

**JUDICIAL DIVERSITY:**

**ACCELERATING CHANGE**

Sir Geoffrey Bindman QC

Karon Monaghan QC

## **JUDICIAL DIVERSITY:**

### **ACCELERATING CHANGE**

In April 2014 Sadiq Khan, Shadow Secretary of State for Justice, asked us to suggest what a future Labour Government could do to ensure our judges better reflect wider society. We were asked to complete our task by Autumn 2014.

Our terms of reference required us to consider:

What practicable steps Labour could take to speed up moves to a more diverse judiciary in the short, medium and long term:

- to identify what is and isn't working with the current mechanisms in place to support moves to a more diverse judiciary;
- how might we better manage the recruitment process for judicial vacancies and prescribe the requirements for judicial office so as to encourage diversity; and
- what further, if any, role can the professional bodies play in diversifying the judiciary.

It was made clear that we were not to feel constrained by the present legislative framework in formulating any recommendations.

In preparing this report, we have consulted as widely as our resources allowed. We have been greatly helped by the reports and academic studies that have previously been produced on the topic of judicial diversity. In addition, we have met the Chair of the Judicial Appointments Commission and two of its Commissioners, senior judges from the UK and other jurisdictions, representatives from the Bar and the Law Society and other members of the legal profession, academic specialists, and others. We were also extremely fortunate to have the assistance of Laura Hilly who provided us with invaluable research support. We are very grateful to her.

Sir Geoffrey Bindman QC

Karon Monaghan QC

November 2014

## CONTENTS

	Executive Summary	5
1.	Introduction	7
2.	Background	11
3.	How Judges are Appointed	13
	a. The Judicial Appointments Commission	13
	b. The Selection Processes	14
	c. Appointments	18
	d. The Supreme Court	18
4.	‘Merit’	20
5.	Who are our Judges	25
	a. Gender	25
	b. Ethnicity	27
	c. Age	29
	d. Disability Status	29
	e. Sexual Orientation	29
	f. Religion and Belief	30
	g. Professional Background	30
	h. Educational Background and Social Class	31
	i. Conclusion	33
6.	Candidates for Judicial Office	34
	a. Barristers	35
	b. Solicitors	39
	c. CILEX	41
	d. Conclusion	41
7.	Barriers to Access	41
	a. Terms and Conditions of Appointment	43
	(i) Flexible Working	43
	(ii) The Circuit System	44
	(iii) Continuing in practice	45

(iv) Return to Practice	47
b. Culture	47
c. On-Line Testing	49
8. Achieving Progress	50
a. Quotas	51
b. Widening the pool of applicants	61
(i) Solicitors	62
(ii) Academics	64
(iii) Employed Lawyers	65
(iv) CILEx	65
c. A Judicial Career	66
d. Encouragement Facilitation and Training	68
9. Recommendations	70
10. Endnotes	73

## **EXECUTIVE SUMMARY**

1. The near absence of women and Black, Asian and minority ethnic judges in the senior judiciary, is no longer tolerable. It undermines the democratic legitimacy of our legal system; it demonstrates a denial of fair and equal opportunities to members of underrepresented groups, and the diversity deficit weakens the quality of justice.
2. The Judicial Appointments Commission (JAC), the senior judiciary and the legal profession have all expressed themselves committed to a diverse judiciary but their efforts to increase diversity have resulted in very limited success. The assumption that the problem will solve itself as the more diverse younger generations of lawyers rise higher in their profession is put in doubt by the statistical evidence in this report. Even if true, progress is manifestly too slow to be allowed to continue without change.
3. There have been many valuable recommendations made in previous reports and we commend the various initiatives of the JAC and those of the professional bodies. We believe that our recommendations, if implemented, will assist in achieving a more diverse judiciary.
4. The Constitutional Reform Act 2005, which established the JAC, requires the JAC to ensure that appointment to the judiciary is ‘solely on merit.’ At the same time it ‘must have regard to the need to encourage diversity in the range of persons available for selection for appointments.’ The concept of ‘merit’ is ill – defined. The value of a candidate to the creation of a diverse judiciary is not itself regarded as an element of merit. We believe that the selection criteria should include reference to that value, whether considered as an element of merit or as a separate factor.
5. Our report identifies a number of barriers faced by potential candidates which adversely affect underrepresented groups and which should be removed or modified. Among these are: the lack of flexibility in relation to part-time appointments, the obligation to go on circuit, and obstacles to returning to

practice for those who leave the judiciary. We also draw attention to the culture of exclusivity which stereotypes the judge as a White male barrister, educated at a public school and Oxbridge. Real or imagined, it deters many potential candidates from underrepresented groups.

6. For the above and other reasons, diversity in the pool of candidates for judicial office is diminished. In addition to addressing these barriers, the pool from which judges are drawn needs to be opened up to more solicitors and to academics, lawyers in the public sector and legal executives.
7. We were informed that there is an expectation that new appointees to the judiciary will be able ‘to hit the ground running’. That seems to mean that they must already have sufficient judicial experience on appointment to be able to sit as judges immediately without support. That requirement favours the long-serving barrister and reinforces the stereotype referred to above. We believe that much better facilities for training and mentoring should be available through the Judicial College and otherwise, so as to improve the opportunities of other qualified lawyers from more diverse backgrounds.
8. We have also concluded that the time has now come for quotas. Progress towards a diverse judiciary has been too slow. Without a requirement to appoint qualified women and ethnic minorities, we believe that the pace of change will remain intolerably slow.
9. Our detailed recommendations to implement these changes are to be found in the body of the report and are repeated in full at the end.

## **1. INTRODUCTION**

1.1. Our legal institutions have long been respected throughout the world. The reputation of our judges for fairness integrity and soundness of judgment is a vital national asset. That reputation is under threat because successive governments have failed to ensure that the administration of the law and the people who conduct its business are attuned to and seen to be attuned to the needs and experience of a changing society. Lord Neuburger, President of the Supreme Court, recently remarked that a combination of recruitment from the Bar and a lack of strategy has resulted in a judiciary that is ‘male, White, educated at public school, and from the upper middle and middle classes.’<sup>1</sup> This imbalance is particularly striking in the Supreme Court itself. Of the 12 judges, 11 are White men and the other is a White woman. In the Court of Appeal, only 7 of the 38 judges are women. There is not a single Black, Asian or minority ethnic (BAME) judge in either the Supreme Court or the Court of Appeal. When three vacancies were filled in the Supreme Court last year, all those appointed were White males. There will be no further vacancies for about two years.

1.2. The need for greater diversity in the judiciary has become ever more pressing. The reasons can be summarized as:

- 1.2.1. democratic legitimacy;
- 1.2.2. fairness and equal opportunities; and
- 1.2.3. better justice.

The first two are largely self-explanatory and uncontroversial. The third is not self-evident but we are convinced that it is right.

1.3. As to the first reason, a judiciary that is comprised almost exclusively of members of a small class – White, male, heterosexual and with a socially and economically advantaged background – cannot command the broad community respect which acceptance of its decisions demands. As equality is increasingly recognized as a fundamental component of a well-functioning and modern, liberal democracy, a wholly unrepresentative judiciary is no longer acceptable.

- 1.4. As to the second reason, the impediments to a judicial career experienced by apparently qualified women and other minorities<sup>2</sup> (particularly at senior level) create unfairness and inequality of opportunity in the pursuit of a valued career. Equality of opportunity in the context of work and in the pursuit of a professional career is now properly regarded as essential, and is guaranteed by domestic and regional equality law.<sup>3</sup> It cannot be denied to lawyers, aspirant judges and those already holding judicial office.
- 1.5. Finally, if we wish to see a judiciary that collectively produces socially sensitive and well-reasoned decisions of the highest quality - a judiciary which does the job the public expects of it - then it must be a diverse judiciary. A diverse judiciary will better dispense justice.<sup>4</sup> We will come back to this aspect when we consider the concept of ‘merit’ and how it features in the selection process for judicial appointment. For now, it is enough to repeat the words of Lady Hale:<sup>5</sup>

So this brings me to the business case for diversity – that diverse courts are better courts. I too used to be sceptical about the argument that women judges were bound to make a difference, because women are as different from one another as men, and we should not be expected to look at things from a particularly female point of view, whatever that might be. But I have come to agree with those great women judges who think that sometimes, on occasions, we may make a difference. That is the result of the lived experience of being a judge for twenty years now and a Law Lord or Supreme Court Justice for ten. I can think of a few judgments where my experience and perceptions of life made a difference to my view of the law, often but not always a view which my brethren were then persuaded (not necessarily by me) to share: the nature of the damage done to a woman by an unwanted pregnancy; the definition of violence to include more than simply hitting people; the importance of seeing children as individual human beings rather than adjuncts of their parents; the realities of owning a family home jointly. ....Women judges may think that some of the results are only common sense – which just shows how gendered a concept like common sense can be. Even if we do not persuade our colleagues to share our point of view, it is important that we articulate it.

[W]hat a person can ‘bring to the mix’ is an important component of his or her merit, at least in a collegiate court

where decisions are made in panels. Everyone brings their own ‘inarticulate premises’ to the business of making the difficult choices inevitably involved in judging. The great American judge, Benjamin Cardozo, said something similar as long ago as 1921: ‘out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component merits’.<sup>6</sup>

- 1.6. Diversity of experience and the difference that diversity can bring will enhance the general body of law. Lady Hale’s comments focus on the value women bring to the judiciary, but of course her remarks are equally valid for ethnicity, social background and for other groups presently underrepresented in the judiciary.
- 1.7. The underrepresentation of women and BAME judges is a matter of considerable concern. We cannot continue to claim that we have a first class judiciary when it is still drawn from such a narrow class. The failure to recruit talent from across all sections of society must mean that talent – perhaps the greatest of talent - is being missed. As Lord Neuberger has said:

The idea that women are less good judges than men is fanciful... But if that is right... why are 80 per cent or 90 per cent 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.<sup>7</sup>

- 1.8. The judiciary of the United Kingdom rates poorly for diversity as compared to the rest of the world. The judiciaries of the countries in the Council of Europe average 52% men and 48% women.<sup>8</sup> In 2010, England and Wales was fourth from the bottom, followed only by Azerbaijan, Scotland and Armenia.<sup>9</sup> Professor Alan Paterson of Strathclyde University has compared the proportion of women in the top courts of the 34 countries in the OECD. At 8%, we were at ‘rock bottom’, albeit closely followed by Turkey. Even the other common law countries are currently much better than us: 3 out of 9 judges are women in the Supreme Court of the United States; 3 out of 9 in the Supreme Court of Canada; 3 out of the 7 in the High Court of Australia and 2 out of 5 judges in the Supreme Court of New Zealand are women.<sup>10</sup>

- 1.9. This is embarrassing and impossible to justify. As we demonstrate, more decisive measures directed at securing a more representative judiciary must now be introduced.
- 1.10. Much of this report is devoted to membership of the senior judiciary. This is for two reasons. Firstly, they are the most influential in terms of the development of the law and legal policy and secondly, it is at the senior level that the lack of diversity is so stark. The statistical picture is set out below but for present purposes it need only be observed that we have only ever had one woman judge in the Supreme Court, Lady Hale, and no BAME judges. That is remarkable and to our considerable discredit.
- 1.11. In preparing this report we have been conscious that the role of the judges is always subject to change. At the present time there are particular challenges as a result of the decline in legal aid and the consequent escalation in the number of litigants - in - person. We have not felt it to be within our remit to examine the judicial role in any detail but as it evolves we are confident that the need for greater diversity can only increase.
- 1.12. Nor do we address the position of non-legal judicial post holders (for example, 'lay' magistrates). The statistics on diversity are much better amongst the non-legal judiciary;<sup>11</sup> the recruitment processes are different and non-legal post holders are not in that capacity on the judicial career ladder.<sup>12</sup>
- 1.13. In our terms of reference we were asked to recommend practical steps which could be taken to move to a more diverse judiciary in the short, medium and long term. We do not feel it appropriate to propose a timetable for reform because some changes could be made simply by the relevant agencies whilst others will require legislation. Our recommendations are foreshadowed in the executive summary at the beginning and set out in detail in the body of the report and again at the end.

## 2. BACKGROUND

- 2.1. An enormous amount of work has already been undertaken on the steps that should be taken to improve the composition of the judiciary. There has been much research that we have been fortunate enough to be able to draw on, and numerous reports on judicial diversity. In the main these have reached similar conclusions and in many cases have made the same recommendations, not all of which have been implemented.<sup>13</sup> In relatively recent times, those reports have included the *Peach Report* (1999)<sup>14</sup>; the successive reports of the Commission for Judicial Appointments,<sup>15</sup> the Department of Constitutional Affairs and the Ministry of Justice on judicial appointments and related reforms,<sup>16</sup> the reports of the House of Commons Constitutional Affairs Committee<sup>17</sup> and the House of Lords Select Committee on the Constitution<sup>18</sup>, the annual reports of the Judicial Appointments Commission<sup>19</sup> (JAC) and the Report of the Advisory Panel on Judicial Diversity (2010)<sup>20</sup> and the progress reports that have followed.<sup>21</sup>
- 2.2. The most comprehensive of these various reports is that of the Advisory Panel on Judicial Diversity ('the Advisory Panel') which was established by Jack Straw M.P., when he was Lord Chancellor and Secretary of State for Justice, under the chairmanship of Baroness Julia Neuberger. The report was published in February 2010 and it contained some 53 recommendations. Many have been implemented, among them that a Judicial Diversity Taskforce be established. The Taskforce comprises representatives from the Ministry of Justice, senior members of the judiciary, the Bar Council, the Law Society, and Chartered Institute of Legal Executives. Its function is to supervise the implementation of the recommendations and it has so far produced three annual progress reports, the latest in September 2013.<sup>22</sup>
- 2.3. A common assumption running through many of the reports has been that improvements will naturally follow from an increase in the presence of women and BAME practitioners at senior levels in the professions. That assumption must now be called into question. We do not believe that there is really a shortage of sufficiently qualified candidates among the underrepresented groups. We believe that the problem lies mainly in the recruitment systems and in judges' terms and conditions of appointment.

- 2.4. It has also been repeatedly stated that whilst diversity is important, it must not undermine the principle that appointment should be on ‘merit’. The implicit suggestion is that merit is more often to be found among White males than others. This is not merely offensive; it demonstrates that the assessment and the definition of ‘merit’ need reconsideration. It cannot be true that ‘merit’ on any rational test is scarcer among women and ethnic minorities. The House of Lords Constitution Committee asserted in its report of March 2012 that ‘merit should continue to remain the sole criterion for appointments.’<sup>23</sup> But, as Lord Goldsmith told the committee, ‘the problem with this whole debate is the assumption that we know what merit is’.<sup>24</sup> A succession of distinguished witnesses failed to produce a definition. Lord Falconer, a former Lord Chancellor, said ‘merit is regarded as coterminous with having been a junior and a QC at the Bar for 30 years.’<sup>25</sup> Alan and Chris Paterson have pointed out that the judiciary, especially at the most senior level, is a collective institution. Thus the selection process ought to be able to provide for a range of skills and experience in the composition of the courts at every level.<sup>26</sup>
- 2.5. Lord Phillips, at the time President of the Supreme Court has said that: ‘The [Constitutional Reform] 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’.<sup>27</sup> We consider that diversity should be taken into account as an element of ‘merit’ or as a distinct factor in the assessment of potential candidates, even if it requires further legislative change. In our view, however, legislative change is not required to allow for this.
- 2.6. A number of measures have already been introduced into law with the aim of increasing diversity within the judiciary. We address these below and examine their impact.

### **3. HOW JUDGES ARE APPOINTED**

#### **(a) The Judicial Appointments Commission**

- 3.1. Until 2005 the appointment of judges was entirely in the discretion of the Lord Chancellor. Judges at senior levels were appointed by him on the basis of private soundings. His officials would tour the country seeking recommendations from judges and barristers. Candidates were never told what had been said about them and they had no opportunity to challenge criticisms or even errors of fact. Unsurprisingly, those appointed were nearly always White men of similar character and social background to the existing judges.
  
- 3.2. The Judicial Appointments Commission (JAC) is now responsible for the selection of judges. It was established by the Constitutional Reform Act 2005 (CRA). It is composed of 15<sup>28</sup> Commissioners, including a chairperson who must be a 'lay member'<sup>29</sup> and a vice-chair who must be a judicial member.<sup>30</sup> The CRA provides that the number of Commissioners who are holders of judicial office must be less than the number of Commissioners (including the chair) who are not holders of judicial office.<sup>31</sup> However, only the chair and 5 other Commissioners are 'lay members'. 7 are holders of judicial office and 2 must be practising or employed as lawyers.<sup>32</sup> Further, of the 7 appointed as holders of judicial office, one must be a Court of Appeal judge and one a High Court Judge.<sup>33</sup> The lay members (that is non-judicial office holders and non-lawyers) are thus in the minority and the judicial office holders include very senior members of the judiciary.
  
- 3.3. The JAC is now responsible for the selection of (or, formally, recommending to the Lord Chancellor or the Queen, as the case may be) candidates for judicial office (fee-paid and salaried), except in the case of judges of the Supreme Court (and magistrates). These offices now include the offices of the Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, Chancellor of the High Court, Lords Justices of Appeal and High Court Judges. Section 9 (Deputy High Court judges) appointments have now also been brought within the remit of the JAC.<sup>34</sup> The Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission are primarily responsible for appointments to the

Scottish and Northern Ireland judiciary respectively.

- 3.4. Selection in each case ‘must be solely on merit’.<sup>35</sup> Otherwise, the JAC is given considerable latitude as to the appointment process it adopts. In performing its functions it ‘must have regard to the need to encourage diversity in the range of persons available for selection for appointments’<sup>36</sup> but this is subject to its duty to select ‘solely on merit’.<sup>37</sup> The approach adopted by the JAC to ‘merit’ and its assessment is addressed below.
- 3.5. Importantly, too, the CRA has been amended<sup>38</sup> so as to place a duty on the Lord Chancellor and Lord Chief Justice to take such steps as they consider appropriate for the purpose of encouraging judicial diversity.<sup>39</sup>
- 3.6. The JAC must comply with the Public Sector Equality Duty to which public authorities are subject by section 149, by the Equality Act 2010. It is also subject to the obligation to publish relevant proportionate information demonstrating compliance with the equality duty.
- 3.7. The JAC develops its selection exercise programme for each year with the Ministry of Justice and Her Majesty’s Courts and Tribunals Service. It is based on current and forthcoming judicial requirements forecast by those bodies. In 2013/2014 the JAC carried out 35 selection exercises. 169 candidates were recommended for salaried posts and 637 for fee-paid posts. In two cases the JAC was unable to recommend candidates to fill all the vacancies ‘largely due to the specialist nature of the posts for which too few candidates had the specific, directly relevant experience required.’<sup>40</sup>

(b) The Selection Processes

- 3.8. According to the JAC, the system for the filling of general vacancies is as follows:<sup>41</sup> The Lord Chancellor sends a vacancy request to the JAC which sets out the role, number, and location of posts; whether part-time working is available, and the minimum eligibility requirements for the post or posts as laid down in statute, as well as any additional criteria applied by the Lord Chancellor. The JAC then prepares an application form (which will require a

‘self-assessment’ as against the criteria for appointment) and information pack, and an advertisement is published on the JAC website and via social media.

- 3.9. Shortlisting is undertaken following the results of an online test or following a paper-based sift by the selection panel of the self-assessment and references supplied by the applicants.
- 3.10. Those shortlisted – about two or three per vacancy - are invited to a selection day, at which the candidates are interviewed by the selection panel with either a presentation, and/or situational questioning or a role-play. The panel usually consists of a chair, judicial member and an independent member. The JAC Commissioners make the final decision on which candidates to recommend for appointment to the appropriate authority, generally the Lord Chancellor.<sup>42</sup>
- 3.11. As to how ‘merit’ is assessed, the JAC have formulated six ‘Qualities and Abilities’, and applicants for each selection exercise will be assessed against five of the six following qualities and abilities:<sup>43</sup>

**1. Intellectual Capacity:** Expertise in your chosen area of profession; ability to quickly absorb and analyse information. Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

**2. Personal Qualities** Integrity and independence of mind. Sound judgment. Decisiveness. Objectivity. Ability and willingness to learn and develop professionally.

**3. An Ability to Understand and Deal Fairly** An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs. Commitment to justice, independence, public service and fair treatment. Willingness to listen with patience and courtesy.

**4. Authority and Communication Skills:** Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved. Ability to inspire respect and confidence. Ability to maintain authority when challenged.

**5. Efficiency** Ability to work at speed and under pressure. Ability to organise time effectively and produce clear reasoned judgments expeditiously. Ability to work constructively with others.

**6. Leadership and Management Skills:** Ability to form strategic objectives and to provide leadership to implement them effectively. Ability to motivate, support and encourage the

professional development of those for whom you are responsible. Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively. Ability to organise own and others time and manage available resources.

3.12. A selection panel will assess a candidate against each of these qualities and abilities and at the end of the process attribute a score to each of them (A – D). Generally, the person with the highest score overall will be selected. As we understand it, judgement will be exercised, however, at the end of the process having regard to performance overall. This may mean that somebody with 3 A's and 3 B's is selected over somebody with 4 A's and 2 B's where, for example, the former candidate has scored exceptionally highly in relation to those qualities and abilities scored at A, whereas the qualities and abilities of the latter candidate were more modest. Inevitably, scoring and weighing up the attributes of candidates in an area like this involves a degree of judgement and a purely mechanistic approach might fail to reflect the actual performance of the candidates. We also heard that performance at interview could '*trump*' the self-assessment. As we understand it the JAC is mindful of the fact that a candidate may appear less impressive on self-assessment (perhaps because they are more reticent, unconfident or concerned that some aspects of their experience may not be persuasive) than at interview. We consider that these aspects of the process are positive. In seeking greater diversity, a degree of judgement needs to be brought to bear in assessing candidates: a candidate that has come from a traditional Bar background (private school, Oxbridge, straight into the Bar and QC) may appear very impressive on paper whereas a person with a less traditional career (perhaps entering later and taking breaks to accommodate children and family life) may initially seem less impressive. It ought to be, and is, possible to reverse that assessment at interview.

3.13. Nevertheless only those qualities and abilities that are identified and set out above are examined. There is no broader consideration of merit embracing the value of diversity for the judiciary as a whole. Whilst diversity is sought and valued as an outcome, it does not feature anywhere in the assessment of 'merit' (see, further para. 4.1 *et seq* below).

- 3.14. Ultimately, taking account of all the evidence before it (self-assessment, interview, references), the JAC selection panel will ‘rank’ the candidates in order.
- 3.15. Specific provision is made in relation to the appointment of the Lord Chief Justice,<sup>44</sup> the Heads of Division,<sup>45</sup> the Senior President of Tribunals<sup>46</sup> and Lord Justices of Appeal.<sup>47</sup> In the case of the Lord Chief Justice the selection panel must include the most senior England and Wales Supreme Court judge<sup>48</sup> and a person designated by the incumbent Lord Chief Justice.<sup>49</sup> In the case of the Heads of Division the selection panel must include the Lord Chief Justice or his or her nominee<sup>50</sup> and the most senior England and Wales Supreme Court judge.<sup>51</sup> A selection panel for the Senior President of Tribunals must include the Lord Chief Justice or his or her nominee and a person designated by that person.<sup>52</sup> Selection in the case of Lord Justices of Appeal must be by a panel which includes the Lord Chief Justice or his or her nominee and a person designated by that person.<sup>53</sup>
- 3.16. There are statutory consultees for each exercise.<sup>54</sup> The former statutory requirement that the selection is followed by consultation with two judges with relevant experience has, in consequence of the Crime and Courts Act 2013, been reduced to consultation with one such judge. In the case of appointment to the post of Lord Chief Justice, the selection panel must consult the Lord Chancellor and the First Minister for Wales. In the case of Heads of Division the panel must consult the current holder of the office for which a selection is to be made. For selection of Senior President of Tribunals, the selection panel must consult the current holder of the office of Senior President of Tribunals. For selection for appointment of post of Lord Justice of Appeal, the panel must consult the Lord Chancellor. For the purpose of appointing High Court Judges, the JAC must consult the Lord Chief Justice but the JAC has stated that it will continue to seek comments from two consultees. In all other cases a person other than the Lord Chief Justice who has held the office for which a selection is to be made or has other relevant experience will be consulted.<sup>55</sup>

3.17. The responses to these consultations will form part of any final decision - making.

3.18. The process, then, is heavily dominated by the judiciary. They form a sizeable group on the JAC itself, will form part of selection panels and are statutory consultees. We have been told that the lay members of the JAC are not in any sense deferential to or swayed by the views of the judicial members. We are a little sceptical about this. As well as the authority inherent in their status, the judicial members bring the experience of doing the job itself. That is likely in practice to be very influential.

#### (c) Appointments

3.19. Formally, appointments in the case of the courts based judiciary and the senior judicial office holders within the tribunals service are made by Her Majesty on the recommendation of the Lord Chancellor. The JAC is a recommending, not an appointing, body.<sup>56</sup> We regard this as an important limitation. The involvement of the Lord Chancellor as the ultimate decision - maker introduces some democratic accountability – in principle at least - and provides a statutory and constitutional basis for declining candidates where diversity targets (or quotas as we prefer; see para. 8.2 *et seq*, below) are not met. It also operates to mitigate the effects of a recruitment process which is dominated by judges who may well be inclined to appoint those in their own image.

#### (d) The Supreme Court

3.20. Selection of judges for the Supreme Court is outside the remit of the JAC. When a vacancy occurs or is imminent in the Supreme Court, a selection commission must be established under sections 26 of the CRA<sup>57</sup> to choose candidates to be recommended for appointment by her Majesty.<sup>58</sup> Any recommendation will be made by the Prime Minister who is bound to recommend any person who is selected as a result of the convening of a selection commission. The commission must have an odd number of members (not less than five)<sup>59</sup> and must include at least one who is non-legally-qualified, at least one Supreme Court judge, at least one member of the Judicial Appointments Commission, at least one member of the Judicial Appointments Board for Scotland, and at least one member of the

Northern Ireland Judicial Appointments Commission.<sup>60</sup> The selection commission decides the selection process for itself.

3.21. The statutory minimum qualification for appointment is to have held high judicial office for at least two years or ‘to have satisfied the judicial appointment eligibility condition on a 15 year basis’<sup>61</sup> or to have been a qualified practitioner for 15 years.<sup>62</sup> The two latter requirements require in effect that the appointee has been a barrister or solicitor in practice for at least 15 years.

3.22. Selection must again be ‘on merit’.<sup>63</sup> The selectors 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.<sup>64</sup> A *de facto* quota is applied in practice to ensure that there is at least one Scottish and one Northern Ireland judge on the Court (facts to which we will return later).

3.23. The information pack supplied to potential candidates for the last recruitment exercise states that the following criteria have to be met to an exceptional degree<sup>65</sup>:

- Knowledge and experience of the law
- Intellectual ability and interest in the law with a significant capacity for analysis and creative thinking
- Willingness and ability to learn about new areas of law
- Clarity of thought and expression, particularly in writing
- Ability to work under pressure and quickly

Candidates must also demonstrate:

- Social awareness and understanding of the contemporary world
- Ability to work with and respect colleagues
- Willingness to participate in “outreach” work
- Vision and appreciation of the Court’s role in development of the law.

3.24. Applicants were also asked to submit examples of judgments, opinions etc. A diversity and equality questionnaire was also to be completed.

3.25. In her role as secretary to the selection commissions which have so far sat to

make recommendations for the appointment of Supreme Court Justices, Ms. Jenny Rowe (also the Chief Executive of the Supreme Court) is currently conducting a review of the selection process. It is understood that improving diversity on the court is one important element of the review, though it is more wide ranging. For the purposes of that review, consultation is taking place and in due course a summary paper will be made publicly available. We make some relevant recommendations below.

3.26. Despite the introduction of greater formality and transparency in the process, the statistical analysis (see below, para. 5.1 *et seq*) demonstrates that there has been little progress in achieving diversity within the court system. Lord Sumption, a recent appointee to the Supreme Court who is almost the living symbol of this failure – a White barrister in mainly commercial practice, educated at Eton and Oxford – said in a 2012 lecture that he thought it may take another 50 years to achieve a fully diverse judiciary.<sup>66</sup>

#### **4. ‘MERIT’**

4.1. We have pointed out that the CRA requires that appointments to judicial office are on ‘merit.’ The CRA does not, however, define this concept or identify how it is to be assessed. To remedy this shortcoming, the JAC has attempted to identify relevant criteria and to apply them in the selection process (para. 3.11, above).

4.2. The JAC takes no account in assessing merit of the value of diversity to the judiciary as a whole. We believe that the ability to contribute to a diverse judiciary should be included among the factors used to define ‘merit’. The late Lord Bingham was a supporter of such an approach in relation to the Supreme Court.<sup>67</sup>

4.3. The judiciary is stronger for diversity: ‘Diverse courts are better courts’.<sup>68</sup> A judiciary is disadvantaged by the absence of perspectives and experiences that do not mirror the experiences of the dominant class (White, male, privileged, ex-barristers). Particularly in collegiate courts women, judges from minority ethnic and social backgrounds, amongst others, can make a difference to

decision making by their own judgments, and by influencing others by bringing their experience to the table. As Lord Justice Etherton has noted:

A well-reasoned and well-presented minority view may be effective in shifting the position of the majority to a more qualified and compromising position than it otherwise would have taken.<sup>69</sup>

4.4. As the House of Lords Select Constitution Committee<sup>70</sup> put it:

Although the simple fact of being a member of an under-represented group will not in itself make someone a more meritorious candidate, ... witnesses pointed to 'limited empirical evidence that diverse judges can improve the decision-making process'. Judging is a more complex activity: it is necessary for judges to understand the wider array of concerns and experiences of those appearing before them. A more diverse judiciary can bring different perspectives to bear on the development of the law and to the concept of justice itself.<sup>71</sup>

4.5. Lady Hale shares the view that sometimes diversity, the presence of women in her example, makes a difference to the substance of the law. She has said that she has come to agree with those great women judges who think that sometimes, on occasions, 'we make a difference'.<sup>72</sup> She has pointed to her experience as a judge, including in the Supreme Court (and before it, the Appellate Committee of the House of Lords) which has led her to conclude that there have been occasions where her experience and perceptions of life made a difference to her view of the law, as compared to those of her colleagues, and that sometimes that was a view of which her colleagues were then persuaded to share.<sup>73</sup> She has concluded that what a person can 'bring to the mix' is an important component of his or her merit, at least in a collegiate court where decisions are made in panels<sup>74</sup> (and this would include, the Divisional Court, the Court of Appeal and the Supreme Court). Similarly belonging to a BAME group or other minority can add a distinct and relevant body of experience.

4.6. In addition, diversity brings legitimacy and that is of critical importance in a democratic society.

- 4.7. Nevertheless, the JAC resolutely stands against introducing the diversity question into the assessment of merit or the ultimate decision on selection (subject to the limited policy introduced pursuant to the amendments made by the Crime and Courts Act 2013; para. 4.8 below). The JAC say that it is firmly committed to the creation of a diverse judiciary and we believe it. However, we disagree with its policy of disregarding the protected characteristics (gender, ethnicity and so on) as part of its assessment of merit.<sup>75</sup>

**Recommendation 1:**

**In assessing the ‘merit’ of candidates for judicial appointment, the ability of the candidate to contribute to a diverse judiciary should be included as a factor to be taken into account.**

- 4.8. The JAC’s conservative approach is reflected in its policy towards section 63(4) of the CRA, as recently amended by the Crime and Courts Act 2013. Section 63(2) of the CRA provides that selection must be solely on merit, as we have observed above (para. 3.4). However, (4) now provides that:

[N]either ‘solely’ in sub-section (2) nor Part 5 of the Equality Act 2010 (Public Appointments etc.),<sup>[76]</sup> prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within –

- (a) the group of persons who hold offices for which there is selection under this Part, or
- (b) a sub-group of that group.

- 4.9. Section 63(4) does not impose any restriction as to the stage at which the so-called ‘tie-break’ can be used. It would be entirely lawful, therefore, for the JAC to apply it at the sifting stage. Instead the JAC has decided that it will use the provision only when making the final selection.<sup>77</sup> To do so at sift or short-list stage would make a greater impact. At sift or short-list stage, it is less easy to distinguish between the best candidates. The worst candidates can usually be easily sifted out as can the mediocre but distinctions between the very best candidates are less easy to draw. If the provision were applied at that stage, there would be an opportunity to ensure that there were maximum numbers of

women and BAME candidates (in respect of whom the JAC apply their policy) on the short-list.

4.10. It has been suggested to us that applying section 63(4) at sift or short-list stage would be unfair because any women or BAME candidate selected in reliance upon this provision might not be the best candidate. We do not agree. Section 63(4) applies where candidates are equally qualified for appointment. If at sift or short-list stage the notional male and female (as the case may be) candidate are equally qualified, section 63(4) positively anticipates that its use can be put to preferring the woman. We cannot see any unfairness here. It seems to us that such an approach would reflect the purpose behind section 63(4) and result in greater diversity being achieved more swiftly than is presently the case.

4.11. The JAC's policy on section 63(4) was effective from July 2014. No appointments round since then has been completed so it is not possible to say yet whether that policy will effect any change (or indeed whether it will ever be used). However, we envisage real problems with it. The JAC see conformity with the objective of appointing on merit as being achieved by a 'ranking' system. As we have stated above (para. 3.12), some judgement is brought to bear after formalistic scoring but ranking is the ultimate means by which the successful candidate is selected. According to the JAC, section 63(4),

will *only* be used when two or more candidates are assessed as having the skills, experience and expertise that result in them being considered equal in the assessment of the Commission. This decision, to be made by the Commission sitting as the Selection and Character Committee, will be based on all the evidence gathered throughout the selection process.

(‘Equal Merit Provision JAC Policy’<sup>78</sup> (emphasis in the original))

4.12. However, at that stage, the chance of two candidates being rated as of ‘equal merit’ is slim if not non-existent. As the Chair of the JAC, Christopher Stephens, himself put it in evidence to the House of Lords Select Committee on the Constitution in answer to the question ‘do you often have two or more candidates of equal merit’:

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

[recommendations] .....[I]n 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...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.<sup>79</sup>

- 4.13. We go further than the ‘tie-break’ (or ‘tipping-point’) provision in section 63(4) and advocate the introduction of quotas (para. 8.2 *et seq*, below). However, in the meantime, section 63(4), if used at the time when it is most likely to have greatest impact (sift/shortlist) provides the opportunity for achieving change more speedily. As Christopher Stephens has acknowledged, if its use is restricted to the final selection decision, it will rarely, if ever, make any difference.
- 4.14. We note that the JAC proposes that the ‘tie-break’ should apply in relation to gender and ethnicity only.<sup>80</sup> We see the sense in that since the statistics in relation to these characteristics are so clear and consistent. However, this should be kept under review with a view to increasing the number of protected characteristics<sup>81</sup> to which the policy applies to reflect the significant underrepresentation of other groups.

**Recommendation 2:**

**The JAC should change its policy on the ‘tie-break’ provision so as to apply it at the sift/shortlist stage where there is significant underrepresentation of women or BAME judges holding the judicial office to which the selection process relates.**

- 4.15. We believe the same approach should be taken to selection of judges for the Supreme Court and offices within it (President and Deputy President) having regard to the underrepresentation of women and BAME judges at that level. This is so especially, given the constitutional importance of the Supreme Court. It is legally permissible to do so. Section 27(5A) of the CRA provides that: ‘Where two persons are of equal merit—Part 5 of [the Equality Act 2010].. (public appointments etc) does not prevent [a selection] commission from preferring one

of them over the other for the purpose of increasing diversity within the group of persons who are the judges of the [Supreme] Court.’ The same observations as we make above apply equally here.

**Recommendation 3:**

**Any selection commission established to select a person to be recommended for appointment as a judge of the Supreme Court (or as President or Deputy President of the Supreme Court) should apply the ‘tie-break’ provision at shortlisting stage, at in least in relation to the characteristics of gender and ethnicity.**

**5. WHO ARE OUR JUDGES?**

5.1. At senior level, the judiciary is dominated by a small elite. High Court judges and those more senior in rank are predominantly White, male, privately and Oxbridge educated, who, prior to commencing a full time judicial career, had been barristers in private practice. Information on educational and social background is not monitored by the judiciary itself, the Ministry of Justice or the JAC.

5.2. The present composition of the judiciary can be broken down as follows (as at 1 April 2014):<sup>82</sup>

(a) Gender

5.3. Of the 3289 judicial posts,<sup>83</sup> women hold 831, amounting to 25.3% of post holders. Women are better represented in the lower echelons of the judiciary. However, at no level do they comprise more than 38.3% of office holders and care needs to be taken in analysing the statistics because non-legal posts (where women are better represented) are often merged with the legal judiciary in published data.

5.4. As at 1 April 2014, of the 161 posts held by the senior judiciary (Supreme Court, Court of Appeal and the High Court), women held just 27, amounting to 17.3%.

- 5.5. Lady Hale is the first and only woman to have sat as part of the 12-member Supreme Court (and she was the only woman to sit as a member of the Appellate Committee of the House of Lords). This position has not changed since the Advisory Panel commenced its work in April 2009.<sup>84</sup> Fourteen men have been appointed to the Supreme Court since the appointment of Lady Hale.<sup>85</sup>
- 5.6. All five Heads of Division (Lord Chief Justice of England and Wales, the Master of the Rolls, President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court) are men.
- 5.7. Seven of the 38 judges in the Court of Appeal are women (18.4%). The forthcoming appointment of an eighth woman, Mrs Justice King, was announced on 31 July 2014 and this will bring women's representation on the Court of Appeal to 20%. The position has markedly improved since the Advisory Panel commenced its work in April 2009 when only 3 Lord (Lady) Justices of Appeal (8.1%) in the Court of Appeal were women.<sup>86</sup>
- 5.8. However, as at July 2014, only 21 of the 108 High Court judges are women (19.4%).<sup>87</sup> When the Advisory Panel commenced its work in April 2009, 15 Judges of the High Court were women (out of a total of 109) (15%).<sup>88</sup> There has therefore been only modest improvement.
- 5.9. There are currently 99 posts in the Principal Registry of the Family Division, for Masters, Registrars, Costs Judges and District Judges (including for Deputy Masters, Registrars, Costs Judges and District Judges).<sup>89</sup> Women hold 34 of these positions (34.3%), with a greater number of women holding Deputy positions (23 of the 34 women in post hold Deputy positions).<sup>90</sup> A similar trend – women having higher participation rates in Deputy positions – is evident in the posts of District Judges at the County and Magistrates' Courts. Women comprise 27.9% of District Judges in County Courts and 36.3% of Deputy District Judges in County Courts. 31% of District Judges in the Magistrates' Court are women, compared with 31.2% of women holding Deputy District Judge posts in the Magistrates' Court.<sup>91</sup>

5.10. There are currently 640 Circuit Court Judges of whom 131 (20.5%) of whom are women. Of the 1126 Recorder positions, 186 are women (16.5%). As at 1<sup>st</sup> April 2009, 14.4% of Circuit Judges were women and 13.7% of Recorders were women. There has again been some fairly modest improvement.<sup>92</sup>

5.11. Women fare better in the tribunals. They currently comprise 44.7% of post holders across the entire Tribunal Service.<sup>93</sup> However, once again there are hierarchical disparities in women's participation. The Upper Tribunal has 134 members, with women holding 38 of these posts (28.4%), compared with the First - Tier Tribunal with 4215 members where women hold 1873 posts (44.4%).<sup>94</sup> The true picture is in fact much worse since the figures for First - Tier Tribunal members include non-legal members who will well outnumber legal members (and are a much more diverse cohort).

(b) Ethnicity

5.12. The 'Diversity Statistics' published by the Courts and Tribunals Judiciary include the ethnic breakdown of post - holders across the judiciary (including within the Tribunals Service) adopting the following classifications: White; Asian or Asian British; Black or Black British; Mixed; and Any Other Background.<sup>95</sup>

5.13. The statistics published are flawed and inadequate. As the 'Diversity Statistics' acknowledge, 'the database of the ethnic origin of the judiciary may be incomplete as (a) judicial office holders are asked to provide the information on a voluntary basis and (b) such details have only been collected since October 1991. Further ethnicity data was collected from judicial office holders in post through a diversity survey undertaken by the Judicial Office in 2007. In May 2009, the Judicial Office began collecting ethnicity data from all new judicial appointees. With effect from December 2011, the Judicial Appointments Commission has shared diversity data on selected candidates with the Judicial Office, in those cases where the individual confirmed they were content for the information to be shared. Not all judges declare their ethnicity and so the ethnicity figure is calculated as a percentage of those members of the judiciary

who have agreed to provide ethnicity data and from whom we have collected this information.’ The data provided appears to be an amalgam with no unified statistical profile. It is difficult to know, therefore, whether the statistics are at all reliable. This is obviously of fundamental importance. If the ethnic composition of the judiciary is not known, it is impossible to determine whether there is any improvement in the representation of BAME judges over time.

5.14. However, in the absence of more reliable figures, they are the source of the analysis below. Clearly, data collection is in serious need of improvement.

5.15. As at April 2009, coinciding with the date upon which the Advisory Panel started their work, 4.5% of judicial office holders in the courts based judiciary, were said to be BAME.<sup>96</sup> The figure as at 1 April 2014 is 5.8%.<sup>97</sup> There has, then, been little improvement.

5.16. Like women, BAME judges are better represented at the lower levels of the judiciary.<sup>98</sup>

5.17. No current or past member of the Supreme Court, or the Court of Appeal, or any Head of Division has identified or been identified as BAME. As at 1 April 2014, 1 of the 106 High Court judges (0.94%) identified as BAME.<sup>99</sup> The ‘Diversity Statistics’ has the proportion of BAME High Court judges as 3.3% but as the statistics demonstrate this is wrong. The figure of 3.3% has been reached only by including those declared to be of ‘any other background’ (ie not falling into one of the classes identified).<sup>100</sup>

5.18. On the other hand 10.9% of Deputy District Judge positions in the Magistrates’ Courts; 7.5% of Recorders; 6.1% of Deputy District Judges in the County Courts; and 6.1% of Deputy Masters, Deputy Registrars, Deputy Cost Judges and Deputy District Judges in the Principal Registrars of the Family Division are said to be BAME.<sup>101</sup>

5.19. There has been little increase in the proportion of BAME Recorders since April 2009, coinciding with the date upon which the Advisory Panel started their

work when 6.02% of Recorders were BAME.<sup>102</sup> This is worrying since this is an entry level position and in the case of fee-paid judges, a qualification for a section 9<sup>103</sup> appointment as a Deputy High Court judge, commonly regarded as a *de facto* (at least) requirement for appointment as a High Court judge.

5.20. The total percentage of BAME judicial (legal) post holders within the Tribunal system as at 1 April 2014 was said to be 9.3%.<sup>104</sup>

(c) Age

5.21. 42.3% of the courts based judiciary are older than 60 whilst, 50.2% of tribunal members are older than 60. Only 2.3% of the courts based judiciary and 4% of tribunal (legal) post holders are under 40. 18.1% of the Judiciary and 14.3% of tribunal (legal) post holders are between the ages of 40-49 whilst 37.3% of the courts based judiciary and 31.5% of tribunal (legal) post holders are between the ages of 50-59.<sup>105</sup>

(d) Disability

5.22. Data on the disability status of judges or tribunal (legal) post-holders is not collected by the Courts and Tribunals Judiciary or the Ministry of Justice.<sup>106</sup>

5.23. This is important because the absence of data in relation to certain characteristics is often given as a reason for not recognizing, and therefore not addressing, their absence in the judiciary.<sup>107</sup>

5.24. The Judicial Appointments Commission collects data on disability status in relation to selection exercises but this does not cover the full composition of the judiciary as it presently stands.<sup>108</sup>

(e) Sexual Orientation

5.25. Data on the sexual orientation of judges or tribunal (legal) post-holders is not collected by the Courts and Tribunals Judiciary or the Ministry of Justice.<sup>109</sup>

5.26. For the same reason as stated above, this is an important omission.<sup>110</sup>

5.27. The JAC has just started collecting data on sexual orientation in relation to selection exercises but again that does not cover the full composition of the judiciary as it presently stands.<sup>111</sup>

(f) Religion and Belief

5.28. Data on the religion and belief of judges or tribunal (legal) post-holders is not collected by the Courts and Tribunals Judiciary or the Ministry of Justice.<sup>112</sup> Once again this is an important omission.<sup>113</sup>

5.29. Along with data on sexual orientation, the JAC has just started collecting data on religion and belief in relation to selection exercises but again that does not cover the full composition of the judiciary as it presently stands.<sup>114</sup>

(g) Professional Background

5.30. A breakdown of the professional backgrounds of the judicial post-holders is published by the Courts and Tribunals Judiciary, adopting the categories of barrister; solicitor; legal executive; and ‘unknown’. The vast majority of judges identify their professional background as ‘barrister’, with 38.1% identifying as ‘non-Barrister’.

5.31. Barristers are particularly well represented in the higher levels of the judiciary. All current members of the Supreme Court were barristers – with only one member (Lady Hale) having spent the bulk of her professional career other than at the Bar (in academia). Lord Collins of Mapesbury, who was a judge of the House of Lords before his appointment to the Supreme Court and who has now retired, was a solicitor before becoming a High Court judge.

5.32. All Heads of Division and members of the Court of Appeal were barristers, and only one current member of the High Court was formerly a solicitor (Mr Justice Hickinbottom<sup>115</sup>), the rest also having been barristers. As at April 2009, coinciding with the date upon which the Advisory Panel started their work, there were three former solicitors on the High Court bench.<sup>116</sup> There are, then, fewer solicitors than has been the case in the past.

5.33. There is only one High Court judge appointed from a tribunal judicial post (also Mr Justice Hickinbottom<sup>117</sup>), he having been a Circuit Judge before his (senior<sup>118</sup>) tribunal appointment.<sup>119</sup> He is a White man and before his appointment was a partner in a large city firm, having been educated at grammar school and then Oxford,<sup>120</sup> so he barely departs from the stereotype of the High Court Judge.

5.34. Amongst the Tribunal Service, 89.1% of respondents (including non-legal members) identified their professional background as being ‘non-Barrister’. Of those who identified their professional background, the majority – 1389 (22%) – were solicitors.

#### (h) Educational Background and Social Class

5.35. The social and educational backgrounds of judges are not monitored by the JAC, the Ministry of Justice or the judiciary.

5.36. However, the recently published report of the Commission on Social Mobility and Child Poverty<sup>121</sup> reveals that 71% of the Senior Judiciary attended an independent (ie private) school,<sup>122</sup> with one in seven judges (14%) going to just five independent schools: Eton, Westminster, Radley, Charterhouse and St Paul’s Boys,<sup>123</sup> compared to 7% of Britain’s population as a whole attending private schools. Twenty-three per cent of Senior Judges attended a grammar school<sup>124</sup> compared with 4% of Britain’s population as a whole.<sup>125</sup>

5.37. In addition, 75% of Senior Judges in Britain attended either Oxford or Cambridge,<sup>126</sup> compared to 0.8% of Britain’s population as a whole.<sup>127</sup>

5.38. Our research indicates that of the 38 members of the Court of Appeal of England and Wales, 27 attended either Oxford or Cambridge for undergraduate or postgraduate studies. Ten members of the Court of Appeal who did not attend either Oxford or Cambridge attended a Russell Group university (those being, the University of Sheffield; University of Exeter; Kings College London; Queen Mary, University of London; Durham University; University of Southampton; University of Bristol).<sup>128</sup>

5.39. As to the Supreme Court, Lady Hale has described it thus: ‘the male Supreme Court Justices mostly fit the stereotypical pattern of boys’ boarding school, Oxbridge college and the Inns of Court. All but two went to independent fee-paying schools. All went to single sex boys’ schools, all but three to boys’ boarding schools. All were very successful barristers in private practice before going on the bench, although two did other things first. Most specialised in commercial, property or planning law rather than what Helena Kennedy calls ‘poor folks’ law’. All but two have a degree from Oxford or Cambridge’<sup>129</sup> (as Lady Hale has observed, this is the only thing that she has in common with them<sup>130</sup>).

5.40. The *Milburn Report*<sup>131</sup> suggested that there may be a small drop in the proportion of judges from private school backgrounds across the judiciary. Without further clarity as to the pool selected, it is not possible to say that this is not simply attributable to the increase in the size of the lower rungs of the judiciary. In any event, it remains high (75%).<sup>132</sup> There is little to indicate that the perception of a judge ‘as a white, probably public school man’<sup>133</sup> who has moved ‘from quad, to quad to quad’ - as Professor Kate Malleon put it to us - is in any way inaccurate.

5.41. Since these characteristics are not monitored by the JAC, the Ministry of Justice or the judiciary, it is hard to determine whether there has been, or continues to be, any improvement in securing diversity in the social and educational backgrounds of the judiciary. The information we have set out above has been obtained from a variety of publicly available sources, some unrelated to the judiciary. There is no particular reason why social, class and educational background cannot be monitored. Universities and other institutions<sup>134</sup> do so to check whether they are affording true equality of access. This reason is also valid for the judiciary. It is typically done by asking questions such as (i) whether a person has attended an independent or state school; (ii) whether they are the first person in their family to attend university or amongst the first generation in their family to go to university<sup>135</sup> and (iii) the name or type of university (Oxbridge/Russell Group/New University) attended, all of which

(and certainly taken together) are good indicators of social origin. For the judiciary this is important not just for determining whether there is equality in access to a judicial career but also because diversity in social background benefits the judiciary.

**Recommendation 4:**

**The collection of reliable data on the ethnicity of current judicial post-holders must be collected as a matter of urgency.**

**Recommendation 5:**

**The Courts and Tribunals Judiciary should collect data on the disability status, sexual orientation, religion and belief and the social and educational background of judges and tribunal (legal) members. The results should be contained within their Diversity Statistics published annually.**

**Recommendation 6:**

**The JAC should monitor the social and educational background of applicants, shortlisted candidates, those recommended for appointment and current post-holders. Such data should be routinely collected and published with other monitoring data.**

(i) Conclusion

5.42. The statistical picture outlined above will not be a surprise to many but it is no less a concern for that. Especially disturbing is the fact that the JAC, which was expected to introduce greater diversity into the judiciary, has made very little difference at the senior judicial level. Whilst there have been improvements, the JAC's figures illustrate that there has been no statistically significant improvement since its establishment in the number of applications or recommendations of women or BAME candidates for the High Court Bench.<sup>136</sup>

5.43. Nor can it be assumed that matters will automatically right themselves in time. As to gender, matters have not improved significantly at the senior level of the judiciary since the establishment of the JAC or since the first, and so far only, woman appointee to the Supreme Court. The fact that there is only one BAME

judge in the High Court demonstrates that there has been no improvement over the period since the JAC took over responsibility for selecting High Court Judges.<sup>137</sup>

5.44. As to social class the picture is even bleaker. One recent report has found that the typical lawyer was likely to be growing up in a family that was better off than five in six of all families in the United Kingdom<sup>138</sup> (in families with income 64% above the average family's income<sup>139</sup>) and another that those entering leading professions like law born in 1970 were, on average from significantly more advantaged backgrounds than those entering these professions who were born in 1958:<sup>140</sup>

The latest data we have on social mobility and access to professional careers is for the generation born in 1970. Those people are now in their late 30s. We cannot predict which of today's generation of young people will go on to pursue a professional career. But, if action is not taken to reverse the historical trend, it would mean that the typical professional of the future will now be growing up in a family that is better off than seven in ten of all families in the UK. This growing social exclusivity is not only a matter of serious concern for the professions; it has profound implications for our society too.

5.45. Given the very great constitutional importance of the courts and their democratic function this must be a cause for alarm.

5.46. The pools from which recruitment to the judiciary takes place, and the pools from which recruitment might take place, are discussed below.

## **6. CANDIDATES FOR JUDICIAL OFFICE**

6.1. The pools from which selection for judicial office is made vary according to the appointment concerned. Recruitment exercises for fee – paid appointments to the lower rungs of the judiciary (the tribunals) have typically attracted a younger and a more diverse cohort of applicants from both branches of the legal profession, and the result is a more diverse judiciary at lower levels. However, barristers (and those who were barristers before taking up salaried

appointments) dominate at all levels in the court service, and at senior level (High Court and above).

- 6.2. There is no doubt that the legal profession has done a great deal to encourage diversity within its number.<sup>141</sup> Nevertheless, women and BAME barristers face particular disadvantages throughout their careers.
- 6.3. Women have outnumbered men for many years amongst law graduates graduating from universities in England and Wales.<sup>142</sup> In 2012, women law graduates numbered 9,645 out of 15,348 law graduates (62.8%)<sup>143</sup> and were more likely to receive either a first class or an upper-second class degree when compared to their male equivalents.<sup>144</sup> However they remain a minority at senior level in the profession. BAME practitioners too remain underrepresented at senior level in the profession.

#### (a) Barristers

- 6.4. Notwithstanding the overrepresentation of women as law graduates, of practising barristers (that is employed and self-employed) in 2012,<sup>145</sup> 64.2% (10,012) were men and 34.7% (5,412) were women.<sup>146</sup> Further, amongst the self-employed Bar (from where most members of the senior judiciary are drawn), 66.4% (8,420) are men and only 32.5% (4,117) women.<sup>147</sup> Women are much better represented amongst the employed Bar (45.5%).<sup>148</sup>
- 6.5. At all major career milestones, the number and proportion of women at the self-employed Bar decline. Thus, in 2010/11, the total number of actually enrolled students on the Bar Professional Training Course (BPTC) was 1,682, 52.2% of whom were women (and they made up 49.4% of those Called to the Bar<sup>149</sup>). However, in 2011/12 (when that cohort might be expected to be undertaking pupillage), only 44% of pupils were women. Further, in 2011/12 women accounted for only 43.6% 'new tenants' (ie those securing tenancy positions as newly self-employed barristers).
- 6.6. Women's representation at the senior end of the Bar is particularly low. In 2012 women accounted for only 12.4% of all practising QCs. While this number has

continued to rise in the past two decades, the increase has been slow and has not kept proportionate pace with the percentage of women entering the profession. For example, in 2012 the average recorded age bracket<sup>150</sup> for QCs was 45-54 years. Assuming that these QCs entered the profession at about the same age as is currently the position (with 76.1% of all new tenants aged between 25-34<sup>151</sup>), they would have commenced their careers as barristers in the early 1990's, at which stage women were already comprising over 40% of new entrants.<sup>152</sup> One of the factors contributing to the underrepresentation of women amongst QCs is the continuingly low application rate from women for QC appointment. In 2010-2011, women made up just 16 per cent of applicants (41 applications), despite 31 per cent (746) of barristers between 15-20 years' Call being women, with the result that the number of men appointed outnumbered women by 3:1.<sup>153</sup> This may be just because women do not 'see' themselves as QCs (and similarly, judges). These figures did not change significantly in the latest completed competition. In the 2013/14 competition 18.7% of applicants were women, compared with 81.3% of men. The result of this competition was that 18 women and 82 men were made QCs, the gap widening from the 2010-11 round with men outnumbering women more than 4:1.<sup>154</sup> In the 2014/15 competition, 19.2% of applicants were women, compared with 80.8% of men.<sup>155</sup>

- 6.7. Statistics for BAME barristers are no better. In 2011/12, 42.9% of all those newly Called to the Bar identified as BAME.<sup>156</sup> This proportion, which is significantly higher than the BAME population as a whole in England and Wales<sup>157</sup> may be accounted for by the fact that almost one quarter of those called to the Bar in 2011/12 were foreign lawyers, not domiciled in the UK.<sup>158</sup> In the 2011/12 reporting year BAME barristers comprised 11.3% of all new tenants<sup>159</sup> and comprised 11% of the Bar as a whole. Again, as with women, BAME barristers were better represented at the employed Bar (13.2%) when compared to the self-employed bar (10.5%).<sup>160</sup> BAME barristers are underrepresented in the rank of QC when compared to their representation in the Bar as a whole, with only 5.5% of QCs in 2012 identifying themselves as BAME,<sup>161</sup> though in 2010 8.8% of barristers Called for 15 years or more identified themselves as BAME.<sup>162</sup>

- 6.8. There are very small numbers of disabled barristers, with only 1% of barristers practising at the bar disclosing a disability in 2012.<sup>163</sup>
- 6.9. The largest numbers of barristers (29.5%) fall in the 35 to 44 age category, with 22.2% being between the ages of 25 to 35, 18.4% between 45 to 54 and 8% being over the age of 55.<sup>164</sup> While 38.3% of barristers did not disclose their age at Call in 2012, those who did were largely below the age of 34 (52% of respondents).<sup>165</sup>
- 6.10. We are not aware of any data on the sexual orientation or religion and belief of barristers already in practice at the self-employed or employed Bar (as opposed to those in training).
- 6.11. Recently, the Bar Council has begun collecting data on educational background of ‘First Six’ pupils through the ‘Pupillage Supplementary Surveys’. Of those who participated in this survey, 28.4% recorded having obtained their first degree from either the University of Cambridge or the University of Oxford. 35.8% of respondents recorded obtaining their first degree at another Russell Group University.<sup>166</sup> 49.5% of this group had studied for a qualifying law degree whilst reading for their first degree at university.<sup>167</sup> 4.3% of pupils had a solicitor, barrister, QC or judge as a parent or guardian during their school years.<sup>168</sup> Other recent data shows that 81 per cent (358) of pupils came from professional backgrounds compared with 55 per cent in the previous year, with almost 40 per cent of pupils having attended fee-paying schools.<sup>169</sup> There is some evidence from within the legal sector that its shifting profile may reflect a contraction of the publicly funded section of the Bar, which usually recruits a more diverse intake, and that the situation may further worsen with legal aid cuts.<sup>170</sup> This could inhibit progress towards a more diverse judiciary in the longer term. Given that the commercial end of the Bar remains ‘so unrelentingly socially exclusive’,<sup>171</sup> the Bar must consider why certain demographic groups disproportionately work in particular areas of the law. It must seek ways of promoting greater diversity across all areas of practice.<sup>172</sup>
- 6.12. The statistical picture presented above means that the optimism conveyed in the

phrases ‘trickle-up’ and ‘don't be shy apply’<sup>173</sup> is misplaced. The measures taken to secure diversity in the senior judiciary are not working, and will not work, if the senior judiciary continues to be drawn almost exclusively from the senior practitioners at the self-employed Bar.

6.13. This is not to say that the Bar should not be doing more to retain women and BAME practitioners. The attrition rates for women appear to be attributable to the lack of flexibility in many areas of the Bar. Many barristers are able to develop predominantly paper practices that might more readily lend themselves to flexible working patterns. The same is not true for others; for example, criminal practitioners. We understand that thought has been given to the provision of crèches in the Inns. Work is ongoing on this. We would encourage the Bar and the Inns to bring this idea to fruition.

6.14. More work needs to be done too on addressing career breaks. Women are most likely to be adversely affected by obstacles to the return to practice after lengthy periods of absence. The Bar Council should consider encouraging chambers to introduce arrangements allowing for lengthy career breaks without terminating the relationship with chambers and with a right to return. The BSB Handbook ‘Equality Rules’ (to which all barristers must conform) requires that chambers have a flexible working policy which covers, amongst other things, ‘the right to take a career break’ so as to enable barristers to manage their family responsibilities or disability without having to give up work. However, the rules do not explain the content of that ‘right’ or prescribe any minimum entitlements. Minimum standards need to be imposed on chambers as to their members’ entitlement to work flexibly and to take career breaks, and clear guidance promulgated on how that is to be achieved.

6.15. Greater efforts need to be made to understand why BAME barristers are underrepresented at senior level, particularly as QCs. This may reflect their dominance in less secure areas of practice, such as criminal legal aid. If so, greater efforts need to be made to ensure that opportunities at the Bar are spread equally across all groups of practitioners, including BAME practitioners.

6.16. The small number of barristers who identify as disabled is also a cause for concern. It indicates an underrepresentation of disabled practitioners. It may also suggest that some practitioners are reluctant to disclose disability. If so, this may reflect a perceived or real intolerance of disability at the Bar. Greater efforts need to be made to ensure that a career as a barrister, both in employed and self-employed practice, is truly accessible for disabled practitioners.

(b) Solicitors

6.17. Like the Bar, the Law Society has done much to promote greater diversity. There is greater diversity amongst the solicitors' branch of the profession where women continue to account for the majority of trainees (61.5% in 2012-13)<sup>174</sup> and have done so since 1987-88.<sup>175</sup> In 2013 women made up 47.7% of all of those with practising certificates. Women are overrepresented at the junior end of the profession, with around 6 in 10 of all those with practising certificates being aged 35 or under. However, they are underrepresented at more senior levels with only 4 in 10 practising certificate holders being aged over 35. In 2013, participation rates for women drop markedly from the 36-40 age group and declined steadily thereafter, whereas for men, participation rates declined modestly but remained high up to the age of 60.<sup>176</sup> Men were also more likely than women to be partners; of the total number of partners (29,863), amounting to 34.4% of all practising certificate holders, only 8,115 (27.2%) were women compared to 21,748 (72.8%) men.<sup>177</sup> Even after adjusting for levels of experience, women achieve partnership at a slower rate than men. For example, in 1992, 79% of male solicitors with 10-19 years' experience were partners, compared with 53% of women with the same experience. Ten years later, though the number of women with 10-19 years' experience who were partners had risen slightly overall, the gap had widened.<sup>178</sup> In 2013 men were still significantly more likely to become a partner than their female colleagues and to become a partner at an earlier point in their career.<sup>179</sup>

6.18. In 2013, BAME solicitors made up 13.1% of all solicitors with practising certificates,<sup>180</sup> compared with 14.6% in the general population.<sup>181</sup> Amongst BAME solicitors holding practising certificates, women are better represented than men, particularly amongst African-Caribbean and Chinese solicitors.

Almost three-quarters of African-Caribbean practising certificate holders are women (72%) and two-thirds of Chinese practising certificate holders are women (63%). White European women are the only group of women that hold a minority share of practising certificates when compared with their White European male colleagues (White European women comprised 47% share of that ethnic group).<sup>182</sup>

6.19. Only 3% of practising solicitors declare a disability, long term illness or health problem and of those only 10.2% declared that they were 'limited a lot'.<sup>183</sup>

6.20. Further, latest available figures show that 28.6% of solicitors attended independent schools (against a society wide figure of 7%).<sup>184</sup>

6.21. Amongst 'Magic Circle' firms, on average only 19.1% of partners are women.<sup>185</sup> This is important when examining the pool from which judicial appointments are made, and how they could be widened and is addressed below.

6.22. There is an increasing body of solicitors who are higher court advocates and QCs, both practising and honorary. Many of these would be likely candidates for judicial office. Yet we are satisfied as a result of our discussions with the Law Society and other members of the legal profession that there is a widespread belief that judicial appointment is the preserve of the Bar, and that solicitors are much less likely to be appointed than barristers. In addition, there are concerns about the reluctance of solicitors' firms to release their partners and employees to seek fee-paid judicial posts in case this might damage their career prospects within the firm. The Law Society encourages solicitors' firms to take active steps to dispel this fear. The Law Society is making efforts to persuade solicitors to consider seeking judicial appointment. A number of firms have signed a declaration committing themselves to the promotion of judicial appointments, including supporting staff who decide to apply for them by allowing them to take the leave of absence necessary to gain judicial experience. However there is no evidence yet available of the effect of this declaration.

6.23. Some of the efforts described in the last paragraph are directed particularly at

women and BAME solicitors. Because of the greater proportion of underrepresented groups among solicitors, as compared to the Bar, increasing the number of solicitor judges is likely to improve the level of diversity within the judiciary.

(c) CILEx

6.24. Members of the Chartered Institute of Legal Executives (CILEx) are a much more diverse group. On average, 73.75% of their members are women, and 31.64% of new students are Black or from an ethnic minority group. Of the 8119 Fellows (Chartered Legal Executive lawyers), 73.4% are female; and 5.65% are from BAME groups. However, CILEx anticipates an increase in the BAME figures once students progress to full Fellowship. 2.21% of CILEx members considered themselves to have a disability. 78.17% of CILEx members are below the age of 49.<sup>186</sup>

6.25. However, their opportunities to take up judicial appointment are statutorily restricted – a matter to which we return below.

(d) Conclusion

6.26. The ‘trickle up’ expectation, by which it was assumed that as, over time, greater numbers of women and BAME entrants became barristers and solicitors, more of them would in the end find their way on to the bench, has not happened. Nor is there any reason to expect it to happen in the foreseeable future. More positive measures are needed if diversity in the judiciary is to be achieved.

## **7. BARRIERS TO ACCESS**

7.1. In August 2013, the JAC published the outcome of a survey of solicitors, barristers and Chartered Legal Executives eligible for judicial appointment.<sup>187</sup> The research was conducted with the Law Society, the Bar Council, and CILEx. This was part of an attempt to explain the failure to achieve greater diversity in the judiciary. While the research showed an improvement on the findings of an earlier study in 2008 in that all aspects of judicial office were found more appealing to potential applicants, there was a wide consensus that specific areas needed to be tackled. Respondents identified a number of needs: more

information about the selection process; more information about judicial roles; part-time or flexible working; work shadowing and mentoring; earlier notice of when vacancies were to be advertised; more training on appointment and more information about minimum entry requirements.

7.2. The results of the JAC's research identified specific issues concerning some groups. It found that women, solicitors of both sexes, and Chartered Legal Executives are less confident in their abilities than men in general and male barristers in particular. The same groups feel they lack information necessary to consider a judicial appointment. There is a strong belief among women, BAME and disabled lawyers that good contacts are essential to achieve judicial office. BAME and disabled lawyers also had concerns about judicial culture and felt they would not be welcomed in the judiciary. Curiously the JAC's research does not ascribe this feeling to women but our discussions with eligible women demonstrate that many share it. Similarly the JAC attributes to BAME and disabled lawyers, but not to women, concerns about the fairness of the actual selection process. The JAC also reports that BAME lawyers are 'significantly more likely to have applied and are twice as likely to have applied more than once but also have a high fear of failure.' Of particular importance is the finding that only 43% of solicitors and 47% of Chartered Legal Executives feel they would receive the support of their employer (compared with 80% of barristers) if they were to apply.<sup>188</sup> 68% of lesbian, gay, bisexual and transgender (LGBT) lawyers would be more likely to apply if there were more openly LGBT members of the judiciary.

7.3. Our discussions with women, BAME lawyers and others familiar with the judicial system and who have taken a particular interest in the lack of diversity indicate that there are other factors which contribute to the underrepresentation of these groups. These include the general requirement to work full-time, the need to go out on 'circuit,' and the prohibition on returning to practice. We examine these factors in detail below.

(a) Terms and Conditions of Appointment

(i) Flexible Working

- 7.4. The Senior Courts Act 1981 has been amended<sup>189</sup> to allow the maximum number of ordinary judges of the High Court and Court of Appeal to be made up of a specified number of full-time equivalents ('FTEs'), rather than a maximum number of individual judges. Similar provision is now made in respect of the Supreme Court.<sup>190</sup> This allows for salaried, part-time appointments. This is an important advance. Flexible working will make a judicial career more attractive for many and will encourage greater diversity.
- 7.5. At present no senior judges hold a part-time salaried post (or job-share). We understand that a job-share arrangement is about to commence involving two female High Court judges. The details have not yet been made public. This is obviously a positive development. However, it does not lie in the hands of the JAC to determine which salaried posts are or should be available for part-time work or job-share. When the Lord Chancellor sends a vacancy request to the JAC, he states whether it can be held part-time or as a job-share. We do not know how he reaches this decision.
- 7.6. We do not understand why all salaried judicial posts cannot be held part-time or under a job-share arrangement. There is nothing about the judicial role which distinguishes it from other occupations where such arrangements are now commonplace.
- 7.7. Given the importance of part-time work, particularly for women and others with caring responsibilities, the Lord Chancellor must disclose his reasons for deciding that a post is not suitable for part-time work or a job-share and the JAC must be required to publish them. Any direction by the Lord Chancellor that a post cannot be held part-time or as a job-share must be strictly justified with reasons.

**Recommendation 7:**

**All posts should be available for part-time work and/or job-sharing unless the Lord Chancellor can justify the need for a full-time appointment.**

**Recommendation 8:**

**If the Lord Chancellor is to direct that a post is not suitable for part-time work and/or job-sharing, he should be required to give reasons and the JAC should publish them.**

(ii) The Circuit System

- 7.8. The requirement to ‘go out on circuit’ has regularly been identified as a deterrent to women who might otherwise apply for senior judicial office.<sup>191</sup> There seems to be considerable resistance, including from the judiciary, to any changes to the circuit system.
- 7.9. The system requires High Court judges who are generally based in London to sit in regional courts outside of London, usually for many weeks at a time. The cost of supporting the circuit system is enormous. For 2013-14, the budget for judges’ lodgings, excluding staff costs, was £2,920,000.<sup>192</sup> Judges’ lodgings are usually large houses which accommodate judges ‘on circuit’. When occupied at all, they usually accommodate only a single judge and their clerk.
- 7.10. The need to go out on circuit can be extremely unattractive to those who do not want to leave their home for weeks on end (especially those with caring responsibilities) and for those unfamiliar with living in such environments (large houses with staff).
- 7.11. We do not believe that there is any justification for the system in this day and age. We have examined the arguments for its retention. The need to travel may have been greater when there were fewer judges than there are today. There seems to be no reason why High Court judges could not be appointed to sit in a particular region. This could increase the pool of candidates. The opportunity to be based in one of the larger cities outside London, with a fixed place of work and home, could be attractive to many who do not want to be based in London. Greater regional diversity would be beneficial to the judiciary which is heavily dominated by London practitioners.

7.12. It has been argued that the circuit system acts as a check on aberrant behaviours and prevents local variations in practice that might develop in the absence of outside supervision or input. Apart from one vague and un-particularised example, we have heard nothing concrete indicating that these fears are justified. It seems to us that there is no reason to assume that a judge in one of the regions or in Wales, for example, is more likely to develop bad habits or permit bad practice in his or her court, than a judge in London. It has been claimed that the difference is that in London there are many more judges capable of identifying poor practice and intervening in the event of it. The answer surely is that there should be systems of appraisal and supervision for all judges. These are common to all occupations and ensure that standards are maintained and support is provided where necessary.

7.13. We know of no empirical study which justifies the circuit system. Nor has there been any evaluation of its advantages, if any, given the enormous cost of supporting it and its impact on those it deters from applying to sit on the High Court bench.

7.14. We are aware that the present Lord Chief Justice is extremely sympathetic to those High Court judges who do not wish to go out on circuit for family or other reasons. There are a number of arrangements in place with particular High Court judges relieving them of the requirement to go out on circuit. However, it remains one of the terms and conditions of appointment to the High Court bench.<sup>193</sup>

7.15. We cannot see any justification for the retention of the circuit system and we recommend it be abolished and replaced with regional appointments.

**Recommendation 9:**

**The circuit system should be abolished and replaced with regional appointments.**

(iii) Continuing in Practice

7.16. It is now possible to hold a salaried judicial appointment part-time (para. 7.4,

above). The advantages of a part-time salaried post, over a fee-paid post, is that it provides security. A part-time salaried judge is appointed to undertake judicial tasks on a fixed number of days. Fee-paid work is much less predictable. For a practitioner (usually a woman) taking a break from full-time practice to raise a family or undertake other caring responsibilities, a part-time salaried post may be very attractive.

7.17. The question arises whether a part-time salaried judge should be able to continue in professional practice on those days when not engaged in judicial work. This may be especially important for those judges who wish to return to full-time practice at a later point (we address this at para. 7.21 *et seq*, below).

7.18. Section 75 of the Courts and Legal Services Act 1990 prohibits a judge appointed to a salaried position from engaging in practice as a barrister or as a solicitor.<sup>194</sup> This prohibition applies to all the judges within the court service up to and including the Supreme Court. We do not consider that this prohibition is justified.

7.19. Fee-paid judges continue in practice whilst sitting part-time without difficulty. We see no reason to treat salaried part-time judges any differently. We believe that the absolute prohibition on carrying on in practice is an unjustified restriction. There would need to be limitations on the right to engage in practice to avoid conflicts or any interference with judicial work but subject to that, the prohibition should be lifted.

7.20. Permitting part-time salaried judges to continue in practice (subject to limitations) may well encourage more women in particular to apply for judicial office.

**Recommendation 10:**

**Part-time salaried judges should not be prohibited from continuing in practice, subject to conditions preventing conflicts of interest or interference with judicial duties.**

(iv) Return to Practice

7.21. Section 75 of the Courts and Legal Services Act 1990 does not in terms prohibit a person who is no longer holding, but who has held, a salaried judicial post from returning to practice. However: ‘the Lord Chancellor ... regards a judgeship as a lifetime appointment. Any offer of appointment is therefore made on the understanding that appointees will not return to practice’.<sup>195</sup>

7.22. The Advisory Panel considered that there should be no change to that policy and in so concluding indicated that they had not identified any substantive evidence that such a change would increase diversity. Our discussions lead us to the opposite conclusion. It is inherently likely that a woman will be better encouraged to apply for judicial office knowing that she can return to practice after raising children.

7.23. We have not heard any convincing reasons why a judge ought not to be able to return to practice, subject to certain restrictions and conditions (as where a conflict may arise, or perhaps on condition that some period of time has elapsed since retirement from the bench). It seems entirely illogical when the judicial system relies heavily on fee-paid judges who often sit in the jurisdiction in which they practise. It is usual for a section 9 judge (Deputy High Court judge) to sit in the Administrative Court determining applications for permission and substantive judicial review claims, and then to appear in that same court as advocate in alternate weeks. This is a surprise to some from other jurisdictions which do not rely on fee-paid judges. It is nevertheless a feature of our system. We cannot see why, with proper safeguards, a judge having completed service as a judicial office holder should not be able to return to practice.

**Recommendation 11:**

**Judges should not be prohibited from returning to practice after leaving the bench, subject to conditions preventing conflicts of interest.**

(b) Culture

7.24. The real or perceived judicial establishment or culture is still a key concern for

solicitors, women and BAME potential judges.<sup>196</sup>

- 7.25. The fact that the judiciary, at senior level in particular, is dominated by White men from a particular social class can make it seem very unwelcoming to those who do not match that profile. We have heard that there are steps taken to promote a friendly and supportive environment within the Royal Courts of Justice. We have no doubt that those efforts are being made and that some friendly and supportive relationships result. However, we are convinced that this is still a real problem.
- 7.26. Nor is it likely to change until there is a radical shift in the profile of the judiciary, by the introduction of more women and minorities.
- 7.27. Much of the deterrent impact of ‘culture’ is based on perceptions and the extent to which a person feels they might, or might not, ‘fit –in.’ As to the commonly held perception of what a judge should ‘look like,’ it is true that many of the assumptions made about the criteria for senior appointment (examples include, that one must be a QC or have had experience as a Deputy High Court judge) are unfounded. The answer to the inaccurate perceptions that may deter qualified candidates is addressed by the JAC (amongst others) by ‘myth busting’; that is, sending out messages through meetings, seminars, notices etc identifying the true criteria for appointment.<sup>197</sup> There are likely to be limits on the success of these efforts, however. This is because when one looks at the judiciary many of these ‘myths’ seem very real. Whilst it is said that being a QC, barrister and/or Deputy High Court judge is not a condition for appointment to the High Court bench, the fact is that all but one High Court judge was a QC in practice at the Bar before appointment and most were Deputy High Court judges before having been appointed, just as they were mostly educated at private schools and Oxford or Cambridge.<sup>198</sup>
- 7.28. To really ‘bust’ the ‘myths’, the JAC must start recruiting from a wider pool and demonstrate by practical application of that commitment that a judicial career is one which is available to women, BAME lawyers and others from non-traditional backgrounds. Merely stating it, in the face of a senior judiciary that is

overwhelmingly male, White and drawn from a small elite, will not encourage those who presently do not believe it, that a career in the senior judiciary is available to them.<sup>199</sup>

7.29. The JAC have tools available to them now (section 63(4), CRA, in particular; para. 4.8) to effect a change by appointing those without the characteristics that are usually associated with membership of the senior judiciary. They should do so. For reasons we give below (para. 8.2 *et seq*), quotas would also facilitate this. This would in turn change the face of the judiciary and encourage greater numbers of women and other minorities to apply.

7.30. Finally, for many men in the senior judiciary (including in the Supreme Court) membership of clubs which exclude women as members is still considered appropriate. These clubs provide real or, at least perceived, ‘net-working’ and valuable social opportunities to male judges that cannot be enjoyed by their female colleagues and this conveys a powerful exclusionary message to women. Until about 40 years ago, ‘Whites’ only membership clubs were also tolerated and indeed entirely commonplace (with a total membership and reciprocal membership of over one million at one time<sup>200</sup>). ‘Whites’ only rules in clubs were made unlawful in the face of some considerable opposition only in 1976. There appears to be no appetite to change the law permitting men only clubs but membership by judges is hardly compatible with their stated commitment to equality and diversity.

(c) On-line testing

7.31. One matter relating to the appointments process adopted by the JAC warrants separate mention. We heard from representatives from BAME groups that BAME applicants for judicial office are disproportionately failing the on-line tests. We heard that the disproportionality was significant, with large numbers failing. This is obviously of considerable concern, not only because it deprives those who fail of the opportunity to progress with their application for judicial appointment, but also because it is acting as a deterrent to BAME lawyers who may be considering making an application for judicial appointment.

- 7.32. We do not have any evidence relating to failure rates. However from the enquiries we have been able to make in the short time available to us, it does appear that BAME candidates are indeed failing disproportionately. Non-discriminatory explanations have been suggested to us including that BAME candidates may be applying ‘too early’. There does not appear to have been any research into this question or into the reasons for the failure rates.
- 7.33. The failure rates are of considerable concern to us. The JAC’s research on ‘barriers to application’ shows that that BAME lawyers already have a high fear of failure. Those fears and their deterrent effect will be made worse with continuing disparities in pass rates in the on-line test.
- 7.34. There needs to be an urgent review of the on-line tests and steps taken to identify why it is that BAME candidates are failing in disproportionate numbers. Steps need to be taken to ensure that the questions asked in the on-line tests are not more readily answered by persons from certain backgrounds (by, for example, the creation of scenarios with which certain groups are more likely to be familiar) and that each of the questions asked in the on-line test is justified having regard to what it is that is sought to be tested by it.
- 7.35. From what we heard, this is a source of real concern and it does need to be addressed urgently.

**Recommendation 12:**

**There should be an urgent review of the on-line tests used by the JAC. Steps should be taken to identify why it is that BAME candidates are failing in disproportionate numbers. If the tests are found to be discriminatory, directly or indirectly, they must be withdrawn.**

**8. ACHIEVING PROGRESS**

- 8.1. There are a number of ways in which the rate of progress in moving towards a diverse judiciary could be accelerated. Many of these have been pointed out in earlier reports. Some have not.

(a) Quotas

- 8.2. The adoption of quotas as a means of achieving greater diversity is controversial<sup>201</sup> but in our opinion the advantages of a carefully constructed quota system outweigh any possible disadvantages.
- 8.3. The JAC has expressed itself thoroughly against quotas. It has even resisted the introduction of targets.<sup>202</sup> The Advisory Panel recommended that quotas or targets should not be introduced<sup>203</sup> on the ground that those from underrepresented groups had firmly and almost unanimously rejected them.<sup>204</sup> The reason for this was said to be because they might be perceived as having been appointed otherwise than on the basis of their true abilities. Further, it was thought that quotas might discourage applications from suitable candidates from well-represented groups who might fear the system was stacked against them.<sup>205</sup> We understand these concerns but we agree with Lady Hale when she says: ‘I tend to think that the judiciary would be better off without prima donnas who might not apply for such reasons...Of course we all want to be appointed on our own merits and not to make up a quota. But no-one should apply for any job unless they think they are worth it. Having applied they should be happy to get it and give it their best shot irrespective of why they were appointed’.<sup>206</sup> We also believe that these concerns will dissipate with the experience of quotas, as they have done in other situations where quotas have been adopted.
- 8.4. We consulted lawyers representing certain minority groups in the preparation of this report. Among them there was support for quotas. It may be that the lack of progress by other measures has produced a change in view at least among some groups.
- 8.5. We are persuaded that a quota system is now necessary to ensure the fair and proportionate representation of women and other minorities at senior level in the judiciary.<sup>207</sup> Quotas are already accepted in the United Kingdom. They have been introduced into other areas of public life. The Equality Act 2010 allows for political parties when selecting candidates for political office to reserve places for candidates from underrepresented groups, where that is a proportionate

means of addressing that underrepresentation.<sup>208</sup> It also allows for all - women shortlists without any need to establish proportionality given the obvious underrepresentation of women in Parliament and other political institutions.<sup>209</sup>

8.6. There is also a *de facto* quota system in operation in the Supreme Court, as is referred to above (para. 3.22). Section 27(8) of the CRA provides that: ‘In making selections for the appointment of judges of the Court [a selection] 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.’ This requirement is satisfied in practice by ensuring that there is least one judge from Scotland and one from Northern Ireland on the Court (the same positive steps are not required for England and Wales, since judges from England and Wales are in far greater numbers on the Court). It appears that in recruiting such judges, therefore, a selection commission will be recruiting the best candidates from Scotland and from Northern Ireland without reference to the quality of a potential competitor candidate from England or Wales. This has ensured that a Northern Irish judge and a Scottish judge have always had a place on the Supreme Court (and before it the Appellate Committee of the House of Lords). Nobody has or could suggest that those candidates so selected are less qualified, competent or able than their English and Welsh counterparts.

8.7. A report by the Hansard Society on ‘Women at the Top’ concluded in 2005 that all women short-lists were the ‘quickest and most effective means of delivering equal representation’, noting that:

After four decades where women’s representation averaged 3% - 4%, in the space of three elections, a step-change at nearer 20% seems to have been established ... they may not be ‘fair’, they may grate against liberal principles, they may, as critics claims, cast aspersions on the merit of the women elected, but one thing cannot be denied, measures that guarantee women’s election work, and work quickly.<sup>210</sup>

8.8. The most compelling argument for quotas, therefore, is that they work and they work quickly. As the statistics demonstrate above (para. 5.1 *et seq*, above), progress towards a diverse judiciary has simply been too slow at senior level

and whilst there has been some improvement, further improvement in the short to medium term cannot be taken for granted.

- 8.9. Concerns have been expressed about the extent to which it would be lawful to introduce quotas, having regard to, in particular, European Union gender (and other) equality laws. Relatively few cases specifically concerning the use of gender quotas in the judicial appointments process have reached the European courts. No such case has reached the Court of Justice of the European Union (CJEU) so far as we are aware. The European Court of Human Rights (ECtHR) has determined in one case that the use of quotas (in respect of nomination lists for appointments to the ECtHR) is not, in principle, objectionable;<sup>211</sup> in that instance requiring that one out of three nominated must be a woman. So long as provision is made for exceptional cases designed to enable each State Party to choose national candidates who satisfy all the requirements for office, such quotas are permissible.<sup>212</sup> Thus, unless it can be said that there is no woman who meets the threshold for appointment, quotas are not unlawful under the Convention.
- 8.10. It has been argued, however, that EU law (having regard to the jurisprudence of the CJEU) will prohibit the use of quotas. This is unlikely to be the case. The discussion below assumes that the holding of senior judicial office falls within the scope of EU anti-discrimination law.<sup>213</sup> If the holding of senior judicial office does not fall within the scope of EU equality law, then there would be nothing in EU law prohibiting the use of quotas in the case of appointment to judicial office.
- 8.11. Assuming EU anti-discrimination law does apply to the appointment of judges (and to the senior judiciary in particular), it is unlikely to preclude a proportionate quota system. This is because, firstly, the CJEU now appears to have the settled view that preferring women over men because of their gender is likely to be lawful where women are underrepresented in the particular field or otherwise disadvantaged, and that preference is proportionate. In *Lommers v Minister Van Landbouw, Natuurbeheer En Visserij*,<sup>214</sup> the CJEU was required to consider the legality of an arrangement whereby an employer provided

subsidised nursery places, but only to women members of staff. The scheme had been set up by the employer to tackle the extensive underrepresentation of women in a context characterised by a proven insufficiency of proper, affordable childcare facilities. It allowed for men to have access to the scheme ‘in the case of emergency’, which was stated to include circumstances where male employees had sole care of their children, but otherwise they did not enjoy this benefit. The CJEU held that such a scheme was permissible in principle and on those facts was lawful under EU law.<sup>215</sup> According to the CJEU, EU law authorises measures which are intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. EU law therefore permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete in the labour market and to pursue a career on an equal footing with men. The fact that the policy in issue did not guarantee access to nursery places to employees of both sexes on an equal footing did not make it disproportionate. Account had to be taken of the fact that the number of nursery places was limited, and there were waiting lists for female employees to obtain a place. Moreover, the scheme did not deprive male employees of all access to nursery places for their children, since such places were accessible in the market generally.

8.12. In *Serge Brihech v Ministre de L’Intérieur, Ministre de L’Éducation Nationale et Ministre de La Justice*,<sup>216</sup> the CJEU confirmed that proportionality was the measure against which the lawfulness of any positive discrimination was to be determined, observing as follows:

Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.<sup>217</sup>

8.13. Current CJEU case law suggests that if a positive action measure has the effect of barring completely a person from access to some benefit or opportunity in

favour of a member of an underrepresented group (women, BAME candidates, as the case may be) it is likely to be regarded as disproportionate and unlawful.<sup>218</sup> Further, it is likely that EU law would expect that some consideration be given to the respective merits of all candidates before the preferring of a candidate from the underrepresented group.<sup>219</sup> An inflexible policy under which a person from an underrepresented group is automatically appointed in preference to others, whatever their respective merits, may be regarded as disproportionate.<sup>220</sup> Subject to these conditions there is no reason to think that EU law would not countenance quotas, most especially in the context of the senior judiciary where the underrepresentation of women judges is so stark, and given the slow pace at which the problem is being addressed without quotas. Similar considerations are likely to apply in the case of ethnicity.

- 8.14. This would be consistent with Article 157 of the Treaty on the Function of the European Union<sup>221</sup> which provides that: ‘with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’. Accordingly, the Treaty anticipates that member States will take steps to address the underrepresentation of women, at least, by the provision of ‘specific advantages’. This is no doubt why there have been no cases in the CJEU challenging quotas in the context of judicial appointments, though such quotas have been put in place across Europe, including in Austria, Belgium and Latvia.<sup>222</sup>
- 8.15. In April 2014, Belgium introduced a new law imposing a gender quota in the composition of the Belgian Constitutional Court. It requires the Court to be composed of at least a third of judges of each sex. This requirement will, however, not enter into force immediately, but only once the Court is in fact composed of at least one third of female judges. In the meantime, a judge of the underrepresented sex must be appointed every time that the two preceding appointments have not increased the number of judges of the underrepresented sex. So for example, if women remain underrepresented on the Court (as they

currently are, representing only around 16% the Court), and the next two appointees are men, the third appointment will have to be a woman.<sup>223</sup> The promoters of the Belgian Bill relied on ‘four different, but interrelated, arguments’, all of which are equally apt in the United Kingdom: ‘(1) The introduction of sex quotas is a powerful stimulus for change that has proved to be useful, notably with regards to the gender composition of the Parliament. (2) There is some urgency to appoint more women on the constitutional bench. (3) Other less restrictive alternatives – such as requiring that at least one member of the Court should be a woman – have failed to bring about real sex diversity. (4) Quotas are not a radical measure since there are enough qualified women who could be appointed to the bench.’<sup>224</sup>

8.16. It is of note too, that quotas are not uncommon in international tribunals and courts. The International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Court of Justice of the European Union, the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights all employ geographical criteria (as with the Supreme Court here) and the International Criminal Court and the African Court on Human and Peoples’ Rights have rules aimed at promoting balanced representation of the sexes in their composition.<sup>225</sup> They are also not uncommon in other areas of public life. Over half of the legislatures in the world now operate some form of gender quota system.<sup>226</sup>

8.17. The difficulty with a quota system lies with the system presently adopted by the JAC for the assessment of merit:

the case against quotas rests largely on the misconception that the judicial appointments process is and can be a ranking merit system. In reality, such a model is not applicable given the particular nature of the judiciary and the candidate pools from which it is selected. Marginal decisions will always need to be made between well-qualified candidates drawn from an increasingly diverse recruitment pool. Such decisions must inevitably prioritise different qualities which cannot be numerically quantified one against the other. In the past, the characteristics which were prioritised often led to self-replication at best and discrimination at worst. By contrast, a

selection system which has an open commitment to the values of equality and diversity can quite legitimately apply quotas within a threshold merit system. This ensures that only well-qualified candidates are selected while allowing space for the promotion of gender balance in the judiciary.<sup>227</sup>

8.18. It is entirely possible to introduce a quota system while maintaining a commitment to the highest standards in the judiciary. There are a number of possible models. Some of them incorporate qualifications to a strict quota that might meet some concerns. We make some suggestions below but we recognise that before any system could be introduced, legislation<sup>228</sup> would be required.

8.19. As to the various models, in principle a quota could apply to all underrepresented groups (particularly those that are ‘protected’ under the Equality Act 2010 and generally under regional and international equality law, and social class which is not so protected). However, it would be preferable to apply them in the first instance in relation to gender and ethnicity only. Gender is easier, because women are the easiest underrepresented class to identify and monitor since the collection of gender statistics is well established. Moreover, as women make up half the population, and have been qualifying as lawyers in equal numbers to men for many years (para. 6.3 above), the underrepresentation of women is especially stark. However, there is no reason why a quota system could not be established in the case of ethnicity and given the complete absence of BAME judges in the Court of Appeal and Supreme Court (and near absence in the High Court), we consider that the time has come to introduce quotas for both gender and ethnicity.

8.20. A new system should be simple, workable and the rationale understandable. We do not say that any system of quotas should not be extended in due course to other groups but it should start with gender and ethnicity.

8.21. Quotas can operate at the application stage of a selection process, the short-listing stage, the appointment stage or all three. The potential advantage of their operation at the application stage is that they increase the size of the underrepresented group in pool. That does not, of course, guarantee that more women and BAME judges will ultimately be appointed. Under the system

adopted for the Northern Ireland police force - a 50:50 system - the quota was applied at the application stage through the construction of a 'merit pool' which included equal numbers of candidates from Catholic and Protestant backgrounds. Candidates who passed the Assessment Centre stage entered the merit pool from which candidates could be selected in a competitive process.<sup>229</sup> As referred to above, in the case of the ECtHR, and in consequence of provisions passed by the Parliamentary Assembly, of the three nominations put forward by Member States for membership of the ECtHR, one must include a member of the underrepresented sex, where underrepresentation is defined as less than 40 per cent of the membership of the Court.<sup>230</sup> The effect of these provisions has been significantly to increase the number of women on the Court. As of April 2014, the Court has 49 judges including 18 women (37 per cent), two of whom are Section Presidents.<sup>231</sup>

8.22. In some systems, the quota applies at a later stage in the process but impacts at an earlier point. For example, the quota system applied at the International Criminal Court formally operates at the voting stage of the selection process. However, its effect is felt earlier at the nomination stage as it has provided an incentive for countries to seek out high calibre women candidates.<sup>232</sup> At the 2008 election for six positions on the Court, women outnumbered male candidates 10 to three. Four women and two men were elected, resulting in a bench with 55% female representation. By 2010, the number of female judges reached 11, or 61 per cent.<sup>233</sup>

8.23. Various design features could be adopted to ensure that any quota system is proportionate. This could include time-limiting the system (by, for example, the enactment of a 'sunset' clause as applies in the case of the provision allowing for women only short-lists in the Equality Act 2010,<sup>234</sup> referred to above, para. 8.5); incremental adoption; the application of a quota of lower than 50 per cent, or a system which allows for exceptions, for example where there is an insufficient number of well-qualified women or BAME candidates in the pool. An illustration of an 'exceptional circumstances' clause is found in the guidelines on the short-listing process for the ECtHR referred to above (para. 8.9). Revised guidelines adopted by the Committee of Ministers in 2012 state

that: ‘Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is underrepresented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.’<sup>235</sup> The exceptional circumstances clause has been applied once, in relation to the candidates list provided by Malta where it was accepted that the small size of the jurisdiction meant that insufficient highly qualified women candidates were available to ensure that a woman was included on the short-list.

8.24. The level at which the quota is set for women need not be 50:50. Many quota systems employ lower proportions. Austria, for example, set a gender quota for High Court judges at 30 per cent<sup>236</sup> and the new gender quota for the Belgian Supreme Court requires the Court to be composed of at least a third of judges of each sex. For BAME judges, the quota could reflect the approximate proportion of BAME adults in the population as a whole or in the working population, or by reference to some other appropriate pool. This would also allow for different quota levels for different ranks which have different recruitment pools. However, quotas must not be set at too low a level for senior appointments because of doubt that enough qualified persons would be available, otherwise their effect could be neutralised.

8.25. Quotas could also be set initially at a lower level but increased over time as the candidate pool widens. Such quotas are categorised as ‘result’ or ‘outcome’ quotas in that they seek to develop in a way which responds to the changing context in which they operate. In some parts of Germany, for example, quota systems are used for public posts which require employers to draft six-year equality plans.<sup>237</sup> These plans must set goals and timetables to achieve a gender balance in the composition of different ranks. The use of stepped-up gender quotas over set periods of time was also a feature of the Austrian judiciary gender quota provisions. These required that, where the number of women employed in an organisational unit within the judiciary was below 40 per cent, binding requirements for quotas were introduced for periods of two years. These were set in such a way that the quotas were raised, step-by-step, up to 40 per cent.<sup>238</sup>

8.26. A 'ratio' method could alternatively be adopted. This would require quotas to be used where the overall gender balance of the institution falls below a certain ratio. This would allow quotas to be introduced or dropped in the light of the changing composition of an institution. An example of such an approach in relation to judicial selection is found in the appointments process to the ECtHR described above (para. 8.21). Provided the proportion of members of each sex falls within a 40:60 ratio, the shortlist gender requirement does not apply. Women currently make up 37 per cent of the ECtHR, so it is quite possible that the requirement will be dropped in the near future as the proportion of women increases. Similarly, if the proportion fell back below 40 per cent, the shortlist gender requirement would be reinstated.<sup>239</sup> The use of a ratio such as the 40:60 rule ensures that a genuine gender balance is maintained. Though it seems unlikely now, it is always possible that the current imbalance will not persist. A quota system which seeks to maintain a broad balance of both sexes may be less open to criticism on the basis that it stigmatises 'quota women' or is unfair to men.<sup>240</sup> Similar considerations apply in relation to ethnicity.

8.27. Quotas can be time limited. For example, gender quotas in Austria expired in 2010. Time limited models are also found in quota systems in areas other than the judiciary. The gender quota arrangements for national elections to the Westminster Parliament and the devolved legislatures of Scotland and Wales were all time-limited and have since been renewed.<sup>241</sup> An alternative approach to time-limiting is to implement the quota incrementally in stages, as in the case of the Belgian Constitutional Court (para. 8.15 above). The advantage of this system is that it allows for the wholly exceptional male candidate to be appointed in a particular round. Had such a system been in place in the United Kingdom in the years since Lady Hale was appointed to the House of Lords in 2004, there would now be five women on the Supreme Court and no quota system would be necessary since women would make up over 40 per cent of the Court.

8.28. Our preferred model at this early stage would be the Belgian model. It is flexible enough to allow for the wholly exceptional candidate in a particular

round and allows for the gradual introduction of larger numbers of women. We also consider that introducing a ‘ratio’ method (40:60) as described above would ensure that it is the need for balance that is highlighted and the importance of that acknowledged. This would mean that once a court reaches the 40:60 ratio, there would be no requirement to appoint a woman (or apply a quota) unless the overall gender balance fell. A comparable model could be adopted for BAME judges with an appropriately modified ratio.

8.29. A ‘sunset’ clause could be introduced with any provision, though if a ‘ratio’ method were adopted, this would probably be unnecessary.

8.30. We recognise that reliance on quotas without more is insufficient. Quotas will not work if those underrepresented do not apply, or are not considered for appointment. We have made a number of other recommendations for making judicial office more attractive to those who are presently underrepresented. Further, if the judiciary does become more diverse, it is likely that members of underrepresented groups will be encouraged to apply in greater numbers as they see people like ‘themselves’ on the bench. ‘Critical mass’, in terms of minority representation, will also have the effect of changing the culture and help address the perceptions that many from underrepresented groups hold about the characteristics that are necessary to take up senior judicial office (para. 7.24 *et seq*, above).

**Recommendation 13:**

**A quota system should be introduced so as to achieve as quickly as possible a balance between the proportion of women and men, and BAME and White judges, in the senior judiciary (including in the Supreme Court).**

(b) Widening the pool of applicants

8.31. The pool from which judges are drawn should be widened. This should be done in three ways. Firstly, solicitors should be routinely included in the pool from which High Court judges are drawn. Secondly, the pool should be widened to include academics. Thirdly, there should be greater movement between the lower rungs of the judiciary, including tribunal level, and the High Court: there

should be the prospect of promotion and a ‘judicial career.’

8.32. Further, senior judges should encourage members of underrepresented groups who appear qualified to hold judicial office, to apply. There should be training available to enable potential candidates to qualify for appointment.

8.33. Public authorities and other employers should demonstrate willingness to release employed lawyers for fee –paid judicial service. This should be treated as part of ordinary career development and time should be provided to facilitate training for the purpose of taking up fee-paid judicial office.

8.34. Consideration should be given to extending the range of posts to which CILEx members can be appointed.

8.35. We now examine these matters in detail.

(i) Solicitors

8.36. There is greater diversity in the solicitors’ branch of the legal profession than at the Bar. There is only one High Court judge who was previously a solicitor and he was not recruited directly from practice (as is the case generally from the Bar), but instead came through the tribunal system (see, para. 5.33, above). There is no reason in our view why solicitors should not apply directly from practice for appointment to the High Court bench. There is no existing statutory prohibition on recruitment direct to the High Court bench.<sup>242</sup> However, there are few precedents and so no real encouragement for solicitors to apply.<sup>243</sup>

8.37. The current solicitor judge was a partner in a ‘Magic Circle’ firm and the background to his appointment is described on the JAC website as follows: ‘For several years, he did not take holidays. He would work 13 day fortnights when it was busy, and then go and sit in Wales for two or three weeks. On top of that, he sat as a Parking Adjudicator one evening a week from 5pm to 8pm, later taking on test cases which raised legal issues. “I wanted to gain as much sitting experience as I could,” he explains. “As a solicitor, you are not in court as much as a busy Silk, even though I had higher rights of audience and appeared in

some major product liability interlocutory hearings. So I sat for the maximum ten weeks a year while doing as many billable hours as anyone else in my firm - so no one could complain.” That is not a trajectory that those with caring responsibilities (overwhelmingly women) and those seeking to achieve a healthy work life balance could hope to achieve. It is not a helpful precedent.

8.38. Anecdotal evidence suggests that a solicitor is likely to have a better chance of appointment to the High Court bench if they are first an equity partner in a ‘Magic Circle’ firm. This assumes that success in such a firm is the hallmark of the highest ability for solicitors. Our experience tells us otherwise. There are many solicitors who choose to pursue a career in publicly funded (legal aid) work or work as employed solicitors with public authorities or commercial entities who are exceptionally well-qualified for office. Making the assumption that it is the ‘Magic Circle’ graduates that make the best judges will simply replicate the patterns that already exist amongst the senior judiciary since the ‘Magic Circle’ firms are dominated by White men with backgrounds similar to those of the White male senior judiciary.<sup>244</sup>

8.39. We strongly believe that opening up the High Court bench (and therefore ultimately the Appellate courts) to solicitors is necessary as a means of promoting diversity. However, it will only work to promote diversity if the solicitors to whom this opportunity is presented span the whole of the solicitors’ branch of the profession, and that the opportunity is not restricted to equity partners at ‘Magic Circle’ firms.

8.40. We are aware that solicitors find it very difficult to secure release from their firms to undertake judicial tasks. In small firms where margins are low and staff under constant pressure, it may be over-optimistic to expect this. However, in larger firms it should be positively encouraged. We believe that there are steps that could be taken to assist with this. The Law Society could provide encouragement pointing to the importance of public service and the value for the reputation of the profession as a whole, as well as of the individuals and firms concerned. It has already done much to encourage its members to seek judicial office and to assist them to do so (see para. 6.22, above). Senior

members of the solicitors branch of the profession and the judiciary could do the same. The message that there is value to solicitors, their firms and the profession more generally in solicitors holding judicial office could be enhanced by greater recognition of solicitors who become judges.

8.41. More effective measures need to be introduced to ensure that solicitors have the opportunity to secure judicial appointment, including at the highest level.

(ii) Academics

8.42. The pool from which judges are drawn should be widened to include legal academics.<sup>245</sup>

8.43. We see no reason why sufficient trial skills (if needed) cannot be taught to those who have not been in practice as barristers or solicitors, including academics. There are many examples of judges whose area of practice at the Bar or as a solicitor did not involve (or principally involve) trial work. The stated requirements for appointment to the High Court bench do not require such experience.<sup>246</sup> Most legal academics would meet the statutory requirements for appointment so long as they had during their period in academia ‘a relevant legal qualification’ for at least the period of seven years.<sup>247</sup> Trial management skills can be and are taught and learnt through a mixture of formal training through the Judicial College and ‘on the job’ training with the assistance and support of more experienced colleagues.

8.44. The inclusion of academics is even more compelling at Appellate level since in the Appellate courts (save in very exceptional circumstances) trials do not take place. No doubt trial experience – as with many other forms of experience - is desirable but since one is dealing at Appellate level with points of law, experience of the conduct or management of a trial is not essential (and nor do all Appellate court judges have it). Other common law jurisdictions routinely appoint academics to judicial office, including at senior level, including Canada, Australia, South Africa and New Zealand.

8.45. The statutory requirements for appointment to the High Court bench do not

require any prior judicial experience but the JAC imposes such a requirement generally, apparently because the Lord Chancellor expects any successful candidate to have such experience.<sup>248</sup> New judges are expected to ‘hit the ground running’. We see no reason why this should be, even at Appellate level.

8.46. The recommendation we make in relation to academics should not be seen as *the* answer to the diversity problem. There is an underrepresentation of women and other minorities at the senior end of academia too.<sup>249</sup> However, there is greater diversity. Including academics in the pool from which selection for judicial office takes place will add more women and BAME candidates and increase diversity in experience and background.

(iii) Employed Lawyers

8.47. Public authorities and private corporations between them employ thousands of barristers and solicitors.

8.48. The profile of employed barristers and solicitors is much more diverse than those in private practice. If recruited in large enough numbers they could make a great deal of difference to the profile of the judiciary. There is little evidence that public authorities (including, for example, the Crown Prosecution Service and the Government Legal Services<sup>250</sup>) encourage their employed lawyers to seek fee-paid judicial posts. It would help if such roles were valued within the organization and the holders of judicial office duly credited. If Government is truly committed to securing a diverse judiciary, then it has in its hands the opportunity to make an immediate difference by mobilizing its own employees.

8.49. Public authorities (including the Crown Prosecution Service and the Government Legal Services) should demonstrate willingness to release employed lawyers to undertake training for judicial office and to undertake for fee –paid judicial service. This should be treated as part of ordinary career development and time should be provided to facilitate the taking up of fee-paid judicial appointments.

(iv) CILEx

8.50. Legal executives became eligible for judicial appointments by the Tribunal, Courts and Enforcement Act 2007. The Judicial Appointments Order 2008<sup>251</sup> made under the 2007 Act made legal executives eligible for the following judicial appointments:

- District Judge or Deputy District Judge (Civil and Magistrates)
- Road User Charging Adjudicator
- Legally qualified member of the Asylum and Immigration Tribunal
- Member of Panel of Chairmen of the Employment Tribunal
- Judge of the First Tier Tribunal
- Adjudicators (regulation 17 Civil Enforcement of Parking Contraventions).

8.51. The Judicial Appointments (Amendment) Order 2013 provided that legal executives could also hold office as senior coroners, area coroners and assistant coroners under the Coroners and Justice Act 2009.<sup>252</sup> At present, two Chartered Legal Executive lawyers are Deputy District Judges.<sup>253</sup>

8.52. The intention behind these changes was to remove the bar on legal executives becoming judges and to increase diversity.

8.53. CILEx argue that all judicial posts should be open to legal executives, subject to meeting the usual requirements for office and following selection on merit. We see no reason why legal executives should be excluded by statute from holding certain judicial posts. Given the greater diversity that exists amongst legal executives, their appointment should be encouraged.

#### (c) A Judicial Career

8.54. The Advisory Panel advocated a move towards a 'judicial career'.<sup>254</sup> We have seen little evidence that this has occurred. There are a small number of examples (two that we are aware of, though there may be more) of tribunal judges being appointed from the tribunals to the circuit bench and the example of Mr. Justice Hickinbottom (para. 5.33, above). In these three cases and therefore, presumably, in all other cases, candidates already holding salaried positions at tribunal level were required to apply for more senior positions in open competition with those with no previous salaried post (that is, just as if they were coming from outside the system). There is no 'promotion' route or expectation that training and appraisal will be provide with a view to promotion

as would be the case in other kinds of employment. This needs to change.

8.55. Judges from the Tribunals Service should be able to expect that promotion through the ranks ultimately to the High Court bench and the Appellate courts will be available to them if they acquire the necessary skills and experience. In very general terms the qualities required for judicial office (and indeed the general '*qualities and abilities*' identified by the JAC; para. 3.11, above) are the same. Many tribunal judges have experience of long and complex trials and dealing with novel points of law (the lengthy equal pay and pension litigation in the Employment Tribunals is one example). There has historically been a firm divide between the tribunals and the courts and little movement between the two, at least so far as the High Court bench is concerned.

8.56. Since tribunal judges are a much more diverse group, a career pathway from the tribunals to the High Court bench would be a means of achieving greater diversity in the senior judiciary.

8.57. Opportunities for career progression need to be structured and supported by appraisals and training, just as one would expect in any other profession, occupation or workplace. This would encourage excellent candidates to apply for judicial office at lower levels since with a structured career path one could hope to be promoted to more senior posts. Excellent candidates are unlikely to apply for posts at very junior level if it is expected that that is where they will spend their whole judicial career. With so few tribunal judges securing appointment to more senior office, that would be a realistic expectation.

8.58. The highly regarded Judicial College could provide training for judges at lower levels who aspire to promotion.<sup>255</sup> Courses could be provided to junior (including salaried) judicial office holders directed at providing the skills necessary to secure promotion through the tribunal ranks and to the senior judiciary. 'Acting up' (temporary promotion) and work shadowing opportunities could also be provided allowing for skills to be learnt and tested. This would reflect the expectations ordinarily enjoyed by those in other professions and occupations and would assist in challenging assumptions that access to the

higher judiciary is through a ‘side-ways’ move from the senior end of the Bar.

(d) Encouragement, facilitation and training

- 8.59. It is widely assumed that since the old ‘tap on shoulder’ approach to the making of judicial appointments has been replaced by the JAC’s processes, there is no room for positive encouragement to potential candidates to apply for judicial office. We reject this view. In reality, anyway, we suspect that it still goes on behind the scenes but for those of ‘traditional’ backgrounds.<sup>256</sup>
- 8.60. It should be the duty of the senior judiciary to identify good candidates for judicial office and inform them of their view and encourage them to apply. There can be no objection to this so long as the judges so doing are not statutory consultees, or engaged in the relevant recruitment exercise. Anecdotal evidence<sup>257</sup> suggests a greater reluctance amongst certain groups to apply for senior judicial office on the basis of a feeling that they are not up to it or do not fit the mould of a senior judge. The senior judiciary has an important role in ‘myth busting’ and one way they can do this is by encouraging less traditional candidates to apply.
- 8.61. Support from a senior judge is likely to boost confidence and may make the difference between applying and not applying. The Lord Chief Justice has a duty to take such steps as he considers appropriate for the purpose of encouraging judicial diversity.<sup>258</sup> He should make sure that all senior judges make a habit of encouraging high quality practitioners from underrepresented groups to apply. The Lord Chief Justice’s ‘Diversity Statement’<sup>259</sup> states that members of the judiciary encourage people from ‘non-traditional backgrounds to consider the possibility of a judicial career.’ It is not clear in practice how this is achieved. Organised talks and seminars at the Inns of Court are important (and are happening, as they should be elsewhere) but they are not enough. Individuals should be identified and encouraged and helped to apply.
- 8.62. Opportunities for training in the skills needed to secure a first judicial appointment are essential. The Advisory Panel recommended a Judicial Skills Course with bursaries for those from underrepresented groups.<sup>260</sup> A course has

been developed but is not run frequently, as we understand it, and very few bursaries are made available.<sup>261</sup> More work is needed on this.

**Recommendation 14:**

**More solicitors should be encouraged to seek appointment to the High Court bench and obstacles to their appointment removed.**

**Recommendation 15:**

**The pool from which candidates for judicial office are drawn should be widened to include legal academics.**

**Recommendation 16:**

**There should be greater progress towards the concept of a judicial career in which promotion can take place from the lower levels of the judiciary (including from tribunals) to the High Court.**

**Recommendation 17:**

**Employers should encourage employed lawyers to undertake fee –paid judicial service and provide release time for this purpose as well as for training to prepare them for judicial office.**

**Recommendation 18:**

**The range of judicial posts to which CILEx members can be appointed should be reviewed and any restrictions should be strictly justified.**

**Recommendation 19:**

**There should be arrangements in place to ensure that senior judges encourage potential candidates from underrepresented groups to apply for judicial office.**

**Recommendation 20:**

**Training should be provided to equip candidates, especially from underrepresented groups, with the skills needed for judicial office.**

## **RECOMMENDATIONS**

### Recommendation 1:

In assessing the ‘merit’ of candidates for judicial appointment, the ability of the candidate to contribute to a diverse judiciary should be included as a factor to be taken into account.

### Recommendation 2:

The JAC should change its policy on the ‘tie-break’ provision so as to apply it at the sift/shortlist stage where there is significant underrepresentation of women or BAME judges holding the judicial office to which the selection process relates.

### Recommendation 3:

Any selection commission established to select a person to be recommended for appointment as a judge of the Supreme Court (or as President or Deputy President of the Supreme Court) should apply the ‘tie-break’ provision at shortlisting stage, at in least in relation to the characteristics of gender and ethnicity.

### Recommendation 4:

The collection of reliable data on the ethnicity of current judicial post-holders must be collected as a matter of urgency.

### Recommendation 5:

The Courts and Tribunals Judiciary should collect data on the disability status, sexual orientation, religion and belief and the social and educational background of judges and tribunal (legal) members. The results should be contained within their Diversity Statistics published annually.

### Recommendation 6:

The JAC should monitor the social and educational background of applicants, shortlisted candidates, those recommended for appointment and current post-holders. Such data should be routinely collected and published with other monitoring data.

Recommendation 7:

All posts should be available for part-time work and/or job-sharing unless the Lord Chancellor can justify the need for a full-time appointment.

Recommendation 8:

If the Lord Chancellor is to direct that a post is not suitable for part-time work and/or job-sharing, he should be required to give reasons and the JAC should publish them.

Recommendation 9:

The circuit system should be abolished and replaced with regional appointments.

Recommendation 10:

Part-time salaried judges should not be prohibited from continuing in practice, subject to conditions preventing conflicts of interest or interference with judicial duties.

Recommendation 11:

Judges should not be prohibited from returning to practice after leaving the bench, subject to conditions preventing conflicts of interest.

Recommendation 12:

There should be an urgent review of the on-line tests used by the JAC. Steps should be taken to identify why it is that BAME candidates are failing in disproportionate numbers. If the tests are found to be discriminatory, directly or indirectly, they must be withdrawn.

Recommendation 13:

A quota system should be introduced so as to achieve as quickly as possible a balance between the proportion of women and men, and BAME and White judges, in the senior judiciary (including in the Supreme Court).

Recommendation 14:

More solicitors should be encouraged to seek appointment to the High Court bench and obstacles to their appointment removed.

Recommendation 15:

The pool from which candidates for judicial office are drawn should be widened to include legal academics.

Recommendation 16:

There should be greater progress towards the concept of a judicial career in which promotion can take place from the lower levels of the judiciary (including from tribunals) to the High Court.

Recommendation 17:

Employers should encourage employed lawyers to undertake fee –paid judicial service and provide release time for this purpose as well as for training to prepare them for judicial office.

Recommendation 18:

The range of judicial posts to which CILEx members can be appointed should be reviewed and any restrictions should be strictly justified.

Recommendation 19:

There should be arrangements in place to ensure that senior judges encourage potential candidates from underrepresented groups to apply for judicial office.

Recommendation 20:

Training should be provided to equip candidates, especially from underrepresented groups, with the skills needed for judicial office.

## Endnotes

---

<sup>1</sup> Catherine Baksi, ‘Neuberger floats career judiciary to boost diversity’ *Law Society’s Gazette* (London, 17 September 2014) 4.

<sup>2</sup> We include women, though in numbers in the majority, as ‘minorities’ since they are under-represented in the important institutions of power, including amongst the senior judiciary. We use the acronym BAME to capture those of minority ethnic origin (Black, Asian and Minority Ethnic).

<sup>3</sup> Equality Act 2010, Part 5; Directives 2000/43/EC; 2000/78/EC and 2006/54/EC.

<sup>4</sup> Erika Rackley, written evidence to the Constitution Committee (Autumn 2011) cited in Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (CentreForum, 2012) <<http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>> accessed 28 August 2014, 39.

<sup>5</sup> See too, ‘I prefer to regard the present judiciary as disadvantaged. They mean well. Few if any of its members are actively misogynist or racist: but they have a lamentable lack of experience of having female or ethnic minority colleagues of equal status. They often simply do not know what to do with us or how to interpret what we say. Giving them a greater diversity of colleagues would do them no end of good. So what I am really saying is let’s have some affirmative action to rid them of their disadvantages’. Brenda Hale, ‘Equality in the judiciary: a tale of two continents’ (10th Pilgrim Fathers’ Lecture, 24 October 2003), cited in House of Commons Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (Court of Final Appeal)*, (First Report of Session 2003–04, Volume 1) HC 48-I, 2004, <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf>> accessed 26 August 2014, para 144. In evidence to the House of Commons Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (Court of Final Appeal)*, (First Report of Session 2003–04, Volume 1) HC 48-I, 2004, <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf>> accessed 26 August 2014, (Q 183) Lady Hale said: ‘I am a supporter of confronting the merit principle head on and saying that there are many more very able, capable, independently minded people of integrity who could make a contribution as judges than the ones who are currently regarded as the obvious candidates under the present system.’

<sup>6</sup> Brenda Hale, ‘Women in the Judiciary’ (Fiona Woolf Lecture, 27 June 2014) <<http://supremecourt.uk/docs/speech-140627.pdf>> accessed 26 August 2014. Internal references removed.

<sup>7</sup> Oral evidence, Constitution Committee Inquiry, 16 November 2011, Q251, cited in Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013) 193.

<sup>8</sup> European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: Edition 2012* (2010 date), fig 11.30 cited in Hale ‘Women in the Judiciary’ (n 6) 6. See too, Rackley (n 7) 22, citing European Commission, *More Women in Senior Positions: Key to Economic Stability and Growth*, (Directorate -General for Employment, Social Affairs and Equal Opportunities Unit G1, January 2010) 66.

<sup>9</sup> *Ibid.* A recent report suggests the position may be even worse: with only Azerbaijan and Armenia having lower proportions: Owen Bowcott ‘Women make up only 25% of judges in England and Wales’ *The Guardian* (London, 9 October 2014)

---

<<http://www.theguardian.com/law/2014/oct/09/uk-lags-europe-gender-balance-judiciary>> accessed 2 November 2014.

<sup>10</sup> Hale 'Women in the Judiciary' (n 6).

<sup>11</sup> Yet there is still an underrepresentation of BAME post holders: 'Courts Diversity Statistics 2013-14' (*Courts and Tribunals Judiciary, Judicial Diversity Statistics 2014* 31 July 2014) <<http://www.judiciary.gov.uk/publications/judicial-diversity-statistics-2014/>> accessed 15 October 2014.

<sup>12</sup> That is, they will not (in their capacity as non-legal members) qualify for more senior judicial posts.

<sup>13</sup> See for example, the recommendations in the '*Peach Report*' (Leonard Peach, *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (December 1999), <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/judicial/peach/indexfr.htm>> accessed 22 August 2014) that 'Deputy High Court Judge posts are filled using the established appointments procedures bringing them into line with other part-time appointments' and that 'consideration should be given to the concept of permanent part-time, appointments with flexible sitting arrangements/working hours, including to the High Court Bench'. It was not until the enactment of the Crime and Courts Act 2013 that the appointment of Deputy High Court judges was brought into line with other part-time appointments or that permanent part-time appointments were formally made available High Court judges.

<sup>14</sup> Ibid.

<sup>15</sup> Established pursuant to a recommendation in the *Peach Report*, *ibid* (and referred to in the Report of the House of Commons Constitutional Affairs Committee on *Judicial Appointments and a Supreme Court* (n 5) para 118 *et seq.*

<sup>16</sup> Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (CP 10/03, July 2003) and related materials <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/2003.htm>> accessed 22 August 2014; and Department for Constitutional Affairs, *Increasing Diversity in the Judiciary* (CP 25/04, October 2004) and related materials <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/judiciary/diversitycp25-04.htm>> accessed 22 August 2014; Ministry of Justice, *Appointments and Diversity 'A Judiciary for the 21st Century': Response to public consultation* (CP19/2011, 11 May 2012) <<https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011/results/response-consultation-appointments-diversity.pdf>> accessed 26 August 2014.

<sup>17</sup> House of Commons Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court* (n 5).

<sup>18</sup> House of Lords Select Committee on the Constitution *Judicial Appointments* (HL Paper 272, 2012) Twenty-Fifth Report of Session 2010-12 HL <<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27202.htm>>.

<sup>19</sup> Julia Neuberger and others, *The Report of the Advisory Panel on Judicial Diversity 2010* (2010) <[http://www.equality-ne.co.uk/downloads/759\\_advisory-panel-judicial-diversity-2010.pdf](http://www.equality-ne.co.uk/downloads/759_advisory-panel-judicial-diversity-2010.pdf)> accessed 2 November 2014.

<sup>20</sup> Ibid.

<sup>21</sup> Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (May 2011) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/2173](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/2173)

---

54/judicial-diversity-report-2010.pdf>; Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (September 2012) <<http://data.parliament.uk/DepositedPapers/Files/DEP2012-1410/JudicialDiversityTaskforceannualreport2012.pdf>> and Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (September 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/244013/judicial-diversity-taskforce-annual-report-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244013/judicial-diversity-taskforce-annual-report-2013.pdf)> all accessed 30 August 2014.

<sup>22</sup> Judicial Diversity Taskforce (September 2013), *ibid*.

<sup>23</sup> Lords Constitution Committee Twenty-Fifth Report, March 2012 'Judicial Appointments.'

<sup>24</sup> Evidence before the Lords Constitution Committee, Autumn 2011 cited in Paterson and Paterson, *Guarding the Guardians?* (n 4), 44.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Guarding the Guardians?* (n 4), 48.

<sup>27</sup> *Ibid*, 49

<sup>28</sup> Judicial Appointments Commission Regulations 2013, SI 2013/2191, reg. 3.

<sup>29</sup> Constitutional Reform Act 2005 ('CRA'), Schedule 12, para 2(1).

<sup>30</sup> CRA, Schedule 12, para 11(1). In practice, this will be a Lord or Lady Justice of Appeal: CRA, Schedule 12, para 11(1) and Judicial Appointments Commission Regulations 2013, SI 2013/2191, reg. 16.

<sup>31</sup> CRA, Schedule 12, para 3A, as amended by the Crime and Courts Act 2013.

<sup>32</sup> Judicial Appointments Commission Regulations 2013, SI 2013/2191, reg. 4.

<sup>33</sup> Judicial Appointments Commission Regulations 2013, SI 2013/2191, reg. 4 which also prescribes the offices that the remaining judicial office holders must hold.

<sup>34</sup> Judicial Appointments Commission Regulations 2013, SI 2013/2191, Part 8. This is a welcome development because these posts are generally seen as an important step in securing a substantive High Court appointment. The process by which one could be become appointed a Deputy High Court Judge was somewhat opaque. It is of note that as far back as 1999, the *Peach Report* (n 13) recommended that the appointment of section 9 judges should be filled using the established appointments procedures bringing them into line with other part-time appointments. This was not done until 2013.

<sup>35</sup> CRA, section 63.

<sup>36</sup> CRA, section 64.

<sup>37</sup> *Ibid*.

<sup>38</sup> By the Crime and Courts Act 2013.

<sup>39</sup> CRA, section 137A, as amended by the Crime and Courts Act 2013.

<sup>40</sup> Judicial Appointments Commission, *Annual Report and Accounts 2013/14* (19 July 2014) <[available at http://jac.judiciary.gov.uk/about-jac/167.htm](http://jac.judiciary.gov.uk/about-jac/167.htm)> 9.

<sup>41</sup> *Ibid*, 74-5.

<sup>42</sup> This account of the process is based on the 'Overview of the Selection Process' which forms Appendix A to *ibid*.

<sup>43</sup> Judicial Appointments Commission 'Qualities and Abilities' <<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm>> accessed 2 November 2014. As to which 5, for example, for posts requiring particular leadership skills, the efficiency quality may be replaced by the leadership and management skills quality, *ibid*.

- 
- <sup>44</sup> Judicial Appointments Regulations 2013, SI 2013/2192, Part 2.
- <sup>45</sup> Ibid, Part 3.
- <sup>46</sup> Ibid, Part 4.
- <sup>47</sup> Ibid, Part 5.
- <sup>48</sup> Subject to her or him being disqualified, incapacitated or that judge's nominee, in which case other provision is made.
- <sup>49</sup> Subject to her or him being disqualified, incapacitated or that judge's nominee, in which case other provision is made.
- <sup>50</sup> Subject to her or him being disqualified or incapacitated, in which case other provision is made.
- <sup>51</sup> Subject to her or him being disqualified, incapacitated or that judge's nominee, in which case other provision is made.
- <sup>52</sup> Subject to certain exceptions and qualifications.
- <sup>53</sup> Subject to certain exceptions and qualifications.
- <sup>54</sup> Judicial Appointments Regulations 2013, 2013/2192.
- <sup>55</sup> For details, see *ibid*, Part 6.
- <sup>56</sup> See, Senior Courts Act 1981, section 10; Courts Act 1971, section 16; Judicial Appointments Regulations 2013/2192, reg.s 8, 14, 20 and 26.
- <sup>57</sup> See too, Schedule 8 and the Supreme Court (Judicial Appointments) Regulations 2013, SI 2013/2193 (see reg. 11(3) for reference to diversity in the constitution of the commission).
- <sup>58</sup> CRA, section 26(2).
- <sup>59</sup> CRA, section 27(1A).
- <sup>60</sup> CRA, section 27(1B).
- <sup>61</sup> As to which see, Tribunals, Courts and Enforcement Act 2007, section 50.
- <sup>62</sup> CRA, sections 25 and 60.
- <sup>63</sup> CRA, section 27(5).
- <sup>64</sup> CRA, section 27(8).
- <sup>65</sup> The Supreme Court, 'Information Pack: Vacancy for Three Justices of the Supreme Court' <<https://www.supremecourt.uk/docs/information-pack-121016.pdf>> accessed 2 November 2014.
- <sup>66</sup> Jonathan Sumption 'Home Truths about Judicial Diversity' (Bar Council Law Reform Lecture, 15 November 2012) <<https://www.supremecourt.uk/docs/speech-121115-lord-sumption.pdf>>.
- <sup>67</sup> Quoted by Alan Paterson and Chris Paterson, 'We need to rethink how we define merit for Supreme Court appointments' *The Guardian* (London, 26 March 2012) <<http://www.theguardian.com/law/2012/mar/26/rethink-merit-supreme-court-appointments>> accessed 2 November 2014.
- <sup>68</sup> Hale (n 6), 21.
- <sup>69</sup> Terrance Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' (2010) *Public Law*, 727, 745, cited in Rackely (n 7), 185.
- <sup>70</sup> House of Lords Select Committee on the Constitution (n 18).
- <sup>71</sup> *Ibid*, para 70 (internal footnotes removed).
- <sup>72</sup> Hale (n 6), 21, citing Madam Justice Bertha Wilson, 'Will Women Judges really make a difference?' (1990) 28(3) *Osgoode Hall Law Journal* 507 (footnote in the original).
- <sup>73</sup> *Ibid*.
- <sup>74</sup> *Ibid*, citing Alan Paterson and Chris Paterson, *Guarding the Guardians?* (n 4).

---

<sup>75</sup> It is of note, that the objection to taking account of the contribution gender, ethnicity etc can make to the judiciary is not founded in any concerns about the extent to which the law might prohibit it (see below for analysis of the legal background) but is an objection in principle.

<sup>76</sup> Which prohibits discrimination in appointments and recommendations for appointments to public office; Equality Act 2010, sections 50 and 51.

<sup>77</sup> Judicial Appointments Commission, 'Equal Merit Provision: JAC Policy' (2014) <[http://jac.judiciary.gov.uk/static/documents/EMP\\_policy.pdf](http://jac.judiciary.gov.uk/static/documents/EMP_policy.pdf)> accessed 2 November 2014.

<sup>78</sup> Ibid, 4.

<sup>79</sup> Select Committee on the Constitution, *Judicial Appointments Process Oral and Written Evidence* <<http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf>> accessed 10 October 2014, 364.

<sup>80</sup> Judicial Appointments Commission (n 77), para 4.

<sup>81</sup> See, Equality Act 2010, section 4.

<sup>82</sup> The following summary derives from the latest diversity statistics (as at 1 April 2014) released on the Courts and Tribunals Judiciary website on 31 July 2014 under the heading 'Court and Diversity Statistics 2013-14', available at: <<http://www.judiciary.gov.uk/publications/judicial-diversity-statistics-2014/>> accessed 30 August 2014.

<sup>83</sup> 'Judicial Posts' comprise the following: Supreme Court Judges; Lords Justices of Appeal; High Court Judges; Judge Advocates, Deputy Judge Advocates, Masters, Registrars, Costs Judges and District Judges; Deputy Masters, Deputy Registrars, Deputy Costs Judges, Deputy District Judges; Circuit Judges; Recorders; District Judges (County Courts); Deputy District Judges (County Courts); District Judges (Magistrates' Court) and District Judges.

<sup>84</sup> The panel was established on 28 April 2009. See Neuberger (n 19), 73. The most senior judges then being Lords of Appeal in Ordinary.

<sup>85</sup> Lord Brown (appointed the day after Lady Hale), Lord Mance, Lord Neuberger, Lord Kerr, Lord Collins, Lord Clarke, Lord Dyson, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwarth, Lord Hughes, Lord Toulson and Lord Hodge.

<sup>86</sup> See, Neuberger (n 19), 73.

<sup>87</sup> Two further High Court appointments have been recorded, which post-date the April 2014 figures bringing the total figure for High Court judges up from 106 to 108, 21 of whom are women (19.4%); <<http://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-2013-what-do-the-latest-figures-show/>> accessed 6 September 2014.

<sup>88</sup> See, Neuberger (n 19), 73.

<sup>89</sup> 'Courts Diversity Statistics 2013-14' (n 82).

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> See, Neuberger (n 19), 73.

<sup>93</sup> 'Courts Diversity Statistics 2013-14' (n 82).

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Neuberger (n 19), 15.

<sup>97</sup> 'Courts Diversity Statistics 2013-14' (n 82).

<sup>98</sup> Ibid.

---

<sup>99</sup> One member identified as ‘Asian or Asian British’, two members identified as ‘Any other background’ and 87 members identified as ‘White’ (information about ethnicity is reported on a voluntary basis and 16 members elected not to report on ethnicity.) See: *ibid.*

<sup>100</sup> One member identified as ‘Asian or Asian British’, two members identified as ‘Any other background’ and 87 members identified as ‘White’ (information about ethnicity is reported on a voluntary basis and 16 members elected not to report on ethnicity.) See: *ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> See, Neuberger (n 19), 74.

<sup>103</sup> Senior Courts Act 1981, section 9. A full list of qualifications for appointment as a section 9 judge (as they are known) is set out in section 9 but in reality for practitioners, the usual route is through appointment as a Recorder.

<sup>104</sup> ‘Courts Diversity Statistics 2013-14’ (n 82).

<sup>105</sup> *Ibid.*

<sup>106</sup> <http://www.judiciary.gov.uk> and see, *ibid.*, for the characteristics monitored.

<sup>107</sup> L Moran, ‘Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings’ (2006) 28, 565 (addressing specifically sexual orientation), cited in Rackley (n 7), 14. The JAC does collect such data in relation to selection exercises (see: Judicial Appointments Commission *Judicial Selection and Recommendations for Appointment Statistics, October 2013 to March 2014* (5 June 2014) <[http://jac.judiciary.gov.uk/static/documents/JAC\\_publication\\_2014\\_06.pdf](http://jac.judiciary.gov.uk/static/documents/JAC_publication_2014_06.pdf)> accessed 27 October 2014) but not in relation to the present composition of the judiciary (a matter for the courts and tribunals judiciary).

<sup>108</sup> Judicial Appointments Commission *Judicial Selection and Recommendations for Appointment Statistics*, *ibid.*

<sup>109</sup> <http://www.judiciary.gov.uk> and see, ‘Courts Diversity Statistics 2013-14’ (n 82), for the characteristics monitored.

<sup>110</sup> Judicial Appointments Commission *Judicial Selection and Recommendations for Appointment Statistics* (n 107).

<sup>111</sup> *Ibid.*

<sup>112</sup> <http://www.judiciary.gov.uk> and see, ‘Courts Diversity Statistics 2013-14’ (n 82), for the characteristics monitored.

<sup>113</sup> Judicial Appointments Commission *Judicial Selection and Recommendations for Appointment Statistics* (n 107).

<sup>114</sup> *Ibid.*

<sup>115</sup> Being only the fourth solicitor to have ever been appointed to the High Court bench: Judicial Appointments Commission ‘The Hon Mr Justice Hickinbottom’ <<http://jac.judiciary.gov.uk/334.htm>> accessed 30 August 2014.

<sup>116</sup> Neuberger, (n 19), 15.

<sup>117</sup> Being only the fourth solicitor to have ever been appointed to the High Court bench: Judicial Appointments Commission ‘The Hon Mr Justice Hickinbottom’ (n 115).

<sup>118</sup> Deputy Senior President of Tribunals.

<sup>119</sup> Judicial Appointments Commission ‘The Hon Mr Justice Hickinbottom’ (n 115).

<sup>120</sup> Debrett’s ‘Gary Robert Hickinbottom’ <<http://www.debretts.com/people-of-today/profile/21082/Gary-Robert-Hickinbottom-HICKINBOTTOM>> accessed 2 November 2014.

<sup>121</sup> Social Mobility and Child Poverty Commission, *Elitist Britain?* (August 2014)

---

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/347915/Elitist\\_Britain\\_-\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347915/Elitist_Britain_-_Final.pdf)> accessed 30 August 2014.

<sup>122</sup> Ibid, 10.

<sup>123</sup> Ibid, 47.

<sup>124</sup> Ibid, 47.

<sup>125</sup> Ibid, 11.

<sup>126</sup> Ibid, 14.

<sup>127</sup> Ibid, 11.

<sup>128</sup> Information via *Wikipedia* and *Debretts.com* (accessed 21 August 2014). The educational background of one member of the Court of Appeal – Sir Nicholas Patten – is not known to the authors.

<sup>129</sup> Hale (n 6).

<sup>130</sup> Ibid.

<sup>131</sup> Alan Milburn and others, *Unleashing Aspiration: The Final Report of the Panel on Fair Access to the Professions* (2009) <<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/227102/fair-access.pdf>> accessed 26 August 2014 ('the Milburn Report'), 18-9.

<sup>132</sup> Ibid, 19.

<sup>133</sup> Lord Neuberger MR (as he was) '[m]ost of us think of a judge as a white, probably public school, man', Oral evidence to the House of Lords Select Committee on the Inquiry into Judicial Appointments Process (16 November 2011), Q248, cited in Rackley (n 7), 129-30.

<sup>134</sup> The Bar Council is already monitoring similar information in respect of first six pupil barristers: Bar Standards Board, *Bar Barometer: Trends in the profile of the Bar* (June 2014) <[http://www.barcouncil.org.uk/media/287767/bar\\_barometer\\_report\\_\\_updated\\_-\\_june\\_2014\\_.pdf](http://www.barcouncil.org.uk/media/287767/bar_barometer_report__updated_-_june_2014_.pdf)> accessed 2 November 2014.

<sup>135</sup> The first two being models adopted by the Law Society: The Law Society, *Diversity Profile of the Profession* (21 May 2014) <<http://www.lawsociety.org.uk/advice/articles/diversity-in-the-profession/>> accessed 6 September 2014.

<sup>136</sup> Judicial Appointments Commission, *Updated analysis of the trends in diversity of applications and recommendations made by the JAC* (5 March 2014) <[http://jac.judiciary.gov.uk/static/documents/Updated\\_trends\\_2013\\_9.pdf](http://jac.judiciary.gov.uk/static/documents/Updated_trends_2013_9.pdf)> accessed 6 September 2014. The JAC have informed us that a further report on 'trends' will be published in December 2014. However, a note of the findings that will be published in December 2014, provided to us by the JAC, indicates that whilst there has been a 'significant' improvement in the number of applications from women for the High Court bench, there has not been any significant improvement in the number of recommendations of women for the High Court. The position remains the same as before for BAME candidates.

<sup>137</sup> Dame Linda Penelope Dobbs DBE was the first non-White appointee to the High Court bench. She retired in 2013 and Mr. Justice Rabinder Singh, the second non-White appointee to the High Court bench was appointed in 2011 and so for a short period there were two non-white High Court judges but the position has reverted to one.

<sup>138</sup> The Panel on Fair Access to the Professions, *Unleashing Aspirations: The Final Report of the Panel on Fair Access to the Professions* (2009) cited in Social Mobility and Child Poverty Commission, *State of the Nation 2013: Social Mobility and Child*

---

*Poverty in Great Britain* (October 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/292231/State\\_of\\_the\\_Nation\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/292231/State_of_the_Nation_2013.pdf) > accessed 2 November 2014, 133.

<sup>139</sup> Ibid, 19.

<sup>140</sup> Macmillan, L., *Social Mobility and the Professions*, Centre for Market and Public Organisation, 2009, cited in Social Mobility and Poverty Commission, *State of the Nation*, *ibid*, 130.

<sup>141</sup> Social Mobility and Poverty Commission, *State of the Nation*, *ibid*, Ch 8.

<sup>142</sup> See Table 2.6 in Rackley (n 7), 46.

<sup>143</sup> The Law Society, *Trends in the Solicitors' Profession: Annual Statistics Report, 2013* (March 2014), 35.

<sup>144</sup> Ibid, 36.

<sup>145</sup> The most recent year for which statistics are available: Bar Standards Board (n 134). Note Because of the nature of the data, overlapping or missing, numbers do not necessarily add up to 100%. (*ibid.*).

<sup>146</sup> Ibid, 9.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> And the proportion of women being Called is declining: *ibid*, 55.

<sup>150</sup> Noting that 55.9% of QC's did not disclose their age.

<sup>151</sup> Bar Standards Board (n134) 62.

<sup>152</sup> Rackley (n 7), 40.

<sup>153</sup> Ibid.

<sup>154</sup> See: Queens' Counsel Statistics from 2003 to present at <<http://www.qcappointments.org/completed-competitions/>>.

<sup>155</sup> Queen's Counsel Appointment Applications Received 2014 <<http://www.qcappointments.org/>>.

<sup>156</sup> 54.2% identified as White, while there was no data recorded for 2.9% of new calls: Bar Standards Board (n 134), 57.

<sup>157</sup> Census data shows that BAME groups make up 34.1% of the working population in London but 11.8% of the overall population in England and Wales: The Law Society (n 143), 16.

<sup>158</sup> Bar Standards Board (n 134), 57.

<sup>159</sup> Ibid, 63.

<sup>160</sup> Ibid, 9.

<sup>161</sup> Compared to 90.7% identifying as White, and no data being recorded for 3.8% of QC's: *ibid*, 44.

<sup>162</sup> Pat Corcoran, *Equality and Diversity in the Queen's Counsel Appointment Process: A Report for QCA Limited* (April 2014) <<http://www.qcappointments.org/>>.

<sup>163</sup> Bar Standards Board (n 134) 11.

<sup>164</sup> Note that 21.3% of barristers did not disclose their age. See *ibid*, 17.

<sup>165</sup> Ibid, 56.

<sup>166</sup> Ibid, 89.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid, 108.

<sup>169</sup> Social Mobility and Poverty Commission, *State of the Nation* (n 138), 243.

<sup>170</sup> Ibid, and see: The Law Society 'BAME lawyer groups and the proposed legal aid cuts' (9 July 2013) <<http://www.lawsociety.org.uk/communities/ethnic-minority-lawyers-division/features/bame-groups-and-the-proposed-legal-aid-cuts/>> accessed 6

---

September 2014.

<sup>171</sup> Social Mobility and Poverty Commission, *State of the Nation* (n 138), 243, para 53.

<sup>172</sup> *Ibid*, 243.

<sup>173</sup> See, *Peach Report* (n 13) ‘Lastly the Lord Chancellor's exhortation "don't be shy apply" is meant to encourage those applicants who for whatever reason are holding back and so increase the numbers of women and members of ethnic minorities in the competitions.’

<sup>174</sup> The Law Society (n 143), 41.

<sup>175</sup> John Jenkins, *Trends in Solicitors' Profession – Annual Statistical Report 1994*, (London: Law Society, 1995), table 9.9 cited in Rackley (n 7), 40.

<sup>176</sup> The Law Society (n 143), 12.

<sup>177</sup> *Ibid*, 27.

<sup>178</sup> Rackley (n 7), 41-2.

<sup>179</sup> See, for sources: Table 2.5 in *ibid*, 42; Law Society, *Trends in the Solicitors' Profession Annual Statistics Reports*, 2010, 2011, 2013, and 2013.

<sup>180</sup> Or 14.4% of solicitors with known ethnicity, as the ethnicity of all solicitors with practising certificates is not known. The Law Society (n 143), 7.

<sup>181</sup> The Law Society (n 143), 14.

<sup>182</sup> *Ibid*.

<sup>183</sup> The Law Society, *Diversity Profile of the Profession: A Short Synopsis* (April 2014), <<http://www.lawsociety.org.uk/advice/articles/diversity-in-the-profession/>> accessed 6 September 2014, 11.

<sup>184</sup> *Ibid*, 12.

<sup>185</sup> Chambers & Partners, *Chambers Student Guide 2014 Diversity Analysis* <<http://www.chambersstudent.co.uk/Articles/Newsletter/1156>> accessed 7 September 2014.

<sup>186</sup> CILEx, ‘CILEx Membership Diversity Statistics’ (January 2014) <[http://www.cilex.org.uk/about\\_cilex/equality\\_and\\_diversity/diversity\\_statistics/cilex\\_membership\\_diversity.aspx](http://www.cilex.org.uk/about_cilex/equality_and_diversity/diversity_statistics/cilex_membership_diversity.aspx)> accessed 2 November 2014, plus briefing note from CILEX ‘Promoting A Diverse Judiciary: CILEx Notes September 2014’ (on file with the authors).

<sup>187</sup> The JAC findings are summarised in its information release of 22 August 2013, available at <http://jac.judiciary.gov.uk/about-jac/2479.htm>. See too, Judicial Appointments Commission, *Barriers to Application to Judicial Appointment: Report* (July, 2013) <[http://jac.judiciary.gov.uk/static/documents/barriers\\_to\\_judicial\\_appointment\\_research\\_2013.pdf](http://jac.judiciary.gov.uk/static/documents/barriers_to_judicial_appointment_research_2013.pdf)>.

<sup>188</sup> *Ibid*.

<sup>189</sup> By the Crime and Courts Act 2013.

<sup>190</sup> The provision made addressing the number of judges in the Supreme Court is to the same effect; that is, the court should comprise no more than 12 full-time equivalents (CRA, section 23).

<sup>191</sup> *Peach Report* (n 13); Hazel Genn, ‘The Attractiveness of Senior Judicial Appointment to Highly Qualified Practitioners’ Report to the Judicial Executive Board (2008) <[http://www.ucl.ac.uk/laws/judicial-institute/files/The\\_Attractiveness\\_of\\_Senior\\_Judicial\\_Appointment\\_Research\\_Report.pdf](http://www.ucl.ac.uk/laws/judicial-institute/files/The_Attractiveness_of_Senior_Judicial_Appointment_Research_Report.pdf)> accessed 2 November 2014.

<sup>192</sup> HC Deb, 27 Mar 2014, col 344W  
<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140327/text/140327w0002.htm#14032796003364>, amongst others.

<sup>193</sup> This is not advertised and nor are the criteria upon which he bases any decision to excuse a judge from the obligation to go out on circuit published. Any judge considering applying to sit on the High Court Bench cannot know then whether a request to be excused would be granted or not and, if granted, for how long and on what conditions. There are a few number of High Court judges that are not required to go out on circuit, particularly those in the Chancery and Family Divisions but the obligation is imposed on the overwhelming number of High Court Judges.

<sup>194</sup> Or in related activities.

<sup>195</sup> ‘High Court Judge: Outline Conditions of Appointment and Terms of Service’ <[http://jac.judiciary.gov.uk/static/documents/High\\_Court\\_Judge\\_outline.pdf](http://jac.judiciary.gov.uk/static/documents/High_Court_Judge_outline.pdf)> accessed 2 November 2014, para 2. There are some limitations to the restriction on practice. Judges are allowed to provide services as an independent arbitrator, mediator or consultant and may receive remuneration for lectures, talks or articles.

<sup>196</sup> Judicial Appointments Commission, *Barriers to Application to Judicial Appointment*, (n 187) 3.

<sup>197</sup> Judicial Appointments Commission, *Barriers to Application to Judicial Appointment 2013: Action Plan* (2014) <<http://jac.judiciary.gov.uk/about-jac/research.htm>>; Judicial Diversity Taskforce (September 2013) (n 21), 34.

<sup>198</sup> Paras 4.30 – 4.41.

<sup>199</sup> And the same is true of sexual orientation: JAC research has found that 68% of lesbian, gay, bisexual and transgender lawyers would be more likely to apply if there were more openly LGBT members of the judiciary; <<http://jac.judiciary.gov.uk/about-jac/research.htm>>.

<sup>200</sup> *Dockers Labour Club & Institute Ltd v Race Relations Board* [1976] AC 285. The position changed with the enactment of the Race Relations Act 1976.

<sup>201</sup> The *Peach Report* (n 13), the first significant report commissioned by what was then the body responsible for recruitment to the judiciary (the Lord Chancellor’s Department) addressing diversity in the judiciary, did advert to the question whether some form of positive ‘discrimination’ should be introduced.

<sup>202</sup> ‘The Governance of Britain – Constitutional Renewal: Pre-Legislative Scrutiny by the Joint Elect Committee on the Draft Constitutional Renewal Bill, evidence from the Judicial Appointments Commission’ (June 2008), para 45.

<sup>203</sup> Neuberger (n 19), recommendation 5.

<sup>204</sup> *Ibid*, 20.

<sup>205</sup> *Ibid*.

<sup>206</sup> Hale (n 6).

<sup>207</sup> In 2005 Lord Falconer, the former Lord Chancellor, stated definitively that ‘We won’t have quotas’: ‘Increasing Judicial Diversity: The Next Steps’ (Institute of Mechanical Engineers, 2 November 2005), 6, cited in Kate Malleon, ‘Gender Quotas for the Judiciary in England and Wales’ in ed. U. Schultz and G. Shaw, *Gender and Judging* (Hart 2013), 484.

<sup>208</sup> Equality Act 2010, section 104 and see Services, Public functions and Associations: Statutory Code of Practice (2010) EHRC para. 12.60, available at <http://www.equalityhumanrights.com/publication/services-public-functions-and-associations-statutory-code-practice> > accessed 2 November 2014.

---

<sup>209</sup> Equality Act 2010, section 104. And before it the sex Discrimination Act 1975 as amended by the Sex Discrimination (Election Candidates) Act 2002.

<sup>210</sup> The Hansard Society ‘Women at the Top 2005: Changing Numbers, Changing Politics?’ (2005) London, the Hansard Society, 7, 96, cited in Malleson, ‘Gender Quotas for the Judiciary in England and Wales’ (n 207), 485.

<sup>211</sup> Advisory Opinion: on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (2008). See too, Recommendation 1429 (99); Resolution 1366 (2004), para 3(ii); Resolution 1426 (2005). See too, *Guido Jacobs v Belgium*, UN Human Rights Committee (HRC), Communication No. 943/2000 (2004) in which the HRC reached a similar conclusion.

<sup>212</sup> Article 21, European Convention on Human Rights: ‘Criteria for office’: ‘1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. 2. The judges shall sit on the Court in their individual capacity. 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office; all questions arising from the application of this paragraph shall be decided by the Court.’

<sup>213</sup> Particularly, Directives 2000/43/EU; 2000/78/EU and 2006/54/EU. See, *O’Brien v Ministry of Justice* [2013] ICR 499 for a discussion on the impact of Directive 97/81/EC on Recorders (fee-paid judges) though it is not clear that that would apply to senior judges and that, in any event, the same approach would be taken to the anti-discrimination provisions which have differently prescribed scope.

<sup>214</sup> (Case C-476/99) [2002] ECRI-2891.

<sup>215</sup> The most relevant being the Recast Gender Equality Directive 2006/54/EC.

<sup>216</sup> (Case C-319/2003) [2004] ECRI-8807

<sup>217</sup> Paragraph 24.

<sup>218</sup> *Serge Brihech v Ministre de L’Intérieur, Ministre de L’Éducation Nationale et Ministre de La Justice*, para 32; *Abrahamsson & Anderson v Fogelqvist* (Case C-407/98) [2000] ECRI-5539, para 56.

<sup>219</sup> *Abrahamsson*, para 56.

<sup>220</sup> *Ibid.*

<sup>221</sup> Which provides for the principle of equal pay as between men and women and which will apply to benefits associated with work Article 157(1) and (2).

<sup>222</sup> Advisory Opinion: on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (2008), para 35.

<sup>223</sup> A. Remiche, ‘Belgian Parliament Introduces Sex Quota in Constitutional Court’ (OxHRH, 21 April 2014), < <http://ohrh.law.ox.ac.uk/belgian-parliament-introduces-sex-quota-in-constitutional-court/>> accessed 2 November 2014.

<sup>224</sup> *Ibid.*

<sup>225</sup> Advisory Opinion: on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (2008), para 34.

<sup>226</sup> See the Global Database of Quotas for Women, at: [www.quotaproject.org/aboutQuotas.cfm](http://www.quotaproject.org/aboutQuotas.cfm).

<sup>227</sup> Malleson, ‘Gender Quotas for the Judiciary in England and Wales’ (n 207), 497.

<sup>228</sup> Because of the impact of the Equality Act 2010, Part 5.

---

<sup>229</sup> Briefing note provided to the authors.

<sup>230</sup> See, Advisory Opinion: on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (2008). See too, Recommendation 1429 (99); Resolution 1366 (2004), para 3(ii); Resolution 1426 (2005).

<sup>231</sup> European Court of Human Rights, 'Judges of the Court' <<http://www.echr.coe.int/Pages/home.aspx?p=court/judges>> accessed 7 July 2014.

<sup>232</sup> See Mackenzie and others, *Selecting International Judges*, (OUP, 2010), 83.

<sup>233</sup> Louise Chappell, 'Gender and Judging at the International Criminal Court' (2010) 6(3) *Politics and Gender*. 484-495.

<sup>234</sup> Equality Act 2010, section 105.

<sup>235</sup> Council of Europe, *Guidelines of the Committee of Ministers on the selection of Candidates for the post of judge at the European Court of Human Rights* (2012) <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282012%2940&Language=lanEnglish&Ver=final&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>> accessed 7 July 2014.

<sup>236</sup> UN Committee on Elimination of Discrimination against Women, Report of Meetings, 2007.

<sup>237</sup> Malleson, 'Gender Quotas for the Judiciary in England and Wales' (n 207), 495 and a Briefing Note provided to the authors.

<sup>238</sup> Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men, 2009, cited in Malleson, 'Gender Quotas for the Judiciary in England and Wales' (n 207), 495.

<sup>239</sup> Taken from Malleson, 'Gender Quotas for the Judiciary in England and Wales' (n 207), 496.

<sup>240</sup> Dahlerup D and Freidenvall, L *Electoral Gender Quota Systems and their Implementation in Europe*, (DG Ipol, Brussels. September 2008) 36-37. Cited to the authors in a paper presented to them.

<sup>241</sup> The legislation, passed in 2002, allowing women-only shortlists for candidates to the Westminster elections which included a 'sunset clause' by which the provisions would expire – unless renewed – in 2015. The Equality Act 2010 includes a provision to extend this to 2030.

<sup>242</sup> Tribunals, Courts and Enforcement Act 2007 ('eligibility condition') sections 50-52.

<sup>243</sup> Expressions of commitment to increasing the number of solicitors applying (see, eg <[http://jac.judiciary.gov.uk/static/documents/JAC\\_TLS\\_News\\_release\\_Jan\\_20\\_2011.pdf](http://jac.judiciary.gov.uk/static/documents/JAC_TLS_News_release_Jan_20_2011.pdf)> accessed on 6 September) does not appear to have worked.

<sup>244</sup> Research undertaken in the 2004 indicated that 53% of all 'Magic Circle' partners had taken their first degree at either Oxford or Cambridge: The Sutton Trust, 'Sutton Trust Briefing Note: The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges' (June 2005) <[http://www.suttontrust.com/wp-content/uploads/2005/05/Comparison\\_educational\\_backgrounds.pdf](http://www.suttontrust.com/wp-content/uploads/2005/05/Comparison_educational_backgrounds.pdf)> accessed 16 October 2014, 8.

<sup>245</sup> It appears that members of the Supreme Court are considering this; see, <[http://www.nijac.gov.uk/a-to-z.htm/event\\_for\\_legal\\_academics\\_interested\\_in\\_judicial\\_office](http://www.nijac.gov.uk/a-to-z.htm/event_for_legal_academics_interested_in_judicial_office)>.

<sup>246</sup> See Judicial Appointments Commission, *Information Pack: 00873 – High Court (Queen's Bench and Family Division) 2013*

---

<[http://jac.judiciary.gov.uk/static/documents/FINAL\\_Information\\_Pack.pdf](http://jac.judiciary.gov.uk/static/documents/FINAL_Information_Pack.pdf)>  
accessed 3 November 2014.

<sup>247</sup> See *ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> Recent reports indicate that in 2011-12 there were just 85 black professors in UK universities and the number of UK academic staff in total from a known ethnic minority at 12.8%: William Ackah (28 March 2014) ‘There are fewer than 100 black professors in Britain – why?’ *New Statesman* <<http://www.newstatesman.com/politics/2014/03/there-are-fewer-100-black-professors-britain-why>> 16 October 2014. While women comprise 44.5% of all academic staff in the UK, they only comprise 21.7% of those holding professor status: HESA ‘Academic staff by professor status and gender 2012/13’ <<https://www.hesa.ac.uk/stats-staff>> accessed 16 October 2014. HESA does not monitor for the participation of women or BAEM in university law departments. However, in 1998 Professor Claire McGlynn reported that only 14% of law professors were women and three out of every five law schools had no women law professors. She noted that ‘lower down the academic hierarchy the representation of women in law departments improves, with women making up 22 per cent of readers, 40 per cent of all senior (non-professorial) staff, and 49 per cent of all lecturers’: Claire McGlynn (28 October, 1998) ‘Why are only 14% of law professors women?’ *Times Higher Educational Supplement* <<http://www.timeshighereducation.co.uk/109593.article>> accessed 31 August 2014.

<sup>250</sup> Obviously in each case steps would need to be taken to ensure that no real (and sometimes perceived) conflict arises but measures can be put in place to address this by ensuring appointments are to jurisdictions where such conflicts are less likely to occur (and where they will be will depend on the place of ordinary employment).

<sup>251</sup> SI 2008/2995.

<sup>252</sup> Although academic at the moment, it is arguable that a Chartered Legal Executive District Judge who satisfies the statutory criteria under the Courts Act 1971 may be eligible for appointment as a circuit judge. Submissions from CILEx, with the authors. The Judicial Office’s judicial progression chart appears to support this view: <http://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/judicial-career-progression-chart/>.

<sup>253</sup> Submissions from CILEx, with the authors.

<sup>254</sup> Neuberger (n 19), Recommendation 1.

<sup>255</sup> The Lord Chief Justice is responsible for arrangements for training the courts’ judiciary in England and Wales under the CRA. The Senior President of Tribunals has an equivalent responsibility in relation to judges and members of the tribunals within the scope of the Tribunals, Courts and Enforcement Act 2007. These responsibilities are exercised through the Judicial College.

<sup>256</sup> A point made by the Advisory Panel: see, Neuberger (n 19), 26.

<sup>257</sup> And this is reflected in a number of items of research, including for example, Leslie Moran and Daniel Winterfeldt, *Barriers to Application for Judicial Appointment for LGBT Lawyers: Lesbian, Gay, Bisexual and Transgender Experiences* (InterLaw, September 2011) <<http://eprints.bbk.ac.uk/4396/1/4396.pdf>> accessed 2 November 2014; and Judicial Appointments Commission, *Research* <<http://jac.judiciary.gov.uk/about-jac/research.htm>>.

<sup>258</sup> Section 137A, as amended by the Crime and Courts Act 2013.

---

<sup>259</sup> *Judicial Diversity Statement* (December 2013) <<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Statements/diversity-statement-lcj-spt-dec13.pdf>> accessed 6 September 2014.

<sup>260</sup> Neuberger (n 19), 27-28.

<sup>261</sup> See Judicial Diversity Taskforce (September 2013) (n 21), 22.