point, it is now the practice of some other European countries, particularly France, to legislate for a proportion of women on boards. I am on a board in France and, faced with that, we have not gone out and recruited a lot of airheads simply to have women on the board; we have gone out to recruit the best possible people we can find who happen to be female. There turns out to be surprisingly—good heavens!—quite a lot of them. It is extraordinary. I think we are a little oversensitive about some of these things in regard to the legal profession.

Lady Justice Hallett: We have to be careful because, although I may have changed as far as section 159 is concerned, I am not in the quotas camp yet. I believe that is patronising and that is why I stick firmly to the words of section 159. As a lawyer, you would hope that I would stick to the law. At the moment quotas are not lawful.

Lord Powell of Bayswater: I do not really see the distinction between quotas and targets. I think it is very legitimate to set targets and ask for them to be fulfilled. “Quotas” is a condescending term, I completely agree.

Lady Justice Hallett: Targets might be possible if our pool was large enough. The pool as far as the lower levels of the judiciary are concerned is not too bad. If our pool was large enough at the senior levels then, yes, you could set a target. At the moment the problem is that you could set a target but the pool is not going to be big enough to meet your target; you would only meet your target by reducing the merit criterion and diluting it in some way. That is my fear about targets. If we all had an equal playing field and we had equal numbers of women at the senior level, I would be happy with targets. But that is my worry.

The Chairman: Lord Powell has introduced France and the corporate sector but we have also looked at the continental system of a different type of judiciary in terms of a career
structure. Lord Renton, I think you wanted to pursue that as well as the point you have just made.

Q253 Lord Renton of Mount Harry: Yes. That is a different story. I would very much like to know your view on the merits or otherwise of a career judiciary. I understand that a career judiciary means that you have actually got lawyers being appointed to junior judicial roles at the beginning of their careers. How is that working out?

Lady Justice Hallett: I will deal with that. As far as France is concerned, I am told that they are looking at our system in many ways, and this is one aspect at which they are looking. Many French commentators accept that one of the many strengths of our system is that we do not take people fresh out of university and just stick them on the Bench judging their fellow citizens. We have at least seven or ten years’ experience—it depends upon the judicial post you are talking about—before we can become a judge. That is particularly important when you have a common-law system whereby judges are having at times to develop the law. It is very different when you have a civil law system—“I am just applying this set of rules”—and therefore I would be against a career judiciary of the kind they have in a civil law system. That is not to say that I am against the idea of people, having had a few years’ experience in practice or the academic world, obtaining a judicial post and moving up the ladder. That is a very good idea but it involves sticking to our essential system whereby you do not become a judge until perhaps you are in your thirties, or seven to ten years after you have qualified. You can then move up the ladder that way, and that might improve diversity. Having brought the tribunals and the courts together within the new Courts and Tribunals Service, I am hopeful that we will encourage greater cross-jurisdictional involvement.

Q254 Lord Renton of Mount Harry: Is there a judgment in that that it is better to be a barrister than a solicitor if you want to become a judge in due course?

Lady Justice Hallett: At the moment we go back to Lord Hart’s point. The trouble is that a number of my friends who are top solicitors will talk the talk but not all of them will walk the walk. They will say the right things. The Judicial Appointments Commission will hold a roadshow and everyone will come out with warm words about, as it was described, apple pie and motherhood, saying that we should encourage our solicitors. However, I am afraid that not all of them do that when they get back to their offices. The second problem is persuading the solicitors to make sure that they are applying at the right level. Some of my friends who incredibly high-powered City solicitors should be looking at the High Court level. However, somehow there is this feeling that solicitors become only district judges or that they should be looking at a different level.

Lord Renton of Mount Harry: Does that feeling still remain?

Lady Justice Hallett: I think it does in some quarters. The JAC tries to persuade solicitors of every kind and at every level that there are all sorts of judicial appointments that might attract them. It was not that long ago that Mr Justice Hickinbottom—whom we have to trot out every time to show that you can be a successful City solicitor and a very good High Court judge—had to start life as a parking adjudicator because they worked in the evenings. Therefore, he could get away with it with his partners. He worked his way up completely, from parking adjudicator to High Court judge. It can be done but it should not be only Gary Hickinbottom who has to fly the flag.
Lord Neuberger of Abbotsbury: There are others such as Lord Hart's former partner, Lord Collins, who went straight from being a high-flying City solicitor to being a High Court judge and ended up in the Supreme Court. There are role models of whom people should be aware, and we should encourage people to look at them. I completely agree with Lady Justice Hallett about judicial career development. We should not be appointing people as judges straight out of university; they should see the real world and have experience as lawyers. They should understand what lawyers do and what the world is like before they become judges. However, we should be more prepared—we are more prepared—to encourage promotions from junior to senior to very senior appointments. One thing that we should be doing—and, again, are doing but should be doing more—is encouraging people who sit at one level to sit part-time at another to show their faces.

The Chairman: Could we come to the whole structure of how appointments are made, particularly at the senior level? One of the issues is the role of the executive. We touched briefly on this in the questions about the Lord Chancellor's role. Lord Crickhowell, do you want to take this?

Q255 Lord Crickhowell: Yes. Both of you in your opening statements pointed out some of the reasons why there could be and, indeed, is some tension developing between the executive and Parliament on the one hand and the judiciary on the other. This has led to the argument that Jack Straw advanced before the Committee that Parliament should have some greater role than it does in the whole process. I have to say that that has provoked a strong reaction against the view that there should be confirmatory appearances before parliamentary committees and so on. A suggestion has been made that, at a senior level, there could be some senior parliamentarians—perhaps from this Committee and the equivalent Committee in the Commons—on the selection panels, so that at least there was parliamentary involvement in the process. I would be very interested in your views on whether there is a way to resolve this tension, which grows from the reasons that you both clearly set out in your opening statements. How would you set about it?

Lord Neuberger of Abbotsbury: First, on the question of tensions, at the risk of sounding self-satisfied or too complacent, if there was not some tension between the legislature and the judiciary, between the legislature and the executive, and between the judiciary and the executive, there would be something wrong. We need a degree of tension—that is part of the system. Therefore, the fact that there is a degree of tension should not be a cause for concern; on the contrary. That does not mean that if the tension becomes inflammatory we should be lax, but I do not think that it is becoming inflammatory.

We have had the advantage of there being a very clear line between the judiciary and the legislature. The nearest that we got to overlap was the anomalous but, in my view, perfectly workable position of the Lord Chancellor. That has now effectively gone in terms of his judicial role, for better or for worse. We now have a very clear line of no legislature involvement in the appointment of judges or the judicial process. I would prefer to keep that as it is. We have a bright line. Once you start muddying the water and involving the legislature in the appointment of judges, you risk going down a slippery slope, not quite knowing where it will end.

The last thing that we want is the sort of thing you see in the United States. I do not pretend that it happens with every appointment to the Supreme Court but we all remember interviews and proposed appointments that led to something of a jamboree or a circus. I do not think that we want that. Also, if you have the idea of a career judiciary along the lines
Lady Justice Hallett and Lord Neuberger of Abbotsbury MR – Oral Evidence (QQ 238-258)

that Lady Justice Hallett described, there is an additional point, which she made to me when we discussed this. That is, if you have legislature involvement in the appointment of senior judges, the more junior judges will bear in mind that they have to keep an eye on the legislature because it will have some say in their appointment to a senior post. While I can see the argument—I do not pretend that there is not one—I strongly favour keeping the legislature out of it.

The legislature performs a function by legislating if it thinks things are going wrong. It is the ultimate power in this country, so if it thinks that the appointments system is going wrong, it can legislate to deal with that. You also have the JAC appearing before committees of the Houses of Parliament to explain what is going on and receive criticism and proposals. Keeping the legislature at one remove from the judicial appointments system is right and should be preserved.

Lady Justice Hallett: I agree. If you accept the principle of an independent Judicial Appointments Commission and/or the role of independent judicial appointments commissioners on the same selection panel for the Supreme Court, I do not personally understand the need to have a member of the legislature directly involved in the selection exercise. I know that many share the view of Jack Straw. My fear is to do with what questions a representative of the legislature can legitimately ask. One of the possible questions that I noticed the Committee had posed for us is just that. I would turn the question on its head. If I cannot think of any question that they could legitimately ask, what is the purpose of any kind of confirmatory hearing? I would not have confirmatory hearings. I would not necessarily have any politician or member of the legislature involved in the selection panels.

The only involvement that I could personally envisage is having some consultation at the beginning of the process. Having consultation at the end of the process could be invidious and could put the Lord Chancellor, for example, in a very difficult position. I can understand people thinking that you should have some kind of consultation at the beginning of the process. However, you have to be very careful about the role of a politician in the appointment of judges. For example, the Lord Chancellor has a significant role, or could have if he chose to use his Constitutional Reform Act powers. We must have a system that caters for a Lord Chancellor who is not, as Lord Irvine was, a very senior and distinguished lawyer. You have the possibility of a politician who may have gone public on a number of occasions, attacking not only judicial decisions but individual judges. I have very real concerns about such a figure, who could now become Lord Chancellor, having any significant role in the appointment of judges. There are a number of difficult problems.

Q256 Lord Crickhowell: Can I just come back on two points? I entirely understand the point that Lord Neuberger made about pensions. On the other hand, they sometimes provoke rather an unfortunate reaction in the press and so on, which can be damaging. Anything that we can do to avoid that sort of hyped-up view, particularly in the popular press, is desirable. We have heard from witnesses that there is clearly a general acceptance that it is right that the Lord Chief Justice and the President of the Supreme Court should report once a year to the appropriate parliamentary committees. I am not quite so clear as to why you should object to the idea that two senior parliamentarians from those committees should join the selection panel that appoints the Supreme Court. Having only two of them was one suggestion. During the selection process they could then ask the sort of questions that might be helpful and might make people feel that at least there was not a
total detachment of the appointments process from Parliament, which is a matter of some
general public concern.

**Lord Neuberger of Abbotsbury**: I think there are two separate questions. One is: what
questions will you ask the candidates? The second is: who will choose them? Picking up Lady
Justice Hallett’s point, it may be worth exploring the idea of the selection panel having a
meeting with two people of the sort that you identify—a member of this House’s
Committee and a member of the Committee in the other place. They could raise questions
that they would like examined. It could be done in that way. I still worry that once you
involve the legislature, with the best of intentions, in a way that looks unexceptionable, you
have started something that may snowball. If it was simply a question of this Committee
suggesting questions that might or could usefully be raised by the selection panel, it may be
something that is sufficiently detached from involving the legislature in the selection process
as not to be objectionable.

**Lady Justice Hallett**: There is also the question of the difficult balance, remembering that it
is a United Kingdom court. At the moment you have two senior judges, with representatives
from Northern Ireland, Scotland, England and Wales. If you add to such a panel, would you
remove the JAC representatives, or would the two members of the legislature be in addition
to them? In which case, you will have a panel appointing the most senior judges in the
country that includes only two lawyers. As we are talking about the qualities of top intellect
and top legal brain, I would question whether you would want to have quite such a lay-
judicial balance. There is also the question of whether the two representatives of the
legislature would be additionally representative of Northern Ireland and Scotland. You
would raise all sorts of complications.

**Q257 The Chairman**: There is also the specific question about the President of the
Supreme Court and the degree to which the President or the Deputy President should be
involved in appointing their own successor. That is a slightly different question from the one
that Lord Crickhowell is pursuing, but perhaps I could ask you about that now.

**Lord Neuberger of Abbotsbury**: It seems to be well established for good reasons that a
person should not be on, let alone chair, the panel that selects his or her successor. That
cannot be right. It is an aspect of the Constitutional Reform Act that was overlooked.
Certainly, I think it is indefensible.

**Q258 The Chairman**: Can we turn to the question of how judges are monitored or
assessed once they have been appointed. We have pursued this in various ways. Should
there be a greater degree of formality, as there is in many professions nowadays, over in-
career assessment?

**Lord Neuberger of Abbotsbury**: I have no doubt at all that all judges should be assessed.
How you do it and for what purpose may be open to argument. Obviously, you do it for
their benefit because it makes them better judges and is therefore better for the public. That
then raises other questions. How do you do it? Where is the money coming from? What do
you do with the assessment? Where the money comes from is not a question that I can
answer at the moment but there has been one attempt to do it properly, which stopped
because there was not the money.

The next question is: who does it? You have to be very careful about how it is done. The
obvious people to do the assessing or appraising are the best judges. However, the last thing
that you want the best judges to do is to be taken off the day job. You want them to be judging. You have to think about that. It is possible that very good retired judges could do it for a bit. Maybe the best judges could take a day or two off every year to spend some time appraising. However, you have to be careful that you do not do that for a number of different factors and find that they are hardly sitting at all.

One idea that may be worth examining is finding some way of identifying the judges who are, for some reason or another, problematic. They talk too much, jump to conclusions, do not consider the case and make it clear what they think. There are various judicial vices of which they are often unaware. It would be worth considering a system for gathering complaints and then saying, “Right, that judge has a problem and he or she needs help and appraisal,” so that appraisals are targeted and reduced. The most difficult question is: if you have an appraisal, is it just a matter between the appraiser and the judge, or does it get sent to the JAC, the Lord Chief Justice or both and taken into account when assessing?

**The Chairman:** What would be your view of that?

**Lord Neuberger of Abbottsbury:** My instinct, which is not terribly reliable here, is that it would be more valuable in the sense that everyone—the appraiser and the judge concerned—would be more honest if it was a private matter between them. Once they both knew that whatever was being said would go to somebody else, they would be less likely to be open and frank. There is, of course, the Office for Judicial Complaints, which deals with any formal complaints about judges. That would be an entirely separate matter. If the judge had done something worthy of a complaint, it would have to be dealt with through the usual channels.

Coming back to the question, I have no doubt that appraisal is something that we should be undertaking. It should be a judicial function; it should not be somebody assessing judges from outside because of the point that Lady Justice Hallett emphasised a moment ago—judicial independence.

**Lady Justice Hallett:** When I was on the Judicial Appointments Commission, my fellow commissioners were always saying, “Why don’t we have the best evidence?” which would be somebody’s track record as appraised. There are areas of appraisal within the judicial system. I believe that some district judges are appraised. In the system for judicial appointment, the equivalent of the line manager, the senior judge of that jurisdiction—this may be within the tribunal system—will not quote from individual appraisals but will give an overall view, such as, “This is a judge who has been consistently late in preparing judgments and grants adjournments too frequently.” They will give you highlights from the appraisal but the judge concerned knows that that is exactly how the appraisal will be used, so nobody is in any doubt. It can be used for career development and as evidence for further judicial appointment.

**The Chairman:** I think we have covered most of the points that members wanted to raise. Lord Pannick had to go to speak in the Chamber; do you have anything further? Does any other member of the Committee feel that things that they wanted to raise with our two witnesses have been left out? Do you two have anything further that you feel we have failed to mention but which you want to say?

**Lord Neuberger of Abbottsbury:** Other than thanking you very much for listening to us and bowling us some questions that were quite difficult to answer, I have nothing to add.
The Chairman: Thank you very much for an enormously important contribution and for giving us so much of your time. It has been very helpful.
Josephine Hayes, Barrister – Written Evidence

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.”55 He goes on to say that the evidence we find compelling or un compelling, 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?”56

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.”57 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 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…”58

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

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56 Ibid, pp. 96, 97.
58 Ibid, p. 100.
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 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 identifiers of patterns, who like working with rules, and can be very successful with rule-based systems such as logic, mathematics or law.

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

59 See the 3rd programme of the BBC documentary series “The Human Mind” (2003).
60 Professor Simon Baron-Cohen of Cambridge University, author of “Mindblindness”, “The Essential Difference” and “Zero Degrees of Empathy”, is expert in this field.
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
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.
- 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 dismissing 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
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 uniformly heterosexual judiciary. Its operation included a rigorous investigation into the private lives of all those interested in judicial appointment.62

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 uniformly heterosexual. 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.

61 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.

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.63 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.64 Other research on LGBT users of the courts in England and Wales65 offers further empirical evidence 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).66 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,67 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?

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64 Above at 19.
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% of gay men, may suggest that awareness 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 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 pertinent 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.

Opinions 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 integrated 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 judicial 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 overarching 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. For example the biographical webpages of the judges of South Africa’s Constitutional Court 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 attuned to the demands of high judicial office.

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 transparency, 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 the UK Supreme Court. From the photographs attached to each page it is at times difficult to differentiate one judge from another. 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.

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71 http://www.supremecourt.gov.uk/about/biographies.html
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.
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
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.72 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.

(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,

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Sundeep Iyer, Department of Government, Harvard University – Written Evidence

New Zealand and the UK – often defined opportunities in the absence of an appointments commission. 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 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. 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 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.

![Difference in Fraction of Appointees Who Are Female, England and N.Zealand](image)

74 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/eij/research/index.html.
(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. What is most striking, 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. This evidence suggests that while establishing an appointments commission initially had a positive influence on judicial gender diversity, that positive effect quickly eroded.

**Difference in Fraction of Appointees Who Are Female, Northern Ireland and N.Zealand**

![Graph showing the difference in the proportion of women appointees between Northern Ireland and New Zealand for years 1998 to 2008.](image)

(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. But this uptick lasts

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75 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.

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

77 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.
just one year - then, there is a sharp and significant decline in the proportion of appointees who were women in Northern Ireland relative to New Zealand. 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.

(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 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. 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 New Zealand), the proportion of women appointees increased.

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78 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.
79 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.
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 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
District Judge Tim Jenkins, Lord Kerr of Tonaghmore, Lord Justice Etherton, Her Honour Judge Plumstead – Oral Evidence (QQ 40-77)

Transcript to be found under Lord Justice Etherton
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.

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 1 and 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
Section 9 of the Senior Courts Act 1981

As you are aware, I gave evidence to the Lords Constitution Committee inquiry into the judicial appointments process in October 2011.

Following my appearance, the Committee considered the process for authorisation of Deputy High Court Judges and the role of the judiciary and the Judicial Appointments Commission (JAC) in that process. This matter was not covered during my appearance before the Committee, so I thought that it would be helpful to set out my views.

Firstly, I would like to clarify the difference between authorisations made under the provisions of s9(1) of the Senior Courts Act 1981 (SCA), and appointments made under the provisions of s9(4).

Under s9(1) of the SCA Circuit Judges and Recorders, that is men and women who have already been appointed as judges, may be authorised to sit as a Deputy High Court Judge. Such authorisations enable Circuit Judges and Recorders with relative expertise to hear cases which would otherwise require a High Court Judge, of which there are a limited number. Contrary to some misunderstanding, this is not an appointment to judicial office at all. It is simply part of a system which will enable those who are already appointed to be deployed to the best advantage.

As Christopher Stephens, Chairman of the JAC, informed the Committee, the judiciary and the JAC have discussed the need to arrive at a clear, fair and consistent framework within which s9(1) authorisations are dealt with across all three Divisions identified business needs are met. In order to reach a satisfactory outcome and to balance these two requirements, the Heads of each Division collectively wrote to the JAC seeking agreement to the implementation of a protocol [the draft protocol was seen by the Committee but has not been published] for authorisations of Circuit Judges and Recorders under s.9(1).

I am pleased to say that this protocol has now been agreed by the JAC. My officials are currently working with officials in the JAC to discuss publication. Christopher Stephens and I have agreed to keep the protocol under review.

Proposals regarding the authorisation of judges under the provision of Section 9 of the SCA are under consideration in the Appointments and Diversity: A Judiciary for the 21st Century consultation document issued by the Ministry of Justice. I believe the process set out in the protocol is proportionate and sets out a fair and transparent approach, with opportunities for authorisations being advertised to all those eligible.

For completeness, the provisions of s9(4) of the SCA enable Circuit Judges, Recorders or practitioners to be appointed to sit as Deputy High Court Judges on an emergency basis, for instance due to unexpected illness, in order to meet the business needs of the court. As such, these appointments have rarely been made since the implementation
of the Constitutional Reform Act 2005. It is crucial to the disposal of justice that LCJ, through the Head of Division, retains the authority granted by s9(4) of the SCA.

14 January 2012
Q162 **The Chairman:** Good morning and thank you both very much for coming and for coming together, which is extremely helpful for the Committee. I think we sent you a slightly directional note about what it was we were seeking to cover both this morning and in our general report. It was perhaps largely couched in negatives in that we do not want pursue administration and we do not want to pursue any of the mechanical issues about the appointment of the judiciary. We are really looking, as the Constitution Committee should do, at the overall constitutional questions that arise particularly out of the 2005 changes and whether, not as I said on the mechanical side but on the constitutional side, there are lessons yet to be drawn or any indications of where we might look for changes as the system goes along. We had what I think the Committee described as an entertaining session last week with three ex-Lord Chancellors, not including Lord Irvine. Between Mr Straw, Lord Mackay of Clashfern and Lord Falconer of Thoroton there was no degree of agreement, I think it is fair to say, on these broader issues. We are looking to you to give us a very concerted steer on where we might be going.

I think it is probably sensible to start with the broad question of whether you think the role of the judiciary has evolved in the last years and what overall effect this may have, or may potentially have, on the constitutional relationship particularly with government and also with Parliament. Perhaps, Lord Phillips, you would begin.

**Lord Phillips of Worth Matravers:** I think the role of the judiciary has changed, particularly as a result of the introduction of European law and the requirement for judges to consider...
the legality in a European context of Acts of Parliament. We are now not merely scrutinising executive action; we are scrutinising parliamentary legislation to see whether it is compatible with the human rights convention, and this then produces what appears to the public perhaps a more confrontational position in relation to Parliament. I do not regard it as being confrontational at all. We are just doing our job. Quite apart from that, over my and Lord Judge’s time in the law we have seen the growth of public law, and that has continued right up to present day. Public law now occupies about half of the time of the Supreme Court.

**Lord Judge:** I think we need to be cautious. Constitutional arrangements in this country have been shifting, and they always shift. They are always in a state of evolution. I understand what Lord Phillips says, but I think we have be careful to recognise that the introduction of the European dimension to our law and the increasing use of judicial review of government action in particular has not altered the basic principle, which is that we try to discover the law, and sometimes it is very difficult. Having discovered it, we say what it is. If, at the end of all this, Parliament does not like the view we form of the law, Parliament is sovereign and Parliament can change it. I think that ultimate final veto on the law remains with Parliament. Therefore the essential ingredients of the constitution have not changed.

We have to be just a little careful not to think that the changes have given our Supreme Court the sort of wide-ranging role that the Supreme Court has in the United States of America or Canada. It is not the same body. In the United States the President chooses who the judges will be. In Canada the Cabinet chooses who the judges will be. They are deciding some very important questions that their legislature has absolutely no control over. For example, take the great and very difficult issue of abortion. The ultimate power in the United States is the vote of nine people. The ultimate power here is in Parliament—the Abortion Act—and we have to be careful, I think, not to get carried away in thinking we have introduced a new Supreme Court with new and different powers that are similar to those in the United States and Canada. If we keep grasp of that, then the changes are not very dramatic.

**Q163 The Chairman:** Lord Phillips referred to the perception of antagonism between Parliament and the judges at times. You must excuse me; I have lost my voice this morning. Do you see it as a sort of perception issue or a reality issue, given what you just said? I think for example so many people in public life, whichever aspect of it, today feel under enormous pressure—for example, from the media—which in a sense distorts those perceptions without necessarily changing the reality. I do not know whether either of you feel that is something that is reasonable.

**Lord Judge:** Can I answer that straight away? It would help if government ministers did not cheer when they agreed with a judiciary decision or boo when they disagreed with it. That I think is very undesirable, and I think it is damaging. If we got rid of that, I think it would be much easier.

**Lord Phillips of Worth Matravers:** Yes, I would agree. We as judges are not in an adversarial position as far as Parliament is concerned. Sometimes one feels the Members of Parliament think they are in an adversarial position with us.

**The Chairman:** Yes, so it is that way around. Both of you have talked about, for example, the impact of European law. Do you think this is really only an issue, in so far as it is an issue at all, which affects the higher judiciary? Do some of these changes about the role of the
Lord Judge CJ and Lord Phillips of Worth Matravers – Oral Evidence (QQ 162-192)

judiciary, which you outlined, Lord Phillips, affect people further down the judicial chain or not?

**Lord Phillips of Worth Matravers:** Many really have their impact at a high level but some have their impact throughout the judicial system—e.g. the law of landlord and tenant. It could be that a circuit judge will have to weigh into the balance human rights considerations in deciding whether to make a possession order.

**Q164 Lord Renton of Mount Harry:** I am interested in what you have just said, Lord Phillips. As it happens I sit on the Justice and Institutions Sub-Committee of our Select Committee on the European Union; we are meeting this afternoon. I often wonder to what extent what we are looking at here does cause difficulty or possible conflict with law in this country. I just quote from one thing we will be looking at this afternoon: “Proposed directive on the right of access to a lawyer and on the right of notification of custody to a third person in criminal proceedings and on the right to communicate upon arrest.” That is all coming to us, as it were, from the EU. Does this cause problems?

**Lord Phillips of Worth Matravers:** The EU can cause problems and so can Strasbourg when they rule on our procedures, some of these procedures being ones we have hammered out with a lot of consultation and thought to give effect to principles of fair trial, in particular. If we then have Strasbourg saying, “You cannot do that,” it raises some very real problems.

**Lord Renton of Mount Harry:** In the end Strasbourg wins.

**Lord Phillips of Worth Matravers:** In the end, Strasbourg is going to win as long as we have the Human Rights Act, and the Human Rights Act is designed to ensure that effect is given to that part of the rule of law that says we ought to comply with our conventions.

**Lord Judge:** I would like to suggest that maybe Strasbourg should not win and does not need to win. The Court of Luxembourg has to win because the legislation says so. The legislation is absolutely unequivocal that decisions in the European Court of Justice are binding on this country. That is a consequence of the fact we joined a Community and the Community has to work as an economic whole.

I think for Strasbourg there is yet a debate to happen—it will have to happen in the Supreme Court—about what we really do mean in the Human Rights Act, or what Parliament means in the Human Rights Act when it said the courts in this country must take account of the decisions of the European Court of Human Rights. I myself think it is at least arguable that, having taken account of the decisions of the court in Strasbourg, our courts are not bound by them. They have to give them due weight; in most cases obviously we would follow them but not, I think, necessarily. I am sure that Lord Irvine might have something to say on that subject.

**The Chairman:** I thought you were about to intervene, Lord Irvine, but you are not.

**Lord Irvine of Lairg:** I will restrain myself.

**Q165 Lord Pannick:** I ask Lord Judge whether he would accept that the changes in the role of the judiciary are perhaps more significant than he suggested, for this reason: that in applying the Human Rights Act, judges now have to access the proportionality of social
policy measures. That is a very real difference from what judges traditionally do, is it not? It is true, of course, that Parliament has the last word, although Parliament would be reluctant to overturn a declaration of incompatibility. Surely the nature of the reasoning process of the judge hearing a human rights case is a bit different from what judges are used to.

Lord Judge: Yes, but I was answering the question of whether the constitutional position has changed; I do not think it has. But if the question is whether the job has become much more difficult for the sort of reasons that you just outlined, yes, it has.

The Chairman: Can we therefore move back to the domestic picture and pursue the question about appointments?

Q166 Lord Renton of Mount Harry: This is a very basic sort of first question: do you think there is sufficient transparency and accountability in the way the judicial appointment system now operates?

Lord Phillips of Worth Matravers: I will answer that question, but before we get into this topic it does seem to me there is a fundamental question as to what we are trying to do: what is the nature of the exercise? Are we setting out to make sure those who are appointed as judges are best fitted to carry out the duties of the judge, or are we trying to do other things at the same time to make sure judges reflect society or that the appointment system is a democratic system? It will not necessarily lead to the same results.

The Chairman: That is obviously a very legitimate question for us. I think the whole discussion about the nature of merit as a basis for appointments is one we obviously wish to return to, but I think at this stage what Lord Renton, as I understand it, is concerned with is whether the system—whatever basis the people are appointed on—is in itself sufficiently transparent and accountable to whomever.

Lord Renton of Mount Harry: Yes, that does indeed follow. Are there objective means of assessing the quality of the work of an individual member of the judiciary after their appointment has been made?

Lord Phillips of Worth Matravers: Yes, that bears of course on promotional appointments, where you are appointing serving judges to take appointments at a higher level. The most important factor in relation to those appointments is track record. Those, I would suggest, best placed to assess track record are those who have been dealing with the work product at the coal face of the candidates and those who have been working with them, so these are the other judges. If you are selecting for the Supreme Court you will have a commission of five, of whom two are the President and the Deputy President of the court, and three others may or may not include judges but normally are unlikely to include individuals who have a personal experience and knowledge of the candidates. They then get together and make their recommendations. How they have done that is not transparent to the world. It is transparent to the Lord Chancellor because a very full report is submitted to him with the recommendation, explaining precisely what the process was and what factors have weighed with the commission in reaching their decision. But it is not transparent to the public how the actual reasoning has gone, and would not be unless you had a report to the public or you had the discussion televised.

Q167 Lord Rodgers of Quarry Bank: I am trying to see what the measure of the success of the process is. What is the product of the process and how can you measure its
success? In my naive layman’s view I want better justice, and if I am in front of a judge I would think him to be usual and fair in all his ways. I am not interested myself in whether judges are long or short, male or female, black or white, or whatever it may be. The process exists, and after people have been appointed what is the way in which you decide whether we have chosen the right men and women named as a result of the process?

**Lord Phillips of Worth Matravers:** The process at the moment says you appoint on merit, so we set out to try to identify the best candidate. It is very hard for anyone to decide whether we have identified the best candidate or whether there was a better candidate we should have preferred, but I think it should become apparent if we have selected a bad candidate—someone who does not do the job properly. Again—from the way the court functions, the product of the court, the judgments that we give—judges are very transparent as far as what they are doing is concerned because they give their judgments in public. That is the essence of the administration of justice.

**Lord Judge:** Can I just follow this up? If we are focusing the discussion on appointments to the Supreme Court then I have nothing to say. But of course, we do have a few hundred—in fact more than a few hundred—other judges and judicial appointments. This is a public job. Every mistake you make is a public mistake. Judges make mistakes like other people. If a judge makes a mistake, there is an appeal, or there may be an appeal. It is very hard to believe this, but you would be amazed at how quickly a mistake circulates around the place. There is an appeal. If the judge does not appear to have made a mistake, there is an appeal. A higher court looks at the judgment and the summing up, depending on the case. I do not mind telling you that, if we have a summing up we regard as not up to scratch, there is a system for addressing that. The system for addressing a summing up that is not up to scratch or a judgment we regard as superficial, or again not up to scratch, is that the judge presiding on the Court of Appeal will speak to the presiding judge or senior presiding judge of that individual judge’s circuit, show the judgment or the summing up to the presider, and say, “This is deficient for these reasons. Find out what is going on.” If it is a judge of proved competence it may very well be there has been a family catastrophe, but one has to find out what is going on. Maybe the judge is ill. Maybe the judge is ageing. There are all sorts of possibilities. That is addressed. There is a meeting between the judge in question and the presider and a report comes through about what it is all about.

There is another aspect of the judicial job. You can start to fall down on it because you start misbehaving. This is now not the quality of your judgment; this is the sort of individual human being you start to become—a bully or difficult, truculent or various other things. We live in a non-deferential age; I get lots and lots of complaints from litigants and sometimes from people sitting in court that the judge behaved badly. They are looked into. If the judge has in fact—it is demonstrated that the judge has behaved badly—then he is subject to a disciplinary process: maybe advice, formal advice, maybe a reprimand and ultimately, in the case of a circuit judge, removal. There is a process by which the performance of judges is constantly being observed because it is such a public job.

Do not then ask me, “Well, what do you do if a judge is ageing, not very good and will not take the hint that it is time for him to retire?” Well, do ask me, and the answer is: we cannot force somebody out if he is behaving himself. We do have judges who are not as good as it was thought they would be; we cannot pretend otherwise. Then there is quite a difficult arrangement that has to be made—ultimately I suppose I am responsible—to make sure that judge is confined to doing the limited level of cases he can do. He may no longer try, for
example if he did once, difficult sexual crime and so on. We take him out of those cases and get him to do the more straightforward assault, occasionally actual bodily harm punch-up, when the boys have had too much to drink on a Friday night. But there is a constant process going on.

**Q168 Lord Rodgers of Quarry Bank:** If I could just follow that up, that is very helpful and very interesting, and I fully understand what you are saying. My question, which is relevant to it, I think, is that, yes, the best candidates are chosen and then some things go wrong. What I am trying to ask, and there may be no answer to it, is when the best candidates go wrong can you find a way of measuring that failure and whether the system itself might have been at fault? With the candidates who have gone wrong, did you go back to a member of the Commission and say, “We chose the wrong man, because we did not account for this, and this and this”?

**Lord Judge:** The answer to your question is no, we do not, because it is very rare for it to become apparent that somebody is not as good as we thought he was until he or she has been doing the job for sometime. If we were to have an example of, shall we say, a judge who was appointed who within two years was simply not up to scratch, then I already discussed with Baroness Prashar some time ago that she needed to know why we thought their system had apparently failed to spot this so that she and the Judicial Appointments Commission could look into it, look through their records and so on and so forth. But once the years have gone by, it is not a fault of the Judicial Appointments Commission or is unlikely to have been.

**Q169 The Chairman:** To follow up, Lord Judge, you said that of course there is always a substantial report to the Lord Chancellor.

**Lord Judge:** Yes.

**The Chairman:** Do you think the role of the Lord Chancellor now is the right one or is there scope for a different emphasis on his or her role in this organisation of the new appointments?

**Lord Phillips of Worth Matravers:** I do not think the role of the Lord Chancellor under the statute as it is now is satisfactory. He has a limited veto power. He can say, “Think again”, but he puts his input in, in such circumstances—or would do—at a very late stage. On the assumption that we have the kind of Lord Chancellor we have had to date, who respects the rule of law and understands the importance of it, I would prefer to have him sitting on the commission as one member of the commission so that he can provide his input at that point.

**The Chairman:** Is that specifically for the Supreme Court?

**Lord Phillips of Worth Matravers:** I am talking about the Supreme Court.

**Q170 Lord Pannick:** You say “sitting on the commission”. Would you accept that the Lord Chancellor could have a power to nominate someone? Or do you think the Lord Chancellor personally should sit?
Lord Judge CJ and Lord Phillips of Worth Matravers – Oral Evidence (QQ 162-192)

Lord Phillips of Worth Matravers: I would like to have him personally there. There is demand for a bigger degree of democratic input into the selection process. I think to have the Lord Chancellor sitting on the commission would go quite a long way to answering that.

Lord Judge: I agree, but I would underline it by adding—and I think Lord Phillips said it—that that would be in exchange for the veto right he has at present, not to have both.

Q171 Lord Powell of Bayswater: We were going to come on to the role of the Lord Chancellor later, but since we seem to have got to it in record time perhaps we can just pursue it a bit further. We have heard quite a number of different views about the right role of the Lord Chancellor, from that he should be excluded altogether from the appointments process and it should be handled entirely by the JAC, to that he should be given a choice of candidates for the senior jobs or no choice at all. Where do you think the right balance on this lies? It seems to me that Lord Chancellors are part of the government. Duly elected, they operate with the authority of the people; therefore, they should have a very considerable role in the appointment of judges. But that seems to be counter to modern political correctness, which is tending to edge the Lord Chancellor out of the process. Where is the right point of balance?

Lord Phillips of Worth Matravers: The important thing about the process is it should not be political. I believe the process ought to be trying to identify those who will do the job best. None the less one has to recognise that at the highest level it is pretty disastrous if you have in position a judge who simply has not got the confidence of the government—who, for one reason or another, is anathema to them. I think it is highly desirable there should be a mechanism that will, all things being equal, prevent that happening. The question is: how should we do it? To have the mechanism of a veto at the last minute I think is less satisfactory than having the Lord Chancellor involved in the selection process. I believe if there were good reason for the Lord Chancellor to say, “X really will not be acceptable to the government,” that would carry enormous weight with the commission. It is very unlikely they would say, “In that case we are none the less going to vote four to one that X should be appointed.”

Lord Powell of Bayswater: I was trying to get at the wider basis—not just the Supreme Court but for other appointments. What should his role be there?

Lord Judge: I think that beyond the heads of division and the Supreme Court, his role should be to make sure the Judicial Appointments Commission is operating in a way that is acceptable. I do not think he can possibly have anything to say about any candidates below heads of division and the Supreme Court. He has no input at all to make other than to be there to look as if he is making an input. Like Lord Phillips, I agree that, for example with the Lord Chief Justice’s job, there is an issue; the government of the day is entitled to have a view about it, and the Lord Chancellor should be the person to be involved in that process. As to whether X or Y should become a High Court Judge or Z or Q should become district judges, or whatever, it is completely pointless; that just adds to the length of the process and does no good. It simply suggests there is a political involvement when we have tried to get rid of it.

Q172 Lord Pannick: Would Lord Judge accept that of course the Lord Chancellor could make representations if he thought it appropriate about the person who is being considered by the Judicial Appointments Commission at the lower level? Would you object to him having a list of the applicants so that he can make representations if he wishes?
**Lord Judge:** It depends how far down you go. I think for the Court of Appeal that would be reasonable. I think for the High Court it would not be, because nowadays the High Court comes from so many different parts of the system that the Lord Chancellor cannot have any idea. We do have to face the fact the Lord Chancellor is not what the Lord Chancellor was; no Lord Chancellor ever is what the last Lord Chancellor was. We also have to face this firm fact: in Mr Straw and Mr Clarke we have politicians who are, with no disrespect to either of them, at the end of their political career. It is very easy to be independent of mind if you have nothing to gain. We could end up with a Lord Chancellor, appointed by any government, who would be a youngish man or woman who would regard the Lord Chancellor’s office as simply a stepping stone to yet grander and more important political authority. I do not want a Lord Chancellor who wants to keep the Prime Minister happy. I want a Lord Chancellor who sees what his role as Lord Chancellor is. So far, so good, but we must not assume the future is certain.

**The Chairman:** That brings us to the wider potential role of Parliament in the whole area of appointments. I know Lord Crickhowell and Lord Irvine are very concerned to pursue this. Do you want to start, Lord Crickhowell?

**Q173 Lord Crickhowell:** I refer to the rather interesting debate we had in our last session between Lord Falconer on the one hand and Jack Straw on the other. Jack Straw had submitted a memorandum in which he suggested Parliament had a legitimate interest in these appointments—Parliament rather more than the executive—and we started this whole discussion with the impact of European law on Acts of Parliament and the courts’ scrutiny of parliamentary legislation, and a confrontational position has been seen to arise. Jack Straw took the view Parliament should, in some way, have a role, although he was extremely tentative about what that role might be. I think we came back to a sort of minimalist position that, perhaps rather than public examination—the sort of thing that happens across the Atlantic—at least this Committee and the corresponding Committee in the other place would have a private session involvement. Earlier we just had a rather interesting comment that the Lord Chancellor might provide that democratic input. Do let us have your views. It is interesting; I mean, Lord Falconer said, “No way.” Jack Straw was extremely concerned about the view that the public as well as Parliament are almost beginning to form—that in some way they were becoming detached from a process that was very important for Parliament. How would you solve the problem?

**Lord Phillips of Worth Matravers:** I think I would be with Lord Falconer. The suggestion of having the Lord Chancellor involved as one of the five in the selection process would be to guard against a particular candidate being appointed who was anathema to the government. The basic task, as I see it, of the Judicial Appointments Commission is to select the candidate who will do the job best. That raises the question: what is the job? If you say the job is really a political job, then you can see the argument that Parliament ought to be having input as to who is chosen because it will be to some extent a political choice. I think the job of the justices of the Supreme Court is very largely one of acute intellectual analysis—clear thinking: it is not essentially a job where your politics is going to make a difference. Once you start introducing some kind of parliamentary choice of who is appointed, one asks what the criteria are that Parliament is going to be adopting in making the choice. If it is simply to appoint the best person, well, I do not think Parliament is best placed to do that. If it is, alternatively, to have regard to political considerations, I do not myself think that is desirable.
Q174  Lord Crickhowell: Lord Judge earlier said, I think, that Parliament can always change the law, but until that happens I think the public get the impression at the moment, for the reasons that were set out right at the beginning of our session this morning, that the Supreme Court is making law. Jack Straw, in his paper said, “The SC is a lawmaker. In almost all other systems, there is an SC with similar powers and a senior judiciary similarly active on an expansive scale. There is a parliamentary/executive role in these various senior appointments.” He pressed the point very hard in this interesting exchange. Although it was very difficult to know what the right balance of doing it was—he claimed he did not want it a politically dominated thing—the basis of his case was that Parliament had a legitimate interest in the way these appointments were made and there should be some mechanism for carrying that out. That was the argument, I think, that was put.

Lord Judge: I have already made the point that, notwithstanding what Jack Straw said, our Supreme Court does not decide on issues like abortion; that is decided by Parliament. That summarises everything I want to say on that point. I am sorry to do what witnesses are told never to do in court, but I am going to ask questions. What is the point of this exercise? What is it intended to discover? Is it intended to discover the private views of the judge, or the future judge, about political questions? Is it to establish whether he or she is a pleasant individual? To what end? What would the result of the answers to the questions be? Would it be that we, whatever form it is that Parliament’s involvement takes, can now say, “Notwithstanding the view of the independent Judicial Appointments Commission that X is the right candidate, we do not want him or her”? In other words, what do we get out of having, in effect, an interview process before whatever parliamentary body is thought appropriate? I think if you ask those sorts of questions you probably end up by saying there is no point. As I said before, it is quite different from the situation of appointments to the United States and Canadian Supreme Courts, where they do have a direct political function. We do not. For asking those questions, you will forgive me. I will now answer yours: I do not think it is a good idea.

Q175  Lord Irvine of Lairg: Do you agree that judicial appointments should be free of political influence both in fact and appearance? The reason for agreeing to that general proposition is so judges will be independent and be seen to be independent in the exercise of their judicial functions.

Lord Phillips of Worth Matravers: That is a partly leading question, to which I will give the answer, “I quite agree.”

Lord Judge: I am very glad Lord Irvine never cross-examined me. The answer to the question is: yes.

Lord Irvine of Lairg: If Parliament had become involved in the appointments process, would not questions inevitably be asked of those being considered for an appointment or promotion of how they would decide particular issues that could arise in front of them? There would just be no way in which you could restrain politicians in such a process from asking such questions; they would not be able to resist the temptation. That would inevitably bring in the appearance of political preferences having a role in the appointment of judges, and would therefore be objectionable.

Lord Judge: If that is a judgment, Lord Irvine, I agree and have nothing to add. I do totally agree; the fact I am not saying it 27 times does not diminish the strength of my agreement.
The Chairman: Can you say it with equal strength, Lord Phillips?

Lord Phillips of Worth Matravers: Yes, I do.

Q176 Lord Crickhowell: Can I ask a related question then? The President of the Supreme Court and the Heads of Division have a major administrative role as well as a judicial role. Is there a case for some kind of pre-appointment involvement of Parliament in looking at the abilities and role in the administration of justice rather than the actual taking of judicial decisions?

Lord Phillips of Worth Matravers: I do not think so. In so far as the appointment of the President of the Supreme Court is concerned, I have no personal experience yet of that, although the Act does require me to preside over the appointment of my successor. When I come to do that, I shall of course be having to have regard to requirements other than those of legal analysis and the qualities one would be looking for if one were just looking for an individual member of the court—you want somebody who would be a good leader. Again, I think the commission that I will chair will be well placed to take those matters into consideration.

Lord Crickhowell: And Heads of Division?

Lord Judge: May I come to that? I do not think that the Supreme Court Justices actually have an administrative role other than the President and the Vice President. I am afraid to say that probably the ultimate administrative role in England and Wales is the Lord Chief Justice and Lord President in Scotland, and I am head of the judiciary and responsible for all sorts of bits of the running of the system. The person who will succeed me will have to have administrative skills. We call them administrative; it is just a good, useful shorthand. Our entire process now involves a large number of judges being involved in administration. Starting at the top there is the Lord Chief Justice, there are the Heads of Division, there is the Senior Presiding Judge, there are Presiding Judges who are High Court Judges on every circuit, there are Family Division, in effect, Presiding Judges, there are Chancery Division Presiding Judges, and then down from them there are Resident Judges, designated Civil Judges and designated Family Judges, all with administrative responsibilities. The High Court administrators, the Presiding Judges, change every four years. Anybody who wants to have a go at administration is able to ask to have a go. They find it extremely burdensome and very, very interesting because you are seeing the system from the inside track. By the time anybody in future comes to be appointed Head of Division or a Lord Chief Justice, he or she will almost certainly have a track record showing that they are able to do some administration. I was Senior Presiding Judge, and I was Deputy Chief Justice and President of the Queen's Bench Division before I become Lord Chief Justice. It does not necessarily follow that my successors will have those different occupations, but there is a track record. I cannot see what it is that parliamentary involvement in the process would add. It is not the prime job; I still regard my prime responsibility as sitting in court. I would be horrified if that were not my prime responsibility. In relation to the administrative side, which is so to speak an add-on to the job, I do not think that having a parliamentary inquiry into my skills before I was appointed would make any difference.

Q177 Lord Irvine of Lairg: I want to revert to Lord Phillips, who told us he was statutorily obliged to sit in on the considerations that will lead to the appointment of his successor. I want to ask Lord Phillips whether he feels uncomfortable in that role because it
may give the appearance of the position of President of the Supreme Court being determined by a self-perpetuating clerisy.

**Lord Phillips of Worth Matravers:** The answer is yes, and not merely because it gives that appearance. I do not think as a matter of substance it is desirable to have the President of the Supreme Court presiding over the choice of his successor. I think it is desirable that he should be consulted.

**Lord Irvine of Lairg:** But not sitting.

**Lord Phillips of Worth Matravers:** Not sitting, that is my view.

**Lord Irvine of Lairg:** You would welcome a statutory change.

**Lord Phillips of Worth Matravers:** I would and I tried to persuade others that one could actually interpret the statute in a way that would relieve me of this responsibility.

**The Chairman:** There may be greater agreement with this with Mr Straw’s paper, where of course he says, in the political way, that he has the highest possible regard for the President of the Supreme Court and all his colleagues, but that he does not believe that the current system is a sustainable model and it will have to be changed.

**Q178 Lord Pannick:** I have the same question; can I broaden it out? Does Lord Phillips think that there are other changes to the panel that appoints Supreme Court Justices that would be appropriate? At the moment you have the President, the Deputy President and the three others; do you think that gives too much weight to the existing members of the Supreme Court?

**Lord Phillips of Worth Matravers:** I would have added in the Lord Chancellor, which would be an increase in the non-judicial members of the commission. I think, obviously, having the President and the Deputy President on the commission of five, our views carry a lot of weight. Whether they carry too much weight is another matter. We are choosing colleagues who have got to work very closely with those who are already Justices of the Court. We are in a position as good as, or better than, anybody else to assess the competing track records and to help the other members of the commission with them. This, I think, is a desirable input. It has been suggested, I know, there should only be one serving Justice—either the President or the Deputy but not both—sitting on the commission. I would be concerned that that might water down the input too much.

**Q179 The Chairman:** There is also the additional but related question about the role of consultation of the devolved governments, and the question about the appointments from Scotland and Northern Ireland particularly. Would you like to comment on that in this context?

**Lord Phillips of Worth Matravers:** Yes, when one consults the devolved governments they have usually something to say about some candidates, a Scottish candidate or maybe a Welsh candidate, but they are likely to say they cannot comment in general on the candidates. I think the influence they have is necessarily not going to be great compared with the kind of detailed responses we get from consultees who really have close contact with the track record of the particular individuals.
**Lord Judge:** Can I just add something? The appointment of the successor to the Lord Chief Justice is a process in which the former, retiring Lord Chief Justice does not participate. I think it is inappropriate for the President of the Supreme Court to preside over the selection of his successor, and it would be if the Lord Chief Justice presided over the selection of his. It is possible that if we are really re-examining the entire process of selection of Supreme Court Justices, it might not be a bad thing to bear in mind that the Lord Chief Justice of the day, if he is not a candidate, has a lot of practical up-to-date knowledge of most of the candidates. That might be a sensible person to add, or perhaps the Master of the Rolls if the Lord Chief Justice were involved. If you are changing the entire structure then you do need to ensure that, if the President is not sitting, there is somebody sitting there who does have a very shrewd idea of what is happening.

**The Chairman:** Does anybody want to pursue these particular points or shall we turn to the question of the particular possibility of parliamentary involvement with people who are already appointed? Lord Judge, you have kindly appeared and given a report to this Committee, which is obviously something we value very much. Lord Renton, I think you wanted to follow the general point about parliamentary consultation and discussion with those who have already been appointed.

**Q180 Lord Renton of Mount Harry:** I wholly see where you two are coming from. If I were in your job I would be saying exactly the same thing, but equally there is of course always a feeling, particularly in the House of Commons, that we need to know more, we have a right to know more, and we have a right to take part in some way in the choice. One rather looks at how to equate this—how to make this reasonable. I suppose that one possibility would be that, post-appointment, the Justices of the Supreme Court might appear before a parliamentary committee to keep them up to date, to tell them what the levels of engagement are—to explain why, so far, there are not many women judges and fewer black ones, et cetera. Do you think that could be made to work in a way that would both satisfy you but also make Parliament think it was a bit nearer to being told what was happening with some possibility of influencing?

**Lord Phillips of Worth Matravers:** I think that is what I am doing at the moment, isn’t it? We are prepared to come and respond to questions from parliamentary committees and do our best to help. Whether there should be a regular session in which the President of the Supreme Court does this is maybe a matter for debate, but I think it is a good thing that we should be prepared to do this.

**Lord Judge:** I take the view that this Committee, or its equivalent in the other place, should have regular meetings, but not too often. Not too often for a whole variety of reasons, including the one that Henry IV gave to his son before he died, “A little too much honey is much too much honey.” The Judicial Appointments Commission can explain to a committee like this where it is going, how it is going, what the difficulties are. Speaking for myself, I am perfectly happy to come and speak. It is one of the wonderful things that I can actually say things before I have heard everybody else. I am perfectly happy to because there is no deliberate obscuring of what is going on, and I like to think that senior judges will actually give the realities as they see them to a committee like this.

I have no problem about it, provided that it does not happen too often and provided that the discussion is, as this one is, structured. We all know what we are talking about. We are not going to be asked questions about our views about whether the unfortunate Welsh captain was sent off rightly or wrongly—I mean, in wider political questions this can happen.
Yes, I have no problem with it, but the idea of having individual people who have been appointed to the Supreme Court come, in effect, to show their faces, I think is open to serious question. They cannot actually help you; they are unlikely to be able to help you on the broad issues that I am responsible for largely in England and Wales. In any event, what is the purpose of it? Just so the public can see on the television that the new Justice of the Supreme Court is X and looks like this and sounds like a perfectly pleasant individual. I am concerned about that. I think the idea of beauty parades is not a good one.

Q181 Lord Renton of Mount Harry: I wholly understand why you are saying this, but I look again at Jack Straw’s last sentence in the paper that he sent us: “I do not believe that the current system, which essentially gives pride of place to the incumbent to appoint his successor, is a sustainable model. It will have to be changed.” He started by saying, “The legitimate external interest is more Parliament’s than the executive’s.” He is no fool; he has been around a lot. I am no longer in the Commons—I was for many years—and one wonders why there is the feeling something ought to be done at the moment.

Lord Judge: I suspect it slightly depends on the newspaper you read. Different people have different views about it. I am not in a position to say what a substantial majority of people in this country think about it.

Lord Phillips of Worth Matravers: I would not be at all opposed to having Members of Parliament on selection commissions, as a matter of principle, provided that they were not seeking to bring a political input in to them. If you had cross-benchers from this House sitting on them—

The Chairman: I wonder how Lord Pannick would respond to that. It seems to me that that is slightly contradictory to what you said originally to Lord Irvine.

Lord Judge: Just before that, can I say I am not in agreement?

Lord Irvine of Lairg: I put it to Lord Phillips that if you invited politicians on such bodies they would bring political expertise and they would be completely incapable of abstaining from political questions.

Lord Phillips of Worth Matravers: I think there would be that danger certainly.

Q182 The Chairman: Let me just intervene to say that both of you have used the phrase, “I have no problem with appearing before a parliamentary committee,” and I think in Lord Judge’s case we have our small taste of the honey once a year on an annual basis. Do you see positive value, either of you, in such appearances? For example, as President of the Supreme Court, would you be content with a regular annual appearance, as Lord Judge is?

Lord Phillips of Worth Matravers: Yes, I would, and if I say I have no problem, I am enjoying this process and I am enthusiastic about it.

Lord Judge: I said before and I said to more than one committee in the other place that I am very happy with it. I think it should happen—no difficulty at all.

The Chairman: If it were a regular date, as it were, one annual appearance, would you feel that that was not an irritating aside part of your life and that it would be of value to you?
Lord Judge: The real question would be, and I know there are people behind me, whether that replaces my press conference.

The Chairman: I think that is unlikely. You obviously feel the same, Lord Phillips. I just want to literally get this on record from the point of view of the transcript so that we have it later.

Lord Phillips of Worth Matravers: Yes.

The Chairman: Lord Irvine, can we turn to your broader point about the constitutional framework for trying to achieve the other points of diversity, et cetera, that you wanted to raise?

Q183 Lord Irvine of Lairg: Yes. I think that it is generally agreed that we should have a more diverse judiciary, if we can—that is to say a judiciary that is more diverse in terms of gender, ethnicity and I suppose also sexual orientation. One of the objectives of the 2005 Constitutional Reform Act was to promote diversity in the judiciary so far as consistent with appointment on merit. Section 63 provided that selection must be solely on merit but Section 64(1) provides that the Judicial Appointments Commission must have regard to the need to encourage diversity in the range of persons available for selection for appointments. That is to say, the pool must be widened but selection must remain solely on merit.

I am interested in the relationship between these provisions and your views on them and the provisions of the Equality Act 2010. Do you think the process of making selections has been clarified by the tie-breaker provision in section 159 of the Equality Act, so that if the representation in public office of a particular section of society is disproportionately low, and two candidates, let us say, are equally well qualified, the selecting body may select the candidate from the underrepresented group? I think what I have said so far is uncontroversial, is that right?

Lord Phillips of Worth Matravers: Yes.

Lord Irvine of Lairg: Now then, what I am looking at is: what is the way to reconcile the primacy of the merit principle with the promotion of diversity? Is the way to do it to hold that if the selection process decides, and this must be the first part, that two or more candidates are of sufficient merit to fill the vacancy in question but are also of equal merit, then and only then the promotion of diversity can be determinant in making the actual selection. Do you agree with that view?

Lord Phillips of Worth Matravers: My view is that it would make absolutely no difference at all because in practice that is precisely what would happen.

Lord Irvine of Lairg: Is that what the statutory provisions indicate? You may well say statutory provisions have no effect in practice, because that could happen anyway, but is that the intended effect of the statutory provisions read together?

Lord Phillips of Worth Matravers: Yes, and I would thoroughly approve of such an approach.

Lord Judge: So would I, but I want to be clear: sufficient is not necessarily equal. We are talking about equal, and equal is a very difficult judgment to make because X and Y may be
equal but X’s strength may be intellectual quality and Y’s strength may be gravity, or whatever it may be.

**Lord Renton of Mount Harry:** It depends on the job in question.

**Lord Judge:** But if you do have such a situation, and you really, really cannot split without going to absurd detail, I have no doubt that the equality provision applies, and should apply.

**Lord Irvine of Lairg:** Yes, of course you have to trust the integrity of the selection process in deciding that candidates are truly of equal merit, so that to decide that is not merely a cloak for promoting diversity. You have to be of the honest view, and trust the process to be of the honest view, that two candidates are of indistinguishable merit in relation to the requirements for the vacancy in question.

**Lord Judge:** Yes.

**Lord Phillips of Worth Matravers:** I think the reality is that you are very seldom in that position because different candidates have different attributes, and when you are looking at the two, I would say that the fact that one is of a gender that is not adequately represented on your court is inevitably going to weigh where you have two candidates who are more or less equal. The idea that you have to have exact equality is not going to be realistic.

**Lord Irvine of Lairg:** That would call into question the integrity of the process.

**Lord Phillips of Worth Matravers:** No, just that it is impossible to say that two people are absolutely on a level pegging; it would be very, very difficult. I can think of, in fact, one situation where we said really there was nothing between them, although they had very different attributes. My belief is that all selection committees in relation to the judiciary are bending over backwards to appoint minorities if they can.

**Q184 Lord Irvine of Lairg:** Do you not appreciate that that casts doubt on the integrity of the process? The integrity of the process was, taking a broad view of merit, that there are two candidates who are of indistinguishable merit. Of course, each may have different attributes, but overall the merit of each is indistinguishable in relation to the job in question, and unless you recognise that, you fail to give effect to the statutory primacy accorded to the merit principle. It is then and only then that you come to diversity.

**Lord Phillips of Worth Matravers:** I agree with that entirely, but I am looking at the realities. I think the realities are that if you have a jolly good candidate who is a woman, the fact that she is a woman is going to help a bit.

**Lord Irvine of Lairg:** Positive discrimination.

**Lord Phillips of Worth Matravers:** Whether that is theoretically desirable or not is another matter.

**Lord Judge:** May I just intervene for a moment? I think that the situation for appointments to, say, the Supreme Court means you are most unlikely to have this level of equality, because there will be a track record for the vast majority of appointments; he or she has been a Recorder, Deputy High Court Judge, High Court Judge, Court of Appeal Judge producing judgments and so on and so forth. I think the more likely place where you will
have equality or apparent equality is on the first appointment to the circuit bench or to the High Court bench.

**Lord Irvine of Lairg:** May I say I entirely agree with you? Perhaps our discussion has focused too much on the elitist end of the system, namely the Supreme Court, and what we are talking about is appointments throughout the whole system.

**Lord Judge:** My answer to your question was to have the whole system in the mind. If there is an equality, then the tipping process should apply.

**Q185 Lord Pannick:** I just wonder whether the concept of merit is sufficiently broad to allow the appointing body to take into account questions of ethnicity and gender in cases where you have candidates who are over the threshold and who are there or thereabouts in terms of equality, given that these are inevitably subjective questions.

**Lord Phillips of Worth Matravers:** I have been thinking about this as a matter of fact, and I think the answer is no. The element that makes one anxious to appoint minorities is that they are in the minority. If they were in the majority on the court, one would not have the same anxiety. It seems to be that merit is a concept that applies to the individual. I have been trying to formulate a different test from appointing on merit for a Supreme Court to reflect this. It would read like this: the commission must select that candidate who will best meet the needs of the court, having regard to the judicial qualities required of the Supreme Court Justice and to the current composition of the court. I think the argument is that for the benefit of the court you ought to have a balanced judiciary. This is, perhaps, a more practical importance in relation to specialities. The Act does not permit or provide that the appointing commission should have regard to the composition of the court and any gaps of specialities on the court. If you have a glaring gap in expertise so far as past practice is concerned on the court, it is unrealistic to think that the commission is not going to have some regard to that. This formula would enable one to do that. It would then open the door to those who argue that one should not put minority considerations out of the picture until you have an exactly balanced pair of candidates but that they should to some extent be weighed in the balance having regard to the existing composition of your court. I suspect there are differing views.

**Lord Irvine of Lairg:** Are you saying diversity is a component of merit?

**Lord Phillips of Worth Matravers:** I am saying exactly the opposite: it is not. If it is desirable to have regard to it, it is because of the existing composition of your court, not because of the effect it has on the abilities of the individual.

**Q186 The Chairman:** May I come in as a layperson in this? That is a very interesting formulation you have read, which I shall read again with great care. Are you saying—in a sense to follow the point made by Lord Pannick—that it is the concept of merit that is too narrow, rather than that you should add bits on to it like a Christmas tree?

**Lord Phillips of Worth Matravers:** No, I am not saying merit is too narrow. It is perhaps quite difficult to define as to what qualities make up the merit, but I do not think diversity has anything to do with merit.

**The Chairman:** No, quite, but in a sense you want to park the merit concept as an ingredient.
Lord Phillips of Worth Matravers: I am not saying I want to do that, but I am saying that if you are going to reflect these views about the importance of diversity, you are fudging if you say, “Well, you can do this by adding a bit of merit to somebody who is in a minority.”

Q187 Lord Pannick: There are two questions. Would your formulation, Lord Phillips, replace merit or would it be an extra factor that the appointing commission could take into account? Secondly, would you give us your views on whether it is desirable to introduce this type of reform? You said “if” you wanted to, this is how you would do it.

Lord Phillips of Worth Matravers: First of all, I intended my formula to put merit at the forefront, because it says that you must select that candidate who will best meet the needs of the court, having regard to the judicial qualities required of the Supreme Court Justice and the current composition of the court. For myself, I would not vote for this formula because I believe on the Supreme Court it is critically important to appoint outstanding candidates from the point of view of merit. The job of a Supreme Court Justice is a very, very exacting one from the point of view of ability. I would be reluctant to introduce a formula that, depending on the views of the commission, might result in that being overborne by diversity.

Lord Pannick: Let me just ask one more question. Is it going to damage, though, confidence in the Supreme Court if it continues only to have one woman and no member of the ethnic minorities? That is the concern.

Lord Phillips of Worth Matravers: This is a different concern; it is one of perception, which I share. I would love the Supreme Court to be 50:50 men and women from the point of view of perception, but it is more important that the Supreme Court should consist of the 12 most outstanding candidates.

Q188 The Chairman: Lord Judge, do you feel the formulation that Lord Phillips offered was more relevant to the broader swath of appointments?

Lord Judge: I would have to take time to think about it. My concern is, and in this I know that a very large number of women judges take the same view, that however you create the formula, you do not end up with what in truth is a quota system. A quota system would be insulting. The judges, or most of the female judges in the High Court, would take the view that it would be completely unacceptable to them. There are different issues that arise, but we cannot have a quota system, whether or not it is through some carefully crafted formula. I simply do not know whether I think Lord Phillips’s formula actually amounts to a quota system. Forgive me for not being able to answer that, but we cannot have it.

We have to be terribly careful about this. Last week—I think it was last week—I introduced Mr Justice Singh into the High Court, a man of outstanding quality. He happens to be the first British citizen of Indian extraction to go to the High Court, but that has nothing to do with his appointment. He has been appointed because he is someone of outstanding quality. We expect him to continue to be someone of outstanding quality. The fact that he is of Indian extraction and therefore has a particular coloured skin is completely irrelevant to why he was appointed and why he will do a wonderful job in his new appointment. We have to be very, very careful about these issues. As I said expressly, it has nothing to do with his racial origin.
Q189 The Chairman: I think I can say, as probably the one person in this room quite able to say it, that I entirely approve of not having a quota system, but I do take Lord Phillips's point that he would like the Supreme Court to be 50:50 in terms of gender representation.

Lord Judge: Forgive me, I would very, very much like that for the High Court, the Court of Appeal and the benches down the system. The only bench where we have roughly 50:50 is the magistracy, but we do have it there, and the proportions go down as you go up the system. Because of this we are spending quite a lot of time trying to think through how best to—

The Chairman: That was my subsequent question.

Lord Judge: I am so sorry. We have to be careful not to assume this is a woman-only problem. Men lose their spouses; they have small children who need caring, I do not myself think it is necessarily necessary for a new female High Court Judge to go out on circuit if she has caring responsibilities, whether she is a single mother or a married woman. I think we should be able to organise the sitting patterns for female High Court Judges or male High Court Judges who have caring responsibilities, so that during, for example, half term they can be at home. They can make up for their time when they are at home by sitting at other times. I think those sorts of very small changes, if we can broadcast it sufficiently to the women of quality, will help. But in the end, I must say this: the women must make their own life choices. We cannot dragoon them into wanting to be judges.

Q190 The Chairman: Absolutely, but there is the sort of accretion or fabian (with a small “f”) approach to this, which Lord Mackay of Clashfern argued very effectively last week he started as Lord Chancellor, but as we all noted it was some 24 or 25 years ago that he began this with great goodwill and effort, and it has not produced enormous numerical results.

Lord Judge: It has not, but there are reasons for it. Let us deal with the Bar first; the solicitors are a different problem and a very serious one, and I will come to them. The entry is roughly speaking now equal. You see some very talented men and you see some very talented women. You think to yourself, “Wow, in about 15 years’ time that young man or woman would make a really rather good recorder.” What happens? Some decide they want to have a family; they have a family. Some decide they do not want to come back; they have made their life choice. Some do and we hope to get them.

Solicitors are rather different. I am sorry that Lord Hart is not here. I simply cannot get the major firms of solicitors to recognise that there are men and women who work as partners in their firms who have or will have serious judicial qualities who should be allowed to consider a judicial career without being disadvantaged. We cannot get them. I think that is dreadful.

Lord Irvine of Lairg: Lord Hart agrees with me and with you, Lord Judge. It is an enormous source of frustration to him, and it was when he assisted me as Lord Chancellor, that one could not persuade the leading firms of solicitors to be more relaxed at supporting the release of high flyers into the judiciary.

Lord Judge: It is very, very sad, but it is not a job I am giving up on.

The Chairman: I think we have digressed slightly from the constitutional issues, but it is still extremely interesting. One of the things that has been suggested to us, and I know Lord
Shaw is concerned with this, is that we could adopt a rather different approach to judicial appointments all the way up.

Q191  Lord Shaw of Northstead: This follows naturally from the discussion that has just been going on. What is your view of the merits or otherwise of a career judiciary in which lawyers are appointed to junior judicial roles at a much earlier stage in their career than has been traditionally the case?

Lord Phillips of Worth Matravers: I have been contemplating this question; I would be opposed to it. I think our judiciary is very highly regarded throughout the world. One of the reasons for this is that it is drawn from practising lawyers who have established their careers, demonstrated their merit, earned a lot of money in some cases, and then prepared as a second career to become judges. If you have a career judiciary that you go straight into from law college, I have a suspicion that what is liable to happen is the high flyers will want to go to the firms and make big money, and those who decide they will go into the judiciary, which almost inevitably is not going to be paid as well, will be those who are the second-grade lawyers. It is quite interesting that in some of the civil law countries where they have career judiciaries it does produce a large number of women judges. Then one is inclined to wonder whether this does not to some extent reflect gender prejudice in the professions, in that the big firms are not taking the women as readily as the men, so that they are then driven into accepting the second best in their field—“All right, I will settle for being a junior judge”—because you start off at quite a junior level. I think even though it would appear to be improving the gender balance, it would be doing so for the wrong reasons.

Lord Judge: In answer to your question Lord Shaw, can I add to what Lord Phillips says? I think that to have a career judiciary in the way in which you identify it ends up producing a Civil Service judiciary. Ignoring for the moment our own difficulties that our structures are that magistrates—civilians—do the vast majority of the low-level cases in the criminal courts, and some indeed in the family courts, we would have to completely restructure what sort of cases these new 25 year-old, 27 year-old judges could do.

The system in many of the civil law countries works so that you start off as a career judge, you then go and do some prosecuting, and then you come back to do some more judging. Your entire career depends on promotion. Now, if you are appointed at 50 there are of course occasions when promotion happens, but it is not all that frequent. I would be very troubled about the perception, if we introduced such a system into our jurisdiction that, well, if you are a junior judge, you have a mortgage to pay. Your children arrive, and it is really quite important you get promotion. It is necessary for financial reasons if no other, and so on. That leads to all sorts of concerns from our point of view.

I found on the continent that many of the people I have spoken to rather like the idea of not having a career judiciary. They think it is a rather good idea to learn all the dirty tricks that can be played on you before you become a judge, so as a judge you are aware of what the dirty trick is that is going on. That is the jocular side of it, but they are more troubled about it, I think, because of the, as I described it, Civil Service element of it. With us, you come to the bench, you have given up private practice; that is it, you are committed. A lot of people will not come to the bench because they do not want to be committed to the bench. It is a perfectly understandable point of view.
Lord Shaw of Northstead: Am I right in thinking therefore you are saying that what we are missing if we have a judicial career is the experience that solicitors and others have who come in at a later date, which brings a very great value to the work that they do?

Lord Judge: Undoubtedly.

Lord Shaw of Northstead: What about the cash situation? By that time, they will find they are earning far more, probably, than they would be if they moved into a judicial system and perhaps they would be deterred then. I take it that many people have to be persuaded.

Lord Judge: I think that the SSRB latest information suggests that anybody, dealing with averages, who becomes a High Court Judge takes a significant diminution in earnings—at the circuit bench, less so.

Q192 The Chairman: Neither of you mentioned that in relation to the difficulty of persuading solicitors. Is that as relevant there?

Lord Judge: Frankly, I do not think it has anything to do with it. I think it has to do with the fact that it is deemed to be a lack of commitment to what in truth is a business, and going off to sit for three or four weeks a year, earning the very small amount that a recorder would earn compared with what a partner in a major firm would earn, is simply unacceptable.

The Chairman: Do you want to pursue that Lord Shaw?

Lord Shaw of Northstead: No, I think that answered my question.

The Chairman: Well, you have both been enormously generous with your time. We have covered a very wide area, I hope with some degree of argumentative consistency through the different points that have been raised. Does any other member of the Committee want to raise further points with our guests? If not, thank you both very much indeed, we are enormously grateful, and on the basis of this conversation look forward to seeing you both again regularly. Thank you.
Judicial Appointments Commission (JAC) – Written Evidence

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’.\(^{81}\)

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

\(^{81}\) http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15102.htm
- 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?**

**Appointments processes**

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

16. Supreme Court82 – 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)83 – 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

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82 CRA, part 3, s.26-31 with the composition of the selection commission set out in schedule 8.

83 CRA, part 4, chapter 2, s.67-84
lay Commissioner of the JAC designated by the JAC Chairman. 84 These selections do not go through the whole Commission.

18. Puisne judges and other office holders (High Court and below) 85 -. 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;

- 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;

84 The membership of the panel for selecting Lords Justices of Appeal is prescribed in section 80 of the CRA.
85 CRA, part 4, chapter 2, s.85-94
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\(^\text{86}\) and Lord Chief Justice has given strong recognition to the achievements of the JAC.\(^\text{87}\) 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%).

\(^{86}\) http://www.parliament.uk/documents/lords-committees/constitution/LordChancellor/FinallCandLCJEvidence.pdf
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 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 201088 and the second volume, covering solicitors, was released in January 2011.89 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.

88 Available at: http://jac.judiciary.gov.uk/about-jac/1005.htm
89 Available at: http://jac.judiciary.gov.uk/about-jac/1181.htm
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.

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. 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.

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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 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.91

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.

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 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.\(^2\) 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.

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

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\(^2\) Constitutional Reform Act (CRA) 2005, Schedule 12, part 1 (1).
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”. 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 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.

<table>
<thead>
<tr>
<th>Year</th>
<th>2005/06 (DCA)</th>
<th>2007/08 (JAC)</th>
<th>2008/09 (JAC)</th>
<th>2009/10 (JAC)</th>
<th>2010/11 (JAC)</th>
<th>2011/12 (JAC) forecast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenditure (£m)</td>
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<td>£6.98</td>
<td>£8.14</td>
<td>£7.65</td>
<td>£6.10</td>
<td>£5.52</td>
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<tr>
<td>Soft Charges (£m)</td>
<td>£2.23</td>
<td>£1.96</td>
<td>£2.40</td>
<td>£2.23</td>
<td>£2.12</td>
<td>£1.70</td>
</tr>
<tr>
<td>Total (£m)</td>
<td>£7.58</td>
<td>£8.94</td>
<td>£10.54</td>
<td>£9.88</td>
<td>£8.22</td>
<td>£7.22</td>
</tr>
<tr>
<td>Applications</td>
<td>2025</td>
<td>2535</td>
<td>3518</td>
<td>3084</td>
<td>4684</td>
<td>7016</td>
</tr>
<tr>
<td>Appointments (DCA) or recommendations</td>
<td>337</td>
<td>458</td>
<td>449</td>
<td>446</td>
<td>684</td>
<td>706</td>
</tr>
</tbody>
</table>
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 sifting 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. 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.

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:

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94 CRA 2005, Part 4, chapter 2, 88 (3)
• 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.

**Selections of women candidates**

<table>
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<tbody>
<tr>
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</tr>
<tr>
<td>Circuit Judge</td>
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<td>49</td>
</tr>
<tr>
<td>District Judge</td>
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<td>37</td>
</tr>
<tr>
<td>Recorder</td>
<td>52</td>
<td>94</td>
</tr>
<tr>
<td>Deputy District Judge</td>
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<td>186</td>
</tr>
<tr>
<td>District Judge (MC)</td>
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<td>8</td>
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<tr>
<td>Salaried Employment Judge</td>
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<td>14</td>
</tr>
<tr>
<td>Salaried Immigration Judge</td>
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**Selections of BME candidates**

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<tr>
<td>Circuit Judge</td>
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<tr>
<td>District Judge</td>
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<tr>
<td>Recorder</td>
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<tr>
<td>Deputy District Judge</td>
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<td>Salaried Employment Judge</td>
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<tr>
<td>Salaried Immigration Judge</td>
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</tr>
</tbody>
</table>

368
**Selections of solicitors direct from practice**

![Graph](image)

**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>
<thead>
<tr>
<th>Lord Chancellor’s immediate areas for consideration</th>
<th>JAC Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 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. 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:</td>
</tr>
</tbody>
</table>
3 More flexible deployment of administrative staff, to respond more effectively to fluctuations in workload.

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.

4 Focus staff resourcing on selection activity and reduce the amount of resource currently invested in other corporate functions.

Staffing levels within the operational support functions have decreased by over a quarter in 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

The JAC is keen to increase the use of technology in the selection process. Last year the JAC
<table>
<thead>
<tr>
<th>8</th>
<th>Considering contracting out some aspects of the selection process through an external provider.</th>
<th>As per question 5</th>
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<td>9</td>
<td>Limiting the number of references taken, and ensuring that they are strictly evidence-based.</td>
<td>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.</td>
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<td>10</td>
<td>The JAC should undertake such data collection, sharing and evaluation as is necessary to ensure the selection process is fair, transparent and based solely on merit.</td>
<td>This already occurs to a large extent. Diversity breakdowns of selection exercises on our website under the code of official 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.</td>
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<td>11</td>
<td>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.</td>
<td>The JAC would support simplification of these stages by the Ministry of Justice if it were to improve the experience of candidates.</td>
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<td>12</td>
<td>The approach to outreach should be consolidated across the JAC, Judicial Office and Courts.</td>
<td>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.</td>
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Judicial Appointments Commission – Oral Evidence QQ 338–372)

Evidence Session No. 11.  Heard in Public.  Questions 338 - 372

WEDNESDAY 7 DECEMBER 2011

Members present
Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Lord Hart of Chilton
Lord Norton of Louth
Lord Pannick
Lord Renton of Mount Harry
Lord Shaw of Northstead

Examination of Witnesses

Christopher Stephens, Chair, Judicial Appointments Commission, Professor Dame Hazel Genn, University College London and Judicial Appointments Commissioner, and Lord Justice Toulson, Judicial Appointments Commissioner

Q338 The Chairman: Good morning and welcome. Thank you very much for coming. The Committee is not being televised this morning but it is being broadcast, so it would be very helpful if, when you first speak, you could simply give us your name and your relationship to the Judicial Appointments Commission so that we have that for the record.

We are, as you know, almost at the end of quite a lengthy inquiry which the Committee has been conducting into the process of judicial appointments, and in a sense our deliberations have been added to by the Ministry of Justice consultation that has come out in the past few weeks. Although it has not refocused our decisions about what we want to emphasise, it has in a way contributed to our thinking about the way in which we should approach how we report and what we report. There are obviously areas that we want to emphasise and focus on that are not part of the MoJ consultation process, but there are also things that are clearly parallel with what we are discussing. The Ministry, of course, is focusing quite a lot on potential legislative change and we are focusing additionally on different changes, for example to the organisation and on some kind of deliberation and assessment of judges’ activities and performance after they are appointed—those kinds of areas.

Clearly, the JAC is very much at the focus of what we are talking about, which is a post-2005 constitutional position. I suppose the basic question to all three of you is: what would you say was the major characteristic of change since 2005 in the judicial appointments that the Commission has created?
Christopher Stephens: That is a difficult question for me, as I am, as I think you know, relatively new. I arrived in February and have done an extensive review of the JAC's activities. I have met huge numbers of judges, members of the professions and other interested parties. I have not particularly focused on the differences between pre-2005 and post-2005, but I think I have met enough people and seen enough of our work to be aware—I hope this is the answer to your question—of some of the things that I think have been achieved in these five years. First, I think that no one would argue with the fact that the decision-making process that we are engaged in is entirely independent. No one is saying that we are captured either by the judiciary, by the legislature or by the executive. If the situation pre-2005 and post-2005 is a point of distinction, that would be the first point that I would make. Secondly, there is a point to make about transparency. What we do is extraordinarily open. We have a rich website, and the nature of our work is described in extraordinary detail. It describes roles, the processes that we engage in, the feedback that we give. There is, as I say, a transparency element which I suspect did not exist before 2005.

Q339 The Chairman: A question always comes up about the quality of appointments.

Christopher Stephens: That is a second very difficult question to answer. I take great assurance both from the Lord Chief Justice and the Lord Chancellor, who have said publicly and to me personally on several occasions that the appointments that have been made in the JAC's period of office are at least as good as the appointments made in the previous period. That is what they are saying, but of course, as you know, there is no judicial appraisal and no performance regime in the conventional sense that I am familiar with. Judges are repealed, which is sometimes in some respects a measure of performance, but otherwise there is no appraisal process, so it is a sort of aggregated anecdote that the judges who are being appointed are as good as they were previously.

Q340 The Chairman: Lord Justice Toulson, you have had experience of both systems from the Bench.

Lord Justice Toulson: Can I pick up on the transparency point, because that is the big, big change? Before the Constitutional Reform Act, despite the genuinely best efforts of successive Lord Chancellors there was widespread public concern that judges were being appointed through cronyism and secret soundings. Nothing, really, could disabuse the public of that. What is quite remarkable now is the level of trust within the profession and the public that what is being done is transparent and independent. One piece of evidence of that is the fact that, within the past five years, among those appointed to the High Court Bench have been the brother of a serving Prime Minister and a former government minister—a former Solicitor-General. Those appointments passed without the remotest comment from the public. No Lord Chancellor in recent memory would have appointed the Prime Minister’s brother to the High Court Bench, because however much he knew that the appointment was being made on merit he would have feared the appearance of cronyism. We now have a system that is transparent and that is believed to be independent.

Q341 The Chairman: Professor Genn, would you like to add to that?

Professor Genn: Having taught this before I became a commissioner, and having been a commissioner, I would say that there are four areas in which we have made a difference. First of all, the Commission is conspicuously independent on appointments; it has made the appointments more independent and more obviously so. As has been said, there is far greater transparency in the processes. Whether people like it not, they know what you have
to do, because the process is open and transparent. I believe that we have widened the pool of people who are putting themselves forward for judicial appointment, which is one of our statutory objectives and something that we have clearly and evidently succeeded in doing. We have also made some progress, I think, on making more diverse appointments in the judiciary, and the available statistics show this, albeit more evidently at the lower levels. None the less, we have made progress, and for me those are four very important changes, if you compare what happened before 2005 with what happened in 2006 and now.

The Chairman: We will obviously come back to diversity, which has been a pretty central part of our evidence.

Q342 Lord Norton of Louth: I come back to your first point about independence in relationship to Parliament. I take it from your evidence that you see some merit in the Commission being responsible to Parliament for its overall conduct, because I deduce from your evidence that you have certain concerns about the position of the Lord Chancellor and the fact that there might be a conflict of interest and that it would protect the Commission if it were answerable directly to Parliament. Is that a fair summary of what you said?

Christopher Stephens: That is exactly right. We are, I think, rather comfortable with our relationship with Parliament. The touch points are that my position as Chairman went through a pre-appointment hearing by the Justice Select Committee. We present a report to Parliament. Over the five years, I understand that Baroness Prashar and other colleagues have appeared on five separate occasions before the Select Committee, and we too in a sense report to Parliament indirectly through the Lord Chancellor, with whom we have a very close relationship and many points of contact. We are rather comfortable with the arrangements.

Q343 Lord Norton of Louth: Yes, but the relationship, say, with the Lord Chancellor might change, so would you like to see any formal change to the relationships or do you think that the current relationship to Parliament is sufficient to protect your independence?

Christopher Stephens: I think that it is all right at the moment, but perhaps Lord Justice Toulson would like to comment.

Lord Justice Toulson: I think that it is working well at the moment. The power that the Lord Chancellor has over the Commission in constitutional terms is a narrow one, deliberately limited by Parliament. Operationally, there is obviously a good deal of discussion. First, under the Act, the status of the Commission is established: it is not a servant or agent of the Crown and it is not part of the executive. Secondly, I think under section 65, the Lord Chancellor has power to issue guidance to the Commission—note that it is guidance, not directions—but he can only issue such guidance, first, with the concurrence of the Lord Chief Justice and, secondly, with the proposed guidance laid before both Houses. That has not happened yet. His power to give directions relates solely to the spending of money—proper accountancy. A very high level of constitutional independence is created for the Commission, which I think is valuable. Operationally, things are, at the moment, working very well, and who can tell whether they might work less well under a different regime?

I think that there is room for more communication between the judges and Parliament and, within that broader umbrella, perhaps room for more communication between the Commission, which plays a very important part in relation to the judiciary, and Parliament.
That is a rather wider subject, which I would not want to get into—I can easily be encouraged to—as it is not really what we are being asked to consider.

**Lord Norton of Louth:** No, and your suggestion is that that would take place within the existing framework.

**Lord Justice Toulson:** It could, within the statutory framework, yes.

**Q344 Lord Shaw of Northstead:** To clear the matter up, starting at the beginning, is there any role for Parliament in the choosing of the members of the JAC?

**Christopher Stephens:** There is not at present.

**Lord Shaw of Northstead:** No, but should there be? That is the point. There have been differing views on this.

**Christopher Stephens:** I do not think so and we collectively do not think so. There is a rigorous process—we are right in the middle of it, as it happens, at the moment. There is a rigorous process of selection under the public appointments process, with an independent chairperson—not myself—an independent assessor from the Public Appointments Commission, a judge and myself having some hand in the process. We make a recommendation to the Lord Chancellor, and from the Lord Chancellor to the Deputy Prime Minister, then to the Prime Minister and finally to the Queen. That is a lengthy and careful process, which I think preserves a degree of independence. I think that is more than adequate to preserve the independence of the Commission.

**Q345 Lord Crickhowell:** I am jumping ahead a bit, but I think that my questions follow logically from where we are. You have been stressing the independence and transparency, quite rightly. You have been talking about the role of Parliament in the setting up of appointments to the Commission. None the less, we have had a great deal of evidence during our sessions, and a good deal of argument and debate, about the fact that, when you come to senior judicial appointments, judges are—indeed, the Lord Chief Justice has stressed this point in the last 48 hours—sometimes seen to be taking what appear to be decisions in the public arena about social and political matters and there is the warning that we need to be careful about this. There has been a certain amount of concern that judges, because of all the reasons that have been set out very clearly, have got drawn into politically contentious decisions, which clearly are of interest to Parliament and indeed to the executive.

A number of suggestions have been put to us about how this matter is to be resolved. Jack Straw came up with some quite strong views, which were countered by a battery of former Lord Chancellors who did not agree. Certainly there has been a very firm rejection of the idea of pre-appointment hearings and so on. But there has been a suggestion that perhaps you could widen the representation on the bodies doing the actual appointments at a senior level by having the chair of this Committee and a corresponding committee of the other House in the selection process. There is also the idea that perhaps there might be more lay members on that group to show that there is a connection between public and parliamentary concerns and, indeed, the concerns of the popular press about this role of the judiciary when it seems to go into the job of politics and social decision-making. What are your views about how best to move on from the independence and transparency to the real
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confidence of Parliament and the executive’s legitimate interests about the way in which the appointments are being carried out?

Christopher Stephens: I suspect that both my colleagues will want to make a comment, if that is possible. Perhaps I could make an initial comment on this. You have wrapped up several questions into a single question, I suspect. First, we are very comfortable to see a widening of the selection processes for the most senior judiciary and there are a number of proposals in the consultation document from the Ministry of Justice which we welcome. I particularly look forward to the results of the consultation on those. There is a suggestion for more panellists, more lay people and so on. I am very comfortable with that.

As to parliamentarians being involved in the selection process, I think we are much more cautious about that. We are very comfortable with the current arrangements, where we consult the Lord Chancellor at a very early stage of selection processes. It may be that that consultation process could even be strengthened in some respects. But involving the Lord Chancellor himself in a selection process has, in terms of public perception, some problems. It is not an overwhelming argument, but I think that there are some problems about the Lord Chancellor being on the selection panel for the next Lord Chief Justice or the next President of the Supreme Court. I think that there are as many disadvantages as there are advantages. So I am rather cautious about that. As to whether he or she in future should be properly consulted at the outset, I am very comfortable with that but less comfortable with them being members of the committee.

Q346 The Chairman: Both your colleagues should also give their views.

Professor Genn: I agree about the role of the Lord Chancellor. Having been involved in some selection exercises for the senior judiciary, my personal view is that there is scope for enlarging the size of those panels and the representation on those panels. I feel that quite strongly.

The Chairman: In terms of lay people?

Professor Genn: Yes. I would not say exactly what kinds of people they should be, but there should be lay representation. I think there is scope for larger panels on these very important appointments. Having been on one Supreme Court appointment panel, I felt that there was plenty of scope to enlarge that in terms of representation.

Lord Justice Toulson: Lord Crickhowell has raised a question of huge importance. The danger is in being long-winded in answer. Can one begin at the beginning, which is the concern which has given rise to this possible proposal? The concern is that judges, particularly senior judges, from time to time have to make decisions which are politically controversial and which may be unpopular with the government of the day. That has increased, as a result of the responsibility placed on judges under the Human Rights Act, which from time to time gives rise to tension between judges and the government. That is a fact of life in any democracy. You do not get it in countries where judges are political placemen but you get it in any mature democracy.

The same debate is raging at the moment in the United States, in Australia, where it recently gave rise to quite a high-profile argument, in Canada, in New Zealand and elsewhere. In that debate, the question is quite frequently raised whether the executive or the legislature should have more control over whom they select as judges so that they are less likely to
make decisions which conflict with government policy. That is really what it comes down to. Experience shows that that creates quite serious problems. Our history has been to go in the opposite direction.

In the first half of the last century, the political approach and the views of prospective judges played a very significant part in judicial appointments. One could digress about Lord Halsbury’s appointments. In the second half of the 20th century, successive Lord Chancellors made it a point of principle to disregard such matters in judicial appointments. To move back to bringing in the executive and the legislature in the appointment of judges would, therefore, be movement against our own history. I do not think that the experience in other western democracies encourages it. It takes a fairly extreme form in the United States, where a key part of nomination hearings is to try to tease out the views of nominees about constitutional issues. That has led, since the rejection of Bork, nominated by Reagan, 25 years ago, to a sort of dance between nominees and the Senate, by which nominees under skilled training have learnt to give away less and less to the point where Chief Justice Roberts declined to answer any question about how he might decide any constitutional question. He said that the role of a Supreme Court judge was merely that of a baseball umpire to call strikes and balls. Everybody knew that it was a fiction, but he managed to reveal nothing and his nomination went through. I seriously question whether introducing the executive and the legislature into the process of judicial appointments will do any good or improve public confidence in the independence of the judiciary. I am afraid that that is a rather long-winded answer.

The Chairman: But it is very helpful.

Q347 Lord Crickhowell: Can I just ask one directly connected question? The proposal has been put to us by witnesses, and was taken up by Joshua Rozenberg in a recent article, that the Lord Chancellor might be presented with three names. I need not add to the question, but do you have any views—I am sure you have—on that proposal?

Christopher Stephens: If you would like a very brief answer to that, we are deeply opposed to it for a multitude of reasons. Most spectacularly, if merit is the cornerstone of what we do, surely it is our statutory duty to find the very best person. The very best person is not the second-best or third-best person. We are very clearly committed to the merit principle, which means one and one only for a particular vacancy.

The Chairman: I am tempted to come to the question of a tie-break but Lord Pannick wants to come in, so we will return to that.

Q348 Lord Pannick: In relation to the role of the Lord Chancellor, you have all emphasised—of course I agree—the vital importance of transparency and independence. Lord Justice Toulson has just explained to us very clearly why there should not be a greater political role in the appointments process. My question is: why should the Lord Chancellor have any role in the appointments process other than as a consultee if one is going to promote independence and transparency? The exception, I accept, would be cases where the appointment is to a leadership role, such as that of the Lord Chief Justice or President of the Supreme Court. In standard High Court or Court of Appeal appointments, why involve the Lord Chancellor at all?

Lord Justice Toulson: There is a practical answer, based on how it operates. The Lord Chancellor has vetoed just a tiny number and in each of those cases there was a good
reason. In a couple of cases we were frankly rather stretched to find the number of candidates that we were being asked to select. Two of those who we thought were appointable but only just were turned down on the basis that it was better to have fewer judicial members than to appoint them. That was perfectly understandable.

One has to bear in mind that judges, as you well know, are irremovable unless they have done something truly awful. It is therefore important that one avoids making mistakes. As it has operated, it has just been a final check mechanism to prevent someone being appointed where the Lord Chancellor had reason to think that he had trouble with a particular candidate. Four out of X thousand is not problematic and has probably saved us making four mistakes.  

Q349 Lord Pannick: My concern is that, once you have set up the system, which will plainly be amended in the light of the Government’s consultation, it will be set in stone for the next few years. A future Lord Chancellor may wish, for whatever reason, to exercise the powers that he or she has been given more actively than the present one. Are you not concerned about this risk?

Lord Justice Toulson: Two things: first, he can veto only once and ask for reconsideration once. The idea that he could think that by vetoing successive candidates he could eventually get the one he wants by a process of elimination could not happen. Secondly, yes, that is a serious point. A way of dealing with it might be to establish a convention—since so much of the British constitution works on convention—that underlines how it has operated. The veto is intended only as a last resort to prevent an egregious error, and not as a way of enabling the Lord Chancellor to say, “On balance, I’d have preferred A to B, although I can’t say that B is unsuitable.”

Q350 Lord Renton of Mount Harry: You say that you can veto only once. Can you explain that?

Lord Justice Toulson: Yes. It is set out in the Act. The Lord Chancellor can ask the Commission to reconsider. If it does but refers the same name again, the Lord Chancellor can veto. He can then ask the Commission—to correct me if I am wrong—to reconsider a second candidate. However, under the terms of the Act, he cannot veto twice. That is built into statute.

Lord Renton of Mount Harry: You mean that you cannot veto two people at the same time.

Lord Justice Toulson: You cannot veto two people in the same competition.

The Chairman: You can do it twice within a given period but not in the same competition.

Professor Genn: Any veto has to be accompanied by reasons. Indeed, any request for reconsideration must be a reasoned decision, which allows some transparency about why someone was turned down.

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95 The JAC has received two rejections and three reconsiderations since its creation.
96 Following a request for reconsideration and then a rejection the Lord Chancellor must accept the new name recommended by the JAC.
97 The Lord Chancellor cannot veto two people for one vacancy. If an exercise is for more than one vacancy he may veto one person for each vacancy.
Lord Renton of Mount Harry: Are you basically satisfied with this?

Lord Justice Toulson: As it has worked in practice to date, I am. I follow Lord Pannick’s constitutional point. I am very alive to the point “Beware of unintended consequences” and the “What if?” question. One way of solving the “What if?” question would be Lord Pannick’s suggestion of removing the power. Another, more moderate way, would be to try in some way to enshrine the present convention so that it does not change in practice.

Q351 Lord Pannick: I have one further question about this. We heard evidence from Jack Straw that, when he exercised his power to ask the Commission, it was leaked and published. There was a real political price that he had to pay. Are you concerned that Lord Chancellors might be very reluctant to exercise the limited power that they now have anyway because of the political price that they may have to pay if it is leaked?

Lord Justice Toulson: The cases in which the veto has been exercised have not been competitions of high political interest. If somebody had leaked them, I cannot imagine that any newspaper would have bothered to publish them. The concern that we are thinking about would be over high-level appointments. Nobody has yet found a way of stopping leaks.

The Chairman: Can we move slightly in the same direction, but look at the actual potential extension of the remit of the JAC? Lord Hart, did you want to start on that?

Q352 Lord Hart of Chilton: As if you did not have enough work already, there has been a suggestion in the consultation paper that you might take on two more pieces of work. I would like your views on that. The first is the appointment of Deputy High Court Judges, which hitherto have been at the disposal of the Lord Chief Justice. It has been suggested in the consultation paper that you might take that on. There has been a disagreement between the witnesses whom we have seen about whether that is a good thing or a bad thing. The good thing is that it would be tidy; you would have an all-embracing power over the appointment of judges. The disagreement comes as a result of deputies being seen as a shortcut to deal with the rate of work but not being really part of the process overall. That is the first question that I would like you to answer.

Christopher Stephens: Clearly, a great deal of work had been done on this prior to my arrival, which culminated in a new protocol that we agreed with the senior judiciary about three weeks ago. The protocol goes a long way to satisfying the sorts of appointment standards that we have set out in all the other appointments for which we have statutory responsibility. Actually, we would rather like to see how this protocol works because it may work rather well and, therefore, the need for statutory change may not be quite so urgent. The reason why we are very exercised by this is that, looking back over the five and a half years of our existence, we have made 54 appointments to the High Court and over 80% of them were Deputy High Court Judges. So there is absolutely no doubt that, although this may be a matter of ordinary administrative deployment, to ask senior circuit judges to step in to a particular task over a summer season, or when there is workload peak, is clearly an issue of deployment; it is also a badge of office and it is a development opportunity.

When circuit judges sit as Deputy High Court Judges, they sit with a certain status and deal with cases, albeit quite brief ones, of a certain level of complexity, which further equips them to be strong candidates for the High Court. If we take our statutory duty of widening the

98 Circuit judges and recorders are also eligible.
candidate base for judicial appointments, these are all part-time jobs, such as Deputy High Court Judge, Recorder and Deputy District Judge. These are the pivotal entry-level positions. That is why we would love to get a greater grasp on it. There is a substantial reason why we are really interested in this. The protocol will go much of the way.

Q353 Lord Hart of Chilton: Could you just help us, for the record, by telling us about the protocol?

Christopher Stephens: It contains a number of elements, which include a proper advertised process, so aspirants will know of these vacancies. It will not be a touch on the shoulder by a judge quietly filling in a spot; it will be an advertised process. They will have to complete a proper application form and answer a number of detailed questions. The judge who is making the appointment will then have to justify why candidate A is preferable over candidate B; we get some proper documentation.

Under the statute at the moment, this is not a position that we recommend; it is a position with which we concur. “Concur” is a rather passive verb, which we do not warm to. With a good deal of open competition, a transparent set of criteria against which people are being appointed, a proper justification by the senior judge who is making the appointments, and the opportunity for us to review all that data before we concur, that goes some of the way and is different from what has happened traditionally.

There is a discussion to be had about this. Again, it is one of the topics on which the Ministry of Justice is consulting. I will read with great interest what the senior judiciary say about this because clearly we cannot get into deployment and it would be absurd to try to do so. That is, I think, the Lord Chief Justice’s principal concern. He is saying, as you said, “We’ve got plenty to do and we are trying to run the judiciary; don’t try to do that too.” We do not want to do that, but if it is an entry-level position, we think we have a legitimate role in that and that is why we are keen to see the consultation and see whether some sense can be made of it. I do not know whether that responds to your question.

Q354 Lord Hart of Chilton: It does. Are there any other views from the panel?

Professor Genn: I agree with that.

Lord Justice Toulson: I think that the key words “discussion to be had” are right. I think it will be interesting to see how the protocol works in practice. That may then throw light on whether there is a need for statutory change or not. You rightly said that Deputy High Court Judge status is a hybrid of two different things. A lot of Deputy High Court Judges would never consider putting themselves forward to be High Court Judges; they have to have that status in order to be able to deal with a personal injury case in the county court or High Court, as it would nominally be, but there are others for whom this is a career path. The protocol tries to bring both functions under one umbrella and it remains to be seen how it will work.

99 Known as ‘an expression of interest form’.
100 The JAC will be provided with information on why the candidate is considered suitable for appointment. This will not be in reference to other candidates.
**Professor Genn:** I would like to reinforce the point that having served as a deputy is terribly important in terms of career development, so it is a very big thing to have been appointed in that way. That is one of the reasons why we are so concerned about it.

**Q355 Lord Hart of Chilton:** The second question about the wider remit also comes from the consultation paper. Should you be responsible for the appointment of all court and tribunal judicial officers in England and Wales, including those not requiring a legal qualification?

**Christopher Stephens:** Yes, that is a very important question. We think that the answer is yes and we think that because they form a college or decision-making panel and they have a serious judicial role. We think that we are the statutory body that knows how to identify judicial skills, even if it is in lay people. Whether appointing a psychiatrist to a mental health tribunal or a human resources or personnel person to an employment tribunal, we think that these are significant judicial appointments and that the kinds of decisions that those tribunals make—sending people back to their own countries, removing people out of their homes, or people losing their jobs—are just as significant in people’s lives as other decisions. These are important judicial choices. We think that lay people have as significant a role as the judicial people. This is an expertise that we have and it is one that we would like to continue to exercise.

**Q356 The Chairman:** There is a specific question about appointments, and I know that Lord Renton wants to come in, but there is another issue in the consultation paper about whether you, Mr Stephens, as chair of the JAC should chair the appointment panel for the selection of the Lord Chief Justice.

**Christopher Stephens:** Well, it is slightly self-serving for me to say, “Of course, the answer is yes.” Therefore, you may want to ask my colleagues.

**The Chairman:** I think that the constitutional point is the one to answer rather than the personal point.

**Christopher Stephens:** Absolutely. I think that on the chairman of the JAC the statute invests a certain set of responsibilities. It seems to me that there is an absolutely simple logic that says that a carefully chosen, independent lay person, who has some expertise of the judiciary, built up over the period of his or her office, is exactly the right person to chair the appointment of the Lord Chief Justice and in certain slightly complex cases the President of the Supreme Court, although there is a devolution question about that. On the Lord Chief Justice, I have absolutely no hesitation in saying that I think that that is what this office holder ought to do.

**The Chairman:** Lord Justice Toulson, do you think that the present judiciary would find that acceptable?

**Lord Justice Toulson:** Yes. They would support it. I think they regard it simply as an aberration in what, on the whole, has been a very good Act, that the chair of that panel should be anybody other than the chair of the JAC. I do not envisage any opposition from the judiciary; I would have thought that there should whole-scale support.

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101 The JAC is currently responsible for selections to all offices in Sch14 of the CRA, excluding Magistrates. This includes non-legal Tribunal posts.
Q357 Lord Renton of Mount Harry: I am fascinated by what you have been saying, Mr Stephens. It seems that you and your colleagues are already very much taking on the difficulties, problems and questions that we have heard about from others, about which one has known for some time. How is the judiciary itself taking the role that you are now putting on the appointments process? Is it all with you? Is there a feeling that you are going too far and it is all too different from how it used to be?

Christopher Stephens: We are talking about several thousand members of the judiciary. Speaking of them all as a collective is extremely difficult. They are instinctively independent and there is a range of views. However, what I have inherited is a series of processes in which there are very sensible touch points with the judiciary, whether it is in defining the requirements of the role, defining how we should examine and test candidates, being part of the selection process in detail, being part of the Commission and helping us to make sound and evidence-based recommendations, or in completing the arduous task of referencing potential candidates for the judiciary. We have a whole slew of touch points with the judiciary, which I think make perfect logical sense. I speak as a complete newcomer with no previous experience. I have looked at everything and that seems to work.

Lord Renton of Mount Harry: It is possibly one of your advantages that you came to it very fresh.

Christopher Stephens: Maybe. I am comfortable with that. The second part of your question was: do they love and respect us? The answer to that is that it is a mixed story. Some of our processes can be criticised. There is a question about the pace and speed of our process, which has irritated some aspirants and some judges themselves as they wait for vacancies to be filled. I think there is an irritation there. There has been criticism of some of our testing processes, which has legitimately irritated some of the judiciary. It is extremely difficult to know how you weed out the less suitable candidates, but we are working on that.

We have concentrated, I think rightly, on trying to widen the pool of candidates in terms of diversity and the nature of the work that people have done, rather than on a charm offensive or a proper engagement with each level of the judiciary. When I have met with the Council of Circuit Judges and the Association of District Judges, I have found all sorts of views, some of them based on our not having communicated properly with them, some of them based on people being cross about our processes and some of them based on people harking back to the old ways—I am afraid I am pretty unsympathetic to that one. In some cases it is just a matter of better information. It will be a focus of the Commission in the next few years, if it survives, to focus on better judicial engagement.

Q358 Lord Renton of Mount Harry: I should like to come back to the question of merit and so on. Would your two colleagues like to add anything?

Professor Genn: I would like to say something, having been involved in the processes since the beginning. There have been some challenges. We have gone through quite a detailed process of changing the selection processes from what went before. There have been some quite difficult changes—for example, introducing different kinds of shortlisting processes, such as qualifying tests for a wide range of appointments. We have gone through quite a process of change and that has presented challenges both to some of the serving judiciary and to the professions to some extent. What the Commission has been successful in doing is, as the Chairman said, bringing those stakeholders along with us and drawing them into our activities. We have got serving members of the judiciary to sit on our panels and help us
with the selections. That is the best way of understanding the processes. We have succeeded in doing that and there are now much greater levels of trust in what we are doing. I do not think that everybody agrees with everything we do or loves every aspect of what we do, but they know what the processes are, they accept them and they understand the reasons for the kinds of changes that we have introduced. I think we have been very successful in that.

**Lord Justice Toulson:** The Committee will well know that lawyers tend, by their DNA, to be antipathetic to change. However, when change comes in, if it is good change, they become used to it. Our experience has been that the more judges have worked with the Commission, the more they have come round to being supportive.

I make one supplementary point about that. Eighteen months ago, there were discussions about possible quite radical changes to the JAC, which would have involved cutting back very much on its powers and independence. At that stage, the senior judiciary was very supportive of the new constitutional regime and did not want to see any rowing back. Yes, there have been irritations about individual issues but, on the big picture, the more that the judiciary sees, the more supportive it is of the new fundamental regime.

**Q359 Lord Hart of Chilton:** It is simply that you made a reference en passant as to who should chair the panel for the selection of the President of the Supreme Court. The current President has indicated that he thinks that the President should have no further involvement in selecting his successor. I should like your views on who should be the chairman of that panel and quite how much lay representation should be on it.

**Christopher Stephens:** Broadly, I would give the same answer as I gave on the appointment of the Lord Chief Justice with due respect for the important elements of devolution. There is a Scottish element and the Scottish Judicial Appointments Board, as it is called. There is a Northern Ireland element. They need to be taken into account. I am not quite clear as to how they should be taken into account but, as the decision emerges on that, some weight should be given to the distribution of work—to whether the work of the Supreme Court is nationwide or to what extent it addresses issues to do with the devolved regimes. My answer and my reasons for it would be exactly the same as my answer on the Lord Chief Justice, absent only the sensitivity to the devolved regimes. Was there a second part to your question?

**Lord Hart of Chilton:** It was about the extent of the lay membership of the panel.

**Christopher Stephens:** At the moment, I think I am right in saying that the appointment of the President of the Supreme Court is made by a committee of five—two Lord Justices of the Supreme Court and then the heads of each of the appointment regimes for Scotland, Northern Ireland and England and Wales, making five. It happens that the head of the Judicial Appointments Commission in Northern Ireland is himself a judge, so the score is that there are three judges and two lay people. That is not consistent with the best tradition that we have established in other judicial appointments. Therefore, there is scope for expanding the number of members on that appointment panel.

**The Chairman:** Sorry Lord Renton, Lord Hart was on that point but I know you had not finished. I apologise.
Lord Renton of Mount Harry: Thank you. It is a question about the underrepresented groups. You say in your written evidence that you measure the progress of underrepresented groups against a pool of eligible candidates—that is, all those who could apply. You also said that this allows performance in terms of diversity to be tracked without the disadvantages of a formal target. I did not quite understand what all that meant.

Christopher Stephens: There is a language problem here. I shall attempt an answer. There are three words that we would distinguish: quotas, targets and benchmarks.

Lord Renton of Mount Harry: What about merit?

Christopher Stephens: That is a different point. We would be delighted to talk about that.

The Chairman: I think we should move into that whole area, if we may, so do say what you wish to say.

Christopher Stephens: We are extremely uncomfortable with quotas; that is, saying that 20% of all appointments must be women or BME candidates. That is at odds with the merit principle. We do not think that quotas are helpful. We do not think that targets are helpful for broadly similar reasons, but we think that it is right to track our progress against the eligible pool. One of the underrepresented groups is solicitors and the number of solicitors or what proportion of the candidate base is solicitors is perfectly ascertainable, as is the proportion of barristers or members of the Institute of Legal Executives, the three communities from which we recruit. It is perfectly possible to do that arithmetic. We should at least be beating the eligible pool of the protected category. If you call that a target, it is a target. That is an absolute minimum standard. If 20% of the applicants are solicitors and we are trying to encourage solicitors to become judges, we should at least achieve 20%. In some of our competitions we do and in some we do not. When we do not, that focuses our outreach and other activities to make sure that we get at least to the minimum standard of the eligible pool. That is all it means. I hope that does not sound too contorted.

Professor Genn: Can I add to that? We are talking about benchmarks. We are looking at progression, so we are looking at the proportion of people who apply to us as compared with those who would be eligible. Among those who apply, we look at progression rates to see, for example, whether women are progressing through our selection processes at the same rate as men, on the assumption that there will be a similar proportion of talented women among those who apply, as compared with men. One of the things that we are quite happy to report is that, certainly in recent years, women are progressing through our processes in greater proportions than men, so they are actually doing better through our selection procedures than men are.

Lord Renton of Mount Harry: It seems to me that, in a sense, you are looking at the problem, seeing who is getting what, but without actually doing anything about it.

Professor Genn: We are doing a lot about it. If you are talking about the diversity question—

Lord Renton of Mount Harry: Yes, diversity.

Professor Genn: The issues are, first, do sufficient numbers of talented people put themselves forward for applications? That is the question about whether you have a good
pool. Secondly, are there barriers that would prevent highly talented people from putting themselves forward? Thirdly, do you have processes that bring those people through to appointment? I think we have strategies on each of those processes. In terms of widening the pool, it is about outreach work; it is about myth busting; it is about improving confidence; and it is about educating people about our processes so that they know what they have to do. If you look at our website, you would drown in information about how you can proceed through our selection processes and about what you need to do to be selected. In terms of barriers to appointment, we have identified those structured features that we think represent barriers to people putting themselves forward, including things like a lack of flexibility in working and increasing the flexibility with which judges can work. We have identified things like needing to go out on circuit, which can be a disadvantage to people with caring responsibilities.

Lord Renton of Mount Harry: A lot of this is on your website?

Professor Genn: Yes. The final thing is making sure that our processes are as fair and as transparent as they can be and that we recognise quality, value it properly and appoint the most talented people who can demonstrate merit best.

Q362 Lord Renton of Mount Harry: Lord Justice Toulson, do you want to add to that?

Lord Justice Toulson: The reasons why different underrepresented groups are underrepresented are not identical. The reasons why solicitors are underrepresented are not the same as the reasons why women are underrepresented. Underrepresented groups may not all have the same view about the difference that the JAC has made. On women, I think you have had written evidence from the Association of Women Barristers and the Association of Women Solicitors, who think that we have been doing as much as we sensibly can by way of outreach to those groups.

Q363 Lord Pannick: I entirely accept what we have been told about all the steps that you are taking. Why is progress so slow compared with other comparable countries? That is a concern.

Professor Genn: First, there is an empirical question about whether it is slow by comparison with other comparable jurisdictions. The USA has been doing this for a very long time and still struggles with issues on diversity. Canada was doing it for a very long time. Those are the places that people point to. If you look at that, they have had decades of taking very positive consistent steps to try to increase diversity. The JAC has been in place for only five and a half years, so there is a question about whether it is so slow. My own view is that there is a difference in what is happening at the entry levels, where it is quite clear if you look at the stats, and the stats produced in the consultation paper, that steady progress is being made both on appointing more women and appointing larger proportions of black and minority ethnic candidates. I think there is an issue about senior appointments. The most visible bits of the judiciary—the Supreme Court, the heads of divisions, the Court of Appeal—are areas where I think there has been a lot of attention and where the pool of highly qualified women and black and minority ethnic people is quite small. It is small for historic reasons in terms of entry into the profession, but it is also small as far as women are concerned because of attrition. That is a problem that is true not just in the legal profession but elsewhere. At senior levels of professions you find fewer women at those highest levels and that is partly to do with issues of attrition. It is a structural issue within the legal profession that the JAC cannot solve, but we can draw attention to it and work with the
professions to try to take steps to alleviate it to some extent. I think that there is a
difference between looking at what is going on at the entry levels and the progression
through the lower levels of the judiciary and the impact that we have made on that and what
is happening at the senior level.

Q364 Lord Pannick: Can I ask you a question about the senior level? The proposal has
been made that section 159 of the Equality Act should apply, so if you had two or more
candidates of equal merit you would give priority to the woman or the BME candidate. In
your experience, do you often have two or more candidates of equal merit such that section
159 could be applied?

Christopher Stephens: The answer is that I think this is a fairly rare event. Certainly in the
time that I have been involved, we have made 500 appointments this year and 200 were
women—200 out of 500, a non-trivial number—and 50 of them were BME candidates. They
were not all judges but they were all judicial appointments. So in that non-trivial sample we
have not had the debate about the tipping point around two broadly indistinguishable
candidates or whatever words you want to wrap around it. I have not seen it, but it may
happen. If it were to happen—I think the Lord Chief Justice said this in a press conference
yesterday and I would echo what he said—we should be prepared to appoint a woman, if
there is a woman and a man. I do not think that we have any problem with the principle of it.
I would simply want to guard against any expectation that this is the silver bullet that is going
to resolve things.

We have made nearly 900 women judicial appointments since April 2006—the figure is 862.
We have done quite a lot of this. We have made over 200 BME appointments as well. We
have not needed section 159 in order to appoint some very large numbers of very capable
people to the judiciary. First, it is not a silver bullet and, secondly, I think one needs to think
very carefully about the many members of protected groups who are very resistant to us
using this provision. People want to know that they have been appointed on merit and merit
alone and they want to walk tall, knowing that that is the basis on which they have been
chosen. Thirdly, I think there is a very large number of other things that would make more
of a difference more quickly. Hazel has referred to some of them. There is the fact that, in
your own profession, the current statistics are that among QCs 11% are women and 89%
are men and among senior partners of solicitors’ firms, the number of women is something
less than 25% and 75% men. Those are the eligible pools from which we are making critical
senior appointments. That is a problem.

This is the first profession that I have touched in my working life where there is not easy
access to flexible working arrangements for senior positions. Having salaried part-time
working in the High Court would be transformational. The fact that we are stuck with this
single number of 108 High Court Judges and if we were to appoint two women on a part-
time basis, they would each count as one, makes it impossible to make part-time
appointments. There are many significant things that we could do, a small number of which
would require statutory change, that would see faster change.

Q365 The Chairman: One of the things you have done is to amend your merit criterion.

Christopher Stephens: Yes.

The Chairman: The interesting thing to me, which, in a sense, simply reinforces what you
have been saying—I have been very interested in your observations—is the awareness of the
diversity of the communities, as included in the merit criterion now, which the courts and tribunals serve and an understanding of differing needs. That speaks very much to this being something that you apply at local levels—therefore, at district court levels and in relation to individual communities rather than on some national perception. Is that unfair?

**Christopher Stephens:** That is not our intention, sorry. That is neither our intention nor our practice. It applies all the way up. I am currently involved in a High Court competition and it applies as significantly at the High Court as it does at the district bench level. I think it probably plays more significantly to Lord Crickhowell’s point at the beginning about the demands of the judiciary in respect of a proper understanding of the diverse society in which we all live. I think it plays more to Lord Crickhowell’s point than it does to an acceleration of the so-called diverse candidates, if I have made that distinction properly.

**Q366 Lord Crickhowell:** As a non-lawyer, can I pick you up on the 108 limit? That is the statutory limit, is it?

**Christopher Stephens:** Yes.

**Lord Crickhowell:** Are you therefore suggesting that that should be ordered? Is that a proposal?

**Professor Genn:** Absolutely it is.

**Lord Crickhowell:** What sort of figure would you have in mind?

**Christopher Stephens:** Perhaps you could bear a piece of personnel speak. It is not for us to say how many judges there should be, as that is for someone else to say, but if it simply said “full-time equivalents”, we would be home free. I do not know how many judges there should be.

**The Chairman:** As you say, it is about flexible working.

**Christopher Stephens:** It is about flexible working.

**Q367 The Chairman:** We have had evidence, notably from Baroness Neuberger, who felt that the recommendations of the Advisory Panel on Judicial Diversity, which she chaired, had, in a sense, not been most effectively implemented. How do you respond to that?

**Christopher Stephens:** I think it is an excellent report; it is a report that we have embraced wholeheartedly. A small number of the provisions in the report are elements over which we have very direct control and, if you wanted to look at the detail, we have made some progress on all of them. The strength of Baroness Neuberger’s report is that it covers the entirety of the judicial challenge with respect to diversity and therefore it covers things like appraisals and flexible working and so on. She is absolutely right: it can be rather frustrating and less progress has been made than should have been. I am personally very engaged with the diversity task force chaired by Lord McNally and with the diversity forum, which is a sort of working group of solicitors and barristers and other interested parties. I am delighted to say that Lord McNally is chairing our meeting tomorrow evening and we are pushing forward with that. There is a great deal to do and it is not in any individual’s gift to make it happen. The command and control approach does not work when you have to persuade the
barrister community to do something different or the solicitors to do something different. They have diffused authority within their own communities.

**Professor Genn:** I think that one of the important things that came out of the Neuberger report was the fact that there was not one single measure—no silver bullet—that you could introduce that would make the difference. The report says that you need a consistent, coherent effort and that many people need to be committed to that. I think the frustration is possibly that there are some people who are part of that responsibility who perhaps have not been pushing things forward quickly enough. We have certainly introduced the changes that have been recommended.

**Lord Pannick:** Who are they?

**Professor Genn:** Who are they? Who are the people who are not doing enough? There is a little frustration, with respect, Lord Hart, to bits of the solicitors’ profession.

**Q368 Lord Hart of Chilton:** That is what I was about to ask you. When Baroness Neuberger came to see us, one of her disappointments was that a group of senior solicitors from the City had said that they would meet together to look at the cultural reasons why more high-flying women solicitors from the City had not gone forward for judicial appointment, but they had not met. They said they would but they had not.

**Professor Genn:** I think that there is a real difficulty. On the surface, there is a commitment to try to support women and indeed men in the solicitors’ profession to enter the judiciary, but I think it is harder for them to deliver in practice than perhaps had been suggested by those people who had signed up to the Neuberger recommendations and I certainly find, in talking to senior women solicitors, that it is incredibly difficult to get that kind of support in the firms to do it. It may be changing slowly.

**Christopher Stephens:** Perhaps I may add to that. John Wotton, President of the Law Society, kindly copied me the letter that he has written to you. He mentioned this very point, that that group has not met. I wrote to him this morning saying, “Let us get together and see whether jointly we can reconvene and breathe some life back into that community.” We are at a very advanced stage of appointing a number of new commissioners, one of whom is a very senior solicitor, who I think would help us in that process. We are on the case, but I think progress has been slow.

**Lord Hart of Chilton:** The difficulty is that these large firms—it was certainly true in my day—see the money that has been spent on training these engines of wealth to their successful positions and they are not things that they want to lose easily.

**Christopher Stephens:** Other professions have cracked this outside the law.

**The Chairman:** Sometimes they have cracked it through targets.

**Christopher Stephens:** Yes.

**Lord Justice Toulson:** Perhaps I can add a point. There is a problem for solicitors which is not entirely of their creation. This sounds a bit technical. The JAC may be asked to do one of two things, either to make selections for definite appointments or to produce a pool of selectable candidates from whom later choices may be made. For certain competitions—
recently for the district bench—the department has chosen the latter route. That puts candidates, particularly solicitors, in a very difficult position not just in the magic-circle firms but in small firms, because they are told, “You may be appointed in the next two years, but there is no certainty that you will be.” If that solicitor feels that he ought to disclose that to his partners, that produces a kind of planning blight. I have been told by solicitors who have been through the process, “I would not go through it again and I would not recommend any other person to do so.” We need to stop putting that impediment in their way.

The Chairman: I think you mentioned that you were appointing new commissioners.

Christopher Stephens: Yes.

The Chairman: Lord Shaw, I think you wanted to ask about the size and so forth.

Q369 Lord Shaw of Northstead: Yes. The Ministry of Justice consultation document states that, “reducing the size of the Commission would contribute towards the overall cost-reduction that a refocused JAC would provide . . . A smaller Commission would facilitate clearer and more responsive decision-making”. It sounds to me from all the work that you do that that would be very difficult, but I would like to have your comments on that.

Christopher Stephens: Certainly when I was appointed in February that was the concern of both the Ministry of Justice and the Lord Chief Justice, so it was not the department alone that was concerned. I think the concerns—I may get instantly corrected by my two colleagues—were because at a certain point of the Commission’s life, when it was getting started, there was a convention that all 15 commissioners should be present in order to make any recommendation of any judicial appointment. I may be exaggerating slightly, but I think that that was an expectation. The quorum is three. Since I have been Chairman the average number of commissioners present has been nine. We have sent our recommendations to the Lord Chancellor on the day of the Commission’s meeting. I do not believe either that the number of commissioners has slowed the appointments process down by a single day or that having eight or nine people around the table is a bad thing at all. I think the challenge is one about deployment and not about the substantive number. I am not at all worried about having a larger numbers of commissioners, but I would not be terribly worried either if the number were slightly smaller. One of the things that I have liked, on observing and chairing the meetings, is the strength of the robust debate when you have powerful lay people and powerful judges present trying to make a good decision on good evidence about an important appointment. That is the nature of the work that is done. I welcome the diverse nature of the Commission and I do not think that this is one of the top priorities; it would not be among my top three things to do.

Q370 Lord Shaw of Northstead: What do you think would cause them to comment on the fact that it might “facilitate clearer and more responsive decision-making”? It sounds as though there is no evidence of that.

Christopher Stephens: A commissioners’ selection meeting, as I chaired three or four weeks ago, for a group of some 56 new judge appointments contained a pack of 400-odd pages of evidence on these recommendations. It is entirely possible to assume that, if you have 15 people round the table, they will not all do an equal amount of preparation. If there is a smaller number, there is the possibility that there will be greater engagement. Actually, I do not think that there has been the slightest problem in that respect. The group that I have been lucky enough to inherit are extraordinarily assiduous and take extraordinary care over
it. I think it may be an arithmetic deduction, but I have not seen it myself. I do not know whether my two colleagues want to add anything.

**Professor Genn:** Perhaps I can add to that. There are cases where we are looking at 100 vacancies, so we are seeking to come forward with 100 names in one selection exercise. The mountain of paper is gigantic. We have a large number of very committed commissioners, who read their way through all of it so that we can have informed debates—and we do have very robust debates in Commission meetings. I am not entirely sure where the desire for a reduction in the number of commissioners comes from. You hear different justifications for it. I agree with the Chairman that the Commission could probably survive a small reduction, but you would need to be careful to maintain the balance between the judicial members and the lay members, which I think is a real strength of the Commission.

**The Chairman:** Survive but not improve.

**Professor Genn:** I do not think that it would necessarily improve it. I think that the Chairman’s point about how you deploy the resources that you have to ensure that you are focused and that everyone has done the work that is necessary is important. But I do not think that it would improve it, no.

Q371 **The Chairman:** Lord Justice Toulson, did you want to add to that?

**Lord Justice Toulson:** I was hoping you would not ask me that.

**The Chairman:** Well, we can move on.

**Lord Justice Toulson:** All I would say is that I do not think that now is the time to make a decision on the number of commissioners, particularly since 11 new ones are just in the process of being appointed. I can see an argument for there being a power to change the size by delegated legislation, provided that it had the consent of the Lord Chief Justice, because I can see that it might be thought at some stage that 15 was not the right number, and you should not have to have primary legislation to change something of that kind. But I do not think that now is the time to make a decision on what the number should be.

**The Chairman:** One of the aspects that we have touched on in various points of this discussion but which we have not addressed specifically is the whole issue of judicial appraisal. I know that Lord Norton wanted to take that up.

Q372 **Lord Norton of Louth:** I take it from your evidence that you are firmly in support of the concept of appraisal but you appear not to think it has a role in the appointment process—I deduce that you want to keep the two things separate. Is there not a role for appraisal perhaps when someone is applying for appointment to a high judicial post?

**Christopher Stephens:** Yes. First, appraisal is very well installed in the Tribunals Service and, in the Courts Service, Deputy District Judges are routinely appraised—it is an important part of the way they work. I think that we are making a sort of purity argument here, which is that the purpose of an appraisal is to support a person in their role, to identify strengths and development needs and to address those development needs so that the person does the job even better than would otherwise be the case. A healthy appraisal discussion looks at the detail of what is going well and what is not going well. There is a legitimacy about that relationship between appraiser and appraisee. I think that using that in
a selection process lacks integrity. First, the appraisee would need to buy into it. Secondly, I suspect that if the appraisee bought into it they would be much less frank in the appraisal meeting. Having done this absolutely standard thing, which exists in every other profession that I am aware of, but then to risk reducing the effectiveness of the little beginnings of appraisal by using it for another purpose is, I think, probably not very wise.

Lord Norton of Louth: This may be a matter of semantics, but should we separate, say, appraisal and assessment?

Christopher Stephens: Yes, absolutely.

Lord Norton of Louth: You have been involved in assessment but the appraisal is very much an internal self-development process.

Christopher Stephens: Yes, absolutely. I also think that a person who is giving a reference on somebody ought to have access to that appraisal and it should be one of the data sources that they would use. But simply to append it, I think, would jeopardise the important work that an appraisal ought to be doing.

The Chairman: We are coming to the end of our time. Thank you so much. This has been enormously valuable. I do not know whether any other Member of the Committee wants to pursue some of the points that have been raised or any other points. I think that we are, as they say in the House of Lords, content, but I am sure that there may be points that you feel we have not sufficiently addressed or other matters that you wanted to raise with us.

Christopher Stephens: No. You have been extraordinarily generous with your time and I think that we have raised all the key points that we wanted to raise. I hope that we have done so appropriately.

The Chairman: And your two colleagues agree with that.

Professor Genn: Content.

Lord Justice Toulson: Content.

The Chairman: We are most grateful. Thank you very much indeed. This is our last evidence session before we see Mr Clarke and Lord McNally in their respective government roles, so it has been very valuable indeed. Thank you again very much for your time.
Judicial Executive Board – Written Evidence

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. 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. The Neuberger Report explained how a universal appraisal system would be likely to assist in

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102 Exceptions may need to apply to the recruitment of Specialist Recorders, who might not have the required sitting experience

103 Neuberger Report, recommendation 46.
the creation of a more diverse judiciary\textsuperscript{104}. That is something the judiciary has long proposed\textsuperscript{105}. 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

9. Report's recommendation that “Social awareness, fairness and public service” be one of the stipulated aspects of merit\textsuperscript{106} and that this could be expanded to include “an awareness and understanding…of diversity of the communities which the courts serve”, (ii) “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.”

10. 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**

11. 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

\textsuperscript{104} Neuberger Report at [146] – [151].


\textsuperscript{106} The wording here is that appearing in the Neuberger report. The JAC has issued a consultation paper on the precise wording of this criterion.
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**

12. 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.

13. 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. 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 would appear to be a commission which itself is diverse.

**Question 10**

14. 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.

15. There is a perception that the present process is not satisfactory. We do not disagree with the Neuberger Report 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.

16. We agree with the Neuberger Report's recommendation that: '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.'

17. Given the importance of the appointments, the process of consultation should be thorough and extend significantly beyond the existing members of the UKSC. All

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107 Reference could again be made to the United States, Canada, and South Africa, amongst others.
109 Ibid recommendation 41–43.
110 Recommendation 43.
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.

18. 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.

19. The measures to increase diversity endorsed in the answer to Question 7 above should be applied to the UKSC.

20. 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
21. 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.

22. 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
23. 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
24. See our answers to questions 1 and 5, above.

25. 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
26. The JAC should have fewer members. In any event, it is unnecessary to have all members involved in every selection process.

Question 16
27. 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.
28. 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.

29. 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
30. See paragraph 35.

Question 18
31. We offer no comment on Northern Ireland’s appointment process.

Question 19 and 20
32. 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.

33. 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.

34. We cannot comment on Question 20.

Question 21
35. 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.

36. 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
37. 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

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111 Also see the answers to Questions 10 and 16.
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
Transcript to be found under the Bar Council
Lord Kerr of Tonaghmore, Lord Justice Etherton, Her Honour Judge Plumstead and District Judge Tim Jenkins – Oral Evidence (QQ 40-77)

Transcript to be found under Lord Justice Etherton
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
Law Society of England and Wales – Supplementary Written Evidence

When I presented oral evidence before the Constitution Committee on 26 October in my capacity as the President of the Law Society. I was asked about the Society’s policy regarding solicitors seeking judicial appointments, with specific reference to attitudes within City firms towards solicitors seeking such appointments. At the end of proceedings I promised to write amplifying on my response to the question.

The Law Society has no “policy” in relation to judicial appointments in the sense of a written document. It has developed its policy stance in response to the succession of constitutional consultations leading up to the Constitutional Reform Act 2005. Its policy is essentially to support the open and transparent public appointments process, to support a more diversified judiciary and the encourage more solicitors to seek judicial appointments. I list below some of our initiatives in support of this policy:

- An information leaflet *Becoming a Judge*
- Frequent articles in the Law Society Gazette
- On line video of the role playing exercise at the JAC’s selection day to assist solicitor candidates to prepare
- A video on judicial appointments for the Junior Lawyers Division
- Bespoke training in competency based testing
- Support for the *Understanding Judging* course organised by the UCL Judicial Institute in November in the form of promotion and two diversity bursaries
- Participation with the JAC in the organisation of outreach events/candidate seminars for solicitors
- Production of a webinar of an outreach event for those solicitors unable to attend one of the seminars
- More specifically targeted events for particular groups of solicitors – women, BME, employed
- Meet the Judges events providing an opportunity for solicitors to hear and meet their peers who have been appointed as judges
- Publicity for the Judicial Office’s Judicial Work Shadowing Scheme
- Publication of advertisements for judicial vacancies in the Gazette and publicity for selection exercises in the Society’s weekly electronic newsletter *Professional Update*
- As part of Black History Month this year we held an extremely well attended and received panel discussion bringing together leading Black and Asian judges to inspire others to consider judicial appointments.

Like the Lord Chief Justice and the Chairman of the Judicial Appointments Commission (JAC), the Society believes that the legal experience gained by solicitors practising in the City equips them well for a judicial career. Aspects of the work of a corporate lawyer, for example the management of complex, multi-party, multi-jurisdictional transactions and the chairing of difficult meetings in connection with such transactions, as well as the experience of a litigator acting in commercial or public law disputes, would be good preparation for the role of a judge in the higher courts. Indeed Baroness Neuberger, when acting as chairman of the Lord Chancellor’s advisory panel on judicial diversity, formed a Solicitors in Judicial
Office Working Group composed of senior representatives from five of the largest City firms. Its remit was to change attitudes in the City, although I understand that the Group has not met.

I think that it is important to remember that there are a number of barriers, perceived or otherwise, to solicitors in City firms applying for or achieving judicial appointment. These include:

1. The fact that, at around the stage in their career when it would be usual to apply for part-time appointments, most solicitors are approaching or at the peak of their practice and are likely to be reluctant to take time away from their practice and clients – this reluctance is likely to be shared by firms;
2. A fear that applying for such appointment is likely to be seen by the firm as a lack of commitment, together with a fear of the effect on a failure to obtain the appointment – and it is unlikely to be practical for a member of a firm to make an application without disclosing this to the firm;
3. It is often genuinely difficult for solicitors to ensure that they are able to meet part-time commitments given the uncertainties of practice;

These concerns, together with the fact that the majority of solicitors in such firms will not necessarily have thought of a judicial career as a major ambition, mean that it is difficult to persuade individuals to seek part-time judicial appointment. And it is also worth adding that the difficulties do not apply to the Bar where the nature of self-employed practice makes it much easier for barristers to take the necessary time out to undertake this work and where barristers have both the ambition and the culture to foster applications.

Despite these barriers, a number of City practitioners do achieve judicial appointment. From my own firm (Allen & Overy) alone, there are a judge in the Commercial Court, a Recorder and the recently appointed Deputy Chair of the Copyright Tribunal. Many more senior City solicitors move on to appointments in public bodies of a more administrative or regulatory character, or serve as members of, for example, the Competition Appeal Tribunal, for which their experience equips them extremely well. I understand that Berwin Leighton Paisner, to name but one other firm, provides complete support to those solicitors who want to apply and those that succeed in obtaining a judicial post.

The Society believes that encouraging judicial appointments is likely to be beneficial to firms: Assisting individuals to apply could help firms’ career planning process and, indeed, be seen as part of their corporate social responsibility or equality and diversity policies. These are points we make to them and it may well be that attitudes are gradually changing, but some firms may reasonably feel that these gains can be achieved in other ways and may not be worth the costs associated with allowing members to undertake part-time judicial work. The Society has no means of compelling firms to allow solicitors to apply without impairing their careers other than repeated exhortation and emphasis on the potential benefits for the firms themselves. One of our Policy Team is soon to meet a group of solicitor judges with City backgrounds to see if they can suggest new approaches to this issue.

I, like my predecessors, regularly press the case for firms to adopt a more supportive stance towards solicitors who wish to apply for judicial appointments. We have facilitated contact
between the JAC and senior figures from City firms and will continue to do so. We are also keen to work with the Lord Chief Justice on initiatives in this area.

As a result of the situation within major corporate firms, the Law Society’s strategy has focussed on encouraging solicitors to consider a judicial appointment and to help those who do wish to apply. We highlight the experiences of City solicitors who have gone to take up judicial appointments in our general promotional work. Indeed, I was happy last week to bestow a lifetime achievement award on Lord Collins of Mapesbury, the only solicitor to have sat in the Supreme Court and who began his legal career in the City firm Herbert Smith.

I hope that I have sufficiently demonstrated the Law Society’s commitment to the continuing improvement in the diversity of the judiciary and our strategy for improving the chances for solicitors who wish to apply. Please do not hesitate to revert to me should the Constitution Committee require any further information.

John Wotton, President
31 October 2011

Transcript to be found under the Bar Council
Legal Services Board – Written Evidence

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.

The evidence

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.112

9. The main themes emerging from the research include:
   • the fragmentation of the profession and consequent nuanced nature of respondents’ experiences
   • 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.

**Trends in the solicitor’s profession 2010**

![Graph showing trends in solicitors' profession 2010](source: The Law Society (2011) Trends in the solicitors’ profession: annual statistical report 2010)

**The diversity of the Bar 2010**

![Graph showing diversity of the Bar 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. An early priority is therefore establishing a more comprehensive evidence base to inform policy interventions.

What we are doing to increase diversity and social mobility in the legal workforce

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 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.

Conclusion

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
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 disproportionate 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
Consultation proposals on judicial appointments and diversity

As previously agreed with the Clerk to the Committee I am writing to enclose a copy of the consultation that we will be issuing on Monday 21 November relating to the judicial appointments process and improving judicial diversity.

We have agreed that these proposals will constitute the written part of my submission to your Committee and I will also appear before you with Lord McNally on 18 January 2012.

A number of my proposals give effect to recommendations arising from the Report of the Advisory Panel on Judicial Diversity, which the Government has publicly committed to implement. Others come from the judiciary and the Judicial Appointments Commission to improve the efficiency and effectiveness of the appointments process. We have also included some measures that respond to evidence already given before your Inquiry on Judicial Appointments Process. Our consultation paper will contain the following proposals:-

- Transferring the Lord Chancellor’s powers of appointment or powers to make recommendations for appointment to the Lord Chief Justice in relation to appointments below the High Court or Court of Appeal (we are consulting on both). This is consistent with the Lord Chief Justice’s role as head of the judiciary. The Judicial Appointments Commission, who are an independent body chaired by a lay individual, will continue to run the selection process and provide oversight.

- Giving the Lord Chancellor a more meaningful role in the most senior judicial appointments through (1) early consultation on potential candidates for the most senior appointments (Court of Appeal and above) which is consistent with the existing process for Supreme Court appointments and (2) as a member of the selection panel for the appointment of the Lord Chief Justice and the President of the UK Supreme Court (UKSC). Given the importance of these roles, I believe there is a clear case for providing accountability for the executive to express a view in terms of its accountability to public and parliament for an effective justice system.

- Removing the Prime Minister from the appointment process since the Lord Chancellor can now make recommendations directly to HM the Queen, as a member of the executive.

- Increasing independent participation and oversight through (1) moving to odd-numbered membership of selection panels for all senior judicial appointments, (2) replacing the judicial chair for the selection of the Lord Chief Justice with the Chair of the Judicial Appointments Commission for England and Wales who is a lay member in that he is not a member of the judiciary and (3) replacing the judicial chair for the selection of the President of the UK Supreme Court with a non-judicial member from either the Judicial Appointments Commission for England and Wales,
Encouraging more diverse applicants to apply for judicial roles through (1) extending salaried part-time working to the High Court and above, (2) enabling the Judicial Appointments Commission to apply the positive action provisions of the Equality Act 2010 when two candidates are essentially indistinguishable and (3) limiting all fee-paid judicial appointments to three 5-year renewable terms.

- Improving the efficiency and effectiveness of the appointments process through (1) reducing the number of Judicial Appointments Commissioners and (2) focusing the JAC process solely on the appointment of judicial office holders whose office requires a legal qualification.

Both I and Lord McNally are looking forward to appearing before your committee as part of your inquiry into the judicial appointments process on 18 January 2012.

18 November 2011
Q373  The Chairman: Good morning, Lord Chancellor and Lord McNally, and welcome to the Constitution Committee. It is good of you to come and give evidence together. As you know, we have been conducting an inquiry into the whole process of judicial appointments and the potential for how it could be altered, and obviously we have been informed by and interested in the consultation paper which you have published. If we may, we would like to pursue with you, perhaps at the end of the session, how the two should lock together in terms of the timing of the publications, and how what we say could be integrated into what you say and so on.

We have reached a stage where the Committee has begun to draft its report. Unfortunately, I was not here last week and Lord Norton of Louth took the Chair at a further discussion on this when some of the questions that we would like to discuss with you this morning were raised as ones that the Committee has not yet taken a particular view on. We therefore thought that it would be useful to ask for your views about where you think the government consultation and projected action will lead. There are other things, of course, that we have asked most of the witnesses that have come before us because they are of general interest, and one or two questions that we have asked but which were not raised in
your consultation paper. Obviously we thought that they were sufficiently interesting to ask witnesses about, but you did not raise those matters in the consultation paper, so it would be valuable to hear your responses to them.

Perhaps I may start with the broad general question. The consultation paper proposes that the Lord Chief Justice should take over the appointment of judges below the High Court or the Court of Appeal, thus obviously removing the Lord Chancellor from that process. Do you think that this would be valuable as a decision and proposal in principle or does it have more to do with practical considerations? For example, the potential addition of resources to the office of the Lord Chief Justice is something that has been raised with us. Lord Chancellor, perhaps you would reflect on that.

**Kenneth Clarke:** Yes. I proposed this in the consultation document because I think that my role as Lord Chancellor for appointments below the level of the High Court has become largely ceremonial and ritualistic. The whole appointment of the judiciary has changed and there are vast numbers of appointments to be made—not only appointments to the county court Bench and the tribunals, but also legions of appointments of one kind or another. What happens is that the Judicial Appointments Commission makes the selection and goes through its processes. The selection comes up and the Lord Chief Justice and I have a look at them. In theory I could go through them and start rejecting people or seek to exercise some sort of veto or ask the commission to look at them again. However, it would be totally otiose for me to do so. I have confidence in the system that it is selecting people on merit and there are no complaints that we are reducing the quality of the respective Benches. I do not know the people. I have no direct contact with the posts concerned and I do not think that anyone in my department is in any better a position than me to second-guess what the Judicial Appointments Commission does. Therefore, I think that we should present a little more of the reality to the outside world and concentrate on the High Court and above.

**Q374 The Chairman:** In a sense, you are saying that this is not a reduction in accountability because, as you say in the consultation paper, your accountability is involved when you reach the higher levels but it is not necessarily involved at the lower ones.

**Kenneth Clarke:** If something improper happened—if I found that someone had appointed his totally unqualified brother-in-law—the Lord Chancellor would be in a perfectly good position to intervene. But what we do not need is a process of paper going backwards and forwards where I go through the motions of endorsing these appointments. I can conceive of exceptional circumstances where I would have to be accountable for the process because someone had a complaint about what was happening. However, there already is a system for handling complaints about the appointments process, which was also set up by my predecessor. It would get rid of something that is actually a bit of a ritual and concentrate on the reality, which is that you start to get involved in practical terms at the High Court level and upwards. I do not get very involved at that point, but for reasons of accountability I should preserve my role there.

**The Chairman:** Even though in effect it is really just selection from one proposed candidate.

**Kenneth Clarke:** Yes. I could veto if I wanted, although I think that I would ask the Commission to think again, but it would be an Exocet missile that I would never fire unless there was some compelling reason. I did have an involvement with a Northern Ireland
appointment, rather ironically just before my powers there were completely devolved so that it could not happen again. But that was simply because of a complaint about an incident that occurred in the process.

Q375 The Chairman: An issue that has been raised with us is whether the Lord Chancellor should have the ability or the power to issue targets and give directions to the JAC about appointments that are put to him or her, whoever it may be.

Kenneth Clarke: I am doubtful about the wisdom of that. The debate would be taken over by the question of whether you had hit your target for diversity, for example. I think that it is important to have a clear policy and to try to put some oomph into it so as to make sure that it actually does make a difference, but I am totally opposed to quotas and I do not think that targets would add very much.

Lord McNally: I think that something better than targets is good baseline figures that would give us a proper idea of the direction of travel. Targets are meaningless if the relevant statistics are not sound, valid and up to date. One of the things that we are trying to do at all levels of appointment is to make sure that we have the baseline statistics that allow us to make judgments about whether the policy declarations on greater diversity are matched by the facts.

Q376 Lord Irvine of Lairg: If merit is the overriding criterion for appointment, and it seems generally from the evidence in front of us that it is, I have some difficulty in understanding what the point of any target is.

Kenneth Clarke: I agree with you, Lord Irvine. The approach that I take is that one absolutely immovable thing is that we should appoint on merit. That has to be a fixed point because, if you appear before any kind of judicial tribunal, you trust that the person who is handling your case has been appointed as the best-quality applicant when the vacancy arose. The second thing that I regard as absolutely immutable is the independence of the judiciary. No suspicion of political patronage should be seen. I do not think that there has been political patronage in modern times, but the problem with the structure that we used to have for the Lord Chancellor is that, certainly to a foreigner, it would look like a system of political patronage. Fortunately, Lord Chancellors did not abuse it. We now have a system that makes it absolutely clear that it is independent of the political sphere.

Once you have protected merit as the overriding criterion and once you have protected the independence of the judiciary, our policy aim is to improve diversity. That follows on from the Neuberger report. We think that we have to speed this up and achieve more on the ground. In terms of gender, we should have a more rapidly rising proportion of women and—this worries me more because the figures for recent appointments are worse—we should have more black and minority ethnic representation. We should be trying to make sure that the Bench starts looking somewhat more like the general population, so long as the most talented and independent people are selected for these posts.

Lord McNally: I have only one problem about the merit criterion. It is often deployed by people who, when you scratch the surface, are really talking about “chaps like us”. That is the danger of merit. Who defines it? Merit is obviously the right criterion. I was asked by a very senior judge whether I could guarantee that in 20 years’ time, under the kind of reforms that the Lord Chancellor would have carried through, we would have greater diversity, and whether the senior judiciary would still have the same intellectual integrity,
Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP and Lord McNally – Oral Evidence (QQ 373–401)

respect and international reputation that it does today. What he was basically saying was, “If we have all these women in there, will all these things fall away?” I do not believe that they will.

Kenneth Clarke: I could have an agitated debate with my friend and colleague on this. It is a failure in most walks of life that people appoint people like themselves. I agree that there is a subconscious tendency in everyone to do so. “Chaps like us” is a slight problem which I think has been avoided by having a Judicial Appointments Commission with laypeople on it and a more limited involvement of the judiciary itself. Merit is merit. If a judge asked me whether I think that in 20 years’ time the Bench would have the same intellectual quality that it has now, my answer would be, “I hope the devil it does and that we do not do anything to lower the intellectual standards of the Bench.” I have had this debate with Lord McNally before. Having rudely interrupted him to say that I do not think that merit is the same as the “chaps like us” problem, let me readily concede that I agree with him that, subliminally, the urge to appoint chaps like us is always a danger in this area. People expect future judges to look like the present judges, but they are not going to.

Q377 Lord Crickhowell: The question that keeps coming up during our sessions is that, although we all agree on the merit principle, one’s experience of judging merit shows that it is often difficult to distinguish between two or three people, since there may be equal merit among a number of candidates. At that point, should one take into account the need to have a more balanced judiciary representing the country and pick from your candidates of approximately equal merit taking that criterion into account? That issue has come up again and again. I should like your views on it.

Kenneth Clarke: In my opinion, yes. I like to think that, in the limited number of appointments that I personally have had anything to do with, it is a principle that I have always applied. I propose in the consultation document that we put in the so-called tipping-point provision as a matter of law. It is taken from section 159 of the Equality Act 2010. Perfectly respectable people will argue that you never have two candidates of the same merit, but I do not agree. Let me take something that is familiar to you, Lord Crickhowell. As you will recall, ministers have a say in who comes into their private office. For years and years I have applied the tipping-point principle. Until the department I am in now, most of the others had underrepresentation of women at the top end of the office. Given that, all other things being equal, I would appoint the woman. But sometimes they were not equal and I never overrode a man who was plainly better qualified and a more ready candidate, as it were. But if I had two candidates between whom you could flip a coin, I think it is right to go for the woman or the ethnic minority candidate.

The Chairman: You have given us a new phrase with “tipping point” because we have been using the phrase “tie break” from the provision in the Equality Act. In a way, the tipping point is slightly broader.

Q378 Lord Powell of Bayswater: I want to pursue the same point about diversity. You said that you would like to see a more diverse judiciary both in gender and ethnic terms. Do you think that the steps that have been taken so far to achieve that are adequate? You mentioned the tie-break provision, but some of us have doubts as to how real it is. There has been a recent statement by the JAC on the issue of merit, saying that it should, “include an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs”, which is another small step forward. Given the scale of the problem, do you think that what has been done so far is likely to bring us to a more
equal situation within a reasonable timescale or do think that something more needs to be done to speed up the process?

Kenneth Clarke: I suppose that is a matter of judgment for us all. The aim is probably widely shared. Any resistance to it in the judicial establishment is purely subliminal and people would deny vehemently that there is any resistance. For quite complicated reasons, it is going too slowly. In other areas of life, we are all getting used to the emergence of women in greater numbers in responsible jobs. We no longer have isolated pioneers and we are used to having women at every level. However, the judiciary does not look good enough. Why are we taking so long to get the proportion up to wherever I presume it is going to go? That is why I have readdressed the problem and I think that we have to give it a little more urgency. We are following the Neuberger recommendations on a number of things, including the tie-breaker or the tipping point.

You mentioned the criteria for selection, Lord Powell. Nowadays, any judge should have reasonable sensitivity and awareness of the multicultural and diverse nature of our society. I think that most judges do, but it is a perfectly useful thing to put in. But somehow we have to speed up the process, and I think that the problems lie not just in the selection of judges. My own personal theory, I have to admit, is that it lies in the career structure of the legal profession, so the problems start lower down. The majority of people being called to the Inns of Court now are women—a slight majority. But will this generation eventually produce about 50% women judges? On all past form, no, it will not. By the time they get to that level, there will be a smaller proportion. I do not think that that is prejudice any longer on the part of the selectors. The women who actually go through a judicial career and then want to sit are somehow thinned out. Again, we have addressed that by saying that we should have part-time working and some flexibility, which I think is a very bold innovation in this area. It breaks with tradition, but it would enable those women who have some family responsibilities, and some men with family responsibilities, to be more able to do the job. What is beyond my reach is that the Bar in particular is such an individual and ferociously competitive career that it appears to be somehow more difficult for the women to rise to the top and become candidates for the judiciary compared with their male equivalents. I am sure that there is no intrinsic difference in ability, merit or anything like that.

Q379 Lord Powell of Bayswater: As I understand it, you are admitting that the process is slow, and possibly unacceptably slow, and yet you are entirely against targets. I quite understand that setting a strict numerical target down to a decimal point would be an absurd undertaking, but targets have worked in a number of other countries in relation to, for instance, women in Parliament, women in business and so on. Would you exclude them entirely from this case, even if they were expressed more in language than figures? Perhaps by a certain date, a certain situation ought to prevail.

Kenneth Clarke: If these proposals, improved as they no doubt will be by the recommendations of this Committee, do not work well, let us try targets next. I have been involved in debates about exactly the same problem of how to increase the number of Conservative women MPs. The one thing that all Conservative women are ferociously opposed to is targets or all-women shortlists. They are opposed to them because what they do not want is for people to be able to say, “Well, she is one of the women we had to have to get up to the target.” My view was always that if we could not get associations to shift and if we continued to fail to get women, in the end we were going to have to have targets. Fortunately, we did not have to do that. I should not divert into that kind of political area,
but my view is the same for the judiciary. I would rather not turn to targets and I think that quite a lot of the female judges and women candidates would rather not appear as though they were appointed to hit a target as opposed to the basis on which the men were appointed, which was purely on merit. I think that we have to avoid that.

**Lord Powell of Bayswater:** The argument is much stronger against quotas.

**Kenneth Clarke:** It is stronger against quotas, yes.

**Lord McNally:** Lord Powell asked about the experience of the public service. I worked in Whitehall in the mid-1970s and now, 30 years later, I am back. People frequently ask me what the main difference is. The main difference is the diversity. When I was in meetings with Jim Callaghan, they were always made up of chaps around the table. Now I often sit at a table where all or most of my advisers are women and there is a good sprinkling of the ethnic minorities among them. If the public service can do that in 30 years, why can we not have similar changes in the judiciary?

The Lord Chancellor asked me to do this job 18 months ago. When Julia Neuberger gave evidence, she said that not much had been done, and I told her that I found that rather hurtful. As the Lord Chancellor has indicated, what we have had is some healthy and robust discussions between ourselves. He brings his experience as a distinguished QC and a member of Gray’s Inn, and therefore part of the profession. I come as a layman to this. One thing that I have come to a conclusion on over the past 18 months is that there is no silver bullet, and that is why I am against targetry. But I think that a number of things can be done, that we are in the process of doing them, and that they will start moving the logjam.

With no disrespect to such a distinguished profession, my reaction when I first came across this reminded me of the old story of meeting the sleeping pig on the road. You give it a kick to move it, it gives a contented grunt and then goes back to sleep. Somehow we have to get buy-in. I agree entirely with the Lord Chancellor that part of that buy-in is from the professions themselves. There is the Magic Circle, or whatever it is called, of solicitors and the Bar Council. In meetings, they profess great enthusiasm. During a previous exercise I heard Lord Hart’s comment that, when he tried to do this seven or eight years ago, he found the door shut in his face. Now they say that they are doing it or that they are going to do it, and they invite us to come and see what they are doing. If we can get that at the beginning of the profession, if we can get more flexibility—we will rely on your report for that—and if there are any catch-22s in the process that prevent women’s progression, then a broad-based approach, including judicial training and judicial appraisal, will move the logjam.

I will concede to the Lord Chancellor that his profession is not inherently prejudiced, but there are problems which need to be unstitched. Other professions have done it, but why not the law?

**Lord Powell of Bayswater:** Would you be a happy man if it took another 30 years to produce a situation of equality in the judiciary?

**Lord McNally:** No.

**Kenneth Clarke:** Neither would I. When I started in practice, parts of the profession were very prejudiced and things are now quite transformed. Lord McNally is quite right to provoke me and remind me of the position, but things have changed. However, I agree entirely that they have not changed enough. It is just a question of what can be done
practically to speed it up without diminishing merit and without going to political patronage in the appointments process.

**The Chairman:** I know that Lord Hart and other Members of the Committee will want to come back to the whole issue of expanding the base for appointments, the question of the Magic Circle solicitors, which you mentioned, Lord McNally, and appraisals. But both Lord Shaw and Lord Renton wanted to come in on this point.

**Q380 Lord Shaw of Northstead:** I wanted to make a point on the length of career that anyone has before they become a judge. If one looks back to when they started their career, one sees that how many men and how many women were involved in those days is reflected in the number of male judges later on. The same applies to the lower ranks. It takes longer to become a member of the lower rank, but if you look back to when they started, you will see that there were fewer women then than there are today. As the number of females at the baseline, at the start of careers, increases, surely the number of female judges would, equally, increase.

**Kenneth Clarke:** I accept that up to a point. There are those who take the view that the only problem is a generation thing and that, if you were appointing a senior judge now, they would have started at a time when there were not very many women in practice. I accept that up to a point, but it should go quicker. I think that that is over now. If you look lower down, you see people getting appointed to the Bench in their late-30s and 40s, so I do not think that it should be a problem. I am dealing with the Bar, but I agree that solicitors are equally important. I think that a little over 50% of those now called to the Bar are women. You have to ask yourself whether, in 20 or 30 years’ time, 50% of the Bench will be women. In my opinion, they should be. Do I feel total inner confidence that that will occur? No. Therefore, this is an area that needs speeding up and I concede to Lord McNally that some of these views need to be challenged. One cannot just wait for it to sort itself out.

**Lord McNally:** It is not just prejudice. We really need to dig into this. One thing that keeps coming up is that, although there is a goodly intake of women and of black and ethnic minorities, they do not last the course. Why are they not lasting the course? Is the career break for motherhood more disruptive in the law than it is in other professions? I have listened to some senior civil servants say that it is, and that women find a career break easier in the Civil Service because it is more understanding of the calls made on a woman when they bring up a family and is more flexible. I hear judges say, “Ah, but you can’t have flexible judges, as that would totally disrupt the processes of the court.” We have to find out why what is already a healthy intake is petering out somewhere halfway along the career path.

**Q381 The Chairman:** There are other professions, as I am sure you realise, such as the medical profession, where the intake of women is higher at the undergraduate level. The flexibility that has been introduced into a lot of the working practices that were traditional, for example, in the health service has produced a much greater throughput of women to senior consultant levels.

**Kenneth Clarke:** I agree entirely. I had involvement with the same subject in the medical profession. That profession had people in it who were as ferociously prejudiced against the promotion of women as they used to be at the Bar. I had bizarre conversations many years ago with senior consultants and senior members of the Bar who were definitely prejudiced. I had a consultant once who decided to support my proposal for a sub-consultant grade in the medical hierarchy because that would be for “the women and the ethnics”. Nowadays, if a
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member of a royal college said that to you, you would think either that he had been drinking or that you were dealing with a madman. This was 20 years ago. I shall not quote similar shattering revelations that I had 20 or 30 years ago from members of the Bar. I agree with you that the medical profession has done better. The majority of people who study in medical schools are women and that is beginning to be reflected in the career structure. I concede that the judiciary is going too slowly. As you may gather, Lord McNally and I totally agree that we have to look down below. Why do the better women drop out somewhat and lose interest in a judicial career whereas men do not?

Q382 Lord Renton of Mount Harry: I wanted to move on—I am no lawyer myself—and ask you what you saw the future position of the Lord Chancellor as being. The Ministry of Justice’s consultation paper states: “Furthermore the Lord Chancellor … has a statutory duty to maintain the independence of the judiciary which also applies to the appointments process”. But you are also saying, I think, that the Lord Chancellor may in future no longer be a lawyer. Is that going to work?

Kenneth Clarke: I think that we will have a Lord Chancellor who is not a lawyer. The lawyers that we have, including me, will not be as senior and distinguished as they used to be. I do not sit as a judge in the highest court of the land or anywhere else and I am not the head of the legal profession. I am only the second Lord Chancellor, I think, who is in this quite different position whereby I am really the Secretary of State for Justice. If you recall, there was rather agitated debate about whether the title of Lord Chancellor should be dropped when those changes were made. Part of me is rather glad that the old title was retained, as I am a traditionalist, but it is a bit of a misnomer. A better understanding of my role would be to describe me as Secretary of State for Justice, which is why I am a Member of the House of Commons—it is no longer necessary for me to be a Member of the House of Lords. My day-to-day responsibilities and those of Lord McNally are very much concerned with the content of criminal justice, with the Prison Service, with the legal aid system and with all the business of government that involves interrelation with the law. I regard the Lord Chancellor as being the obvious person to whom the judiciary and the legal profession look first as their contact with the executive, and I regard myself as the voice and face of the executive towards the judiciary and the legal profession, but any resemblance between my job and that which was carried out by Lord Irvine is not too close. It is a quite different function, really.

Q383 Lord Renton of Mount Harry: Given the duties that still fall on the Lord Chancellor, is it not much more likely that a Lord Chancellor who is and has been a lawyer will be nearer to understanding what to do? What about judicial appointments, for example, if the Lord Chancellor is not a lawyer?

Kenneth Clarke: I am sure that Lord McNally would quite rightly accuse me of subconscious bias. I personally think that the Lord Chancellor and the Secretary of State for Justice should be a lawyer, but I am quite resigned to fate. There is no rule now; there is no particular reason why everybody is going to keep to that. I have to guard against the fact that I am a lawyer. I have not practised for over 30 years. At least I had a serious practice—I can attest to that—but I have to be careful that I suddenly do not start taking on myself some assumption that I am a lawyer and that that enables me to challenge everything that is coming out of the profession. I am an out-of-date lawyer. I have done two stints at the Health Department, but I was not a brain surgeon; indeed, I have no clinical ability whatever and have never worked in the health service. The British system of government, to the
bewilderment of a lot of people, has always worked on the basis that you get reshuffled around areas where you adapt to the culture, and that it is what you bring to it as a politician and a political leader, and whatever executive skills you have, that really counts in the end.

The Chairman: In a sense, that brings us to the issue that has been raised by a number of our witnesses about accountability and the relationship with Parliament, something that we talked about briefly earlier. Lord Crickhowell, do you want to take that up?

Q384 Lord Crickhowell: One of your predecessors, Jack Straw, expressed the view that the Lord Chancellor should be involved in some way and that there had to be a connection between Parliament and the appointments system. Generally the view that has been expressed very strongly to us is that politicians must not be involved in appointments. Even the suggestion that perhaps the Chairmen of this Committee and a corresponding Committee in the other House should sit in on the process would appear to be undesirable. Therefore, the first question that I would like to ask is this. If, at the end of the day, that is the position, do you think that the relationship, the responsibility and the connection with Parliament is as it should be or do you have any views as to what the relationship should be? We all agree that for political reasons politicians must not individually make appointments, but we have a parliamentary system that ultimately must be responsible for ensuring the effective working of a good judicial system. Would you first make a general point about the parliamentary/judicial link?

Kenneth Clarke: I agree with what you have said. I am all in favour of having no political patronage in appointments. Our consultation document has two separate elements to it. One makes it clear that normally the Lord Chancellor himself does not play a direct part in the selection of judges, but it readdresses the role of the Lord Chancellor when it comes to the President of the Supreme Court and the Lord Chief Justice. We suggest that perhaps there should be a greater involvement of the Lord Chancellor than there is now because the executive has to have some involvement in that, but not a decisive one. The relationship between the President of the Supreme Court and the Lord Chief Justice as it is working now is really quite important because it is where the interface occurs a great deal of the time. It reminds me of the relationship that I used to have with the Governor of the Bank of England when I was Chancellor of the Exchequer. He was totally independent and I could not tell him what to do. In my day I was supposed to, but I was acting on a quite different basis because I disapproved of that. I was in favour of an independent Bank of England, and I still am. But, nevertheless, we had to meet each other quite regularly because stuff was always coming up that had to be sorted out. The executive and the judiciary need to know what their respective views are on particular things.

So far as Parliament is concerned, the involvement of the select committees is important. The fact that you can have the Lord Chief Justice and the President of the Supreme Court along here to give evidence is important. But when it comes to appointments, I react to that. There would be a danger that confirmation hearings would become political. Perhaps it is a slightly exaggerated view, but the American experience is just shocking and anything that got remotely near that would be deplorable. All Members of Parliament and Peers are extremely wise and detached people, but sooner or later you would have a stray Member of Parliament who would ask a judge about his or her views in sensitive areas. If it becomes partisan, obscure events in the history of the lawyer will suddenly be ferreted out. So far as I can see, some American confirmation hearings are totally consumed by the social attitudes of the
judge and his sexual history. That is not a basis on which you should be appointed to the Bench. Of course, the British Parliament is not silly and would not go anywhere near that and I have no fear that it would happen in a modern Parliament, but after a while a certain partisanship could creep in, and I would not like that.

Q385 Lord Crickhowell: The weight of the evidence that we have received entirely goes along with that. On the appointment to the Supreme Court, again there is broad agreement with what your consultation document addresses, which is that it should have some lay representation, that it should not be chaired by the outgoing President and that it should have these two lay members. We seem to have been heading in the same direction. But I note that in the proposals the selection committee would include the Lord Chancellor. Earlier, you spoke of being the voice of and link with the executive. Presumably the proposal is that you are there not to get Parliament involved but in some way as a link with the executive. I am not clear why the presence of the Lord Chancellor in the selection process at that point is considered to be a sensible involvement in view of all that has been said about avoiding any sense that political influence is being exercised rather than simply selection by merit.

Kenneth Clarke: Also, I mentioned the views of the Committee. In the course of this we seem to have gone around and around on the question of the exact composition of the group of people who should be involved in the selection of the President of the Supreme Court and the Lord Chief Justice. We have proposed that the Lord Chancellor should be a member of the selection panel as a representative of the executive, the reason being—going back as briefly as I can to what I just said—that there will need to be a personal relationship between the Lord Chancellor, the current holder of the post and his or her successors, because the executive has to interact with the judiciary. That is because the duties of those two very senior posts involve some court management, case management and general accountability for the performance of the Bench. If you become the President of the Supreme Court or the Lord Chief Justice, you will no longer just be trying cases. They have a much wider role. The Lord Chief Justice nowadays is the head of the legal profession. As Lord Chancellor I am no longer head of it, as my predecessors used to be.

I am interested in what you have found from the evidence. I do not think that the leading judiciary are opposed to this. There is a general acceptance that there must be an executive role, and before I put out the consultation paper we had already debated exactly where to slot the Lord Chancellor in. I have tentatively put forward that I do not think that the Lord Chancellor should chair the selection panel but that he should be a member of it. I do not think that the present President or the Lord Chief Justice, certainly those who are serving in office, should be involved in the choice of their own successors, so we have altered their role quite considerably. We are making quite important constitutional proposals when it comes to the appointment of these two very senior judges because I think that the position is different from that of the other appointments.

Q386 Lord Crickhowell: Should the chairman of the JAC chair it?

Kenneth Clarke: I canvassed views all over the place before I came to canvass public views and the views of the select committees of Parliament. The present proposal is that he or she should chair it. The Judicial Appointments Commission is working well now, but I think it has got to work better. If you have a Chairman of a Judicial Appointments Commission, it is difficult to find anyone more obviously objective and in touch with the system to chair it.
Lord McNally: In opposition, we supported the then Labour Government in their constitutional reforms that separated these powers and, looking at it first hand now, I have to say that it works very well. I do not think that there is any idea of going back, although after I had to face hostile questions in the upper House on some recent appointments to the Supreme Court about gender, Michael Howard sidled up to me and said, “Of course, if you had left the job with the Lord Chancellor, you could have had all the women you wanted in the Supreme Court”, but I think that he was just being mischievous.

I think that the structure works well. As a purist I would say, “Yes, there should be absolute separation”, but the point just made by the Lord Chancellor that there are aspects of his job, the Lord Chief Justice’s job and the President’s job which overlap means that it makes common sense to have the Lord Chancellor there.

There are always parliamentary ambitions, and I see myself first and foremost as a parliamentarian rather than a temporary minister, and we should resist letting Parliament in. I was speaking yesterday to the members of the parliamentary delegation to the Council of Europe and they asked why we could not have hearings for nominations to the European Court. I would worry about any move to a form of Americanised politicisation of appointments because what we have now is so much better. It is something that we should preserve if we can.

The Chairman: Lord Norton, did you want to pursue anything about the Supreme Court?

Q387 Lord Norton of Louth: Yes. Taking the conversation about the selection committee a bit further, there seems to be general agreement among the witnesses and, indeed, the President of the Supreme Court himself. He says that he should not be involved in the appointment of his successor. But I presume that to achieve that, you will have to amend Schedule 8 to the Constitutional Reform Act 2005. Perhaps I could also pursue the point that you were making about the composition of the selection commission itself. As I understand it from the consultation paper, you have a view that there should be a minimum number of lay members and a minimum number of judicial members, but you do not seem to have a view as to where the balance should lie. Should it be a majority of lay members or judicial members who form the selection commission?

Kenneth Clarke: I think that your first point was that Lord Phillips agrees that he should not be involved in the choice of his successor. He has expressed that opinion on more than one occasion. That is certainly his view. I think that the Lord Chief Justice takes the same view about his position as well. In fact, I am sure that he does. We are consulting. I think that I revealed that this went through one or two stages before we put this forward for consultation. I think that it is important that we have lay members as well. That was one of the big innovations when the Judicial Appointments Commission first started appointing everybody else, but it has worked. The Judicial Appointments Commission is improving the way in which it works. Not everything works perfectly there, but as far as the actual appointments are concerned, there is nothing wrong. Having laymen is probably quite a good thing. I keep referring to Lord McNally, but the fact is that he answers this argument that people keep appointing each other—people in their own image whom they have known all their life at the Bar—all the time.

Q388 Lord Norton of Louth: Would that be an argument for having a majority of lay members? A minority might offset choosing people in the same image, but if you have a majority that wants to choose in the same image, you have a problem.
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Lord McNally: I think that we are consulting on it.

Kenneth Clarke: I am glad to say that Tom cannot remember any more than I can quite where we came down in the final document. It sounds as if we have left it open.

Lord McNally: Perhaps we are waiting for your report. There is an argument both ways. There is a danger that if you put a legal majority on, it will dominate and people will say that it is just tokenism. I would be interested to hear your opinion.

Q389 Lord Norton of Louth: If the majority is judicial members, the danger is that they will then choose in their own image, but if you have a majority of lay members, is there a danger of not having the confidence of the profession?

Lord McNally: Starting from scratch 18 months ago, I am very impressed by the way in which the JAC is working. I have great confidence in developing that. It is finely balanced, and that is one reason why we should consult on this and listen to opinion.

Lord Norton of Louth: It would presumably require an amendment to Schedule 8 to achieve that.

Lord McNally: Yes

Kenneth Clarke: I have been reminded that it is pretty open in the document. The wording is quite obscure. It is quite clear that it does not come to any firm conclusion about the balance between lay and legal.

The Chairman: One thing that you are both very firm about is your enthusiasm for the way in which the JAC is working. I know that Lord Rennard wants to pursue some points on it—

Kenneth Clarke: Before you say that, it is improving. I have some reservations about the JAC. I have no reservations about the appointments. The quality, as far as I can see, remains the same, and it is a better and more transparent process and all the rest of it. When I arrived, I was worried about how much it was costing and how long the appointments were taking. It seemed to me that it was all a bit process-dominated and that not all the process was essential. I have asked the Chairman—who is independent, so it is entirely up to him—to see what he can do to address those reservations. Some of the minor appointments should not take 18 months to fill. It is not necessary for every commissioner to be involved in every appointment. There were some suggestions from lawyers that when they fill in the forms, go through the process and do the role playing, which the Commission is frightfully keen on to see what they would look like on the Bench and all that sort of thing, the process is slightly taking over from the point. It does not damage the outcome, which is the most important thing. I have no reservations about the outcomes that are being produced, but I have asked the Commission to think about whether it could do it rather cheaper and quicker and could perhaps cut out a little of the form filling and the process that are dominating it. Just in case we have given unstinting praise—

The Chairman: You may have answered some of the points that Lord Rennard wants to make, but I will let him speak for himself.

Q390 Lord Rennard: Most of the points have been answered, because you have both been very generous in your praise for the process of the Judicial Appointments Commission and have suggested that it has worked well over the past five or six years. Just for the
purposes of the inquiry, it would be helpful if you could say whether you think that there should be any specific changes to its remit or composition. People are talking about perhaps loosening the way in which people can become members of it. Do you have any comments on the remit or the composition that you would like to add?

Lord McNally: I fully endorse what the Secretary of State has just said. We did not say, “Carry on, you are doing just wonderfully.” Going to Julia Neuberger’s criticism that we have done nothing, the Secretary of State himself took leadership in trying to sharpen up the process. That goes back to the point that I made earlier. One suspected that there were some catch-22s in the process that lost women and black and ethnic minorities: the process of the forms, the explanation of why you did not get through at a particular time or a lack of data. It is now producing some very good data on the selection process but also some very worrying ones. The last biannual report that I saw showed going through the process for Circuit judge appointments from the left-hand side to the right-hand side. On the left-hand side—the applicants—there was a goodly number of women and black and ethnic minorities. The final column was those selected, and the same bias was still there. It showed: black and ethnic minorities selected, nil; women, three; men, 27. You think, “Well, what’s happening along the way? Is it really winnowing out duds or are there some problems?” I think that the Chairman is addressing that. On the diversity of selection, I am told that the four new commissioners are extremely good and very diverse. There are three senior civil servants and one former Governor of Jersey. It looks a very narrow group, but I am assured that the diversity comes in other experiences.

Kenneth Clarke: One change that we are making to address some of the things that I was talking about is that we are proposing to reduce the size of the Commission—the number. The present statute is too rigid in the criteria for selection, so we are altering it. Lord McNally has touched on a much more important point. We have more lay members on this and other bodies, but we have to be careful when selecting lay members for all bodies. I do not criticise anyone. The quality of appointments is very good, and the four people who have been appointed will be excellent. Neither Lord McNally nor I chose them. There was a proper process for selecting them. There is, as we all know, a tendency for the quangocracy to be self-perpetuating, and people run up a tremendous score of public roles that they have fulfilled on one body or another. If it comes to people appointing people in their own image, there is a slight tendency for the new, totally non-political or detached and objective selection of laymen to produce a lot of people who look very like recently retired senior civil servants for all these roles. Sooner or later, and not just in this area, we are going to have to address that.

Q391 The Chairman: It is one thing to say that we would like the appointment set-up to be less rigid—to be based on less rigid criteria, precisely addressing the points that you have just made—but it is difficult to identify how you would redefine it.

Kenneth Clarke: We are consulting on whether we should repeal the rather narrow boxes that we are in at the moment. It is the process that has then got to get people who look a bit more to Lord McNally and me like laymen as a representative body of experts and high-quality laymen.

Lord McNally: We can give you a paper on it. Camisha has just helpfully given me a whole load of statistics showing that there is still a problem. What I am confident of is that the JAC is aware of the problem and it is now able to produce statistics and dig into the process to see if some of the fault is in its own processes—these rather complicated forms with tick-
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boxing and the rest—or others. Going back to Lord Powell’s original question, I suspect that there are some quite easy process changes which could help to unblock the logjam. The other is for people to speak out in the professions and say that the judiciary is not just for senior barristers, which is still an impression that deters others from trying. I think that that is part of it. I do not see the JAC, certainly under its present Chairman and with its present terms, as a barrier to what we are trying to do. In fact, I think that its shoulder is to the wheel as much as ours is.

Q392 The Chairman: You have both been very critical of the United States’ processes, and I think that we are agreed on that, but there has also been some evidence on Canada, for example. The role of political leadership in all these matters has been very important in exhorting the different institutions not simply to do things differently but to make a tremendous solemn dance about it from the senior political point of view. You have both been quite hesitant, for example, in response to Lord Norton, about saying whether you think that the Supreme Court appointments arrangement would be different if there were a majority of laypeople. I am hearing from you a degree of aspiration but not particularly practical proposals on that, for example.

Kenneth Clarke: When it comes to the appointment of somebody to the judicial office, we appoint some lay members and some judicial members. My guess is that it is not very often that all the lawyers agree with each other and all the non-lawyers agree with each other. It is a bit like working in a coalition Government: when you have a discussion, you suddenly find that the people on the two sides seem to come from both parties. Perhaps because of my legal background I am blind to the problem, but I do not think that there would be such a rigid division between the lawyers and the laymen on every aspect of the appointments system.

Lord McNally: My experience of coalition Government is that not all the radicals are on one side and not all the conservatives are on the other. Camisha is very worried that I misled the Committee when I said that only three women got through in the most recent exercise. Eleven of 30 names got through the selection process for circuit judges.

Kenneth Clarke: I think that there were no ethnic minorities.

Lord McNally: There were no ethnic minorities.

Kenneth Clarke: Throughout all this I am more concerned about the slow progress with ethnic minorities—just look at the figures. Although I resist targeting and so on, we are going very slowly on ethnic minorities. Somebody was telling me the other day that 40% of those called to the Bar are ethnic minorities, a slight overrepresentation, but the proportion on the Bench is absolutely tiny.

Lord McNally: I know that Lord Rodgers wants to come in on this, but one thought that we had when discussing this yesterday was perhaps to bring together a group of black and ethnic minority lawyers in the middle rank, as it were, at the point where they do not move forward to apply, and simply ask them: “You’ve come this far in your career. Are you thinking about the judiciary? If not, what is putting you off applying? Do you think it is a closed shop? Do you think it is weighted against you?” I wonder what Lord Hart thinks. I know that the witnesses are not supposed to question the Committee, but he has been around the track.
The Chairman: Perhaps I may park Lord Hart for a minute, because I know that Lord Rodgers wants to come in on the previous point, and then we will come to Lord Hart.

Q393 Lord Rodgers of Quarry Bank: We have been discussing the performers—that is the nature of it—but we do not think much about the customers: those on the other side in the court. For example, if I were in a court, whatever the circumstances might be, I would say: “I’m not very interested in your diversity. I’m not very interested in your age. I am interested in how good you are in the process of justice.” We somehow lose that. We are discussing each other, who performs best and how competitive they are, but what is the measure at the end of the day? On the last occasion that we took evidence we had Mr Justice Toulson, and I will take just a sentence. He said: “One has to bear in mind that judges, as you well know, are irremovable unless they have done something truly awful. It is therefore important that one avoids making mistakes.” I think that that is a very important sentence. I am rather disturbed about this. There is a degree of gradations of awfulness. If I were in front of a court and I discovered someone being eliminated because they were “truly awful”, that would be one thing, but what if one of the judges was pretty awful? I do not like the idea of pretty awful judges either. So there are bound to be gaps in the appraisal system, with bad judges appointed. Can we do something to make sure that bad judges become better?

Kenneth Clarke: I agree with the first part of your question, Lord Rodgers. That is why I began by saying that it seems to me that two things have to be immutable. The first is that we appoint on merit. I agree with you that the litigant likes to believe that the judge has been appointed because he or she is good and was the best candidate at the time. The second is independence: the judge was appointed without political patronage and sits there independently of the government and the executive of the day, and will sometimes give judgments that the executive and the government do not like. That is an absolute test in any country where the rule of law applies. After that, we have a policy of diversity. That is why I have made it subject in that way. Diversity is a problem. It does not mean that we do not have any policy of diversity, but it must not compromise merit or independence. That is where we are.

On the second point, we are proposing to have a system of appraisal. That is actually quite a bold innovation. You can accuse us of doing nothing, but it would be harsh in the light of what we are proposing. I think that the judiciary is happy to contemplate the proposal, which I think should be done. It is a process of continuous appraisal. You will occasionally be disappointed by the people whom you have appointed. It is not true that all of them will maintain the same high standards. In most walks of life now, appraisal becomes part of the system. In the case of the judiciary, it is appraisal of the judiciary by itself; it is the other members of the judiciary who will appraise you. We are getting near to starting that at the very junior levels. I get no opposition to this. I look forward to the day when, at the very highest level, they do a bit of mutual appraisal. I can see that several members of the Committee share my view, having gone through this somewhat uncomfortable process of introducing what is now quite widespread—this kind of appraisal. In prospect, it is always slightly disturbing, but in practice most people find it very useful and beneficial in maintaining standards and drawing people’s attention to areas where they are perhaps not doing as well as they could, whereas they used to, or whatever the issue might be. So we are moving towards a proper system of appraisal of the judiciary by itself.
Q394 Lord Rodgers of Quarry Bank: What is the measure of success? If the appraisal works well and we have your appointments, what is the measure of their competence?

Kenneth Clarke: Off the cuff, I hesitate to reel off a list of qualities that a judge has to display. Just to give you a terribly general reply, I have always thought that the most important thing that a judge has to have is good judgment. It sounds corny and it sounds silly, but they should have good judgment in the ordinary, layman’s sense of the word. There are all kinds of other frightfully important things that they must have, like knowledge of the law, case management and all those kinds of things, but good judgment is the most important. That is the most difficult thing to appraise. I do not envy the Judicial Appointments Commission. Some of the most brilliant advocates that you could find at the Bar turn into the most dreadful judges when you appoint them. Some of the most pedestrian advocates turn out to be absolutely marvellous at being good, sound people applying good, sound judgment to the problems before them. It is part of the appointments process to guard against that. Some people know their own positions. I have known plenty of people at the Bar who were brilliant advocates and had no intention of ever applying to be a judge, because they just happened to know that their own skills were far better used in the field of advocacy than if they were going to sit there all day handling a case sensibly and detachedly and deciding an issue.

Lord McNally: I think that appraisal has become much more a part of modern life in business, in the Civil Service and in all professions. We have made it clear that we want the judiciary to have ownership of appraisal and that it is not a matter of men or women from the ministry coming along to appraise them. We are working with the senior judiciary on how it could be implemented. Dame Hazel Genn at University College London is also working on how the structure could work and doing some interesting work on judicial training which might help people to dip their toe in. When Lord Hart and I were at University College, the legend was that lecturers could be sacked for indecency but that professors could be sacked only for gross indecency. Whether you would have such gradation in appraisal of judges, I do not know. I will remind the Secretary of State that he was talking of his own experience on the senior board of a company where the board was appraised. He said that it was rather like jumping into a swimming pool—a little bit of a tiptoe at the edge, but once you were in, it was quite an interesting experience. I think that that would improve the judiciary—I do not think that you will see situations where Judge X gets nine out of 10—just as it has other areas. I heard one senior civil servant say that she did not think that she would have got to the position that she did without the benefits that appraisal had given her to up her game. That is the benefit of appraisal and why it has spread out into other professions. All we are suggesting is that the judiciary is not a closed profession and could use some improvements in appraisal, selection and diversity.

Can I make just one other statement about what you do when you go into court and who you are being judged by? It is 30 years since I first asked the question in the other place about diversity in our police force, because I have always passionately believed that you cannot police areas with an all-white police force without causing tension. I do not think that you can have a really harmonious society if the judiciary, however excellent, does not seem to reflect the society to which it is dispensing justice. You do not sacrifice quality for that aim, but I think that we are right to point in the direction of having a judiciary that in some ways reflects the society to which it is delivering justice.

Lord Renton of Mount Harry: That is a very important statement.
Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP and Lord McNally – Oral Evidence (QQ 373–401)

Lord McNally: That is my opinion, but it is one that I feel very strongly about, because I think that that is how you keep a society harmonious. Again, I came to this as a layman. One of my privileges is that I get invited to the service at Westminster Abbey. At the end, the judges all file past. The first time I went, just over a year ago, it felt like I was watching that scene in “Fantasia” where all the mops come down. If you see the full serried ranks of the judiciary, they all look an awful lot alike. In the long term, that is a threat to the harmonious nature of our society unless we address it. But that is a personal opinion.

Kenneth Clarke: You say that it is a personal view, but it is pretty well government policy. So long as all the judges are wearing long wigs and tights, they all look fairly similar on ceremonial occasions. Lord McNally may give a give a personal opinion, but it is not far removed from the approach that we are trying to adopt in the consultation.

The Chairman: I know that Lord Hart and Lord Renton want to raise something. Lord Renton, is your question on this point?

Q395 Lord Renton of Mount Harry: Yes, it is. I was just wondering how, at this stage, you think the appraisal will work.

Lord McNally: We want to give the judiciary ownership of this, so it would be a judge-to-judge appraisal. My own instinct is that it would be a private exercise in that it would not be a matter of, “Unless you pass this, you’re fired”. Hopefully, it would be an attempt to make sure that colleagues were aware of changes, up to the mark and thinking through their role. As the Secretary of State was explaining to me, FTSE 100 companies increasingly deal with their senior management in that way, as does the Civil Service—again, I do not want to ask for evidence from the Committee, but I am sure that Lord Powell would be able to tell us how the senior Civil Service now appraises. Right up to permanent under-secretaries, appraisals take place. People see it as a proper part of career development. It is not any kind of quiet inquisition to root out the bad judges; it is designed to make good judges better.

Kenneth Clarke: It does not apply to ministers of the Crown, of course.

Lord McNally: Of course, not—my God, no.

Kenneth Clarke: No qualifications or experience required; no appraisal carried out.

Q396 Lord Hart of Chilton: I am very interested in this because in the old days there was a certain amount of resistance to the appraisal of the judiciary. Are you saying that the judiciary has welcomed this in principle, before you get down to how it is going to work in practice? Is it signed up to the appraisal system?

Kenneth Clarke: The ones whom I have met are. There have been attempts in the past—there was an attempt to get a recorder appraisal system, which did not work—but we are back again. We have got an advisory group, and it will certainly come in. I just have not done a wide enough survey. Whether every High Court judge thinks that this should apply at the level of High Court judges, I do not know. The flippant remarks that I made just a few moments ago rather reflect what I always find: the sense that it is a terribly good idea for the staff or the lower ranks, but surely you do not mean it to apply to us. I think that that is changing. I personally have not encountered any resistance. I do not know whether Tom has.
Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP and Lord McNally – Oral Evidence (QQ 373–401)

**Lord McNally:** The ever helpful Camisha reminds me that tribunal judges, magistrates and deputy district judges are currently appraised. The senior judiciary—

**Lord Hart of Chilton:** That is what I am talking about.

**Lord McNally:** It came up with an idea that I think the department termed “gold-plated”. That is why it would be expensive and elaborate. I have not seen the details of this “gold-plating”, but that is why we pushed it slightly back, to see whether we could get something that was more practical and user-friendly, as it were. We are in discussions with them, but I am not aware that any of the senior judiciary has said, “Over my dead body”.

Q397 **Lord Hart of Chilton:** Does that mean that there would then be a formal record of this appraisal, and would it be used in promotion exercises?

**Lord McNally:** I think that that would have to be true for internal use. Whether it would be open to a freedom of information request—

**Kenneth Clarke:** We and the judges would have to think about that. It is a question that we perhaps should not answer; it has not been addressed to us before and we should think about it before we start this debate. I entirely agree with what has just been said. There is a danger that we will have a frightfully expensive system. That is why the recorder appraisal system failed. They went in for a tremendously elaborate system that cost too much. The moment that people start getting nervous about what is going to happen to the appraisal, you have to be careful, and I think that, understandably, we were not careful. Half the judges would insist on the most amazing system, a right to appeal and all that sort of thing, if they felt that their appraisal was on the record and would affect their future judicial career. It is much better as a tool to be used by the judiciary as a body, like any other professional group as a body, to raise the quality of performance and to bring home to colleagues the areas where they could perhaps hit the best standards of their colleagues and so on. Once it starts being a path to promotion and allocating where you sit in the system and so on, people will understandably start getting much more nervous about it.

**Lord McNally:** I am told that, as you will probably recall, in September 2004 a recorder appraisal working group chaired by somebody called Mr Justice Leveson went to work. The working group agreed that the basis for any appraisal scheme must be that the appraisal of judges can be done only by judges. They alone are in a position to distinguish between legitimate variations of style and either praiseworthy or unacceptable performance. Of course, I take advice from my legal adviser that this is still work in progress.

**Kenneth Clarke:** That cost £150,000 a year and was abandoned, so we are starting again.

Q398 **Lord Crickhowell:** The caution that you have just expressed about how you use the appraisal is rather important. I thought that Lord Powell might come in at this point because he provoked a very vigorous debate in the Committee last week about whether, having done these appraisals, they could or should be used in the appointments process. One argument was that if you have appraisals and you know a lot about someone, surely they should be used. Lord Powell put that argument rather effectively. There was an opposite view.

**Kenneth Clarke:** I look forward to your advice. I am just nervous. This is a completely new question to me. I had not previously thought about it and, if I am not careful, I shall give an
Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP and Lord McNally – Oral Evidence (QQ 373–401)

answer, walk out and find half the judiciary quizzing me about this great announcement that I have made—so I look forward to your Committee’s conclusions, if you have had a vigorous debate about it. I do not know about Tom, but it is the first time that I have turned my mind to the question of whether you keep a record and use it at later stages.

Lord McNally: I have been in government long enough now to know that if the boss says he is still thinking about it, you shut up.

Kenneth Clarke: We shall have to see what our mutual view is.

The Chairman: Lord Powell is indicating that he is resisting the opportunity to develop this argument again, so this is obviously something that we shall discuss when we come to the publication of our report and the outcome of your consultation. I am also very aware of the time.

Kenneth Clarke: I hope that in a few minutes you will excuse me. I have a Statement after Prime Minister’s Questions. I may leave Lord McNally to continue the rest of the session.

Q399 The Chairman: I have two very practical questions; I am not sure which of you you feel would be most sensible to answer them. We are slightly concerned about the timing of the end of your consultation period, which, as I understand it, is 13 February. You said several times this morning that you hope to include our report in that. However, if our report is delayed—thank you very much Lord Chancellor, Secretary of State, whatever you prefer.

Kenneth Clarke: I am sorry that I have to slip away

The Chairman: It was very nice to see you. Thank you so much.

How do you see these two processes integrating in a practical way? That is our concern.

Lord McNally: We have always welcomed the fact that you have gone ahead with this inquiry. It would be extremely helpful if you could publish as close to our own timeline as possible. It would be most helpful if you could publish your report in March, because we would like to start the next stage in April.

Q400 The Chairman: In the same way that you need to take the advice of the Secretary of State, I need to take the advice of our advisers, but we have registered the point. You said in the consultation paper, although this is obviously irrelevant to the Constitution Committee per se, that you hope that you might be using more secondary legislation in respect of judicial appointments. Our concern is what aspects of the process you would regard as being of sufficient constitutional importance not to be included in that, because obviously if there were a lot of Henry VIII clauses in secondary legislation around these issues, that would not be viewed with great enthusiasm by this Committee.

Lord McNally: I am reasonably confident even in his absence to say that the Secretary of State would be totally against using Henry VIII clauses in this exercise.

The Chairman: That is a very clear steer. Thank you.

Lord McNally: Let me also say that one of the joys of trying to push through this particular direction is that the Secretary of State has been entirely supportive. As I said at the
beginning, the search for a silver bullet will be frustrating because I do not think that there is one, but if we can keep up the momentum and look for the obvious wrinkles and hidden barriers, we can make progress. The report that you are going to submit will be very important in this.

**The Chairman:** I am grateful that you think so. We have covered a great deal of ground this morning, and I thank you for that. I should have thanked the Lord Chancellor, or the Secretary of State, as I hear he prefers to be called, more formally. I do not know whether any Member of the Committee feels that some of the subjects that were discussed in relation to the agreements on our own report have not been covered with the two Ministers.

**Q401 Lord Hart of Chilton:** I would like to ask a question, please. You referred to Baroness Neuberger’s report. One of the issues that she raised when giving evidence to us goes back to the wide pool in which you want to fish for merit, which would include the solicitors’ profession. You referred to the fact that in one of her recommendations she had the agreement of all the Magic Circle of solicitors’ firms to sign up to investigating how further progress could be made to encourage solicitors to pursue a judicial career. There was to be a series of meetings, but not one has taken place. We quizzed the President of the Law Society about it, and generally the feeling was that although the solicitors may have signed up, a lot more work needs to be done to cajole and explore why it is not possible to recruit more solicitors. My firm produced the first solicitor Supreme Court Justice and did make progress in encouraging that as a career path, but the feeling is that there is a dragging of feet and that it does not really concern the big firms. There is a sense that they are money machines that train people at great expense to be solicitors and to conduct the practice of a solicitor, but not to consider the opportunity to take up a judicial career. That seems to me a pity, because there are a number of very talented people in the profession who could make excellent judges, but the monopolistic view seems to be that, “It is not really for us to play a part in providing candidates for judicial preferment”.

**Lord McNally:** I agree entirely, and what I said earlier is true. There have been a lot of bold declarations. The Prime Minister made Downing Street available to me to hold a meeting with solicitors, ILEX, the Bar and others. Everyone was all in favour of this, but it is a question of whether we can get to the next stage. I was very interested in your experience. It is easy to get declarations of good intent but then to leave it. Just for the record, I am told that that the group known as the Magic Circle did meet once, but only once, and that no action points arose from the meeting. That is exactly what we are dealing with.

**Lord Hart of Chilton:** That is the pity of it.

**Lord McNally:** On the pool, again we should be willing to look far wider than we have at present. ILEX has shown that it has a source there. Experience as a tribunal judge should be seen as a career progression. I am interested in the appointment of Deputy High Court Judges, which seems to be one of the last bits that still exist on the old tap-on-the-shoulder basis. I have my suspicions that some of the old ways produce old results. Interestingly, I had a vigorous debate with Baroness Neuberger about looking among lawyers working in public service. She was very hostile to that because she said that if government lawyers became judges, that would again blur the separation of powers. I disagree because it is a pool of talent that should be utilised.
What I can do is give an assurance to Lord Hart and the Committee, and perhaps even persuade Lord Powell to have a quiet drink with me and unburden himself. I am sure that some of these ideas have been tried before and have run into the same problems that he set out, but it is nevertheless worth trying them again. One of those is engaging the Magic Circle and perhaps to keep up the pressure there. What encourages me is that I saw one of those notes which from my past experience I know produces results. It was scribbled in the margin: “The Prime Minister is taking a personal interest in these matters.” That can be a great help in making sure that these things do not run into the sand.

**The Chairman:** Thank you, Lord McNally. This has been an extremely useful session. I am most grateful to you for the time that you have given to the Committee.
The Hon Mrs Justice Macur DBE and the Rt Hon Lord Justice Goldring – Oral Evidence (QQ78-120)

The Hon Mrs Justice Macur DBE and the Rt Hon Lord Justice Goldring – Oral Evidence (QQ78-120)

Transcript to be found at Rt Hon Lord Justice Goldring
Professor Kate Malleson, Professor of Law, Queen Mary University of London and Professor Robert Hazell, Director of the Constitution Unit, School of Public Policy, University College London – Written Evidence

Submission to be Found under Professor Robert Hazell
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](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.\(^{114}\)

2. In 2005 I was a member of the ad hoc panel\(^{115}\) 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.\(^{116}\) 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.\(^{117}\)

4. I also have an interest in judicial appointments as the husband of a candidate in recent selection processes, Lady Justice Arden.

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\(^{114}\) See especially paras. 23-24 of opinion No 1.

\(^{115}\) 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.

\(^{116}\) See Council Decisions 2010/124/EU and 2010/125/EU appointing the members and establishing the operating rules of this panel.

\(^{117}\) 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.
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, or whether individual decisions are made and recorded in a formalised way by reference to the particular criteria. [Theme 2]
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. [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

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118 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.

119 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.

120 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:
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. 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. 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 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. 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. 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. 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. [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

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121 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.
122 This has not been the practice at the Supreme Court level, despite the small numbers of candidates involved.
123 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.
124 The CCJE’s Opinion No. 1 examined the position in 2000.
125 See the CCJE’s Opinion No. 1, para 19. It does not therefore always avoid political controversy and criticism for lack of 
126 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 
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.  

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.  

19. I would favour appellate commissions, particularly at the Supreme Court level, which are more inclusive of the various public interests in the law. 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.  

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.  

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, 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; 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.  

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.  

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

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127 This might involve a greater risk of public knowledge of candidatures. But the present system has already appeared incapable of avoiding this.  
128 And bearing in mind also that the Scottish or Northern Irish representative has often been a judge: para 17 above.  
129 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.
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.\[130\]

5 July 2011

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\[130\] 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 – Written Evidence

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:
Robert Martin, President, Social Entitlement Chamber – Written Evidence

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.


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;
Robert Martin, President, Social Entitlement Chamber – Written Evidence

(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
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.”

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.

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.”


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 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
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 feedback. 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.
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 from 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
Lord McNally and Rt Hon Kenneth Clarke QC MP – Oral Evidence (QQ 373–401)

Transcript to be found under Lord Chancellor
Karon Monaghan QC, Professor Aileen McColgan, and Rabinder Singh QC – Written Evidence

Submission to be found under Professor Aileen McColgan
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**
Executive Summary

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% 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.

• 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

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133 Figures are taken from the 2001 census.
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\(^{134}\).
- 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\(^{135}\).

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 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.

\(^{134}\) Out of a total of 679 posts (as at 1 August 2011), only 282 (42%) are legal posts.

\(^{135}\) Also known as the Good Friday Agreement or the Stormont Agreement.

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.


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.’

10. In June 2005, NIJAC was established under the Justice (NI) Acts 2002 & 2004 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).

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.

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136 Commonly referred to as the Criminal Justice Review.
137 Paragraph 6.102
15. This Agreement also envisaged the devolution of policing and justice, within two years, to a restored Northern Ireland Assembly.138

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 Service139 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


- To conduct the appointments process and to select and recommend for appointment in respect of all listed140 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.
- 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.

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138 The Northern Ireland Assembly was restored in May 2007 with Ian Paisley (DUP) as First Minister and Martin McGuinness (SF) as deputy First Minister.
139 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.
140 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).
21. The 2009 Act extended NIJAC’s statutory duties further in that NIJAC became not only a recommending body in respect of Crown\textsuperscript{141} appointments, but also an appointing body in respect of non Crown\textsuperscript{142} 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

26. The 2002 Justice Act sets out the composition of NIJAC as follows:

- a Chairman (the Lord Chief Justice of NI);
- five judicial members\textsuperscript{143} (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);

\textsuperscript{141} 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.

\textsuperscript{142} 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.

\textsuperscript{143} The judicial members are nominated by the Lord Chief Justice.
Northern Ireland Judicial Appointments Commission (NIJAC) – Written Evidence

- 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.\(^{144}\)

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.\(^{145}\). As at the 1 August 2011, there were 679 judicial office holders.

33. In addition, NIJAC has overseen 507 judicial appointment renewals.

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;

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\(^{144}\) NIJAC’s Lay Commissioners also sit on Panels in relation to Court of Appeal and Supreme Court Judge appointments.

\(^{145}\) Figures quoted are at 1 August 2011.
- 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).

**NI Judiciary – Breakdown by Gender as at 1 August 2011**

![NI Judiciary - Breakdown by Gender as at 1 August 2011](image)

**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.
NI Judiciary – Breakdown by Community Background

![NI Judiciary - Breakdown by Community Background](image)

**Age Profile**

38. It is also interesting to note that in NI, 54% of judicial post holders are aged 55 and under (see below).

**Age Profile of Judicial Post Holders as at August 2011**

![Age Profile of Judicial Post Holders as at 1 August 2011](image)

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).
Professional Background of Judicial Post Holders as at 1 August 2011

Ethnicity

40. Given the smaller jurisdiction ethnicity is not a particular issue for NI. Ethnic groups represent only 0.9%\(^\text{146}\) of the overall population (compared to England & Wales where ethnic groups represent 12.5% of the population\(^\text{147}\)).

41. Judicial equity monitoring data\(^\text{148}\) 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.

\(^{146}\) This figure includes Irish Traveller.

\(^{147}\) 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.

\(^{148}\) 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 projects149 have concluded that there are numerous factors impacting on low female representation at senior levels including:

- awareness/atraction;
- 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.

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149 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) will be established. The Committee will agree the shortlisting criteria, assessment methods to be used and interview questions.

47. Regardless of the route 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 any under-representation, the need of any policy/process refinement in the judicial appointments process and informs targeted outreach activity.

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150 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.

151 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.

152 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.
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’. 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,
- publication of a Guide to Judicial Careers 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

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153 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.

154 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.

155 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
the launch of the NIJAC website\textsuperscript{156} (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.

\textbf{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.

\textbf{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:

\textbf{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;
- 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.

\textbf{Judicial Medical Posts}\textsuperscript{157}

\textsuperscript{156} 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.

\textsuperscript{157} 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
• 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).

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).

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posts were advertised in May 2011 which resulted in 57 applicants – the best ever response to an advertisement for judicial medical officers.
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
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 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 welcomed the establishment of the judicial appointments commissions, perhaps seeing them as an opportunity for them to exert a significant influence on the appointment process. Given that they understandably believe that they know better than most the qualities required of a judge, it would not be surprising if they considered this to be in the public interest. In my view the judicial appointment process is one of the few areas where accountability can be enhanced without threatening judicial independence, and that since the judiciary and the senior judiciary in particular are clearly a branch of government – democracy requires that the appointment process and the definition of 'merit' involves a strong and vigorous input from non-lawyers. As Tom Legg, former Permanent Secretary in the Lord Chancellor’s Department, observed a decade ago with reference to the possible establishment of judicial appointment commissions: “It is hard to imagine such [commissions] without a contingent of senior judges. They would inevitably have a heavy, and often a predominating, influence. It is no reflection

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158 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).
on our judges to say that this would be undesirable. No branch of government should be effectively self-perpetuating”159

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.

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.

159 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.
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.160

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.

160 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’.
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. 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. 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.

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?

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

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161 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.

162 See Mary Clark’s helpful article ‘Introducing a Parliamentary confirmation process for new Supreme Court justices’ 2010 Public Law 464.

163 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.
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
Professor Alan Paterson, Professor Cheryl Thomas, Dr Erika Rackley and Professor Brice Dickson – Oral Evidence (QQ 1–39)

Transcript to be found under Professor Brice Dickson
Lord Phillips of Worth Matravers, and Lord Judge – Oral Evidence (QQ 162-192)

Transcript to be found under Lord Judge
Her Honour Judge Plumstead, Lord Kerr of Tonaghmore, Lord Justice Etherton, and District Judge Tim Jenkins – Oral Evidence (QQ 40-77)

Transcript to be found under Lord Justice Etherton
INTRODUCTION:

This brief memorandum is a response to some of the questions in the Ministry of Justice (MOJ) Consultation Paper, “Appointments and Diversity: A judiciary for the 21st Century”, and supports my oral evidence which I gave to the Committee on 30 November 2011.

Judicial independence is a core and non-negotiable feature of any proper democracy. How judges are selected is, therefore, a matter of constitutional significance. In a modern democracy it is about balancing independence, accountability and legitimacy, and ensuring that the process of selection is not captured by any vested interest.

The proposals in the MOJ’s consultation paper are intended to achieve the proper balance between executive, judicial, and independent responsibilities; improve clarity, transparency, and openness; create a more diverse judiciary; and deliver speed and quality of service to applicants, the courts and tribunals, and value for money to the taxpayer.

Please see below my response to the questions posed in the Consultation Paper:

ACHIEVING PROPER BALANCE BETWEEN EXECUTIVE, JUDICIAL, AND INDEPENDENT RESPONSIBILITIES:

Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court?

The Lord Chancellor is the Minister responsible for the justice system and for him to fully discharge that duty and properly account to Parliament for it, he should not transfer this role and power to the Lord Chief Justice.

Furthermore all judicial appointments are important as judges at all levels can have a direct and profound impact on the public and business. Retaining senior posts and transferring others to the Lord Chief Justice would send a wrong signal.

If senior appointments are transferred to the Lord Chief Justice then there should be no statutory requirement to consult the Lord Chief Justice and his nominee as currently required under the Constitutional Reform Act 2005 (CRA).

Question 2: Do you agree that the Judicial Appointments Commission (JAC) should have more involvement in the appointment of deputy High Court judges?

These appointments are of real significance to the administration of justice and they should be made in an open and transparent way, according to declared procedures and against clear criteria. In 2008 the JAC recommended the following: “The judiciary should be invited to propose, for each type of significant designation or nomination, a set of procedures which would satisfy the criteria of openness and accountability and that the JAC should be invited
Baroness Prashar, Inaugural Chairman of the Judicial Appointments Commission, 2005-2010 – Written Evidence

“...to approve the procedures. This would then leave the judiciary to make individual decisions against those criteria with the JAC having no concurring in individual decisions.”

This, I believe, is a workable proposal.

Question 3: Should the Lord Chancellor be consulted prior to the start of the process for the most senior judicial roles (Court of Appeal and above)?

Part of the selection process for Justices of the Supreme Court provides for the Lord Chancellor to be consulted (s27 (2) CRA). It is argued that appointments below the level of the Lord Chief Justice, and above the High Court, providing a requirement for the selection panel to consult the Lord Chancellor, would allow the panel to take account of the Lord Chancellor’s views.

What would be the purpose of the consultation with the Lord Chancellor?

If the purpose is to make the selection panel aware of the qualities and abilities he would like in the selected candidate that would be quite appropriate. It is indeed helpful, when drawing up a job description and person specification, if all relevant parties are consulted. However, it would not be appropriate if the Lord Chancellor named candidates or commented on possible candidates he would prefer.

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members?

Perceptions are important. This would help to increase confidence in the process and should be adopted. The best practice, however, is to arrive at decisions through rigorous discussion and deliberation. Casting vote should be the very last resort.

Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division on appointments in England and Wales?

Those in these roles work alongside the Lord Chief Justice and report to him, it is, therefore appropriate that Lord Chief Justice should chair selection panels for these posts.

Question 6: Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales?

The arguments advanced by the Advisory Panel on Judicial Diversity to support this proposal are strong and should be adopted.

Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto?

This would not be appropriate. The Lord Chancellor should retain his distance from the selection process. He should, however, be consulted at the outset of the selection process.
Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice?

A five member panel chaired by the Chair of the JAC would further enhance the perception of independence.

Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto?

The answer to the question 7 applies here as well.

Questions 10 and 11: What are your views on the proposed make-up of the selection panel for the appointment of the President of the Supreme Court?

Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court should be a lay member from the JAC (UK), the Judicial Appointments Board for Scotland or the Northern Ireland Judicial Appointments Commission?

The arguments advanced by the Advisory Panel on Judicial Diversity are appropriate and the proposals in the consultation documents should be adopted.

Question 12: Should the Lord Chancellor make recommendations to HM the Queen instead of the Prime Minister?

The arguments put forward by the consultation document are sound and should be adopted.

IMPROVING DIVERSITY

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this?

Introduction of salaried part-time working for senior judicial appointments would help to increase diversity as this would enable flexible working and it would also give greater flexibility to courts with regard to deployment.

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable?

This proposal raises the following questions:
How would this work in practice? In reality it is extremely rare when two candidates are indistinguishable.

Would it be counter-productive and acceptable to minorities?

Would it create a perception of positive discrimination?

In any event if this change is adopted it should not create an expectation of “overnight change”. Forensic look at the processes of the JAC is only part of the answer. It also detracts from other changes which are needed. The Advisory Panel on Judicial Diversity recognised that increasing judicial diversity at every level is a shared endeavour…is a long term goal and is dependent on factors outside the control of the JAC.

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

This proposal is worth taking forward as it would help to improve diversity and should be applied flexibly.

QUALITY, SPEED OF SERVICE AND VALUE FOR MONEY
Question 16 and Question 17:

How many Judicial Appointments Commissioners should there be?

Should the membership of the Commission be amended as proposed above?

This is being proposed in order to increase efficiency and save money. This would be a false economy. The JAC is a body of constitutional significance and not just a recruitment agency. The composition of the Commission is finely balanced between lay, professional and judicial members and each one brings a very useful perspective. As the Chair of the JAC I did not find the Commission too big or unwieldy and worked very efficiently.

If the MOJ is minded to reduce the size of the JAC it could be reduced by two, that is, by having only one Court of Appeal judge instead of two and not appointing a magistrate member as the JAC does not get involved in the appointment of magistrates.

Paragraph 97 states that a smaller Commission would facilitate clearer and more responsive decision making.............a smaller Commission would provide more opportunities for Commissioners to work repeatedly within the same jurisdiction, creating stronger and more appreciative working relationship between the JAC and the HMCTS.

There is another side to this argument. Too close working can lead to cosy relationships and loss of objectivity and independence. Responsiveness can mean meeting the immediate business needs of the system at the expense of diversity.
Baroness Prashar, Inaugural Chairman of the Judicial Appointments Commission, 2005-2010 – Written Evidence

Paragraph 99 argues that if the size is reduced then it is desirable to loosen the rigid criteria which currently prescribe who can be Commissioner. There is a proposal to abolish the numerical and other requirements in Schedule 12, paragraph 2(2) to the CRA.

This would give too much discretion to the executive and reduce the impact of the JAC. If we want to guard the independence of the judiciary then we have to guard the independence of the body that selects judges. Please see the booklet, “JUDICIAL APPOINTMENTS: BALANCING INDEPENDENCE, ACCOUNTABILITY, AND LEGITIMACY”, published in 2010, pages 47/48. The number of Commissioners and the process by which they are appointed should be prescribed in legislation and not left to the discretion of the executive. It is crucial that in the name of efficiency the JAC is not weakened.

23 January 2012
Baroness Prashar – Oral Evidence (QQ 305–337)

Evidence Session No. 10.  Heard in Public.  Questions 281 - 337

WEDNESDAY 30 NOVEMBER 2011

Members present
Baroness Jay of Paddington (The Chairman)
Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Shaw of Northstead

Examination of Witnesses

Baroness Prashar, former Chairman, Judicial Appointments Commission

Q305  The Chairman: Baroness Prashar, good morning, and I am sorry we have slightly overrun. Apologies; I hope you have not got a problem with our slightly delayed timing. Welcome; thank you very much for coming. You were kind enough to sit in on the previous session, so you saw some of the points that were of immediate concern to the Committee. I know that you particularly obviously want to refer in what you have to say to the consultation document that we were discussing with the previous two witnesses, but obviously also to reflect on your time as the chair of the JAC. I wonder if we could just start with the broad general question about whether you feel—as in a sense has been indicated as a possibility by the consultation document—that the remit of the JAC should be extended, and that a greater degree of flexibility should be introduced into it, so that some of the administrative problems that I know you have spoken about before are eased in the future.

Baroness Prashar: Indeed. Can I first of all say how much I welcome this particular inquiry, because the JAC has been operational for about six years, and I think the time is right to look at how the system has been operating, and whether some adjustments are needed. I was thinking about sending in a written submission; I decided against that because I knew that you have seen this booklet, which we produced before I left the JAC in October 2010. I also saw the submission by the JAC in response to your call. I thought it would be duplicating, so I decided not to do that.
In terms of what I think the JAC has achieved and where we needed changes, and in terms of making the system more transparent, I think the JAC achieve that objective, because now people know how appointments are made and I think that if you are looking at ones below High Court, the system is very open. But I know there are concerns about what happens above High Court. I think there are some proposals in the Ministry of Justice consultation paper that I would like to discuss with you. I would be happy to answer questions in response to that. Having said that, it is important that, in setting up the JAC, the Constitutional Reform Act was trying to balance independence, accountability and legitimacy. Did we get the balance right? In my view I think the balance is right, but of course some adjustments need to be made.

Then there is the question of widening the pool. The JAC succeeded in widening the pool, because if you look at the number of applications we get there certainly has been great improvement in the number and proportion of women and minorities applying, even when you are looking at ILEX and so on. In terms of outcomes, at lower levels we have seen an increasing proportion of women being appointed and minorities, but not such progress on the question of solicitors. There are concerns at senior level.

But having said that, I think it is important—and I do want to say this at the outset—that the JAC, from my point of view, is a body of constitutional significance. In trying to increase efficiency, one must not turn it into a recruitment agency. It is very important to keep that in mind. That is where I will say a few things about what I think the role of the Chairman and the commissioners and how they are appointed is. I will leave it at that, and I think—

Q306  The Chairman: Please do develop that last point if you want. It is very relevant.

Baroness Prashar: It is important, because when we are looking at the question of balance, and if JAC is an important part of that, how the Chairman and commissioners are appointed is extremely important. If you are looking at the appointments when I was appointed and the commissioners were appointed, I described the system in this book. An agreement was made between the then chairman of the selection panel, Sir Nigel Wicks, who was then the Chairman of the Committee on Standards in Public Life, and Lord Falconer that the same process should be used—ie, one person should be recommended for the post and not to use the system adopted for public appointments where the minister gets a choice. That is quite important, because the independence and the perceived independence of the JAC is very important. If you want to guard the independence of the judiciary, the JAC has to be seen to be an independent body as well. The same applied to the appointment of commissioners.

The proposal made by the Ministry of Justice consultation document is they want to reduce the number of commissioners—because they think this will either save costs or speed things up; I do not agree with that. They are not likely to save a lot of money, and I am not sure that it will speed up matters in any way. I also think there should not be flexibility. At the moment it is prescribed who the commissioners should be. That is very important, because to give the discretion to the Lord Chief Justice and the Lord Chancellor to pick and choose and supplement the Commission as they wish would be the wrong thing. In a way it is something that should be set in statute. If they do want to reduce the number of commissioners, they can do away with the magistrate element, because when the JAC was set up the view was—
Q307 Lord Renton of Mount Harry: Could you remind us how many there are at the moment?

Baroness Prashar: Fifteen, including the Chairman. There was a view that the Commission would take over the selection of magistrates, and that was then dropped. We no longer need a magistrate member of the Commission. The other thing is we currently have two Court of Appeal judges. I do not think we need two; we can do one. We can reduce the number from 15 to 13, but I would not be in favour, in terms of the reduction or giving the flexibility to the Lord Chief Justice and the Lord Chancellor in terms of supplementing the Commission as they wish. It should remain prescribed in the legislation. How the Commissioners are appointed and how the JAC operates must remain part of the legislation. Otherwise you will get allegations about who selects or appoints the Commissioners. Independence of the JAC must be guarded.

The Chairman: Lord Pannick, you were asking previously about the role of the Lord Chancellor, which you obviously heard, Baroness Prashar, we were discussing that at some length with three previous witnesses; did you want to pursue that?

Q308 Lord Pannick: I would like just to hear Baroness Prashar’s view on the continuing role of the Lord Chancellor in the light of your experience.

Baroness Prashar: The current role of the Lord Chancellor in the process is appropriate, in so far as no list is given: he is given a single name. If he does not like the name he can send reasons and there can be some dialogue. I think that is appropriate. In terms of the senior appointments, I would not be in favour of the Lord Chancellor being on any of the selection panel. That would be a step too far. I think he should maintain his distance. What we can do, particularly with senior appointments, is have an open consultation; this can be done by the JAC chair. When a vacancy comes up and a job description has been drawn up we can seek the views of the Lord Chancellor—not the people, but the sort of person he or she would like, and what the qualities and what the needs of that job are. That would be, in my view, an appropriate involvement.

Also, the suggestion that appointments below High Court should now be made by the Lord Chief Justice and should not go for recommendation to the Lord Chancellor, I suppose, is being made to speed up the process. We are too fixated on the importance of the senior appointments. They are very important, but I do not think that the appointments to the Circuit Bench, to the District Bench, or tribunals, are of any less importance because they really matter to the citizens. I was very keen that one should not be dividing the tribunals and the courts; we should see the judiciary as a whole. Therefore, anything that sends a message that the lower tiers are of any less importance would be negative, in my view. If they think it is going to save them a couple of weeks—the Lord Chief Justice, given that he is now head of judiciary—I do not feel strongly about that, but I think we ought to bear in mind that we ought not to do things that in any way send a signal that lower-tier appointments are not as important.

Q309 Lord Pannick: In relation to the High Court and above, would anything be lost, and might not there be gains, in saying that the Lord Chancellor can send in his or her views
on particular candidates, but the Lord Chancellor should not have what is surely at the moment a cumbersome system of asking the JAC to think again? Let the Lord Chancellor be a consultee on particular appointments if he wishes.

**Baroness Prashar:** As I said, I think he can be consulted at the early stage, because I believe that when you are starting a selection process it is very important to talk to all the individuals who might be involved in working with them—the judiciary, the Lord Chancellor—to see what sort of person they would like in that post. I think that is important. I also think that in the selection panels and the way the selections are made, know the full picture because they know who the candidates are. If you are widening the pool you are getting candidates who the Lord Chancellor may not even know, if you are widening the pool to solicitors, and so on. I am not so sure that I would like comments on candidates, but I would like consultation. At the end of the process, in my time there was only one particular post where there was a challenge from the Lord Chancellor. If you leave the publicity aside, it is quite a rigorous process, because the Lord Chancellor has to give reasons. If the panel have done their work properly, they have looked at the merits of the candidates, they have given reasons why certain people should be recommended, and it is a very mature dialogue. I think it focuses the mind. Therefore I think it really works well. The only thing that distorts it is all the speculation in the press. But if you look at the system and the way it works, it is very robust, it encourages a very good dialogue and discussion on the merits of the candidates, and it does pull out what the real concerns are.

**Q310 Lord Powell of Bayswater:** Moving back to Baroness Prashar’s opening remarks: obviously the JAC has improved the transparency of the appointment process and it has obviously had success in getting more diverse applicants, certainly at the lower levels. Is there any evidence either way as to whether it has improved or changed the quality of the judiciary?

**Baroness Prashar:** As you are well aware, the JAC was not really set up to improve the quality, because, as we heard earlier, the quality of the judiciary is internationally renowned. It was very much to widen the pool from where judges are drawn. It has succeeded in doing that. The only thing that I used to hear was feedback from the Lord Chief Justice on the quality of the appointments, the selections that we were making. I am quite keen that we should now begin to have some form of assessment—or you can call them appraisals—of how these people are performing. This is something I did suggest before I left, and there are some moves within the judiciary to look at appraisals. Having said that, it is really important if you are widening the pool and you are appointing people that there is also support given to those who are new to the judiciary and there is training. There needs to be a partnership between the Judicial Studies Board, the JAC and the judiciary to begin to look at what sort of appointments are being made. I also think we need to look at how the profile of the judiciary is changing, not just in terms of diversity, but in terms of age. The time is right to take some steps to make some assessment.

**Q311 Lord Powell of Bayswater:** I have two comments on that. One is that one could argue that widening the pool could perhaps lower the average quality. But that is really a theoretical thing. On the assessment point, which I think is very important and what I
Baroness Prashar – Oral Evidence (QQ 305–337)

wanted to hear you say, how do you think that assessment can best be conducted in a way that is meaningful, rather than just a bureaucratic formality?

**Baroness Prashar:** Can I first deal with your point? I do not think that diversity—widening the pool—leads to lowering of standards because I do not think that diversity and merit are incompatible. I in fact believe that if you widen the pool you are probably getting high-quality judges because of the assessments that we make. How can we do the assessment? I think that the judiciary itself should be looking at the way they appraise judges, and there are different ways of looking at it: it could be the quality of their judgments, or how they are performing—their efficiency—and different people can be involved. I know there are proposals there, but these are probably being shelved on the grounds of cost. Appraisals are done in all institutions, and I do not think it is something that cannot be done by the judiciary.

**Q312 Lord Powell of Bayswater:** That is my point: the Civil Service, the military, they all have established things. Yes, it is a bit absurd that the judiciary does not.

**Baroness Prashar:** Yes, but I think it was on the grounds of cost.

**Q313 Lord Powell of Bayswater:** That is a rather bad argument, is it not, really?

**Baroness Prashar:** I am not justifying it. I am very much of this view to urge them to do that.

**Q314 Lord Hart of Chilton:** As you sought to increase diversity and widen the pool from which you could choose, what were the main difficulties that you came across?

**Baroness Prashar:** There were different difficulties for different groups. Let me start with solicitors. It was very difficult to get solicitors to apply, because if they applied they were seen by their firms to be disloyal. They also felt that if they applied, for example, to be recorders—part-timers—how would they make time for their sittings? That remained a problem, and still remains a problem: changing attitudes. We worked very closely with the Law Society; the solicitor member of the Commission and I had discussions with large firms, with the managing directors of these companies. I even encouraged the Lord Chief Justice to put out an invitation to solicitors to apply. We had a whole range of discussions to encourage solicitor applications.

As far as women were concerned, there were perceptions and mythology around whether they would get a fair deal, and there were of course concerns at High Court level about working patterns, particularly about being on the circuit and being away from home.

For minorities—this is anecdotal—I used to speak to the circuits and I would say particularly to black and ethnic-minority barristers, “Would you apply? We are about to run a High Court selection exercise”. They would say, “Not yet, because we are young, we have children to put through school and we have mortgages”, and of course it would be at a later
stage. There are demographic factors. But having said that, I think all the outreach work did help dispel these myths, and that is why we did see an increase in applications.

**Q315 Lord Hart of Chilton:** What further steps do you think can be taken, because some of those obstacles that you have referred to and we have heard from other witnesses are pretty insoluble in a way, because if you take the example of solicitors, if you have the senior partners of firms not willing to allow time for people to take up positions of, say, recorder, let alone see there being the possibility of another career within the profession, seeing them as assets of the firm that they do not want to lose, what does one do?

**Baroness Prashar:** In my view this is a slow process; as you begin to get some increase, some discussion, views will thaw, but one has to change the attitude of the solicitors’ law firms. They have to begin to see that if someone from their firm becomes a judge it is a kudos for the firm, and they have to look at ways of working to enable that. These are some of the attitudinal and structural issues.

I always did feel that it was very easy, when you are looking at diversity, to take a very forensic look at the appointments process: you tweak it here, tweak it there, and change the proportions of panels and so on. That detracts from some of these broader structural issues which need to be looked at. We heard earlier about flexible working; this is something I recommended to the then Lord Chancellor in 2008. How deputy judges were appointed was a running sore. When I first became Chairman this was something that was raised with me by a lot of women, saying, “We do not quite know how Deputy Judges are appointed”. We did get the senior judiciary to look at it and encourage them to invite expressions of interest. The recommendation here is that the involvement of the JAC would be a good thing. It need not be too difficult. I also take the view that now the Lord Chief Justice is the head of judiciary it is like running an organisation: he should take the responsibility on how deployment is done. I am of the view that, like the JAC has a diversity duty under section 64, that duty should be extended in legislation, both to the Lord Chancellor and the Lord Chief Justice, because they too should be conscious—in the way they manage the judiciary, the way judges are deployed—of how they are bringing people up the system to give them the experience so they are able to apply for senior posts.

**Q316 The Chairman:** One way we have heard of shortening the process—the cultural change you have described—is of course not necessarily adopting quotas, which seems to be anathema, but targets. Is there any role for the JAC in that?

**Baroness Prashar:** No. I have always been opposed to targets, because that is a very superficial way. To meet targets would not be compatible with merit. Targets are not the way. I am quite keen on a sustained cultural change in working practices, and of course people being a bit more imaginative. I do think there is something that needs to happen, particularly within the judiciary about working patterns.

I do come back to the fact that there was always tension. When we recommended certain changes to widen the pool, the opposition or the objection that came from the Ministry of Justice and the judiciary was, “This is a business need; we want this done quickly”. I will give you an example: we were quite keen that for fee-paid the experience should be made
desirable but not essential. If you have experience of mediation, or you have done other work, these skills are transferable. There was reluctance to make that desirable. These non-statutory eligibility criteria meant that we could not have the desired impact on diversity. To overcome this I think that, both to the Lord Chancellor and the Lord Chief Justice, should be given the responsibility to widen the pool in the way it is imposed on the JAC.

Q317 Lord Shaw of Northstead: Baroness, in my reading I understand that you are very much against being regarded as a recruitment agency, but listening to some of your answers I wondered perhaps if your view did not come clearly through that you were not in fact recruiting when you went and saw these solicitors and other bodies and so on. I wonder if you could clarify the situation.

Baroness Prashar: The distinction I would make is that we were not recruiting; we were trying to convey to the constituencies from where we wanted to encourage more applicants that there is a new system for appointments. Before there was a view that you could only become a judge if you were a barrister; solicitors did not feel they were treated fairly if they applied. It was a question of explaining to them how the system works, that the system is open to them and that if they were to apply they would be treated fairly. In other words, that is making the system known to the constituencies. It was not like a Milkround would inviting people to apply. That is not what we are doing. We are making them aware that the system has changed and that now they can apply.

Lord Shaw of Northstead: To follow that through, making it quite clear, there is no occasion where you go after specific people to try to recruit them.

Baroness Prashar: No, that would be inappropriate for a selecting body, to go and tap people. What I did do, as and when we launched a selection exercise for the High Court, was to write to Heads of Division, the Lord Chief Justice, and all the minority and women’s organisations, and say, “This exercise is going to be launched on a particular date. Can you please bring it to the attention of those you think appropriate?” There is a distinction.

Q318 Lord Crickhowell: I want to go back to the appraisal point, which we left rather quickly. I think my memory is right that we heard that appraisal does take place within the judiciary, in that heads of division examine a particular judge, particularly if there are shortcomings. They will take them away and say, “Look, you seem to be taking a very long time over decisions”, or whatever the shortcomings are from the report. There is a sort of internal system of appraisal. I am slightly puzzled and concerned about the idea that you have some much more detailed form of appraisal that then gets sent back to the judicial appointments system on the way in which everyone has performed that you have appointed. I am not at all clear about how you think that would work, and whether it would be desirable. I may have got what you are proposing wrong.

Baroness Prashar: Appraisals are really about giving people feedback: how they are performing and how they could improve their performance. I am not suggesting that
Baroness Prashar – Oral Evidence (QQ 305–337)

appraisals should be sent to the JAC as part of the assessment, but appraisals can be used by referees to write references. I am not in favour of sending appraisal reports to the JAC, because their purpose is to make an assessment of performance and give people feedback, whereas a reference is really about whether that person will be able to do the job they are applying for. They can of course refer to the appraisal report in the reference, but not send the appraisal report to the JAC. Is that clear?

Q319 Lord Crickhowell: I am comforted by that answer, because I thought you had implied that you were going to look at the way you were dealing with or how well you were making the appointments by then looking at the appraisals and then seeing who had done the job right. I understand now that is not what you are telling me about, and you are describing the kind of appraisal that we have heard about in earlier evidence.

Baroness Prashar: Indeed.

Q320 The Chairman: But one of the things we have heard—which certainly surprised me as someone not involved in the legal profession—was that those appraisals were, as it were, not attached to further development of a judicial career. I think that is one of the things that we have pursued; Lord Norton may want to deal with this, about the prospects of having a specific career in the judiciary.

Q321 Lord Norton of Louth: I was slightly concerned about what you said about the extent to which an appraisal might feed into the assessment, because you were saying that someone who has done the appraisal may then build on that in providing a reference.

Baroness Prashar: No, what I meant is that the appraisal is there, and obviously if whoever is writing a reference can refer to it for reference of performance. It is one piece of information; I am not saying it should be the sole piece of information.

Q322 Lord Norton of Louth: But still keep the appraisal separate for self-development purposes.

Baroness Prashar: Absolutely, yes.

Q323 Lord Norton of Louth: On the career development side—I take it you are against a career judiciary—is there more that could be done to facilitate, and anything that could be done through the route of the JAC that could facilitate it, other than, as you say, going out and explaining what is available?

Baroness Prashar: I do not think it is something that can be done through the JAC. At the moment what happens is the solicitors become district judges and that seems to be the ceiling. There is very little movement between that to the Circuit Bench, or Circuit Bench to
High Court. I would like to see much more movement on that, and that is why I am keen that the Lord Chief Justice and his other judges should look at deployment to make sure that people who are stars can be deployed in to give them the right kind of experience, so they can compete on an equal basis when they apply. Because the JAC assesses people on merit—that is the way we can contribute; the JAC does not have a prejudice that a district judge cannot become a circuit judge and a circuit judge cannot become a High Court judge. This relates much more to deployment and the experience they are given once they become a judicial office-holder.

Q324 Lord Norton of Louth: Slightly separately, do you have a view on the point—you heard the previous session—about part-time appointments, and the feeling there was of yes, up to a certain level, but not beyond it. The consultation is looking at whether one can do that at a higher level and use part-time working. Do you have a view on that?

Baroness Prashar: As I said, I recommended flexible part-time working way back in 2008.

Q325 The Chairman: Right the way through?

Baroness Prashar: No, we were looking really at fee-paid and so on. I have seen the consultation paper which also talks about High Court. I see the arguments about the practicality of it, but I think one cannot react to it without having experimented, and having looked at and made some assessment about whether this can be accommodated. I would not mind some kind of experimentation and piloting of that, because I do not think it should be something that should be dismissed out of hand on the grounds that it is not practical. Yes, I think anything that encourages different patterns of working and flexible working, and some men may even benefit from that, should be considered quite seriously.

Q326 Lord Renton of Mount Harry: Perhaps I might ask a rather unpopular question that I asked both Lord Woolf and Lord Carswell about—whether there is any role in this for Parliament. I understand that we are likely to have changes in the Constitutional Reform Act, which will therefore obviously have to come to Parliament, but do you think there is any possibility, and would you see anything good, in a parliamentary committee questioning candidates for senior judicial posts, perhaps before the Lord Chancellor confirms their appointments, thus in a sense bringing Parliament rather more, in a sense, into the outcome?

Baroness Prashar: No, I am not in favour of parliamentary hearings, but I know that the push for that has come in order to increase accountability. I think there are different ways in which you can build accountability. That is why I commenting earlier on how the JAC commissioners are selected. The Chairman currently has a confirmatory hearing before the Justice Committee of the House of Commons. That is one form of accountability. The JAC produces an annual report. When I was Chairman I appeared before the House of Commons Select Committee four times. The Lord Chief Justice appears before this Committee. It seems to me that there are different ways in which you can build in that accountability, whereas I think to put selected candidates before parliamentary scrutiny—well, we know what happens in America—it will be a toxic mixture; I do not think it would
be appropriate, because you need to look at what you are trying to fix. There are different ways in which you can build in accountability.

Q327 **Lord Renton of Mount Harry:** I do not think that the United States example is a fair one. It is very different, what Senators do and so forth. I only say, because one has a feeling—being a member of this Committee brings it on—that there are an awful lot of MPs that really know very little about what is going on in the judiciary, how it works and so forth, and I wonder whether there is a way perhaps for you all to make MPs know more, so that when something like the Constitutional Reform Act comes along, for example, or the question of employment of more women et cetera, some MPs are rather more conversant than they are at present.

**Baroness Prashar:** That can be done through select committees because, as I said, apart from appearing before the Select Committee itself I was proactive and wrote to the Chair of the House of Commons Select Committee to say I would be very happy to come and explain to them what we are doing; and of course there is the annual report. There are ways in which they can become more conversant with the selection processes. I am not sure that having a hearing would in any way improve their understanding of how the process operates.

Q328 **Lord Renton of Mount Harry:** You do not feel at the moment there is any sort of serious gap?

**Baroness Prashar:** As far as accountability is concerned, I think not, because the JAC is accountable to Parliament of course through the Lord Chancellor, and JAC funded by the MoJ. The Lord Chancellor is the one who makes the appointments, so I feel the balance in terms of accountability is right.

Q329 **Lord Pannick:** Can I just ask about accountability through the lay membership of the JAC? We heard evidence earlier this morning that cast doubt on the utility of the role of the lay members. I was very interested in your perspective on that.

**Baroness Prashar:** Indeed. I did not agree with what was said this morning about lay members, because if you look at the composition of the commission, I always said that the word “lay” is a misnomer. The members of the Commission who were not judicial office-holders were of extremely high calibre and brought different qualities. If you want to widen the pool then you want people with a broader perspective. It is those different perspectives that make the Commission a very interesting body. That is why I am against changing the numbers, because for me the best part of the job was having a Commission of that calibre and the discussion that took place. You do not just have a lay member on the panel to increase transparency and to satisfy public perception: they all bring something. The selection panel is assessing a different quality of applicants: that is judicial ability and the way they act—the communication skills, and efficiency. The way panels operated in terms of assessing candidates at a senior level was to look at the different skills required so they would bring something to the discussion and how the assessments are made. Once you were on the Commission, there was very little distinction between the judicial and the lay
members. I know there is a perception out there lay members would be full of deference to judicial members: not at all. The Commission was a very robust body, and it worked extremely well. Lay members add real value, and what I valued most was their independence of mind. I did not agree with what was said this morning.

Q330 Lord Goldsmith: I will stop for a moment if I may to follow a little bit further a point raised by Lord Renton about the role of Parliament, because I would very much like to know your answer to this question, the answer to the question that some members of the public and some commentators are raising, and I expect will increasingly be raised: how do judges come to be appointed these days to make the decisions that involve policy and value judgments in a way that they did not before, when we have no idea what their views are before they were appointed? To what extent is what the JAC is doing an answer to that question? To what extent is the process the JAC goes through an answer to that question?

Baroness Prashar: I come back to the point that the way you deal with that is by talking to a range of people about what qualities and skills are required. If I may I will share something with you here. I recall that there was a debate, when it came to the Supreme Court: do you need generalists or specialists? There are different views about this. This was never resolved; this was dependent on the person who was leading to say what sort of person they were looking for. As a lay member of the panel it is a question I would ask. You have 12 members: do you want a public law expert, a human rights expert? I think then initial discussions are important.

That is something that should be thrashed out at the outset, because in my view it is very important to be clear what you are looking for and what the qualities are. If that is clear then the rest of the process follows. That is what I think: we can make too many concessions to ill informed criticism outside and we can pander to perception. I think we should not, but on the other hand there has to be a balance. That is where I feel that the non-judicial office-holder members of the JAC, increasing the number of lay members on the panels, would make a difference, because you can ask those questions. You can ask straightforward questions, because if there are only judges they know them, and they would already have preconceived views about them. Other members do not know them, and can ask the questions. That is the value of a diverse panel.

In other words, you build that into the actual process. I am not opposed to increasing the number on the selection panel, or to tweaking them in order to deal with public perception. But I am more concerned about the quality of the people on those panels and how the process itself works and how rigorous it is. That is what is important, and that leads me to say that the people you need on these panels need to be people who are very robust, with independence of mind, who are mindful of what is happening outside and can bring that to the selection process.

Q331 Lord Crickhowell: I am relieved to hear what you said about lay members: I thought we had gone on long enough, and I did not challenge Lord Woolf on it, but I did disagree with him. I think it is important for the reasons that have just been given in your answer to Lord Goldsmith, but also, looking back on one’s own experience, for example, I was president of a university and we were selecting academics. I did not have any particular knowledge about their academic expertise, but I did feel that I and the other lay members of the selection committee were able to make some useful contribution and judgments to the
thing. I do not agree with the view that you have to be a lawyer in order to make judgments, and I think it is crucially important, if we are to deal with the very real problem Lord Goldsmith has raised about public perception, that there are seen to be lay people involved in the process at every level, so it does not seem to be simply a self-perpetuating body of lawyers with no outside involvement. I am comforted by your answer on that particular question.

Q332 The Chairman: May I just come back—obviously we are, even with being rather late to start with you, Baroness Prashar, beginning to run out of time and I apologise for that—to the point raised in the document from the Ministry of Justice about the Advisory Panel on Judicial Diversity. We had fairly firm evidence from the chair of that, Baroness Neuberger, that she felt the application of that advisory panel's reports had been totally inadequate. It says in the document from the MoJ now that, “A number of our proposals give effect to those recommendations”. How do you see those two points of view or lack of activity on one side and now apparently government intention to activate this on the other?

Baroness Prashar: I do think there has been a lack of activity. I feel quite strongly about this, because matters that are within the remit of the Ministry of Justice and the judiciary were never pursued as actively as they should have been. As I said, I made some recommendations to the then Lord Chancellor in 2008, to which I never received a reply. Then of course they set up the panel. It was very easy to take a forensic look at the JAC, it is a convenient fig leaf and many recommendations focus on tweaking this or that of the selection process. But it was the broader issues that needed looking at, and they are difficult ones. It is partly to do with attitudes, partly to do with culture, and structured changes are needed to make a real difference. Even if you look at the proposals in the Ministry of Justice consultation document they are very much about changing the composition of the panels—these should be an ethnic mix: they are all focused on the selection process. The ones that are focused on structured change are about flexible and part-time working. Other than that, there is not very much in terms of how they need to change. That is why I am very keen that the responsibility of the JAC should also be imposed on the Lord Chancellor and the Lord Chief Justice, and that there should now be a much more active approach to looking at some of these structural issues and some experimentation. I am, with Baroness Neuberger, aware that they have not been as active. I do think that the proposals are only focused at the JAC and the selection process, and not at some of the broader issues that she raised in her report.

Q333 Lord Powell of Bayswater: On that broad subject, you expressed yourself strongly against targets, yet earlier in the discussion we had with the former Lord Chief Justice it was said that merit should embrace diversity. That seems to me to rather lower the barriers against targets, because if diversity is a part of merit, and merit is the main principle of appointment, and diversity is admitted universally to be lacking in the senior judiciary, then why is it so wrong to set targets that try to work towards correcting that part of merit, so merit is fully established in the appointments at the higher level?

Baroness Prashar: There are other ways in which you achieve that without setting targets. I would make a distinction here. If you are looking at senior appointments—and I think the example that was given by Lord Carswell was an important one, where you have
members of the Supreme Court and you do not have a women or a minority person as part of that, and you think there is a need for that. When you are drawing up what you need, you can put that as a job description within which you then make the assessment, without having to set a target. I found that at senior level one may have to look at that, but this is where I come back to how you define the job, what you are looking for, and whether you think you would benefit from having people with different points of views and a diverse Supreme Court. If that is the case it should be openly stated. When it comes to lower levels, even High Court, where the numbers are large, it is not so easy. Let us say we have a selection exercise for the circuit Bench: we would get a vacancy request that would say, “Can you select 28 circuit judges?” We would run the selection exercise, and we would interview about three times or twice as many applicants. Obviously when selecting those, there were those who were really without a doubt good and would be selected, and then others who were not. There would be these in the middle. We were not looking at diversity then: we would then look at these in the middle against the criteria. There are ways in which you achieve change that without having to set targets. It is much more above the sophistication of the selection process, and I do put a lot of importance on the way we operate, without having to have targets or positive discrimination. I have not spoken to a woman or a black person who would want positive, because they would not want to be seen to be appointed because they are a woman. They all want to be appointed on merit. I am not sure it will do any favours to either the system or the communities themselves. We have to really look at this, because I do not think the merit is lacking out there. It is the barriers in the system that need to be dismantled to deal with this issue.

Q334 Lord Powell of Bayswater: If diversity is part of merit, I am not sure that the argument wholly applies. We had evidence last week or the week before from a group of women and ethnic minorities who were quite keen on targets. I have to say, the other methods you have described have been extraordinarily slow in producing results.

Baroness Prashar: It has been slow in producing results because we have not taken action in time on some of these structural issues I am talking about. This is not the only area I have been involved in on the question of diversity: since 1995 I have been involved in diversity issues in the Civil Service, since 1984 in the voluntary sector and so on. It is always my frustration that we never take the relevant action at the right time, and when there is an uproar we go for short-termism and there is a cry for targets, positive discrimination and so on; that is the frustration. I do think that the time has now come to achieve change at the senior level. We should be making an absolute effort to make sure that we change the complexion of the High Court. Unless that happens you will not have a feeder system for the Court of Appeal and the Supreme Court. Some of the recommendations in the Neuberger report are very relevant; it has been on the shelf for almost two and a half years. As I said, some of the recommendations in the report are things I highlighted in 2008.

Q335 The Chairman: It does not sound, from what you said, that you are particularly optimistic about the present consultation process leading to those kinds of structural changes that you want.

Baroness Prashar: No, I am not.
Q336 Lord Goldsmith: Just another aspect of diversity, which is the position of the appointment of—you have talked about solicitors, women and ethnic minorities—government lawyers: did the Commission make any progress in relation to that?

Baroness Prashar: No; you will recall, you came to talk to us in your capacity as Attorney-General, and in fact in this very letter that I keep referring to in 2008, we made strong representation for changes for the Government Legal Service and employed lawyers, but I do not think there has been any movement on that.

Q337 The Chairman: You have been enormously helpful, Baroness Prashar, and frankly it would be very helpful if in the continuing watching brief, which I am sure you will conduct, on the consultation process from the MoJ, you wanted to make further comments to us, because our report will not be finalised until the new year. We would be very happy to receive any additional written comments you wanted to make.

Baroness Prashar: I would probably do that, because I think there is a great deal I wanted to go through, but the time is not there. I may just put that in writing.

The Chairman: That would be very helpful. Thank you very much, and thank you for your time. Again, apologies for the delay.
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. 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 Supreme Court. This compares poorly, in terms of diversity, with a number of comparator institutions.

<table>
<thead>
<tr>
<th>Country</th>
<th>Court</th>
<th>Number of Women Judges</th>
<th>Total number in post</th>
<th>Representation of women as a %</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Criminal Court</td>
<td>11</td>
<td>18</td>
<td>61.1%</td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>Supreme Court</td>
<td>4</td>
<td>9</td>
<td>44.4%</td>
</tr>
<tr>
<td>Australia</td>
<td>High Court</td>
<td>3</td>
<td>7</td>
<td>42.9%</td>
</tr>
<tr>
<td>European Court of Human Rights</td>
<td>19</td>
<td>47</td>
<td>40.4%</td>
<td></td>
</tr>
</tbody>
</table>

164 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.
3. There has been no woman judge in a senior administrative role (as a Head of Division) since Baroness Butler-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.  

<table>
<thead>
<tr>
<th>Court of Appeal</th>
<th>Number of Women Judges</th>
<th>Total number of Judges</th>
<th>Representation of women as a %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 October 2000</td>
<td>3</td>
<td>40</td>
<td>7.5%</td>
</tr>
<tr>
<td>14 February 2011</td>
<td>4</td>
<td>43</td>
<td>9.3%</td>
</tr>
<tr>
<td>7 June 2011</td>
<td>3</td>
<td>43</td>
<td>7.0%</td>
</tr>
</tbody>
</table>

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 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

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166 Excluding Jonathan Sumption QC who is yet to be sworn in as a Supreme Court Justice.
167 Table taken from EJI website.
diversity of the judiciary as a whole may ‘tip the balance’ in their favour.\textsuperscript{168} 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.\textsuperscript{169}

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.

\textit{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 \textit{additional} factor in the appointments process, which only bites when it is necessary to break a deadlock between two or more suitably qualified candidates, \textit{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.

10. Baroness Hale has made a similar point in the course of making what she terms ‘a positive case for judicial diversity’:

\begin{quote}
‘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’.\textsuperscript{170}
\end{quote}

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’.\textsuperscript{171}

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,

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\textsuperscript{168} 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’.

\textsuperscript{169} Recommendation 21


it is impossible to exclude ‘a general outlook, or personal philosophy, based on an individual judge’s life experience’\(^{172}\) 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.\(^{173}\) 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 law, to the problem under discussion and to ideas of what makes a just result.’\(^{174}\)

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.

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\(^{172}\) Etherton above at 740-741. See also Hale, above and J Raz Practical Reason and Norms (OUP, 1999)(first edn, 1975) p 139-140.


\(^{174}\) Hale, above at 320.
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.

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 measurable 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 ethnic mix.¹⁷⁵

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.

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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 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.
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 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.

\[176\] Erstwhile High Court and Court of Appeal Judge. Since 2004 judge at the Court of Justice of the European Union.
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 – Written Evidence

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
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.

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?

Is the current system of making appointments based on merit?

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.

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.

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.

Do we have a sufficiently diverse judiciary?

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 so. 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.
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)  

1. The question I wish to address is: Is the present judicial appointment system sufficiently based on the merit principle?

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 PhD 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, 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 PhD and lengthy judicial experience cannot progress further than the Upper Tribunal. That is an untenable anomaly.

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177 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.

178 Previously Vice President of the Immigration and Asylum Tribunal and then Vice President of the Asylum and Immigration Tribunal.
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 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
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[^179] 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 \(^{180}\) that they are actively promoting diversity on the bench. As Lord Bach reminded their Lordships \(^{181}\) 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 \(^{182}\). Similarly, whilst 8 per cent of the UK population is BAME, less than 4 per cent of the judiciary is from this background \(^{183}\). 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 \(^{184}\).

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 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

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\(^{180}\) 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’;


\(^{182}\) 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”.

\(^{183}\) 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.

\(^{184}\) Dobbs J, Diversity in the judiciary – Lecture, Queen Mary, University of London, 17 October 20007.
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 there 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
1. The independence of the judiciary is a crucial prior-condition for any properly functioning democracy. All criminal cases are prosecuted in the name of the state. These days a significant proportion of civil litigation involves the state as a party – usually as a respondent to actions for judicial review of executive actions/ inactions; or in which the state indirectly has an interest in the result.

2. There therefore can be no argument that at the point of decision in an instant case, the judge must be able to come to a view on the facts and law without anxiety as to how such a decision may be received by those in political control of the state. That in turn means that the environment in which the judiciary operates has broadly to be immunised against political interference or influence to a degree which would be impossible or inappropriate in respect of other areas of governance.

3. At the same time, any Parliament, on behalf of those who elected it, has a legitimate interest in the quality of justice, the efficiency and effectiveness of the court system. Moreover, it will be particularly exercised if the consequence of judicial decisions is go beyond an interpretation of the law towards the making of substantive changes in the law.

4. The Constitutional Reform Act 2005 (CRA 2005), and the subsequent Concordat between the judiciary and the Lord Chancellor (LC), sought to strike an appropriate balance here. As LC I sought faithfully to operate to the spirit as well as the letter of these texts, and in particular to close down criticism which Ministers had been tempted to make of judicial decisions which were inconvenient or unwelcome to Ministers.

5. Six years since its passage, eight since its design was formulated, is a good time to reassess whether the Act has worked.

6. What has worked well:

7. (i) A restricted role for the LC.

8. The old system was time-expired. As the LC and his Department became more and more involved in the general work of Government, it was impossible to justify an “old-style” LC, Cabinet minister, Speaker of the Lords, and Head of the Judiciary (who did from time to time sit as a Law Lord).

9. (ii) Appointments of judges at first-instance:

It is right that appointments from Deputy District Judges (DDJs) through Circuit Judges (CJs) up to and including High Court (HC) Judges should have been taken out of the hands of the LC, and placed under a separate Judicial Appointments Commission (JAC). Certainly in recent decades, the LC and his Department in practice operated fairly; but justice in appointments, like the dispensing of justice elsewhere, has not only to be done but be seen to be done; this could not be the case with the old system. Moreover, as the number of appointments grew, and the available pool even more (there’s been a six fold increase in number of practitioners at Bar over 40 years, five-fold for solicitors) there had to be a more
sophisticated and formal system. This said, the JAC has not visibly widened opportunities for women or black and Asians – matter of great regret.

10. For DJs and CJs I took the LC out of the system altogether.

11. (iii) Court of Appeal Appointments:
The appointments of LJs differ from those at first instance. For LJs, appointment is in the hands of a JAC selection panel consisting of the LCJ, a Head of Division, and two JAC members one of whom must be lay. In practice the power of appointment is in the hands of the LCJ and Head of Division.

Although judges at this level are in practice making law as well as interpreting it, my own balance comes down on the side of the existing system.

12. The position of LCJ is the most inherently demanding in the whole of the system, with extensive administrative and HR responsibilities as well as those of judicial leadership. But it is an executive/ceo role constrained as no other is, since once an appointment is made, the appointee has complete tenure until retirement – at 70 – save in the most exgregious of circumstances, In this situation I believe it only reasonable to give the LCJ a prime role in the appointment of LJ positions, and ditto Heads of Division.

13. What has not worked well:

14. Heads of Division (HoD) and Justice of the Supreme Court (JSC) positions:

In the latter years until the CRA came into force, the old-style LC was principally involved in these appointments, and rightly so. The system worked, too. There is no evidence, certainly in recent decades, of any kind of political bias being brought to bear by the LC; and quality of our senior judiciary is as high as ever.

15. The CRA sought to recognise that at this level, any new-style LC, on behalf of the executive, would continue to have a legitimate interest in who was, and who was not, being appointed to these posts.

16. The reasoning was that, in respect of the LCJ/HoD, because these individuals are not only the judicial leaders in their field, but also because they are directly responsible for the efficiency and effectiveness of the system, and crucially for the use of the taxpayers’ money, voted by Parliament.

17. There is no equivalent executive and administrative responsibility for the President of the Supreme Court and the other Justices of the SC. They sit above the structure. But the SC these days, since the ever-widening scope of JR, and then the impact of the HRA, is making law in a way we have never seen in recent centuries. The SC is inevitably involved in judgements with an impact on our politics, however much the individuals are themselves detached from party politics.

18. The CRA sought to balance these interests by a special procedure. This was by a special four-member panel similar to that for LJs for LCJ/HoDs, and a special five-member commission for SC appointments. In the latter case the members are the PSC, DPSC, and
one member from each of the three JACs of the UK. In both cases the lead role is held by the President of the Supreme Court.

19. By s 29/30 in respect of the SC, and s 73/74 in respect of the senior CA positions, the LC has power to refer a recommendation back, and in certain circumstances to reject a recommendation. But both the detailed wording and, more importantly, the expectation in practice makes even those very limited powers for the LC very difficult to exercise.

20. As is a matter of record in the press, there was an occasion when I sought to use those powers. Since I have always observed the confidentiality necessary for the consideration of such appointments I am not here going into any detail. I hope however it will be accepted that I would not have sought to exercise these powers unless I had believed that I had grounds within the Act for doing so, and that I went to considerable lengths to ensure that my actions could not be construed, as party political, which remotely they were not. In the event, the matter was not seen through to a conclusion. Partisans to the appointment – not anyone directly involved in the process – leaked extensive detail to the press; an election was looming; I confirmed the appointment.

21. What this episode taught me is that what Parliament intended – that there should be a considerable partnership in these appointments – cannot in practice happen with the current text of the CRA. The Executive does have a legitimate interest in the wide skills required of the LCJ/HoD to administer a crucial and costly public service; that should be reflected in the provisions.

22. For SC appointments the legitimate external interest is more Parliament’s than the Executive’s. The SC is a law-maker. In almost all other systems where there is a SC with similar power, and a senior judiciary similarly active on an expansive scale, there is a Parliamentary/Executive role in these very senior appointments. I do not have a ready-made prescription for that role just yet. I want to see much more detail of comparative practice. I have the highest possible regard for the President of the SC and all his colleagues. But I do not believe that the current system, which essentially gives pride of place to the incumbent to appoint his successor, is a sustainable model; and it will have to be changed.

October 2011
Rt Hon Jack Straw QC MP, Rt Hon Lord Mackay of Clashfern, Rt Hon Lord Falconer of Thoroton – Oral Evidence (QQ 121-161)

Transcript to be found under Rt Hon Lord Falconer of Thoroton
Supporting Higher Court Advocates (SAHCA) – Written Evidence

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.
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
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. 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

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And, second, there several key lessons to be learned if a country wishes to achieve greater diversity in the judiciary.

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
Parliamentary Judiciary Committee

The Constitutional Reform Act 2005 (CRA) and the Human Rights Act 1998 have affected the relationship between the judges, the executive and Parliament. The CRA has also changed the means of communication between the judges and Parliament at a time when Parliament has been showing an increasing interest in various aspects of the way that the judiciary operates and the system of judicial appointments. The Ministry’s current consultation paper raises a number of matters concerning the relationship between Parliament and the judges, and there are practical questions to be considered about the means of communication between them.

The principle of separation of powers in our constitution has the following ingredients, which are not in dispute. These are:

(1) the principle of Parliamentary sovereignty;
(2) the principle of independence of the judiciary;
(3) the convention that (a) judges should not be personally attacked in Parliament or by ministers and (b) judges should refrain from making statements expressing their personal opinions on politically controversial issues. (This convention is sometimes breached by ministers and sometimes breached by judges, but it is generally followed.)

The principle of separation of powers does not require that there should be no communication between Parliament and the judges on matters concerning the operation of the legal system and the appointment of judges.

Before the CRA, the Lord Chancellor was head of the judiciary. As such he spoke on the judges’ behalf and was answerable to questions in Parliament. The Law Lords were also members of the upper house and this provided opportunities for informal contacts between the senior judiciary and government and Parliament. This has changed.

The Lord Chief Justice is now head of the judiciary. Section 5 of the CRA provides that he “may lay before Parliament written representations on matters which appear to him to be matters of importance relating to the judiciary or otherwise to the administration of justice.” This would be a weapon of last resort and has never yet been used. Except in the context of a constitutional crisis or some matter of extreme concern, it is unlikely to be used.

Meanwhile, a practice has grown up of Parliamentary Committees asking for the appearance of judges. The committee in question may be the House of Commons Justice Committee, the House of Lords Constitution Committee or some other departmental select committee. When it was introduced this practice was intended to be exceptional, but it has become more frequent. It is a cause for some concern whether it is being overused. Judges who are called before such committees may have views of their own which do not necessarily
represent the views of the judiciary. They may not be particularly well informed and it can be an easy temptation for them to become drawn into political areas.

It is not for judges to dictate to Parliament what form of committee system it should have, but there is a need to consider what is the most sensible, practical and appropriate means of communication between the judiciary and Parliament. A joint Parliamentary judiciary committee could have a number of merits. Such a committee would be able to exercise continuing Parliamentary scrutiny over the operation of the appointment system and other matters relating to the administration of justice. The Lord Chief Justice would be able to raise points with the committee as a less formal alternative to making a representation to Parliament under section 5. The terms of reference of the committee would need to be carefully considered with due regard to the principle of separation of powers and the convention referred to above. Requests for the appearance of a judge other than the Lord Chief Justice before the committee (or any other Parliamentary committee) should be addressed to the Lord Chief Justice’s office.

9 December 2011
United Kingdom Association of Women Judges (UKAWJ) – Written Evidence

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
I am writing with reference to your correspondence with Mr Phillip Elkin, dated 27 September 2011, in which you kindly agreed that the Welsh Government could make a submission to the Committee at this time.

I wish to draw to the Committee's attention an issue that the current First Minister for Wales, Carwyn Jones, and his predecessor, Rhodri Morgan, have raised previously, when responding to consultations under section 27(2) of the Constitutional Reform Act 2005 by selection commissions for appointments to the Supreme Court.

The First Minister most recently raised the issue when he responded on 17 October 2011 to a consultation by Lord Phillips of Worth Matravers, the chair of the current selection commission for Supreme Court appointments.

The Welsh Government’s concern is that the criteria for selection of Supreme Court Justices, and the information for candidates, consistently omit to make any explicit reference to the devolution settlements and the developing divergence of the law in Wales.

Section 27(8) of the Constitutional Reform Act 2005 (“the 2005 Act”) requires selection commissions to ensure that, between them, the judges of the Supreme Court will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.

The information packs for candidates consistently appear to interpret the above requirement as if the reference to “each part” of the United Kingdom means no more than “each jurisdiction” of the United Kingdom.

For example, the most recent information pack stated that in the Supreme Court at present, there is one Justice who has knowledge of and experience in the law of Scotland, and one Justice who has knowledge of and experience in the law of Northern Ireland. It went on to say “the remaining Justices have knowledge of, and experience of practice in, the law of England and Wales”.

Similarly, the Supreme Court guidance note on the procedure for appointing Supreme Court Justices, dated March 2010, advises that the requirement in section 27(8) is designed to ensure that there is continued representation from both Scotland and Northern Ireland.

In my view, if Parliament had intended section 27(8) of the 2005 Act to do no more than ensure that the Court contained knowledge and experience from the three jurisdictions, the provision would have made an explicit reference to jurisdictions.

This apparently restrictive interpretation of section 27(8) means that the Welsh devolution settlement, and the growing divergence between the law in Wales and the law in England, are not acknowledged as factors which should be taken into account in the selection process.

There is now a very large volume of subordinate legislation made since 1999 which is
different from its equivalent in England. Since 2007, the National Assembly for Wales has produced the equivalent of primary legislation through Measures and, following the referendum in May 2011, can now pass Assembly Acts on a much greater range of subjects and without prior agreement from Westminster. The divergence between the law in Wales and the law in England is in these circumstances certain to increase.

Wales has a unique position in the devolution structure within the United Kingdom. The National Assembly for Wales exists alongside the sovereign UK Parliament within a legal jurisdiction that extends across two nations. Although the laws passed by the National Assembly for Wales extend to England and Wales because that is, currently, the whole jurisdiction, the substance of the laws as they apply in England and Wales will continue to diverge significantly. Moreover, there are significant differences between the legislative processes and Ministerial functions applicable in Wales compared with those of Westminster.

Wales is, therefore, a legally significant “part” of the United Kingdom in its own right, and will become increasingly so. It is already, and will become increasingly, important that the people of Wales see the Supreme Court as fully reflective of the Wales in the same way as of Scotland and Northern Ireland. We are firmly of the view that the appointments process for Supreme Court Justices should seek to recognise the status of Wales’ devolved legislature and its legislative output (as the Supreme Court did itself in Axa v Lord Advocate [2011] UKSC 46), with a view to ensuring that the make-up of the Supreme Court reflects that status.

I urge, therefore, that the selection criteria and information pack should be designed so as to elicit whether, and the extent to which, candidates have knowledge of the Welsh devolution settlement and the growing body of law and legal institutions specific to Wales.

If the selection commission were in possession of this information, they would in my view be far better able to fulfil the requirements of section 27(8) of the 2005 Act. The alterations we propose would also encourage more candidates to come forward who feel they may be able to bring a “Welsh dimension” to the work of the Supreme Court.

In responding to consultations under section 27(2) of the Constitutional Reform Act 2005, the First Minister has also expressed the view that he would welcome greater diversity in the Supreme Court. I would like to reiterate that view.

Theodore Huckle QC
Cwnsler Cyffredinol
Counsel General

December 2011

Transcript to be found under Lord Carswell