

Increasing judicial diversity

A Report by JUSTICE

Chair of the Working Party
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EXECUTIVE SUMMARY

Over the past ten years important steps have been taken to improve diversity in the judiciary. However, progress has been too slow and interventions have, to date, been insufficient. The judiciary is still dominated by white and privately educated men. The United Kingdom remains significantly worse in terms of diversity than other European and common law jurisdictions. The issue has been discussed and reported on for many years; indeed, this is the third JUSTICE report raising concerns about the demographic make-up of the judiciary. However, progress at the highest levels has remained stagnant.

This report focusses on the senior judiciary: specifically, the structural barriers faced by women, visible BAME (Black, Asian and Minority Ethnic) people and those from less advantaged socio-economic backgrounds. To address the diversity deficit, this report advocates systemic changes to judicial appointments. It also explains why achieving diversity matters, both for getting the best decisions but also to improve legitimacy. In the Working Party's view, a senior judiciary that so markedly does not reflect the ethnic, gender or social composition of the nation is a serious constitutional issue. Much more must be done to strengthen diversity for reasons of legitimacy, quality and fairness.

Notably, our report highlights that there is a significant pool of talent from which to draw, and proposes specific processes to open up routes to the bench for diverse candidates. Furthermore, the Working Party sets out a series of measures to encourage underrepresented groups to embark upon a judicial career. Our approach would produce a judiciary of the highest quality that reflects the make-up of our nation.

The Working Party appreciates that some of the measures we recommend will be unpopular with some, and will undoubtedly meet some, perhaps tacit, resistance. If the long-standing issue of lack of diversity is to be genuinely addressed then those at the most senior levels must accept that difficult and perhaps unpopular decisions will have to be taken.

Recommendations

Valuing difference

The public must be confident that the judiciary is able to deliver justice fairly. When presented with an overwhelmingly white, male and privately educated judiciary, questions about the legitimacy and objectivity of judgments may be raised. Further, the quality of our senior judiciary will improve when drawn from a more diverse cohort. The Working Party suggests a number of measures, including:

- In the assessment of “merit”, the ability to contribute to a diverse judiciary should be taken in to account.
- Placing reasonable time-limits on holding office as a Recorder or Deputy High Court Judge.

Ensuring accountability

A fragmented, uncoordinated approach to judicial appointments has led to a series of non-diverse appointments and “buck passing”. Evidence from a variety of sectors has shown that target-setting can help to tackle the diversity deficit. Targets are a way to ensure that real progress is either made, or if not, the failure publicly exposed and then debated. Without publicly stated goals, it is too easy for those responsible to either blame each other, or – as happens to a worrying degree at the moment – the candidates themselves.

The Working Party believes we can create a critical mass of women and BAME candidates in the near future. Recommendations in our new model of accountability include:

- Creating a permanent “Senior Selections Committee” dedicated to appointments to the Court of Appeal, Heads of Division and UK Supreme Court.

- Introducing targets “with teeth”, i.e. targets for selection bodies, with the “teeth” being monitoring, transparency and reporting on progress to the Justice Select Committee.
- A general responsibility on selectors and the judiciary to encourage a much more diverse field of people to apply for senior judicial office.

Fair and proactive recruitment

Unconscious bias is a natural, but insidious, barrier to diverse representation. Recruitment is also unduly reactive and not sufficiently focused on the benefits diversity will bring to the bench. Only systemic changes will ensure that more diverse candidates apply and are successful. The report suggests a number of measures to ameliorate the effects of biases, including:

- Introducing “appointable pools”, i.e. talent pools for each court. This requires a rolling, proactive programme of recruitment consisting of two stages: the first focussed on the qualities of the individuals applying, the second focussed on the needs of the institution.
- External review of selection processes.

Attractive, inclusive career paths and working conditions

Diversity in the judiciary cannot be improved if diverse candidates are not applying in the first place. To encourage applications and promote talent, we recommend various measures including:

- Creating an upward judicial career path, where junior lawyers can take up an “entry-level” position and work their way to the top.
- A “Talent Management Programme” to enable talented judges to progress their career.
- Making flexible working the default.

Practical implementation

The Working Party recognises that the UK Parliament must scrutinise and grapple with an array of complex and technical issues in light of negotiations to exit the European Union. However, certain immediate policy changes can be made without legislation and lead to significant improvements (see **Annex I**, available on the JUSTICE website).

I. INTRODUCTION

The present imbalance between male and female, white and black in the judiciary is obvious... I have no doubt that the balance will be redressed in the next few years... Within five years I would expect to see a substantial number of appointments from both these groups.

Lord Taylor, Lord Chief Justice of England and Wales, 1992¹

... the judiciary is dominated by white males... The historical reason for this – namely that white males overwhelmingly dominate the profession at all levels at which judicial appointments are made – is ceasing to be valid. Women and members of ethnic minorities have entered the profession in substantial numbers and many have now reached the point of eligibility for appointment. Yet it would appear that of the cohort eligible for appointment to Assistant Recorder and Recorder, a smaller proportion are appointed than the proportion of eligible white males. This means in due course, that there will be fewer such persons to appoint to senior positions. The apparent case of bias needs to be tackled now.

The Judiciary in England and Wales, JUSTICE, 1992²

- 1.1 This is the third report on the judiciary that JUSTICE has published in its 60 years. In both the 1972 and 1992 reports, JUSTICE expressed concern about the demographic composition of the judiciary and processes for judicial appointments. A number of JUSTICE's recommendations over the years have been adopted, most notably the proposal for an independent body with lay membership to appoint judges. However there has been insufficient progress towards addressing the anxiety of 25 years ago about judicial diversity. JUSTICE's 1992 projection that without intervention the senior judiciary would remain white and male has largely come to pass.

¹ Lord Taylor, *The Judiciary in the Nineties*, Richard Dimpleby Lecture, 1992, cited in House of Lords, Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010-12, note 132, available online at <https://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf>.

² JUSTICE, *The Judiciary in England and Wales* (1992), available online at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/JudiciaryInEnglandWales.pdf>. See also JUSTICE, *The Judiciary* (1972), p. 10, available online at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/TheJudiciary.pdf>.

- 1.2 While there have been a number of recent reports on judicial diversity³ – on which this report draws – JUSTICE is so concerned with the impact of a white, male and privately educated judiciary on the fair administration of justice that it is compelled to once again consider how our judges should be appointed. Underlying this report is a commitment to ensuring that the best possible judges serve in our courts, maintaining the judiciary’s independence and its reputation for excellence internationally.

Context

- 1.3 The Working Party acknowledges the real commitment from key actors in the senior judiciary and in the Judicial Appointments Commission (JAC) to increase judicial diversity, and fully recognises the hard work that is being undertaken in parts of the system, for example by the Judicial Office. Progress has been achieved over the ten years of the JAC, in particular on the number of women on the Circuit bench and in the High Court. However, as is clear from the rest of this report, there remains a very long way to go.
- 1.4 This Working Party has been tasked with making concrete suggestions about ways of strengthening judicial diversity. The report identifies the barriers – structural and psychological – to entry and promotion for women, Black, Asian and Minority Ethnic (BAME) and socially disadvantaged candidates and proposes that through the use of a number of techniques adopted in other professions and industries meaningful progress can be achieved over the next few years. Chief among these is the proposal that “targets with teeth” be adopted, which should focus minds on how to proactively increase diversity.

³ Advisory Panel on Judicial Diversity (chair, Baroness Neuberger CBE), *The Report of the Advisory Panel on Judicial Diversity* (2010), available online at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>; See note 1, House of Lords, Select Committee on the Constitution, Judicial Appointments; G. Bindman & K. Monaghan, *Judicial Diversity: Accelerating Change*, (2014), available online at https://jac.judiciary.gov.uk/sites/default/files/sync/news/accelerating_change_finalrev_0.pdf. See further Annex II (online).

- 1.5 The report focusses on the senior judiciary: the Circuit bench,⁴ High Court, and Court of Appeal in England and Wales, and the UK Supreme Court.⁵ In scope, it concentrates on achieving greater gender, ethnic and social diversity. The Working Party has considered other protected characteristics such as disability, religious belief and sexual orientation, however our consultations revealed the challenges faced by women, visible BAME people and those who are socially disadvantaged to be most acute.
- 1.6 At the time of writing, the judiciary in England and Wales is facing what can only be described as a recruitment crisis.⁶ The latest Judicial Attitude Survey reveals that deteriorating working conditions and diminishing levels of net earnings and pensions are undermining the morale of our judges. As a result, in the next five years many intend to leave the bench early – 40% at the Circuit bench; 47% at the High Court; and 41% at the Court of Appeal.⁷
- 1.7 The concern is not just that salaried judges are leaving, and are projected to leave early, but that there are increasing difficulties in recruiting suitable people to replace them. At the time of writing, the JAC is running competitions for 25 appointments to the High Court and around 120-140 to the Circuit bench – which amounts to around 20-25% of each of the benches.⁸ The JAC is struggling to fill vacancies; if the current trend continues, there could be a serious shortfall. The impact on the fair administration of justice is self-evident.

⁴ I.e. the Crown Court and the County Court.

⁵ Diversity also poses a challenge for the judiciaries of Northern Ireland and Scotland, which provide three of the 12 judges on the UK Supreme Court. Though our report focusses on England and Wales, we expect many of the principles and recommendations elaborated in this report to be relevant also to those nations.

⁶ A. Jack, *A low benchmark?*, New Law Journal, 12 January 2017, available online at <https://www.newlawjournal.co.uk/content/low-benchmark>.

⁷ C. Thomas, *2016 UK Judicial Attitude Survey, Report of findings covering salaried judges in England & Wales Courts and UK Tribunals*, February 2017, p.5, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>.

⁸ House of Lords, Select Committee on the Constitution, *Oral Evidence Session with the Chairman of the Judicial Appointments Commission*, 1 March 2017, available online at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/judicial-appointments-followup/oral/48558.html>

- 1.8 The Working Party is deeply concerned that public service through a judicial appointment is no longer considered as attractive a career as it once was; the final chapter of this report makes recommendations in this regard. This crisis has undoubtedly been exacerbated by the longstanding expectation that the senior Bar will provide virtually all of our judges. This situation merely reinforces the urgent need to actively recruit judges from other talent pools.
- 1.9 At the same time, these challenges offer an unprecedented opportunity. The majority of the Supreme Court – all nine judges from England and Wales – will be replaced over the next three years, resulting in further vacancies cascading down the judiciary. With such a high number of appointments needing to be made across the senior judiciary, there is a real chance to change the demographic composition of our judiciary rapidly. By extending the pool and positively encouraging diverse candidates the overall quality of the judiciary can be enhanced, whilst at the same time filling the gap left by senior QCs apparently reluctant to apply. Should this opportunity not be seized there is a risk that the quality of the judiciary may fall and white, male hegemony on the bench will be further entrenched.

An appetite for change

- 1.10 It is widely recognised, including by the Lord Chancellor and the senior judiciary,⁹ that a judiciary comprised mainly of white men from socially advantaged backgrounds¹⁰ is neither desirable for our justice system nor acceptable in 2017. The problem is acute: very few countries – indeed, within the Council of Europe, only Armenia and Azerbaijan – have lower proportions of women in their judiciary than the UK.¹¹

⁹ The Rt. Hon. Elizabeth Truss, Secretary of State for Justice, *Women in the Legal Industry*, speech at Spark 21 Conference, November 2016, available online at: <https://www.gov.uk/government/speeches/women-in-the-legal-industry>; Lord Neuberger, *The Role of the Supreme Court Seven Years On – Lessons Learnt*, Bar Council Law Reform Lecture, November 2016, para.51, available online at: <https://www.supremecourt.uk/docs/speech-161121.pdf>.

¹⁰ See Tables 1 and 2, below. See also P. Kirby, *Leading People 2016*, The educational backgrounds of the UK professional elite, The Sutton Trust, February 2016, pp.30-31, available online at http://www.suttontrust.com/wp-content/uploads/2016/02/Leading-People_Feb16.pdf. In 1989, 76% of High Court and Court of Appeal judges were privately educated, in 2004, 75%, and in 2015, 74%. In addition, in 2015, 74% of these top judges were Oxbridge graduates.

¹¹ Council of Europe, *European judicial systems, Efficiency and quality of justice*, CEPEJ Studies No.23, Edition 2016, p. 101, available online at <https://www.coe.int/T/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%202023%20report%20EN%20web.pdf>

1.11 The Working Party believes that diversity matters for three key reasons (see further **Chapter II**):¹²

- a. Legitimacy: To ensure the legitimacy of the judiciary in the eyes of the public, and especially the trust of court users.
- b. Quality: To improve the quality of judgments through the benefit of a broader range of judicial perspectives, drawn from the widest possible pool of talent.
- c. Fairness: To ensure that our judges are selected through fair selection processes, which do not inadvertently disadvantage or advantage certain demographic groups.

1.12 For these reasons, the Working Party considers that any “diversity deficit” in the judiciary must be addressed now. The UK Supreme Court illustrates that there is a serious problem in this respect. At the time of writing, there is only one woman among the 12 Justices on the Supreme Court. Lady Hale is the only woman ever to serve on the Court and all of the judges are, and have always been, white. None are from disadvantaged backgrounds.¹³ Our Supreme Court continues to be an aberration among the leading common law jurisdictions, with Australia, New Zealand and Canada approaching gender parity on their highest courts (see Table 3, at the end of this chapter).

¹² See also note 3, *The Report of the Advisory Panel on Judicial Diversity* (2010), p.4; note 3, G. Bindman & K. Monaghan, *Judicial Diversity: Accelerating Change*, p.7; E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, (Routledge Cavendish, 2012), Chapter 6.

¹³ See note 9, Lord Neuberger, *The Role of the Supreme Court*. As of 2016, 10 attended private schools, 2 grammar schools.

1.13 In England and Wales, the Circuit bench, High Court and Court of Appeal all suffer from a lack of diversity as well. As noted,¹⁴ there has been some improvement over the last ten years in the overall proportion of women. However, progress is slow and the absolute numbers remain low.¹⁵ More troubling is the almost total lack of visible BAME people in the senior judiciary. Across the High Court and Court of Appeal, there are only two judges who are not white (less than 2%).¹⁶ On the Circuit bench, of those judges whose ethnicity is known, just 3% are BAME.¹⁷ The importance of the latter is underscored by the Lammy Review into outcomes for BAME individuals in the criminal justice system.¹⁸ The dearth of senior judges who are not white is simply unacceptable.

¹⁴ See para 1.3 above, see also Table 1 below.

¹⁵ At the time of the most recent official statistics there were 106 High Court judges of whom 22 were women, and 43 in the Court of Appeal (including *ex officio* judges) of whom eight were women. See Courts and Tribunals Judiciary, *Judicial Diversity Statistics* 2016, July 2016, available online at <https://www.judiciary.gov.uk/publications/judicial-statistics-2016/>.

¹⁶ There is a serious problem with data in respect of protected characteristics. For example, the judiciary's official statistics do not include the socio-economic/educational background of judges. (See *Ibid*, *Judicial Diversity Statistics* 2016.) Data collected on ethnicity is broadly classified, so for example the percentage of "Asian/Asian British" may include a variety of ethnicities. The inadequacy of relevant data has been identified as a consistent hurdle by those consulted by the Working Party. Some consultees noted that official BAME figures can be confusing on the number of *visible* BAME judges. For example in the High Court 5% are listed as "BAME" (2 "Asian/Asian British" and 3 "other"), but in fact only 2 High Court judges (1.9%) are not white. JUSTICE surmises that the three "other" BAME judges are from white ethnic minority groups. This approach to diversity monitoring contrasts with that of the QC Selection Panel: their website provides the percentage of "applicants who declared an ethnic origin other than white", see *Report of Queen's Counsel Selection Panel to the Lord Chancellor On The Process For The Selection And Appointment of Queen's Counsels 2016-17*, November 2016, p. 20, available online at: <http://www.qcappointments.org/wp-content/uploads/2017/01/FINAL-Report-of-the-QC-Selection-Panel-for-England-and-Wales-2016-17.doc>.

¹⁷ See note 15, *Judicial Diversity Statistics* 2016. Judges who self-declared as BAME comprise 9 Asian, 3 Black, and 5 "Mixed". 537 judges self-declared as white. The 3% figure (17/554) excludes the 6 "Other" and the 66 "unknown".

¹⁸ Interim findings of David Lammy's review can be found online. See N. Uhrig, *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales*, Ministry of Justice (2016), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568680/bame-disproportionality-in-the-cjs.pdf. See also these recent analyses of the overrepresentation of BAME people at various stages of the criminal justice process: <https://www.gov.uk/government/statistics/associations-between-ethnic-background-and-being-sentenced-to-prison-in-the-crown-court-in-england-and-wales-in-2015> and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568680/bame-disproportionality-in-the-cjs.pdf.

- 1.14 Finally, on socio-economic diversity, though the official statistics do not provide data on this, other sources suggest very little change. In the High Court and Court of Appeal, three-quarters of the judges were privately educated and this has remained constant since the 1980s.¹⁹
- 1.15 For comparison, in the UK, women comprise 50% of the population, BAME people 14%,²⁰ and 93% of people are State educated.²¹ On gender and ethnicity, these percentages are broadly reflected in the solicitors' profession as a whole,²² while the practising Bar comprises roughly 37% women and 12% BAME people.²³ Research also suggests that "solicitors come from a more diverse [socio-economic] background than comparable barristers".²⁴ However, at the senior ends, these percentages drop markedly. Diversity at the junior end does not necessarily translate into diverse partners,²⁵ QCs²⁶ or judges.

¹⁹ See note 10, P. Kirby, *Leading People* 2016, pp. 30-31.

²⁰ According to the 2011 census, the white ethnic group accounted for 86% of the usual resident population. ONS, *Ethnicity and National Identity in England and Wales: 2011*, available online at <http://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11> [accessed 21 March 2017].

²¹ ISC, *Research*, available online at <https://www.isc.co.uk/research/> [accessed 21 March 2017].

²² Of solicitors with practising certificates 48.2% are women and 15.5% BAME, see The Law Society, *Trends in the solicitors' profession*, Annual Statistics Report 2015, April 2016, available online at: <http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2015/>.

²³ Bar Standards Board *Report on Diversity at the Bar*, December 2016, available online at https://www.barstandardsboard.org.uk/media/1818210/bsb_report_on_diversity_at_the_bar_2016.pdf. See also Bar Standards Board *Practising barrister statistics*, 2015, available online at <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> [accessed 21 March 2017].

²⁴ M.Blackwell, *Old boys networks, family connections and the English legal profession*, Public Law, 2012, p.5.

²⁵ SRA, *How diverse are law firms?*, 31 October 2015, available online at <http://www.sra.org.uk/solicitors/diversity-toolkit/diverse-law-firms.page>.

²⁶ Bar Council, *Momentum Measures: Creating a diverse profession*, (July 2015), p.3, available online at http://www.barcouncil.org.uk/media/378213/bar_council_momentum_measures_creating_a_diverse_profession_summary_report_july_2015.pdf. See also note 23, Bar Standards Board *Report on Diversity at the Bar*, December 2016 suggests that it will take "over 50 years" for QCs to be 50% female. Though their assumptions are not set out, this appears to be an extrapolation from the percentage points increase of female QCs in 2015 to 2016 (0.7%).

The judiciary must be truly open to everyone of the requisite ability. I simply do not accept that this is an issue where we should be content to sit back and just wait for things to happen.

The Rt. Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *Speech for the Women's Temple Forum, 19 October 2015, p. 2.*

- 1.16 It is clear that change will not happen if simply left to an organic process. Speaking at a recent Bar Council Law Reform Lecture, Lord Neuberger of Abbotsbury noted that “the profession and wider society are looking to the Supreme Court to lead the way on diversity rather than simply waiting for a ‘trickle up’ effect from natural developments and efforts made lower down the system.”²⁷ Progress is therefore, and as demonstrated, not a given. If we want to increase diversity then the problem needs to be tackled now.

Explaining the lack of diversity

- 1.17 There are three explanations consistently given for the continuing lack of diversity. First, the argument that, as a function of historic entry to the profession, there are insufficient numbers of women, BAME people, and people from less privileged backgrounds suitable for appointment. Although these groups are underrepresented at the senior end of the independent Bar and partners in law firms, this cannot alone explain why the senior judiciary lacks diversity. As the JUSTICE Working Party observed in the early 1990s, the legal profession as a whole has plenty of women and BAME people. This is even truer today. Comparative figures for various parts of the legal profession are illuminating in that they reveal that there are significantly more ethnically and gender diverse pools of talent available, including at very senior levels (see Table 2, at the end of this chapter).

²⁷ See note 9, Lord Neuberger, *The Role of the Supreme Court* at [51].

- 1.18 Those who posit this argument invariably suggest that now 20% of the High Court are women, the gender problem is on its way to solution. In our view though, the current pace of change is unacceptable. A review of the low numbers of women and BAME Recorders and Deputy High Court Judges²⁸ – accepted feeders to the senior judiciary – gives continued cause for concern. The lack of BAME judges will not correct itself without much more proactive steps. It is also true that the number of women at Court of Appeal and Supreme Court level remains woeful.
- 1.19 The second explanation is that we do not have diverse judges because women and BAME candidates do not put themselves forward for appointment. The blame is consistently placed on the “supply” of diverse candidates. In the view of the Working Party, the failure of outstanding women and BAME lawyers to apply reflects a failure of the system itself. Furthermore, the JAC’s own figures reveal that the story is more complicated than simply failure to apply. When BAME people and solicitors (a group more diverse than barristers) do apply for judicial appointments they are much less likely to be successful than white candidates or barristers.²⁹ Research also suggests that aspects of the applications process, and perceptions about the culture of the judiciary itself, may be putting off underrepresented groups.³⁰ While emphasising the importance of ensuring that the judiciary provides an attractive career for diverse candidates, the Working Party has found the problem to lie more on the “demand” side of the appointments processes. It is important to identify and challenge barriers to entry for those who would bring a different perspective to the bench.

²⁸ Or “DHCJs”. Though no official data is published on this, we understand that only 11% of Chancery DHCJs are women, with just one non-white Deputy out of 90. See also note 1, House of Lords, Select Committee on the Constitution, *Judicial Appointments*, p.53: “a list of those currently authorised or appointed to act as Deputy High Court judges should be published”.

²⁹ Judicial Appointments Commission annual statistics on applications and recommendations for appointment show diversity data on gender, ethnicity and professional background: available online at <https://jac.judiciary.gov.uk/> For example, in the Recorder competition, BAME people were 14% of total applications, 8% of those shortlisted, and 5% of recommendations. 34% of applications for DHCJ were solicitors, but only 9% of those shortlisted and 5% of recommendations.

³⁰ Judicial Appointments Commission, *Barriers to Application for Judicial Appointment Research*, June 2009, available online at https://jac.judiciary.gov.uk/sites/default/files/sync/about_the_jac/research-barriers-to-application-report-2009.pdf; Judicial Appointments Commission, *Barriers to Application for Judicial Appointment*, July 2013, p. ii of iv, available online at https://jac.judiciary.gov.uk/sites/default/files/sync/about_the_jac/research-attitudes-to-judicial-appointment-2013.pdf: The perceived requirement to go on Circuit (among other factors) was identified as an off-putting factor for women. BAME respondents were twice as likely as white respondents to say the fear of failure would deter them from applying for judicial office. See also note 12, E. Rackley, *Women, Judging and the Judiciary*, Chapter 4; D. Feenan, *Women judges: Gendering judging, justifying diversity* (2008) 35 *Journal of Law and Society* pp. 490, 495.

1.20 The final explanation commonly given is that the key principle governing our appointments to judicial office is merit. Though “merit” is not defined, the implication is that achieving merit and diversity are at odds. The Working Party is committed to seeing the best possible candidates appointed to the bench and be promoted within it, but is concerned that “merit” can very easily become a vehicle for unconscious bias and a tendency to replicate the characteristics in the existing judiciary.³¹ This report finds that, properly conceived, achieving the highest quality judiciary *requires* more women, BAME people and greater social diversity (see further **Chapter II**).

The route to the bench

1.21 England and Wales does not have a formal career path to the senior judiciary, but we do have a *de facto* one. Currently, the senior judiciary is a “second career” for those who have built a successful practice at the independent Bar. The overwhelming majority of judges in the High Court and above were recruited from the ranks of Queen’s Counsel at the independent Bar, having previously served as Recorders or Deputy High Court Judges.³² The vast majority of Circuit Judges are also recruited from the senior end of the Bar, and many were also Recorders.³³

³¹ See note 12, E. Rackley, *Women, Judging and the Judiciary*, pp.187-195; *ibid*, D. Feenan, pp. 495-500.

³² These are both fee-paid positions: these judges are usually full-time barristers who only sit as judges 15-30 days a year. JUSTICE conducted research into the career histories of sitting High Court, Court of Appeal and UK Supreme Court judges, which confirmed that virtually all of these senior judges were previously QCs, and many had been Recorders/DHCJs.

³³ See note 15, *Judicial Diversity Statistics 2016*, which record that 99% of High Court judges, and 89% of Circuit judges, are barristers by background. An internal analysis by a member of our Working Party revealed that of the 100 appointees to the Circuit bench from May 2014 to October 2015, around 90% were barristers and around 90% had been Recorders.

- 1.22 There is no doubt that the Bar experiences particular challenges with respect to diversity. There is a particularly high rate of attrition for women, who leave practice for a range of reasons, most of which have nothing to do with their resilience, nor their intellectual and analytical abilities.³⁴ While women enter the profession in the same numbers as men, they make up only 30% of barristers over 15 years call.³⁵ BAME people make up roughly 11% of those over 15 years call.³⁶ Critically, only 14% of Queen’s Counsel are women and only 6% are BAME.³⁷ Bar Council research shows that the QC pool will not attain gender or ethnic balance anytime soon, if ever.³⁸
- 1.23 Socio-economic diversity is a real concern: three quarters of barristers and Queen’s Counsel were privately educated.³⁹ As Blackwell observes, “[i]f High Court judges almost invariably continue to be recruited from the Bar, it may be another decade before we even really start to see High Court judges from more diverse socio-economic backgrounds. Indeed, whether things have changed much regarding socio-economic class at the entry-level for the Bar may be questioned”.⁴⁰ Socio-economic diversity may even be getting worse, given the exceptionally high costs of qualifying as a barrister and small number of tenancies available.
- 1.24 Although the practice of recruiting senior barristers directly to the bench may be prized by some,⁴¹ due to a number of factors, such as work allocation, recruitment and caring responsibilities,⁴² women, BAME people and those from less advantaged backgrounds are poorly represented (particularly as QCs). As a result, though Recorders are a key entry point to the senior judiciary, only 20% are women, and only 6% are BAME.⁴³

³⁴ See note 12, E. Rackley, *Women, Judging and the Judiciary*, Chapter 2.

³⁵ BSB, *Women at the Bar* (2016), p.7, available online at https://www.barstandardsboard.org.uk/media/1773934/women_at_the_bar_-_full_report_-_final_12_07_16.pdf.

³⁶ See note 23, Bar Standards Board, *Practising barrister statistics*.

³⁷ See note 23, Bar Standards Board, *Report on Diversity at the Bar* (2016), p.3. For an analysis of the QC appointment process, see M. Blackwell, *Taking Silk: An empirical study of the award of Queen’s Counsel status 1981-2015*, *Modern Law Review* 78 (2015), p. 971.

³⁸ See note 26, Bar Council, *Momentum Measures*, pp.1-2 at [2.3]-[3.5].

³⁹ See note 10, P. Kirby, *Leading People 2016*, pp.30-32.

⁴⁰ See note 24, M.Blackwell, *Old boys networks, family connections and the English legal profession*.

⁴¹ See e.g. Lord Sumption, Bar Council Law Reform Lecture, *Home Truths about Judicial Diversity*, November 2012, p.23, available online at <https://www.supremecourt.uk/docs/speech-121115-lord-sumption.pdf>.

⁴² See e.g. Bar Council, *Snapshot: The Experience of Self-Employed Women at the Bar* (2015), available online at http://www.barcouncil.org.uk/media/379529/snapshot_-_the_experience_of_self-employed_women_at_the_bar.pdf

⁴³ See note 15, *Judicial Diversity Statistics 2016*, which records that 93% of Recorders are barristers. Statistics on Deputy High Court Judges are not included in this data.

- 1.25 In 1972, JUSTICE found that “the larger the pool of candidates, the better the chance of a good judicial appointment”.⁴⁴ This report reiterates that sentiment. A reason sometimes offered for appointing senior Silks to the Bench, rarely expressed publicly but strongly held, is the view that the cleverest lawyers go to and stay at the independent Bar. The Working Party does not share that assumption. While the independent Bar undoubtedly produces many brilliant judges, efforts need to be made to actively recruit from alternative, more diverse pools. Possible sources of candidates include academics, solicitors, in house counsel (e.g. in NGOs or companies), the Government Legal Service, the Crown Prosecution Service, the Tribunals and the District bench. Many excellent women lawyers are attracted by the working culture and flexibility offered by these employers.
- 1.26 As JUSTICE has previously recommended, there also must be a real career path allowing excellent lawyers to join the judiciary (including the Tribunal judiciary) at the lower rungs and stand a genuine chance of moving all the way up. In our view, a rigorous and objective system of appraisals must be a key part of this career development.

Appointing the judges

- 1.27 Historically, judges were appointed by a “tap on the shoulder” from the Lord Chancellor. With the establishment of the JAC in 2006, the expectation was that a change in process would result in a change in profile of the judges appointed. However, though the JAC has overseen a more open application and selection process for appointments up to the High Court, the experience of the last decade would suggest that greater transparency of selection process has not greatly advanced inclusion and diversity. There are continuing issues around the level of transparency, as we set out below. We are concerned that the JAC procedures have become unduly bureaucratic, working responsively rather than proactively, and focus too much on process and too little on outcomes. There is much that can be learned from other areas about structuring recruitment processes to facilitate diverse appointments (see **Chapter IV**).

⁴⁴ See note 2, JUSTICE, *The Judiciary* (1972), p.10.

- 1.28 At the same time, the JAC has never been given a specific mandate to achieve greater diversity.⁴⁵ The “equal merit provision” is a very limited tool and has proved to be largely ineffective.⁴⁶ It is not a proxy for actually aiming to achieve greater diversity. The JAC has a limited role overall, with appointments to the Court of Appeal, for Heads of Division and for the UK Supreme Court being undertaken by *ad hoc* panels, including JAC lay panel members. With such complicated and diffuse responsibilities for different levels of appointment, there is no one body or person to hold accountable for the lack of diversity. Buck passing is rife.
- 1.29 Whereas in other sectors there would be a dedicated department responsible for workforce planning, recruitment/promotion, performance appraisal, and pastoral care of staff, the judiciary suffers from the absence of integrated human resources management. The Working Party understands the reasons for splitting recruitment from other “human resources” functions, and at the present time that independence will be maintained. However, responsibility for other human resources functions in the senior judiciary of England and Wales is even more diffuse and unclear. Matters like pay, working arrangements and work allocation are split across the Judicial Office, Her Majesty’s Courts and Tribunal Service (HMCTS), and the Ministry of Justice. An unclear division of organisational responsibility for human resources contributes to the lack of responsibility for achieving diversity.

⁴⁵ See R.Hunter, *Problems of scale in achieving judicial diversity*, in G. Gee and E. Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017).

⁴⁶ *Judicial Selections and Recommendations for Appointment Statistics*, April 2015 to March 2016, Judicial Appointments Commission, 2 June 2016 (updated 1 December 2016), p.11 available online at https://jac.judiciary.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statisticsbulletin-jac-2015-16-revised.pdf. In 2015-16 just 14 out of 308 recommendations were made using the EMP, and it is unclear if it has ever been used at senior levels. Before the EMP was introduced some argued that it would make very little, if any difference to diversity; for example, the then Chair of the Judicial Appointments Commission, Christopher Stephens, said in evidence to the House of Lords Select Committee that it is a “fairly rare event” in which two candidates are considered to be of equal merit, see Select Committee on the Constitution, *Judicial Appointments Process*, Oral and Written Evidence, June 2011, p.386, available online at <http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf> The provision will only be used at the final decision-making stage 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 JAC.

- 1.30 The appointment procedures – both JAC and *ad hoc* – include an important role for serving judges, both on panels and as statutory referees and consultees. These panellists enjoy an unparalleled understanding of the job, of the qualities required and, for more senior appointments, a personal knowledge of the candidates themselves. Though the judges serve on appointment panels alongside lay selectors – who we are told usefully challenge their views on candidates – it is hard to imagine a candidate being appointed or promoted against the advice of a judge who knows them or who has strong views on their suitability.⁴⁷ This is where “affinity bias” becomes significant.
- 1.31 Behavioural science indicates that we are all inclined towards and feel comfortable with those who are similar to us. For all judges’ expertise in objectivity, an instinctive affinity with those like them is a very deep rooted human response. The existing judges involved in appointing our new judges are generally white, male former barristers. We do not suggest that they are consciously biased against women, those from different social backgrounds or non-white candidates, but the figures do suggest that they have a bias towards appointing candidates who are like them and who have had careers like them. Senior judges may not appreciate that candidates with very different personal and professional experiences would also make excellent judges, albeit perhaps in a somewhat different mould. Recognising and guarding against all forms of unconscious bias is critical in achieving a more diverse bench.

Achieving change

- 1.32 The Working Party is aware that some of its recommendations require amendments to primary legislation. Policy-makers and the judiciary alike have recognised that fundamental change is urgently needed. It is clear that there is no single problem and no single, simple solution to improve the diversity of the senior judiciary. However, it is essential to tap into a far wider array of talent, to reform selection processes, and to create a judiciary that is attractive and inclusive to all.
- 1.33 Given all of the above, it is long past time to turn rigorously to other, more diverse pools and to really value difference. We explore this next, in **Chapter II: Valuing Difference**.

⁴⁷ On judicial influence in judicial appointment processes, see G.Gee, R. Hazell, K.Malleson & P.O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015), Chapter 7.

- 1.34 Positive steps are urgently needed to ensure a critical mass of BAME people and women are appointed as senior judges, soon. With lack of accountability proving an obstacle to change, we advocate the establishment of mechanisms for responsibility for diversity. This is the subject of **Chapter III: Ensuring Accountability**.
- 1.35 It is also critically important that recruitment is proactive and that selection processes are fair and rigorous, which is explored in **Chapter IV: Fair and Proactive Recruitment**. Learning from other industries, the Working Party is confident much can be learned from new insights and research to minimise unconscious bias. Finally, **Chapter V** proposes establishing an inclusive career path and highlights the need for attractive terms and conditions of work, and targeted action to ensure judges, particularly those from underrepresented groups, progress all the way to the top. Multiple points of entry to the senior judiciary will allow for a quasi-judicial career path, whilst still not compromising our tradition of recruiting excellent senior practitioners from the Bar.

Table 1: Senior Judicial Statistics⁴⁸

	1995 ⁴⁹	2007 ⁵⁰	2016 ⁵¹
Supreme Court	Female: 0% (0) BAME: 0% (0)	Female: 8.3% (1) BAME: 0% (0)	Female: 8.3% (1) BAME: 0% (0)
Court of Appeal	Female: 3.1% (1) BAME: 0% (0)	Female: 8.1% (3) BAME: 0% (0)	Female: 20.5% (8) BAME: 0% (0)
High Court	Female: 7.3% (7) BAME: 0% (0)	Female: 9.3% (10) BAME: 0.9% (1)	Female: 20.8% (22) BAME: 1.9% (2) ⁵²
Circuit Bench	Female: 5.6% (29) BAME: 1% (5)	Female: 11.4% (73) BAME: 1.4% (9)	Female: 25.6% (160) BAME: 3.7% (23)

⁴⁸ This table is taken from official statistics (% adjusted to one decimal place), except for the % of BAME judges on the High Court in 2007 and 2016 (where the exact number of non-white judges was readily discoverable). The official statistics do not include socio-economic background.

⁴⁹ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Annex G (2004), available online at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/judiciary/diversitycp25-04.pdf>.

⁵⁰ Courts and Tribunals Judiciary 2007, available online at <https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2007/> [accessed 21 March 2017].

⁵¹ See note 15, *Judicial Diversity Statistics* 2016.

⁵² From JUSTICE's own research we know there are only two people from visible ethnic minorities in the High Court, Mr Justice Singh and Mrs Justice Cheema-Grubb: see note 16.

Table 2: Pools

Profile⁵³ \ Pools	Senior Government lawyers ⁵⁴	Senior CPS lawyers ⁵⁵	Law professors ⁵⁶	Solicitors' partners	Queen's Counsel	Circuit judges	Upper Tribunal judges
Women	51%	57%	30%	28%	14%	25%	34%
BAME	10%	15%	8%	8%	6%	<4%	12%
Privately educated	- ⁵⁷	-	-	51%	71%	-	-
Attended Oxford or Cambridge	-	-	-	55%	78%	-	-
High Court judges from pool as % ⁵⁸	<1%	0	<1%	<1%	97%	<15%	<6%

⁵³ For partners and QCs, see notes 10, 25 and 37. For judges, see note 15.

⁵⁴ *Statistics at GLS, Diversity profile of GLS*, December 2016, available online at <https://www.gov.uk/government/organisations/civil-service-government-legal-service/about/statistics> [accessed 21 March 2017].

⁵⁵ “Senior” includes the following positions: Senior Prosecutors & Senior Crown Prosecutors/Senior Legal Assistants. See CPS, *Workforce Diversity Data 2015-16*, available online at https://www.cps.gov.uk/data/equality_and_diversity/workforce_diversity_data_2015_16.html [accessed 21 March 2017].

⁵⁶ HESA, *Staff in Higher Education 2013-14*, February 2015, available online at <https://www.hesa.ac.uk/data-and-analysis/publications/staff-2013-14>.

⁵⁷ Please note that hyphen means we were unable to find data on this.

⁵⁸ See note 15, *Judicial Diversity Statistics 2016*: 99% of High Court judges were previously barristers. Since 2016 Mr Justice Hickinbottom has been elevated to the Court of Appeal so, at the time of writing, there are zero solicitor-judges in the High Court. JUSTICE’s internal analysis into the background of High Court judges (2016) investigated their careers prior to joining the High Court; please note this is not official data. Compiling this history was not straightforward, and sometimes information was missing or sources did not agree. “Upper Tribunal” judges includes fee-paid and analogous positions. Finally, in 2016-17 there were a number of changes in the High Court so this row necessarily represents a snapshot in time.

Table 3: International Comparators⁵⁹

	Court	Women	Total number of judges	Women as % of court
New Zealand	Supreme Court ⁶⁰	3	6	50%
Germany	Federal Constitutional Court ⁶¹	7	16	44%
Canada	Supreme Court ⁶²	4	9	44%
Australia	High Court ⁶³	3	7	43%
France	Constitutional Council ⁶⁴	4	10	40%
	International Criminal Court ⁶⁵	7	18	39%
Ireland	Supreme Court ⁶⁶	4	11 ⁶⁷	36%
Norway	Supreme Court ⁶⁸	7	20	35%
Denmark	Supreme Court ⁶⁹	6	19	32%
USA	Supreme Court ⁷⁰	3	9 ⁷¹	33%
South Africa	Constitutional Court	3	9	33%
	ECtHR ⁷³	15	47	32%
Sweden	Supreme Court ⁷⁴	5	16	31%
Israel	Supreme Court ⁷⁵	4	15	27%
Italy	Constitutional Court ⁷⁶	3	14	21%
UK	UK Supreme Court	1	12	8%

⁵⁹ This table was adapted from A. Paterson & C. Paterson, *Guarding the Guardians?, towards an independent, accountable and senior judiciary*, (Centre Forum, 2015), p.38.

⁶⁰ *Courts of New Zealand, Supreme Court: Judges*, available online at <https://www.courtsofnz.govt.nz/the-courts/supreme-court/judges> [accessed 21 March 2017].

⁶¹ Bundesverfassungsgericht, *Justices of the Federal Constitutional Court*, available online at <http://www.bundesverfassungsgericht.de/EN> [accessed 21 March 2017].

- ⁶² Supreme Court of Canada, *Current Judges*, available online at <http://www.scc-csc.ca/court-court/judges-juges/current-actuel-eng.aspx> [accessed 21 March 2017].
- ⁶³ High Court of Australia, *About the Justices*, available online at <http://www.hcourt.gov.au/justices/about-the-justices> [accessed 21 March 2017].
- ⁶⁴ Constitutional Council, *The members*, available online at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/the-members/the-members.25737.html> [accessed 21 March 2017].
- ⁶⁵ The International Criminal Court. *The Judges of the Court*, available online at <https://www.icc-cpi.int/iccdocs/PIDS/publications/JudgesENG.pdf> [accessed 21 March 2017]
- ⁶⁶ Supreme Court of Ireland, *Current Judges of the Supreme Court*, available online at <http://www.supremecourt.ie/SupremeCourt/> [accessed 21 March 2017].
- ⁶⁷ This includes the 2 *ex officio* members of the Court. Excluding them, the female percentage is 44%.
- ⁶⁸ The Supreme Court of Norway, *The Justices*, available online at <https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/The-Supreme-Court-of-Norway-/Justices/Justices/> [accessed 21 March 2017].
- ⁶⁹ Danmarks Domstole, Supreme Court Justices, available online at <http://www.supremecourt.dk/about/staff/Pages/default.aspx> [accessed 21 March 2017].
- ⁷⁰ Supreme Court of the United States, *A Brief Overview of the Supreme Court*, available online at <https://www.supremecourt.gov/about/briefoverview.aspx> [accessed 21 March 2017]
- ⁷¹ As at 21 March 2017, Neil Gorsuch has been nominated to fill the vacancy left by Justice Scalia's death in February 2016.
- ⁷² Constitutional Court of South Africa, *Current Judges*, available online at <http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm> [accessed 21 March 2017].
- ⁷³ I.e. the European Court of Human Rights, *Composition of the Court*, available online at http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer [accessed 21 March 2017]
- ⁷⁴ Hogsta Domstolen, *Justices of the Supreme Court*, available online at <http://www.hogstadamstolen.se/Domstolar/Hogsta-domstolen/Justitierad/> [accessed 21 March 2017].
- ⁷⁵ The State of Israel Judicial Authority, *Justices of the Supreme Court of Israel*, available online at <http://elyon1.court.gov.il/eng/judges/judges.html#12> [accessed 21 March 2017].
- ⁷⁶ Corte Costituzionale, *The Constitutional Court: The Composition of the Court*, available online at <http://www.cortecostituzionale.it/actionCollegioEn.do> [accessed 21 March 2017].

II. VALUING DIFFERENCE

The need to expand the talent pool

- 2.1 In this chapter we set out the positive case for changing the complexion of our senior courts. Selectors should value a diverse judiciary and positively seek to create it, for reasons of legitimacy, fairness and quality.
- 2.2 The obvious lack of female and visible BAME senior judges threatens to erode the public's confidence in the judiciary: "a significant amount of research has now been conducted in England and Wales drawing a direct connection between judicial diversity and the public perception of the fairness of courts."⁷⁷ Perceptions matter greatly, perhaps especially for the UK Supreme Court (the most visible and, increasingly, scrutinised judges)⁷⁸ and for the Crown Court (where those tried are disproportionately non-white, yet the judges are overwhelmingly white).⁷⁹ In today's society it is difficult to justify or explain a senior judiciary which so obviously does not reflect the make-up of the nation.⁸⁰ It is also notable that increasing numbers of very senior positions in the wider criminal justice system are held by women, for example the Commissioner of the Metropolitan Police Service and the Director of Public Prosecutions, but not in the senior judiciary.

⁷⁷ C. Thomas, *Judicial Diversity in the UK and Other Jurisdiction, A Review of Research, Policies and Practices*, The Commission for Judicial Appointments, November 2005, p.55, available online at https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf.

⁷⁸ See, for example, BBC News, *UK's Supreme Court faces Brexit limelight*, 15 November 2016, available online at <http://www.bbc.co.uk/news/uk-politics-37979406> [accessed 21 March 2017].

⁷⁹ See note 18.

⁸⁰ Note also that the BAME population in the UK is projected to rise significantly in the next decade, see note 126.

- 2.3 Reducing the homogeneity of our senior judiciary is not simply a matter of legitimacy. It is also about ensuring equal opportunities for everyone – an intrinsic good. Significant overrepresentation of a certain demographic group calls into question the objectivity of the current system. This report returns to the importance of fair selection in **Chapter IV**. The consequence of not recruiting from a wide enough pool is necessarily that the institution is not benefiting from the top people. As Lord Neuberger has asked: “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.”⁸¹
- 2.4 As set out in **Chapter I**, the vast majority of senior judges were previously barristers. The reasons for the lack of diversity⁸² at the senior Bar, and steps to change it, are outside the scope of this report, but there is little indication that the position is going to change in the foreseeable future.⁸³ Nor do we need to rely on change at the Bar: there are intellectually outstanding lawyers working in other settings who better reflect the make-up of society. In addition, those we consulted shared our view that very successful barristers do not invariably make the best judges. In this way, public confidence and quality point in the same direction: both are enhanced by appointing from a broader range of candidates. It is sometimes assumed that senior barristers can hit the ground running as judges. However, JUSTICE’s 1992 report challenged the notion that barristers necessarily have the right skills for the bench:

*[B]oth judges and advocates must be able to grasp the essentials of a case quickly and have the mental toughness to deal with difficult parties and to withstand the passions that litigation arouses. Equally, advocacy gives a grounding in court procedures ... Procedures can, however, be learned in other ways. The thrust of the advocate’s job is in analysis of a case for the purpose of deploying emphasis and persuasion to present the case at its best. Beyond that, he or she has no business in judging it or the client. Judges must decide where the merit lies between warring parties and make judgments on conflicting facts. The best drama producers may not be the best critics...the strong combative or competitive streak present in many successful advocates is out of place on the Bench. Advocates without these qualities (and possibly with smaller practices as a result) may make better judges. Thus we regard as misconceived the argument that judges of the higher courts should be drawn exclusively from the ranks of the most successful advocates.*⁸⁴

⁸¹ House of Lords Select Committee on the Constitution, *Oral evidence*, 16 November 2011, Qu 251, cited in E. Rackley, note 12, *Women, Judging and the Judiciary*, p.193.

⁸² E.g., over 80% of QCs are white men, see note 10, P. Kirby, *Leading People* 2016, p. 31.

⁸³ See note 26.

⁸⁴ See note 2, JUSTICE, *The Judiciary in England and Wales* (1992), p.12.

- 2.5 As well as missing many excellent potential judges, the narrow demographic of the existing judiciary leads to a narrowing of experience and knowledge. As renowned US Supreme Court Justice Cardozo famously explained:

*The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility; one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.*⁸⁵

- 2.6 A large body of evidence now confirms that, as illustrious judges have long suggested, different but complementary perspectives are better for collective decision-making than homogenous excellence.⁸⁶ For example, the UK Supreme Court would be poorer if comprised of 12 property lawyers, no matter how outstanding. A breadth of backgrounds is important in the higher courts sitting as panels – but judges sitting alone also benefit from the wisdom of their colleagues, whether through personal contact or reading their decisions. Conversely, there is a risk that those with very similar backgrounds assume an uncritical “common sense” view, which does not accord with the experience of the public.

Aside from the empirical studies ... we cannot ignore the experience of distinguished past judges whose own judicial experience endorses the value of diversity and the distorting effect of the lack of it.

The Rt. Hon. Sir Terence Etherton, *Liberty, the archetype and diversity: a philosophy of judging*, Public Law, 2010, p.11.

⁸⁵ B. Cardozo, *The nature of the Judicial Process*, (Yale University Press, 1961), p.177, cited by Lady Hale, *Appointments to the Supreme Court*, Conference to mark the tenth anniversary of the Judicial Appointments Commission, University of Birmingham, November 2015, p. 1-2, available online at <https://www.supremecourt.uk/docs/speech-151106.pdf>.

⁸⁶ I. Bohnet, *What Works*, (Harvard University Press, 2016), Chapter 11, pp.229-30; J.Surowiecki, *The Wisdom of Crowds*, (Anchor, 2005), Chapter 2. See generally Chapter IV: we all have cognitive biases that can lead us astray. Some biases harm collective decision-making, such as overconfidence and groupthink. See also D.L. Rhode, *Lawyers As Leaders*, (Oxford University Press, 2015), p.47: famously, some American presidents surround themselves with a “team of rivals” to avoid the “perils of insular thinking” (including Presidents Lincoln and Obama).

2.7 Given all this, judicial diversity will improve the institution as a whole. An inclusive, diverse judiciary is all the more important in a common law system, where the judiciary “occupy a unique position...they don’t just implement the law, they also create it.”⁸⁷ Of course, white, privately-educated, male barristers do not all reason in exactly the same way. But there will be far *greater* variety of thought when most of the senior judiciary do not hail from this fairly narrow subset of society. To be clear, this report is not suggesting that outcomes are entirely determined or predicted by personal characteristics; only that judges are human, so like the rest of us their thinking is shaped by their experiences. Gender, ethnic and social background are all reliable indicators of “valuable experience which is different to the norm”.⁸⁸ Encountering different perspectives may help people to interrogate their assumptions and counteract misperceptions, but these are not easy tasks.⁸⁹ Ultimately then, only changing the demographic make-up of the senior judiciary will unlock *all* the many benefits of diverse thinking.

To understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench.

Sonia Sotomayor, A Latina Judge’s Voice, *The New York Times*, May 2009, p.8.

⁸⁷ A. Hirsch, *Brilliant Lord Bingham was the greatest judge of my time*, September 2010 available at <https://www.theguardian.com/law/afua-hirsch-law-blog/2010/sep/12/lord-bingham-civil-liberties>

⁸⁸ The Rt. Hon. Sir Terence Etherton, *Liberty, the archetype and diversity: a philosophy of judging*, Public Law, 2010, p.11; see also note 12, E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, p.148 and Lady Hale, *Women in the Judiciary*, The Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society, June 2014, p.4, available at <https://www.supremecourt.uk/docs/speech-140627.pdf>.

⁸⁹ See note 86, I. Bohnet, *What Works*, especially Chapter 2 on the immense difficulty of “de-biasing” our minds.

Signalling commitment to change

- 2.8 Given that calls to expand the talent pool date back at least 45 years, the time has come to explicitly recognise the value of difference as one factor among others in assessing what an applicant offers to the judiciary. The Working Party broadly adopts Bindman and Monaghan’s recommendation that “the ability of the candidate to contribute to a diverse judiciary should be included as a factor to be taken into account”⁹⁰ in the selection process. In New Zealand, the current system of judicial appointments recognises the significance of difference by including among four general criteria for office “reflection of society”, i.e. someone “who is aware of, and sensitive to, the diversity of modern New Zealand”⁹¹ which has been described as the need for “a good knowledge, acquired by experience, of New Zealand life, customs and values”.⁹² As can be seen from Table 3, New Zealand’s highest courts fare significantly better than our own, in terms of gender diversity at least.
- 2.9 However, the selection criterion needs to be worded more strongly than “sensitivity” to diversity. It should make clear that what the institution needs is much greater social, ethnic and gender diversity. Among other factors, it should be relevant that a candidate is, by reason of their background, able to contribute to a more diverse judiciary. An explicit signal to selectors that diversity is a factor of value will help to improve the composition of senior judiciary. We come to the use of the word “merit” later but it needs to be fully understood and accepted that “the judiciary is stronger, and justice dispensed better, the more varied the perspectives and experiences that are involved in its decision-making”.⁹³

⁹⁰ See note 3, G. Bindman & K. Monaghan, *Accelerating Change, Recommendation 1*.

⁹¹ See *Judicial Protocol*, (April 2013, updated April 2014), available online at <http://www.crownlaw.govt.nz/assets/Uploads/judicial-protocol.pdf> [accessed 21 March 2017].

⁹² *The Report of Royal Commission on the Courts*, (Wellington Government Printer, 1978), p.199, cited in *ibid*, *Judicial Protocol*, p.4.

⁹³ See note 12, E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, p. 187. Furthermore, Lord Bingham recommended that “merit” take into account “wider considerations, including the virtue of gender and ethnic diversity”. See A. Paterson & C. Paterson, *We need to rethink how we define merit for supreme court appointments*, *The Guardian*, 26 March 2012, available online at <https://www.theguardian.com/law/2012/mar/26/rethink-merit-supreme-court-appointments> [accessed 21 March 2017].

2.10 We also share the concern of the Lord Chief Justice, the Senior President of Tribunals and the Lord Chancellor that the positions of Recorder and Deputy High Court judge – so vital as entry points for senior practitioners – need to be regularly refreshed. The Government’s “Modernising Judicial Terms and Conditions” consultation in 2016 proposed fixed time-limits on these posts, given that the junior ends of the legal profession and judiciary are significantly more diverse.⁹⁴ The Working Party considers that serious consideration should be given to placing reasonable time-limits on these two positions. This would enable a far wider cohort of people to gain vital judicial experience, on their way to a permanent appointment. We note the Government’s response to the consultation did not take this proposal forward, but we believe that special considerations apply to the senior judiciary that do not apply to tribunals. While Recorders average 21 years in post and remain a very un-diverse pool,⁹⁵ the problem of “bed-blocking” will only continue. In general, the Working Party feels there should be many more flexible positions in the salaried judiciary, which may prove attractive to some who currently spent many years as fee-paid judges (see **Chapter V**).

Changing the image

2.11 As set out above, more diverse pools of candidates exist but are not currently being appointed. Systemic barriers need to be dismantled, because history suggests that change will not happen organically. The continuing tendency to appoint a very high proportion of senior barristers appears to stem from a deeply entrenched belief that they not only have the most relevant experience, but that those without that experience are significantly less likely to make good senior judges. In order to widen the pool, selectors need to be prepared to both value other experience, but also enable non-barrister candidates to gain relevant experience. It is worth noting that the ongoing modernisation of the courts – with much more of the judiciary’s business transacted online – will result in changes to the way judges work and arguably the skills that they need, particularly at the Circuit bench.

⁹⁴ Ministry of Justice, *Modernising Judicial Terms and Conditions: Consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions*, (September 2016), available online at https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/supporting_documents/consultationdocument.pdf.

⁹⁵ *Ibid*, pp. 11-12.

- 2.12 The first stage is to consider how to re-draw and re-define criteria so as to attract more diverse talent (see further **Chapter IV**). The JAC has recently published a more detailed table of competences than in the past, with illustrations that go beyond the QC-orientated norm.⁹⁶ Signalling that those with different backgrounds are highly sought after can take many forms. Borrowing an illustration from attempts to improve the diversity of Parliament,⁹⁷ some political parties have explicitly re-drawn their criteria for selecting party candidates so as to attract underrepresented groups.
- 2.13 The second stage is to encourage those other pools to think of the judiciary as open to people like them. As well as actually appointing more judges from underrepresented groups, one simple way of signalling that “non-traditional” experiences are valued is by saying so, openly and often. The judiciary already tries to dispel the stereotypical picture of a judge – for example, through the work of Diversity and Community Relations Judges – and this can be reinforced by highlighting senior judges who do not fit the stereotypes. Existing efforts to educate the public should also be focussed on where they are most needed – for example, by judges visiting deprived schools and convincing young people that they can aspire to judicial office. This could also help forge better relations between courts and their communities.
- 2.14 The third stage is to actively look for other professional pools in a creative and proactive way. One important group is the large number of senior BAME lawyers in the Crown Prosecution Service, with highly relevant Crown Court experience. They are currently prevented from sitting as Recorders, because of concerns about bias. On the assumption that there are insuperable legal barriers to them to sit as Recorders, then active steps should be taken to encourage them to get other part time judicial experience, and given their familiarity with the criminal courts careful consideration should be given to whether this group needs any judicial experience before being appointed as Crown Court judges. In appropriate cases the *de facto* requirement of Recorder experience before appointment as a Circuit judge for experienced Crown Prosecutors could be removed.

⁹⁶ See *High Court 2017– Transferrable skills and experience*, available online at https://jac.judiciary.gov.uk/sites/default/files/sync/selection-exercises-2016/041_transferrable_skills_table.pdf [accessed 21 March 2017].

⁹⁷ See, S. Childs, *The Good Parliament Report*, July 2016, p.14-15, Recommendation 6, available online at <http://www.bristol.ac.uk/media-library/sites/news/2016/july/20%20Jul%20Prof%20Sarah%20Childs%20The%20Good%20Parliament%20report.pdf>.

- 2.15 Another possible pool for the senior judiciary is partners exiting solicitors' firms. We expect that these lawyers, if not yet ready to cease working, might relish continuing intellectual and professional challenge and a chance to use their skills in public service. Unlike other senior solicitors in private practice, getting their firm to release them would obviously not be a problem. The Working Party also suggests that firms who are willing to release their lawyers for many hours of pro bono work might consider releasing them for fee-paid judicial office, which is also an important public service.
- 2.16 Other measures may also help to create a diverse and sustainable talent pool. The Judicial Office's mentoring and work shadowing initiatives should be extended and support programmes should be targeted at underrepresented groups. Encouraging candidates from diverse backgrounds to apply for senior judicial office should be an integral part of leadership judges' responsibilities. **Chapter V** recommends a quasi-judicial career path to bridge the gulf between the lower and higher courts – including, for example, High Court judges providing sponsorship or mentoring of tribunal judges. Such a scheme would confer a responsibility upon the sponsor or mentor to relay their knowledge to the potential candidate and guide them through the appointments process.

Pre-appointment training

- 2.17 The Working Party recognises that selectors may be reluctant to appoint lawyers to the Circuit and High Court benches who lack courtroom experience. Appointing Queen's Counsel may seem like the safe option, given the immense difficulty of removing a senior judge.⁹⁸ However, for fee-paid appointments it is appropriate to appoint candidates with potential rather than particular experience. Targeted pre-appointment training would help to counteract any perceptions that non-barristers are less qualified and to make selectors less risk-averse. This could build on the excellent work of the new "Diversity Support Initiative" offered by the Judicial Office to women, BAME people, and those from less advantaged socio-economic backgrounds. The success of pre-appointment training should be measured in terms of whether it actually helps applicants to secure appointments. A rigorous course would give selectors the confidence to recruit for promise and ability rather than preferring those with familiar experience.

⁹⁸ We note the JAC's new Track 1 High Court competition, which was open to people without previous judicial (or indeed barristerial) experience. At the time of writing it is of course too early to say if this initiative has been successful in diversity terms, see Judicial Appointments Commission, *High Court Judge, January 2017- Track 1*, available online at <https://jac.judiciary.gov.uk/vacancies/041A> [accessed 21 March 2017].

- 2.18 Training should focus on identifying and teaching judicial skills – such as the ability to control court proceedings, assess evidence, and produce judgments. Judge-craft training offered to new and existing judges by the Judicial College could be used as a model; indeed, opening up Judicial College courses may be a cost-effective option. Training may usefully involve role-play of courtroom scenarios and giving judgments following oral evidence. In principle pre-appointment training is likely to positively impact on diversity in a number of ways:
- a. Training could provide important reassurance to candidates about the nature of the competencies they will be required to show, and the nature of the job.
 - b. Training may also help tribunal judges seeking promotion, but who have little trial experience.
 - c. The mode of delivery of the training may also produce other intangible but meaningful benefits. Contact with the judiciary through pre-appointment training could help to address concerns about the approachability or dominant culture of the judiciary that applicants are considering joining.
- 2.19 The most crucial aspect of design is ensuring that training adds value and is highly regarded by selectors, so consultation with the senior judiciary and the JAC will be essential.

Conclusion

- 2.20 The benefits of increasing the diversity of the judiciary need to be embedded in the system. Difference should be valued not feared, and clear positive steps need to be taken to recruit senior lawyers from outside the Bar. This recommendation follows similar ones from JUSTICE and others⁹⁹ over many years.

⁹⁹ See note 2: JUSTICE *The Judiciary* (1972), which recommended expanding the talent pool to include solicitors and academics, and *The Judiciary in England and Wales* (1992), which repeated this view. See generally Annex II; see also: note 3, *The Report of the Advisory Panel on Judicial Diversity* (2010); note 1, *Judicial Appointments*, House of Lords Select Committee on the Constitution, 2012; note 3, G.Bindman & K.Monaghan, *Accelerating Change*, p.69, Recommendation 20.

III. ENSURING ACCOUNTABILITY

Context

- 3.1 A number of senior judges have publicly championed the value of difference in recent years.¹⁰⁰ The Secretary of State for Justice and Lord Chancellor, Elizabeth Truss MP, has expressed her desire to increase diversity.¹⁰¹ However, commitment to achieving real change is precarious if it depends on the good will of those currently in office. Transparent structures for ongoing accountability are critical.
- 3.2 Despite the stated commitment to increased diversity, present efforts are hampered by the fact that there are a range of actors involved in judicial appointments and promotions – none of which are directly responsible for increasing diversity of the judiciary. This means each can point to the others as a reason for the lack of improvement. Relevant responsibilities are divided as follows:
- a. The Judicial Appointments Commission (“JAC”) is responsible for Recorder, Circuit bench, Deputy High Court and High Court appointments.
 - b. Senior selections (Court of Appeal, Heads of Division and UK Supreme Court) are not within the JAC’s remit, and are instead made by ad hoc panels, albeit convened by the JAC.¹⁰²
 - c. HMCTS, the Judicial Office, the JAC, the Lord Chief Justice and the Lord Chancellor all have different roles to play, in work allocation, attracting talent, and appointments.

¹⁰⁰ Baroness Hale, Dame Heather Hallett, Lord Neuberger, and Sir Terence Etherton, to name but a few: See note 88, Lady Hale, *Women in the Judiciary*; Dame Heather Hallett DBE, *Independence under threat?*, Bentham Association Presidential Address, March 2012, available online at https://www.laws.ucl.ac.uk/wp-content/uploads/2014/10/hallett_12.pdf; See note 8, Lord Neuberger, *The Role of the Supreme Court Seven Years On – Lessons Learnt*; Sir Terence, Etherton, *Challenges facing the judiciary in the next Parliament*, UCL Conference at the Institute for Government, June 2015, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2015/06/speech-by-sir-etherton-challenges-facing-the-judiciary-in-next-parliament.pdf>.

¹⁰¹ See note 8, Secretary of State The Rt Hon Elizabeth Truss, *Women in the Legal Industry*.

¹⁰² See the Constitutional Reform Act 2005, Section 79; 70; Schedule 8.

- 3.3 Several of those consulted pointed out serious weaknesses in the current ad hoc system for selecting senior judges (as defined in 3.2b). Without a JAC-equivalent, a new panel is assembled whenever a vacancy (or, more recently, group of vacancies) arise on the Court of Appeal or Supreme Court.

*By definition, these panels are concerned with a ‘snap-shot’ picture and lack a consistency of membership or approach ... What is required is a process whereby, as in the days of appointment by the Lord Chancellor, the appointing body can actively take account of the longer term institutional needs of the senior judiciary and the Supreme Court in particular.*¹⁰³

- 3.4 This fragmented approach is a problem, and has been raised as such by senior judges. A combination of reactive recruitment and the inability to engage in succession planning have led to a series of non-diverse appointments.¹⁰⁴ There is little institutional memory, so each appointment is made largely in isolation from the last and next. The results are stark. Of the last 20 appointments to the Court of Appeal, 16 were white men,¹⁰⁵ and since Lady Hale was made a “Lord of Appeal in Ordinary” in 2004, all 15 appointments to the UK’s highest court have been white men. There has only ever been one female Head of Division, Lady Justice Butler-Sloss, and none have been BAME. In summer 2016, six new judges were appointed to the Court of Appeal, but only one was a (white) woman. However, appointments are rarely looked at in this holistic way; if they were, the outcry would surely be greater. The lack of a specific, standing body responsible for senior selections makes such scrutiny or accountability almost impossible. Therefore, we propose a permanent, high-profile committee specifically charged with senior selections.
- 3.5 It is also important to ensure that there is accountability for diversity both in JAC appointments and senior selections. The JAC has had relatively greater success in appointing women to the Circuit and High Court Bench (see **Chapter D**); still, 15 out of the last 20 appointments to the latter were white men. There is a real need for institutional mechanisms to increase the pace of change. As such, the Working Party recommends “targets with teeth” for selection committees. These targets could be laid out in statute, but in the short term could be non-statutory. This will ensure that, in ten years’ time, meaningful progress has been made.

¹⁰³ See note 59, A Paterson & C Paterson, *Guarding the Guardians?, towards an independent, accountable and senior judiciary*, p.30.

¹⁰⁴ By “appointment” we include only the first time a judge was made a Lord of Appeal in Ordinary/Supreme Court Justice.

¹⁰⁵ JUSTICE’s internal research, correct as of 21 March 2017.

3.6 Finally, accountability for change must extend beyond recruitment. Creating a field of diverse, high calibre applicants is essential. It is the Working Party’s view that the senior judiciary needs to be supported by a properly-resourced human resources function, which could, for example, engage in active head-hunting.¹⁰⁶ Furthermore, there must be open and constructive coordination between the permanent human resources staff on the one hand, and selection commissions on the other. This will enable both to discharge their shared responsibility to increase diversity.

A new, permanent Senior Selections Committee

3.7 The Working Party proposes a new standing body for senior appointments – called the “Senior Selections Committee” (SSC). The JAC and the SSC would then each be publicly scrutinised for appointments within their respective control. The JAC would be held accountable for improving the diversity of selections up to and including the High Court, and the new SSC for those appointments above that level. It would also then be possible to compare the progress of one independent body against the other.

3.8 The SSC would rectify the problems we identify above, as well as bringing visibility and accountability to the recruitment of the most senior and constitutionally important judges. We favour a standing, nine-person body.¹⁰⁷ The most significant selection decisions in our country surely merit a proper, permanent committee of this stature.

¹⁰⁶ The Diversity Support Initiative run by the Judicial Office is, on a small scale, an example of proactive human resources management. Similarly, the UK Supreme Court has been running “insight sessions” for potential candidates in anticipation of the recruitment round in summer 2017. However, it is too early to assess the success of such initiatives in enabling “non-traditional” candidates to succeed in selection exercises.

¹⁰⁷ Our model is inspired by note 59, A Paterson & C Paterson, *Guarding the Guardians?, towards an independent, accountable and senior judiciary*. Unlike the Paterson model, the Working Party decided against the representation of parliamentarians on the SSC.

3.9 The SSC would be responsible for appointing Court of Appeal judges, Heads of Division and UK Supreme Court Justices. The key feature would be that the expertise of judges would be maintained, but their views counterbalanced by a wider range of non-judicial perspectives. Drawing on previous ideas,¹⁰⁸ we propose:

- i. Three **judicial members**, or their nominees. This could include the President of the Supreme Court and the Lord Chief Justice (for England and Wales appointments, or his or her equivalent from Scotland or Northern Ireland for the relevant Supreme Court appointments). The third member will offer a different judicial viewpoint¹⁰⁹ from those sitting on the Court of Appeal and above. For example, a High Court judge, a Circuit judge, a senior member of the Tribunals, or a retired judge could all offer useful insights. As well as offering a fresh perspective, the third member significantly improves the chance of having the input of a female and/or BAME judge.¹¹⁰
- ii. Three **lay members**, some of whom could be chosen by the JAC. As the ad hoc selection panels are currently comprised, the lay members are the only counterbalance to the judges on the panel. Their presence is meant to ensure that the judiciary is not “self-selecting”. Some consultees were sceptical about whether two or three lay people, by themselves, are able to challenge senior judges’ assessments of candidates sufficiently. An enlarged SSC would in our view provide better checks and balances, while still including a vital lay perspective.
- iii. Three **non-judicial expert members**:
 - Member(s) jointly chosen by CILEx, the Bar Council and the Law Society, who could bring useful professional views on essential qualities for judges. All three bodies recognise the need for a diverse judiciary.
 - Member(s) independent of the judiciary, preferably with expertise in furthering equality and inclusion, for example the Chair of the Equality and Human Rights Commission, senior academics, or retired civil servants.¹¹¹

¹⁰⁸ Ibid.

¹⁰⁹ Research suggests that involving lower-ranking judges encourages diverse choices. See note 71, C.Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions*, p.43.

¹¹⁰ E.g. former High Court judge Dame Linda Dobbs. Of course lower-ranking judges would have to be prepared not to seek promotion for themselves, but some High Court judges do not want to go to the Court of Appeal (e.g. because of retirement age, or preferring trial work to appellate judging).

¹¹¹ Non-judicial members could be offered training courses to enable them to best apply their expertise to the judiciary and feel confident expressing disagreement.

- 3.10 One clear advantage of the SSC would be that the value of difference could be built into its design and functioning from the outset, as the expert membership illustrates. An enlarged, long-term membership would allow for both continuity and a wider range of perspectives. Appointments could be for fixed non-renewable terms, which could sensibly coincide with the proposed new fixed terms for judicial leadership roles.¹¹² A permanent SSC would also ensure that *every* senior recruitment exercise includes both female and BAME selectors. The Working Party suggests that the SSC's rules require ethnic and gender diversity in its composition.
- 3.11 Finally, the SSC would also be responsible for succession planning for the most senior judiciary in between appointments. Planning for forthcoming retirements should be an integral part of a selection commission's function (see further **Chapter IV**). To make proactive recruitment practicable and cost-efficient, the SSC and JAC could share administration and facilities. The SSC and the JAC would also be accountable for reporting annual progress against targets, which we turn to next.

The Targets

Why Targets?

If there has been no significant increase in the numbers of women and BAME judicial appointments in five years' time, the Government should consider setting non-mandatory targets for the JAC to follow.

House of Lords Select Committee on the Constitution, 25th Report of Session 2010-12, 2012, p.36.

¹¹² A recent government consultation paper suggested that judicial leadership positions, e.g. Lord Chief Justice, should be subject to fixed non-renewable terms to allow a wider range of judges to benefit from these opportunities, see note 94, Ministry of Justice, *Modernising Judicial Terms and Conditions, consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions*. At the time of writing this proposal is being taken forward in the Prison and Courts Bill.

- 3.12 The underrepresentation of certain groups in the senior judiciary is pronounced and persistent. Despite numerous reports and recommendations progress has been “glacial”.¹¹³ Some (for example, Bindman and Monaghan) have argued that significant change can only be achieved in the near future through quotas – mandatory rules backed up by legal sanctions. The Working Party has considered quotas but a majority of members feel that at the present time the disadvantages outweigh the benefits.¹¹⁴ Our goal is to increase the pace of change without introducing quotas, which could generate resistance and resentment as well as risking stigmatisation of those selected.
- 3.13 The Working Party is, however, of the view that the time has come for there to be publicly stated targets for both gender and ethnic diversity, and that a failure to meet those targets would need to be both reported and explained. Targets are voluntary goals, but they can change behaviour in the right circumstances. The Working Party’s view is that targets are necessary, and will complement “the vigorous pursuit of a variety of initiatives led by the judiciary”¹¹⁵ and others. Though they are aspirational, targets will focus the minds of everyone involved on the importance of diversity. They will also set a transparent benchmark against which annual progress can be easily (and externally) measured. Targets will force the selectors to look beyond the obvious candidates, prompt judges to encourage applications from a much wider group, and support the careers of future candidates from currently underrepresented groups.

¹¹³ C.O’Cinneide & K.Malleon, *Are quotas for judicial appointments lawful under EU law?*, UCL The Constitution Unit, November 2014, available online at <https://constitution-unit.com/2014/11/14/are-quotas-for-judicial-appointments-lawful-under-eu-law/>.

¹¹⁴ Quotas are legally enforceable requirements and a failure to meet them could have legal consequences whereas a target is a figure to aim at, not a legally binding goal. However, in our “targets with teeth” model, if the target is not achieved then those responsible would account for that failure. For a discussion of the benefits and disadvantages of quotas, including different kinds of quota systems and a comparison of quotas and targets, see K. Malleon, *Diversity in the judiciary: The case for positive action*, (2009) 36 *Journal of Law and Society* 376; K. Malleon, *Gender quotas for the judiciary in England and Wales* in U Schultz and G Shaw (eds), *Gender and Judging* (Hart Publishing 2013) 481; K. Malleon, ‘*The disruptive potential of ceiling quotas in addressing over-representation in the judiciary*’ in G. Gee and E. Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017).

¹¹⁵ The Rt. Hon. The Lord Thomas Of Cwmgiedd, Lord Chief Justice of England and Wales, Speech for Temple Women’s Forum, Leeds, October 2015, p.1, available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/temple-womens-event-leeds-oct-2015.pdf>.

- 3.14 There has been insufficient change in the five years since the House of Lords’ Constitution Committee issued its report (see box above).¹¹⁶ If action is not taken now, the next five years will be equally disappointing. Without targets, there is little prospect that the good intentions of current actors will translate into action: transparent goals are the best way to significantly increase the number of female and BAME judges in the senior judiciary in a reasonable timeframe. Some people consulted have expressed concern that targets will mean compromising on quality. The Working Party wholly rejects this suggestion. It is simply impossible to accept that over the last 13 years only one woman has had the qualities to be a member of the Supreme Court, and only two non-white people for the High Court and above. As explained above, the current system does not really appoint on the basis of those who are best suited for the job, because it narrows its search to such a small and non-diverse pool, and defines “merit” in such a homogenous manner (see further **Chapter IV**).
- 3.15 As Lady Hale has noted, there are already effectively quotas for the Supreme Court judges from Scotland and Northern Ireland.¹¹⁷ This is for entirely proper constitutional reasons. However, we cannot see why if quotas are acceptable for this reason, targets should not be acceptable for the equally important, though different, reason of achieving an appropriately diverse bench.
- 3.16 Lastly, it is crucial to create a critical mass of women and BAME judges in the near future, rather than the occasional individual who can feel highly isolated, and may look and feel like a token appointment. Appointing such candidates in sufficient numbers *must* become the norm. Given the very small numbers in question, and the findings of the most recent Judicial Attitude Survey, we fear that the proportion of senior judges from underrepresented groups may even regress.

¹¹⁶ In April 2012, there were 17 female and two visible BAME High Court judges, see *Diversity statistics and general overview 2012*, available at <https://www.judiciary.gov.uk/publications/diversity-statistics-and-general-overview-2012/>. Compare Table 1, Chapter I.

¹¹⁷ See Constitutional Reform Act 2005, Section 27 (8): “making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”

- 3.17 There are numerous instances of targets in other sectors.¹¹⁸ For example, large global law firm Eversheds LLP has exceeded its 2011 target of having 25% women in its partners by 2016, and aims for 30% by 2020.¹¹⁹ Furthermore, following the “Women in Finance” Charter a number of public and private sector financial organisations have signed up to targets. The Financial Conduct Authority has committed to almost gender parity in senior leadership by 2020, and 8% BAME.¹²⁰ The Government has also reportedly introduced a target for gender diversity in public appointments.¹²¹
- 3.18 An oft-cited example is the 2011 Davies Report,¹²² which set a target for female representation on corporate boards. At this point, women made up only 12.5% of the members of FTSE 100 boards, and the rate of increase was very slow. The Davies target was 25% female representation on FTSE 100 boards by 2015.¹²³ This was achieved and in fact surpassed. By 2015 the proportion of women had almost doubled: 26.1% on FTSE 100 boards, and 19.6% on FTSE 250 boards. There has also been a reduction in all-male boards.¹²⁴
- 3.19 Finally, the Good Parliament Report recently recommended “targets with teeth”: in that case, the proposed “teeth” are the threat of statutory quotas if targets fail to produce results.

¹¹⁸ See e.g. T.Wright, *Gender and Sexuality in Male-Dominated Occupations: Women Working in Construction and Transport*, (Palgrave Macmillan, July 2016).

¹¹⁹ *Diversity at Eversheds Sutherland*, p.16, 18, available online at <http://www.eversheds-sutherland.com/global/en/where/europe/uk/overview/diversity/index.page?>

¹²⁰ *FCA continues its strong commitment to diversity and inclusion*, October 2016, available online at <https://www.fca.org.uk/news/press-releases/fca-continues-its-strong-commitment-diversity-and-inclusion>.

¹²¹ *Better Public Appointments? Follow-up and the Government Response to the Committee's Third Report, Better Public Appointments?: The Grimestone Review on Public Appointments*, House of Commons Public Administration and Constitutional Affairs Committee, Eleventh Report of 2016-17, February 2017, p.4, available online at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmpublicadm/1062/1062.pdf>.

¹²² Lord Davies of Abersoch, *Women on Boards*, February 2011, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf.

¹²³ *Ibid*, p.4.

¹²⁴ E.Doldor, R. Sealy & S.Vinnicombe, *Women on Boards: Taking stock of where we are, The Female FTSE Board Report 2016*, p.1, available online at <http://www.citywomen.co.uk/wp-content/uploads/2016/08/Female-FTSE-Board-Report-2016.pdf>.

Recommendation 9: Introduce prior to dissolution for the 2020 general election statutory sex/gender quotas to take effect for the 2025 general election if, three months prior to the 2020 general election, political parties currently represented in Parliament have failed to select at least 50 percent women in a party's 'vacant held' and 'target seats'. Introduce permissive legislation to allow for party quotas for other under-represented groups, where parties have failed to select proportional percentages of candidates from these groups.

S. Childs, *The Good Parliament Report*, July 2016, p.3.

The Supreme Court – an illustration of targets for the senior judiciary

3.20 The level of, and timescales for, targets must be both realistic and ambitious. Without wishing to be too prescriptive, the UK Supreme Court offers an example of a realistic gender target to achieve in the next decade. It is a straightforward example, because all 12 current Justices retire by 2026. Eleven men will be replaced – six by 2019 – as well as Lady Hale, presently the only female Justice. Targets are simple to implement given this certainty of timeframe. There should be an overall target that, at a minimum, women comprise 40% of the Supreme Court by 2026.¹²⁵ In other words, at least five female Justices in ten years' time.

3.21 This could be broken down into mini rolling targets, as follows:

Target 1) – by the end of 2019, minimum of THREE female Justices

- Minimum two women appointed out of the six vacancies,
- Total if target achieved = 3/12 Justices will be women (including Lady Hale)

¹²⁵ This figure falls between the percentage of women in the population (50%) and the percentage of women in the judiciary (around 30%). We expect this latter figure to rise over the lifetime of the target. As we have seen, some legal sectors exceed 50% women at senior levels (for example, the GLS). Also, the absolute numbers we are concerned with are very small (40% at every level would only require around 70 women in total in the High Court, Court of Appeal and Supreme Court).

Target 2) – by the end of 2022, minimum of FOUR female Justices

- Two women to be appointed (including Lady Hale’s replacement)
- Total if target achieved = 4/12 Justices will be women

Target 3) – by the end of 2026, minimum of FIVE female Justices

- One more woman to be appointed (if has not already happened)
- Total if target achieved = 5/12 Justices will be women

3.22 The same approach should be taken to visible BAME representation. Again using the UK Supreme Court as a simple example, it is easy to break down an overall target – a minimum of 2 non-white Justices by 2026¹²⁶ – into smaller milestones. Encouraging the SSC to appoint one person who is not white by 2020 and another by 2026 is, in our view, sensible and realistic. Allowing for the possibility of individuals with intersectional identities (e.g. a judge who is both female and of BAME origin), by 2026 there should be **at most** seven UK Supreme Court Justices who are **both** white and male. This is by no means the boldest target, but we consider it a reasonable and achievable one and it would create a critical mass of diversity at the highest level.

3.23 Social diversity is more difficult because official data is not currently collected on the socio-economic background of judges. Many years of research from the Sutton Trust and others consistently shows that those with a private education are significantly overrepresented in the senior judiciary. This report strongly recommends better data-collection, and that policy-makers work to devise a consistent set of factors that assist in defining and monitoring socio-economic background.¹²⁷ The very strong tendency to appoint Oxbridge graduates to the senior judiciary also raises serious issues around social diversity given Oxbridge’s very high proportion of privately educated students.¹²⁸ However, since there is not presently systematic official information collected on the social backgrounds of the judiciary and applicants, this report cannot recommend social diversity targets at this time.

¹²⁶ This would mean 16% of the court would be an ethnicity other than white. Note that the BAME population in the UK is projected to grow significantly by 2030, from 14% to almost 1/3 of the UK population, see: M.Lawrence, *Future Proof: Britain in the 2020s*, Institute for Public Policy Research, December 2016, p.6, available online http://www.ippr.org/files/publications/pdf/future-proof_Dec2016.pdf?noredirect=1.

¹²⁷ Approaches could be borrowed from the evidence-based practice of organisations with expertise in this field, such as the Sutton Trust and the Social Mobility and Child Poverty Commission.

¹²⁸ All but two members of the Supreme Court, and 74% of the Senior Judiciary attended Oxford or Cambridge, see note 9, P. Kirby, *Leading People 2016, The educational backgrounds of the UK professional elite*, p.2.

3.24 Certainly at the Supreme Court and Court of Appeal level the pool of potential candidates could and should extend beyond the existing judiciary. The Working Party does not consider that prior judicial experience is essential for sitting on an appellate court, with JUSTICE having made the same recommendation in 1972 and 1992. In this regard we welcome the recent statement by the JAC¹²⁹ on appointments to the Court of Appeal, encouraging applications from people outside the normal salaried High Court pool. Indeed, Lord Neuberger, President of the Supreme Court, alluded to the prospect of widening the pool in November 2016:

*We have one white woman and ten white men, and, although two of the eleven were not privately educated, none of us came from disadvantaged backgrounds ... the fact around 20% of the English and Welsh High Court and Court of Appeal judges are women represents a marked improvement on the past cannot alter the fact that it is way lower than it should be. The fact that things may be getting better does not of course justify our sitting on our hands and waiting for things to improve. **We should do as much as we can in terms of encouraging excellent potential candidates to apply for Supreme Court appointments, in particular from outside the traditional pool – the senior national judiciaries.***¹³⁰ [Emphasis added]

¹²⁹ See *Court of Appeal 2017*, available online at <https://www.supremecourt.uk/about/appointments-of-justices.html>.

¹³⁰ See note 8, Lord Neuberger, *The Role of the Supreme Court Seven Years On – Lessons Learnt*, Bar Council Law Reform Lecture, para.51.

- 3.25 Direct recruitment from the Bar to the highest courts is not unheard of here or abroad. Lord Sumption is a notable recent example, although not unprecedented.¹³¹ Lord Reid (a member of the Appellate Committee of the House of Lords from 1948-1975) was also appointed without prior salaried judicial experience. Current US Supreme Court Justice Kagan spent most of her previous professional life as an academic, and a former judge on Australia’s highest court, Justice Callinan, was appointed straight from practice. Trial management experience is not necessary to be a member of the UK Supreme Court; narrative appellate advocacy is the form and Justices sit in panels of five (at a minimum). We appreciate the disadvantages of direct recruitment, possibly most importantly the impact on the other tiers of the senior judiciary. However, given the urgent need to achieve a more diverse Supreme Court and Court of Appeal, such appointments are in our view justified. Indeed, this is the approach that the UK Supreme Court’s independent selection commission is currently taking. The 2017 selection exercise for three new Justices is open to candidates who are not serving judges.¹³²
- 3.26 The Working Party can imagine fine academic lawyers serving on the Court of Appeal or Supreme Court, though current eligibility criteria present a serious obstacle to this group of potential candidates. To be eligible for the Court of Appeal, candidates must have at least seven years post-qualification experience; for the Supreme Court the minimum is 15 years.¹³³ The problem is that many (extremely eminent) legal academics have either never qualified to practise in the first place, or have done so after having been academics for a long period of time, meaning they do not have the required number of years’ experience *after* qualification. To enable access to this pool, this report recommends that for judicial appointments to the Court of Appeal and Supreme Court the requirement of *post-professional qualification* experience in the law should be removed. Alternative qualification requirements could be introduced for example, by stipulating that candidates must either be qualified to practise or must have undertaken a PhD in law or equivalent. Such a step would allow access to the appellate judiciary to a new pool, increasing the possibilities of a more diverse judiciary.

¹³¹ Lord Sumption had sat as a Deputy High Court Judge, and a part time judge in the Channel Islands, see *Biographies of the Justices*, available online at <https://www.supremecourt.uk/about/biographies-of-the-justices.html>.

¹³² See *Judicial vacancies*, available online at <https://www.supremecourt.uk/news/judicial-vacancies.html>.

¹³³ For the Court of Appeal eligibility requirements, see *Court of appeal judges*, available at <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/coa-judges/>. For Supreme Court eligibility requirements, see *Procedure for Appointing a Justice of the Supreme Court of the United Kingdom*, available at: <https://www.supremecourt.uk/about/appointments-of-justices.html>.

- 3.27 With BAME appointments there may be a need for those with responsibility to encourage good candidates both in career progression and in making applications. However, this shows the benefits of targets in forcing a more proactive approach.
- 3.28 Though there will be differences in timescale, we see no reason why similar targets could not be applied to every court or tribunal. Policy-makers and selectors should work together to set ambitious five and ten year targets, and measure progress towards them annually. At present the only judicial body that would meet a target of 40% female representation is the tribunals system. Those that had already met the target can be showcased as examples of good practice. They could concentrate on ensuring gender and ethnic balance is maintained, and in taking positive steps to improve social diversity.
- 3.29 The Working Party firmly believes that we can increase the pace of change without in any way compromising quality. Taking women as an example only, in the longer term selectors might aim for gender parity at each level of the senior judiciary. However, in the immediate term, targets could be more modest – tailored to reflect the proportion of female judges one would reasonably *expect* to see at a particular level, if there were no barriers to entry. Analysing barriers in the system gives the lie to fears that quickening the pace of change threatens quality, and challenges assumptions that there are simply not enough good candidates out there. Too few women or BAME people applying for judicial office must be seen to represent a failure on the part of the system, and indicate greater problems with the attractiveness of the job for this cohort. **Chapter V** of this report sets out various ways the judiciary could be made more attractive for women and BAME candidates, thus encouraging more to apply.

The Teeth

- 3.30 Once target levels are agreed, strategies would be required to incentivise the responsible body. The “teeth” for composition targets (e.g. 40% of the UK Supreme Court should be female by 2026) are **transparency, monitoring and reporting** to Parliament. Accountability for targets will be ensured through the “comply or explain” model: if the JAC or SSC has not achieved a particular target, it must set out in detail the reasons why not and what is being done to meet it as soon as possible.

Transparency

- 3.31** With an overall target and date – for example, a minimum of five female Supreme Court Justices by 2026 – it is easy to set milestones to measure incremental progress. It is also easy to subject progress to public scrutiny, and call for corrective action if, for example, a target is missed.
- 3.32** The JAC has taken steps to improve transparency, for example the publication of annual statistics on the diversity of those who applied for certain positions, broken down by application, shortlist and final stages. However, there is still more work to be done. This report echoes previous recommendations that selectors improve data-collection and transparency, particularly:
- a. The effect of each recruitment exercise on the overall composition of the judiciary at the relevant level should be made clear.
 - b. Diversity statistics on all those currently authorised to sit as Deputy High Court judges – whether under section 9(1) or section 9(4) – should be collected and published annually along with the statistics on all other judicial office-holders.¹³⁴
 - c. Data on additional protected characteristics should be collected and published. In addition to gender, ethnicity and professional background, it would be particularly useful to have much more reliable information on: disability, sexual orientation, and socio-economic background (see paragraph 3.23) *e.g.* the percentage of judicial office-holders who attended a fee-paid school (an inexact but nonetheless useful proxy for social diversity).

Monitoring

- 3.33** Progress against targets should be monitored by policy-makers, the press and the public. If the JAC and SSC persistently fail to meet targets, then strong consideration would have to be given to introducing statutory quotas instead. Indeed, if despite targets *another* ten years pass without significant progress, calls to introduce quotas will become difficult to resist.¹³⁵

¹³⁴ See note 3, G.Bindman & K.Monaghan, *Accelerating Change*, p.3, Recommendation 5. See also note 1, *Judicial Appointments*, House of Lords Select Committee on the Constitution, pp.52-53. This may need to be a shared responsibility of the judiciary (which currently publishes annual statistics on judicial office-holders) and the JAC (which creates the pool of DHCJs); see paragraph 3.36.

¹³⁵ The Working Party discussed quotas in some detail, and some of our members feel that they are justified. However, the majority were not in favour of quotas at this time (see further above). Ultimately, the Working Party agreed unanimously that “targets with teeth” ought to be introduced.

Parliamentary involvement

- 3.34** A Parliamentary Committee should be explicitly charged with calling selection bodies to account for their progress. Both the SSC and JAC would be required to report to it on a regular basis. The Working Party recommends the Justice Select Committee.
- 3.35** Assuming reporting against targets would be the responsibility of the existing Justice Select Committee, specific and regular sessions would be dedicated to judicial diversity. The Select Committee could focus public attention on the importance of achieving judicial diversity and scrutinising any failures to achieve the targets set. It could also have a positive role in proposing further steps that can be taken.

Responsibility for ensuring a diverse field of applicants

- 3.36** In addition to targets, the Working Party feels that a wider range of actors should be subject to a general responsibility to encourage “non traditional” candidates to apply, though how they discharge that responsibility may differ. In the Working Party’s view, the statutory diversity duties placed on the Lord Chief Justice and the JAC require that active, evidence-based measures are taken to improve gender, ethnic and social diversity. Like selectors, the judiciary should collect and publish more data (see paragraph 3.32). Transparency enables others to monitor progress. For example, the Lord Chief Justice should inform Parliament of efforts to improve diversity of applicants for senior office, particularly progress made and areas of improvement (as they already regularly report to the Justice Select Committee).¹³⁶
- 3.37** To avoid the “buck passing” problem the Working Party considers it essential that there is clarity around responsibility for encouraging many more applications from underrepresented groups, and helping those candidates to succeed:
- a. As the “**employer**”, the primary responsibility for ensuring diversity in the field of applicants should lie with the judiciary, appropriately supported by their own, dedicated human resources function. However, the JAC and SSC would have a clear interest in ensuring that they are successful (e.g. by sharing data-analysis and jointly reviewing successes and areas of improvement).

¹³⁶ See *Lord Chief Justice questioned in annual meeting with Committee*, March 2017, available online at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news-parliament-2015/lord-chief-justice-evidence-2017/>.

- b. As the “**recruiters**”, the JAC and the SSC must take proactive steps to achieve as diverse a field as possible e.g. through targeted advertisements. Potentially useful reforms to selection processes are discussed further in **Chapter IV**.
- c. A general responsibility to encourage applications from underrepresented groups should apply to **all judges in leadership positions**. Those applying for such roles should be able to demonstrate how they have lived up to this responsibility – for example, through sponsorship of a lower-ranking judge. As they do now on occasion, judges not involved in selection exercises should encourage women, BAME people and those from less socially privileged backgrounds to apply for work shadowing and training programmes (see **Chapter II**).

3.38 For the judiciary to effectively and efficiently discharge its responsibility may require some centralisation and/or better coordination between the Judicial Office, HMCTS and the MOJ. It is the Working Party’s view that the senior judiciary in England and Wales needs support from its own, properly-resourced human resources function. An integral part of this role is to ensure regular continuous professional development and objective appraisal of existing judges, particularly in fee paid appointments in order to help candidates provide evidence of suitability for salaried posts. Also relevant to the subject of this report, the judiciary’s human resources should run support programmes, collect and assess data and benefit from strong feedback-loops to learn from mistakes. One example is the cohort of “near misses” for judicial appointments (excellent, appointable candidates who did not quite make it) who could be specifically encouraged to re-apply, perhaps through coordinated efforts between selectors and the judiciary.¹³⁷

¹³⁷ There seems to be an issue with the JAC being prepared to give information on “near misses” but it must be possible to overcome this, by at least asking those candidates whether they would be prepared to be contacted for this purpose.

- 3.39 Techniques adopted in other sectors, like headhunting, could also be explored. They are currently not used with the purported justification that such approaches represent a return to “tap on the shoulder”. The Working Party does not accept this. Excellent barristers are frequently encouraged to apply for judicial office, so there should also be “talent spotting” elsewhere (like law faculties, in-house counsel, and lower tiers of the judiciary). One way of reaching out to outstanding lawyers who may not otherwise consider a judicial appointment would be through a head hunting function that sought them out, pointed them towards training/support programmes, and encouraged them to apply. Head hunters are used widely by Government without any suggestion that they violate the principles of equal opportunities, but seem to be resisted for judicial appointments. The Working Party feels that proactive approaches must be embraced to create a better, more diverse field of applicants.¹³⁸
- 3.40 Furthermore, there must be open and constructive coordination and co-operation between the “judicial HR” on the one hand, and the selection commissions on the other. The differing work cultures, remits and expectations of various actors inevitably result in some conflict, with the Working Party told of instances, for example, where confidentiality has been used as a bar for the exchange of critical information about candidates between the different actors.
- 3.41 Too often the failure to make diverse appointments is put down to diverse candidates not putting themselves forward. This report concludes that the failure of suitable diverse candidates to apply for appointment represents a failure of the system, which needs to be addressed. Serious questions need to be asked about why good BAME and women are not applying, and proactive approaches need to be adopted.

¹³⁸ See also K. Maleson, *Diversity in the Judiciary: the case for positive action*, (2009) 36 *Journal of Law and Society* 376, 387-9.

Coordination between the judiciary and selectors

- 3.42** The Working Party understands that the various actors already attempt to coordinate their actions through the Judicial Diversity Forum. In 2014 the Lord Chief Justice also established a Diversity Committee of the Judges' Council. The Judicial Office is responsible for many innovative initiatives but undoubtedly better, more streamlined coordination of effort is possible. Much more could be done by selectors to project forward the impact of particular rounds of appointments on diversity in five to ten years' time. With the introductions of targets, coordination can become more structured and focused. With greater transparency, coordination on measures vital to success will be possible – for example, ensuring that all Deputies and Recorders get sufficient sitting experience to progress their careers.
- 3.43** The JAC and SSC would each engage in succession planning and forecasting, to enable them to meet transparent, well-defined goals. They would also look to publish an ongoing plan of action that addresses progress against targets – both successes and areas of improvement.

Conclusion

- 3.44** The Working Party recognises that these changes would have cost implications, but a more diverse judiciary deserves the investment. The Ministry of Justice must be prepared to dedicate resources to reform. Though establishing the SSC and monitoring progress against targets would obviously cost money, it would bring permanence, better planning and improved coordination. This would be more efficient and, ultimately, less resource-intensive over the medium to long term. The benefits of proactive recruitment are further explored in the next chapter.

IV. FAIR AND PROACTIVE RECRUITMENT

Context

[A] scientist and a lawyer both suffer from the fact that personal convictions and biases keep on breaking in. However much we try and allow for our own prejudices, it is almost inevitable that that insidious and uncontrollable imp, unconscious bias, will be hard at work.

Lord Neuberger, President of the Supreme Court, *Science and Law: Contrasts and Cooperation*, The Royal Society, London, November 2015, para.17.

- 4.1 As Lady Hale,¹³⁹ Lord Hodge¹⁴⁰ and others have recognised, everyone falls prey to unconscious bias – colouring, for example, subjective notions like “excellence.”¹⁴¹ However well-intentioned, selectors are only human. They cannot help but be influenced by stereotypes and preconceptions when assessing what the best applicants “should” look, sound and act like. Tendencies to replicate the status quo are prevalent and persistent.¹⁴² In addition, affinity bias (preferring people who remind us of ourselves) almost certainly creeps into qualitative judgements. Only by acknowledging the risk of implicit bias can selectors devise strategies to counteract it.

¹³⁹ Lady Hale, *Equality in the Judiciary*, Kuttan Menon Memorial Lecture, February 2013, p. 13, available at <https://www.supremecourt.uk/docs/speech-130221.pdf>.

¹⁴⁰ See Lord Hodge: *Women want true equality not positive discrimination*, November 2015, available at <https://www.solicitorsjournal.com/news/employment/discrimination/24469/lord-hodge-women-want-true-equality-not-positive-discrimination> [accessed 21 March 2017].

¹⁴¹ For the winter 2016 recruitment exercise for Deputy High Court Judges, the JAC for the first time produced a table endeavouring to flesh out the vague concept of “exceptionality”; see <https://jac.judiciary.gov.uk/vacancies/044> [accessed 21 March 2017].

¹⁴² See e.g. S. Johnson, D. Heckman & E. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, Harvard Business Review, April 2016, available online at https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired?utm_source=twitter&utm_medium=social&utm_campaign=harvardbiz [accessed 21 March 2017], report of a study by the University of Colorado: “It’s well known that people have a bias in favor of preserving the status quo; change is uncomfortable. So because 95% of CEOs are white men, the status quo bias can lead board members to unconsciously prefer to hire more white men for leadership roles.”

It would not be impossible to speculate that it is always much easier to perceive merit in people who are like you than it is to discern the merit of those who are a bit different.

Baroness Hale of Richmond, BBC interview, 2 October 2013.

- 4.2 At present, the JAC uses qualifying tests or paper sifts of application forms to narrow down the field of candidates, employing role-plays and interviews for later stages of recruitment. Further, all selections of senior judges at present currently rank candidates to fill limited vacancies. The more open and formal application processes of the last ten years are undoubtedly better than “tap on the shoulder”. However, there is clearly room for improvement. It is no answer to say that those selected are “the best”. Unconscious bias exists, the diversity deficit persists, and merit “*is not self-defining*”.¹⁴³
- 4.3 Of course, no one is suggesting that individual selectors are deliberately or overtly prejudiced. However, many consultees *were* concerned about systematic barriers working against candidates with less familiar profiles and the Working Party shares those concerns.
- 4.4 This chapter proposes a switch to a system of proactive recruitment called “appointable pools”.¹⁴⁴ Pools would allow for proactive, efficient recruitment, and would put the institutional need for greater diversity at the forefront of selectors’ minds. The Working Party also suggests thorough and ongoing review of selection processes: trialling both systemic and candidate-focussed reforms to counteract bias and make recruitment more inclusive. For example, ensuring that there is diversity amongst selectors themselves has been recommended in the past but has not been implemented consistently.¹⁴⁵ The apparent disproportionate failure rate of BAME people at sifting stage is also a real concern; despite Monaghan and Bindman’s call for an urgent review of this in 2014, no explanation has yet been identified.¹⁴⁶ While we are aware that the JAC has taken some steps to improve their processes, further and more fundamental changes are required if the targets outlined in the previous chapter are to be met.

¹⁴³ Lord Bingham, *The Law Lords: who has served*, in L.Blom-Cooper, B.Dickson & G.Drewry (eds), *The Judicial House of Lords 1976-2009*, (Oxford University Press, 2009), p.126. See also: K. Maleson, *Diversity in the judiciary: The case for positive action* (2009) 36 *Journal of Law and Society* 376, p.391-3; note 12, E Rackley, *Women, Judging and the Judiciary*, p.187-95; note 60, A. Paterson and C. Paterson, *Guarding the Guardians*, p.72-3.

¹⁴⁴ See further Annex III.

¹⁴⁵ See note 3, *The Report of the Advisory Panel on Judicial Diversity* (2010), p.10, Recommendation 31.

¹⁴⁶ See note 3, G.Bindman & K.Monaghan, *Judicial Diversity: Accelerating Change*, pp.49-50.

Proactive recruitment – strategic planning and appointable pools

- 4.5 We have a reactive, fragmented approach to appointments that fails to produce diverse appointments. Of course these challenges are not unique to the judiciary. Other sectors have struggled with devising mechanisms of recruitment that result in high quality, diverse candidates who meet institutional needs. Critical in addressing this challenge has been adoption of a more proactive, “talent” or “appointable” pool approach to recruitment, a version of which we outline below.
- 4.6 An appointable pool is a pool of people who are deemed to have met the very high standard of appointability to a particular post and are willing to take such an appointment. An appointable pool involves two stages: how people get into the pool, and when people get out. The first stage is focussed on the qualities of the individuals applying, the second stage is focussed on the needs of the institution.
- 4.7 An appointable pool works by providing a defined pool of appointable individuals – who are competitively recruited to the highest objective standard – and who are appointed to particular posts according to institutional need. The institutional need may be to ensure a balance of skills and experience in a particular management structure, or to allow for stronger succession planning by staggering retirement dates.
- 4.8 Similar approaches have been used elsewhere. For example, a recent review of important public appointments described selectors competitively recruiting “appointable” people (from which the Minister then picks, so obviously this process is not identical to judicial appointments). Like judges though, public appointees must be of a very high quality, and inspire public confidence.

Public appointments should be made on merit by the well-informed selection of individuals who through their qualifications, experience or qualities match the needs of the public body and the post in question. Ministers should **make their final choice from a short list of such ‘appointable’ people.**

Sir Gerry Grimstone, *Better Public Appointments*, March 2016, p.5.

- 4.9 The review¹⁴⁷ of public appointments recognised that inclusion is key to getting the best appointees: “Public appointments should reflect the diversity of the society in which we live. Ministers should have this front of mind when making appointments”.¹⁴⁸ There is no reason why the same should not be equally, if not more true of judicial appointments. This also gives the lie to the often cited objection that achieving diversity could be inimical to achieving excellence.
- 4.10 We expect an appointable pool would operate as follows for appointments to the senior judiciary.

Stage One: Creating the appointable pool

- 4.11 The first step would be the creation of an appointable pool for a particular court; one for the Circuit bench, the High Court and so on. Initially there would be a recruitment exercise for the particular pool, with further regular exercises to replenish the pool. The precise size of the pool and the timing of the replenishment exercises would depend on the court. However, they would be more regular and predictable (unlike at present) which would be better for both candidates and the judiciary. Appointable pools require the kind of forward planning, data analysis and human resources management that we discussed in the last chapter.
- 4.12 To be recruited into the pool, candidates would have to meet a very high threshold of appointability. Appointability would be measured objectively, rather than comparatively, in other words candidates would be measured against a fixed benchmark which would be consistently high.¹⁴⁹ Measuring candidates against a fixed benchmark means the standard for appointability is consistently high year on year. Were it otherwise, one might just get the “top-ranked” people out of a bad bunch, or miss out on excellent people in an exceptionally strong year.

¹⁴⁷ And responses to it: e.g. see note 121, *Better Public Appointments? Follow-up and the Government Response to the Committee’s Third Report, Better Public Appointments?: The Grimstone Review on Public Appointments*, House of Commons Public Administration and Constitutional Affairs Committee, para. 8: “We are pleased that Mr Riddell is actively attempting to promote diversity in public appointments, which we believe is vital”.

¹⁴⁸ *Ibid.*, para. 38.

¹⁴⁹ Appointability is the policy some barristers’ chambers adopt when deciding which of their pupils (trainee barristers) can become permanent members: each candidate is measured against an objective standard, not compared against each other. Surpassing a rigorous standard means that a candidate has the qualities required, and merits appointment.

- 4.13 Everyone appointed to the pool would be deemed outstanding and therefore fit for appointment to the particular court for which the pool would operate. Significantly, once in the pool all candidates would be considered equally qualified and capable; there would be no ranking of candidates within the pool.
- 4.14 The task of those creating and, then, regularly replenishing the pool – the JAC up to the High Court and the SSC beyond it – would be to create the best possible pool of future judges: that is, from a variety of backgrounds, specialisms, skills and qualities deemed necessary for the particular court. For the purpose of this report, a critical advantage of creating an appointable pool is that it focusses the minds of those recruiting on the demographic mix of those suitable for appointment. As explained in the previous chapter, both selectors and the judiciary itself are responsible for ensuring that outstanding women and BAME candidates are applying to the appointable pool in much larger numbers. Selectors must then make best endeavours to meet the targets proposed in the previous chapter. In practice, this will mean continuously refining selection processes to ensure that talented, diverse candidates are not being sifted out (see further the second part of this chapter).
- 4.15 When a pool is initially created, it would be slightly larger than projected vacancies. This is efficient; the idea is to create a “rolling pool”. This also means that some of the people who currently come extremely close to being appointed (and then, perhaps, decide not to reapply) may make it into the pool (though of course, only if they are “appointable”). Some consultees expressed concern that people who just miss out on appointment are extremely good and indeed would have been appointed were there more vacancies, and yet may never reapply. Evidence generally shows that women and BAME people are more likely to be put off by rejection.¹⁵⁰
- 4.16 An appointable pool would also allow more flexibility if, for example, slightly more vacancies arose than were expected, or if some “appointable” people decide to drop out of the pool. Projecting vacancies is possible through strategic planning and coordination with the judiciary, for example projecting numbers of retirements and promotions in coming years. It also requires analysing previous trends (for example, looking at the average number of vacancies per year over time).

¹⁵⁰ See note 30, *Barriers to Application for Judicial Appointment Research*, June 2009.

4.17 A variety of strategies could be used to ensure that the appointable pool is diverse, depending on the appointment being contemplated. The need to encourage diverse applications was set out in **Chapter III**. The second half of this chapter offers ways to make selection processes more inclusive and accurate. Those in the pool would also be offered attractive opportunities for professional development, like training.

Stage Two: making appointments from the appointable pool

4.18 Once a pool of equally appointable candidates is created, the JAC or SSC would select from the pool when vacancies arise. At this second stage, institutional needs, including the need for greater diversity, take precedence. In light of the diversity crisis, at least in the short to medium term, the Working Party would expect that women and BAME candidates would be given priority appointments, as well as people with specific expertise. White men in the appointable pool would also be guaranteed an appointment within a reasonable period of time, but may spend longer in the pool. We expect that for some candidates, being guaranteed an appointment may be more attractive than irregular and unpredictable recruitment exercises.

4.19 The pool would then be replenished on a regular basis – that is, “topped up” to roughly its original size, taking into account how many people have already left the pool *and* projected future vacancies.

4.20 Those selected to the appointable pool would do so in the expectation that they would be appointed to a judicial post within two or three years, depending on the particular court. The Working Party accepts that this means that diversity of the courts would not improve quite so quickly (because, on occasion, someone would be appointed from the pool to a post to meet the time limit rather than for the court’s need for diversity). However, we believe this is justified in order to continue to attract excellent candidates from “overrepresented” groups. Of course, the size of, and period in, the pool would vary by court. But in most cases, at stage two, we expect that priority would be given to the court’s needs (for greater diversity or if there is a pressing need for a particular specialism).

4.21 The Working Party understands that concerns have been raised in the past over the use of the so-called “section 94” reserve list. As will be clear from the above, a reserve list differs from an appointable pool in a number of ways. Importantly, and unlike with a pool, reserve candidates are not guaranteed an appointment, nor do they benefit from opportunities like training or work shadowing. Some concerns around reserve lists may be relevant though, for example the risk of confidentiality breaches. Confidentiality of those in an appointable pool should be maintained.

- 4.22 We accept that someone who had successfully applied for a judicial appointment would have to arrange their practice accordingly (e.g. not committing to very long trials). But the Working Party notes that a pool may be attractive for certain groups of candidates. The obvious example is “appointable” salaried judges, who may welcome the certainty of a promotion within a fixed timeframe. Also, “non-traditional” candidates, such as academics, may be better able to adjust their work in anticipation of moving into the judiciary. Such candidates are probably not well-represented on current reserve lists, but an appointable pool would contain a mix of experiences and expertise.
- 4.23 Of course, appointable pools complement this report’s proposal to modernise human resources management generally. One example, with which the Working Party agrees, is the proposal of the Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor that all sitting judges should give notice of their intention to retire. Though most judges *do* give “adequate notice” at present, “formalising a notice period would help HMCTS and the judiciary prepare for the reallocation of work and possible succession planning”.¹⁵¹ Relatedly, there should be open channels of communication between judiciary and selectors, and rigorous data-analysis and succession planning. Such measures would make it possible for the selection commissions to give their “appointable” candidates some idea of when they will leave the pool.

Desirability of change

- 4.24 The Working Party appreciates that the creation of appointable pools would mark a significant structural change to processes of judicial appointment, but believes that it is necessary both to reap the benefits of progressive human resources management and to increase diversity. The current approach is simply not delivering. It is important that the appointable pool would be recognised as strengthening the appointment process as a whole and would not act as a disincentive to excellent candidates who do not have any of the underrepresented characteristics. Outstanding male, white candidates would continue to be appointed to the bench, though with greater competition and initially to a slightly longer time frame for some courts.

¹⁵¹ See note 104, Ministry of Justice, *Modernising Judicial Terms and Conditions, consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions*; Modernising Judicial Terms and Conditions, Government Response, February 2017, p.5, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590426/modernising-judicial-terms-and-conditions-government-response.pdf.

- 4.25 The Working Party sees appointable pools being a useful mechanism for judicial appointments for a number of reasons.
- 4.26 First, it would enable the JAC and the SSC to plan and recruit strategically, taking into account context and consequences. If there were an appointable pool of, for example, future Court of Appeal judges, the composition of the bench could be foreseen well in advance. This would also greatly assist with meeting diversity targets (see **Chapter III**). It is worth recognising that at the moment our system operates with *de facto* pools of assumed candidates. For example, our Working Party has been told, on numerous occasions, that there is a large pool of 20 women in the High Court, to fill the 38 vacancies on the Court of Appeal. It is assumed that we are on our way to gender parity. However from our consultations, we know this not to be the case. While it may be expected that very many women on the High Court are likely meet the quality standard for the Court of Appeal, they do not all necessarily seek higher judicial office. A formal appointable pool for the Court of Appeal would provide absolute certainty on who is and is not capable and willing for appointment. If the pool started to look too white and male to reach the target, proactive steps could be taken to seek out more diverse candidates for the Court of Appeal pool.
- 4.27 Second, recruiting in batches favours heterogeneity. Research shows that recruiting multiple candidates at once “makes evaluators focus on individual performance instead of stereotypes”.¹⁵² Conversely, the fact that the 15 appointments to the UK’s highest court between 2004-2016 were all white men shows that looking at each appointment in isolation risks losing sight of the big picture. The Supreme Court’s decision to replace retiring Justices in groups of three over the coming years is therefore welcome. Setting out to proactively recruit a diverse group of people will help to focus minds, and ameliorate the serious effects of “status quo bias” (i.e. unconsciously preferring white men). A recent study suggests that where there is only one female (or ethnic minority) in a pool of four finalists “their odds of being hired were statistically zero”. But adding just one more female (or ethnic minority) finalist dramatically increased the likelihood that they would be hired.¹⁵³ In addition to pools, other ways to offset implicit biases are set out later in this chapter.

¹⁵² See note 86, I. Bohnet, *What Works*, p.5.

¹⁵³ For women, the odds of them being hired “were 79.14 times greater if there were at least two women in the finalist pool”; for the minority candidates the odds were “193.72 times greater if there were at least two minority candidates in the finalist pool”- University of Colorado, April 2016: see note 142, S.Johnson, D.Heckman & E.Chan, *If There’s Only One Woman in Your Candidate Pool, There’s Statistically No Chance She’ll Be Hired*, Harvard Business Review.

- 4.28 Third, over time a proactive appointment pools system should be far more efficient than a reactive one. When a vacancy arises, it can be quickly and immediately filled from the pool without the need to go through a fresh recruitment round. While resource intensive to establish, the expectation would be that it would quickly become a more efficient mechanism for recruitment.
- 4.29 Finally, beyond diversity, appointable pools would allow for much stronger human resources management for the senior judiciary generally. It would provide a way of ensuring that there is a breadth of skills and experiences on particular courts, and allow for greater succession planning. For example, if the appointable pool for the High Court contained too few judges of a certain specialism, proactive steps could be taken to ensure that those specialists were recruited to the pool, so they would be available when needed.

Permanent process improvements

- 4.30 The establishment of appointable pools would greatly strengthen the appointments process generally, and specifically for diversity, but other improvements could and should be made. In this respect, we recommend that *all* the selection procedures for senior judicial appointments be subject to thorough, regular reviews by external experts.

Context

- 4.31 A growing body of scientific research demonstrates that unconscious biases affect us all.¹⁵⁴ By biases we mean “systematic errors”¹⁵⁵ rather than deliberate discrimination. Many sectors recognise the problem, and are taking action.
- 4.32 As well as having distorting effects on decision-making, biases are difficult to remove; they are “built into our practices and procedures, not just our minds”.¹⁵⁶ As such, “debiasing” requires much more than a one-off training course. Relevant experimental findings include the following:

¹⁵⁴ See generally e.g. D.Kahneman, *Thinking, Fast and Slow*, (Penguin, May 2012); C.Sunstein and R.Thaler, *Nudge: Improving Decisions about Health, Wealth and Happiness*, (Penguin Books, 2009). See also S.Fisker and L.Krieger, Policy Implications of Unexamined Discrimination, Chapter 3, in E.Shafir, *The Behavioural Foundations of Public Policy*, (Princeton University Press, 2012): “Employment decision makers...might explicitly endorse equal opportunity, but unexamined prejudices might nevertheless derail their decisions”.

¹⁵⁵ Ibid, D. Kahneman, above note 169, p3-4.

¹⁵⁶ See note 86, I. Bohnet, *What Works*, Chapter 1, and see generally Chapter 2.

- a. Recipients of two otherwise identical CVs are significantly more likely to reject the one with a non-white sounding¹⁵⁷ or female¹⁵⁸ name.
- b. A great deal of research reveals the effect of unconscious stereotypes about women¹⁵⁹ and BAME people¹⁶⁰ on employment decisions.
- c. Studies suggest that decisions can be influenced by irrelevant cues like accent or confidence (which may correlate with social and educational background).¹⁶¹
- d. Mere awareness of biases may be ineffective to control them, and may even make biased thinking worse (see **Chapter II**).

¹⁵⁷ See e.g. *Black and ethnic names have less chance of making shortlist*, Financial Times, May 2016, available at <https://www.ft.com/content/83cac990-182a-11e6-b197-a4af20d5575e> [accessed 21 March 2017]: “A 2009 study... found “white” sounding people needed to send nine written job applications to get a callback for interview. The figure rose to 16 from ethnic minority applicants.”

¹⁵⁸ See e.g. the “Heidi-Howard” experiment: See note 87, I. Bohnet, *What Works*, pp.21-22.

¹⁵⁹ For example, the “competence-likeability” dilemma: “What is celebrated as entrepreneurship, self-confidence, and vision in a man is perceived as arrogance and self-promotion in a woman... Women in stereotypically male domains encounter backlash at every juncture: when getting hired, compensated, and promoted” (based on largely US studies on white men and women). Further, “Numerous additional field experiments have been conducted in which male and female candidates, otherwise equally qualified, have applied for the same jobs, and again and again bias has been found to influence outcomes”. See I. Bohnet, note 86, p.22-25. See also note 154, E. Shafir, Chapter 3, above: “causal evidence clearly demonstrates that gender bias occurs in experimental settings that control for extraneous variables”.

¹⁶⁰ See e.g. E. Shafir, note 154 above, and S. Johnson et al, note 142 above.

¹⁶¹ See e.g. S. Purkiss et al, *Implicit sources of bias* available online at <http://www.sciencedirect.com/science/article/pii/S0749597806000690> [accessed 21 March 2017], I. Bohnet, note 86.

- 4.33 Though predictable errors plague decision-making, well-designed processes and environments can help to avoid them. The first step is surely to acknowledge that biases play a part in judicial selections just as they do in all other human decision-making. Our intuitions of how a judge *ought* to be are surely shaped by who many senior judges *are*: white, male, privately-educated former barristers. Overconfidence in one’s abilities, for example to be objective or rational, is in itself a well-documented cognitive error.¹⁶²
- 4.34 Mindful of all this, to insist that greater inclusion means compromising on merit misses the point; there is no fool-proof, scientific method for deciding between candidates. Though poor candidates may be obvious, “distinctions between the very best candidates are less easy to draw”.¹⁶³ Quite apart from all the reasons that inclusion *improves* quality (set out in **Chapter II**), the persistent absence of those who are noticeably different from the judicial stereotype indicates that something is going wrong with selection. It means that recruitment processes need to be revisited.

Particular areas of improvement

- 4.35 A number of problems with the current selection processes were repeatedly raised in our evidence-gathering, including:
- a. A lack of transparency surrounding selection processes.
 - b. Making appointments in isolation without regard to context or long-term implications.
 - c. The relative homogeneity of selectors and referees.
 - d. Lack of clarity over how to satisfy the competencies and an implicit assumption that advocacy experience is valued over any other legal experience.
 - e. The absence of a publicly-available, rigorous scoring policy to minimise subjectivity and undue favouring of barristers.
 - f. A lack of meaningful feedback for unsuccessful applicants.
- 4.36 Rather than designing processes to minimise decision-making errors, these issues may compound them. As explained above, unconscious biases are ever-present and can have far-reaching effects.

¹⁶² See e.g. D.Kahneman, *What would I eliminate if I had a magic wand? Overconfidence*, available online at <https://www.theguardian.com/books/2015/jul/18/daniel-kahneman-books-interview> [accessed 21 March 2017].

¹⁶³ See note 3, G.Bindman & K.Monaghan, *Judicial Diversity: Accelerating Change*, p.22.

Reforms to processes

- 4.37 The Working Party has found the JAC keen to find ways to increase inclusion in its processes and in this respect we have four major recommendations. First, as mentioned, ensuring that selectors are, themselves, diverse in terms of gender, ethnicity and social background is essential. We suggested in **Chapter III** above that the new “SSC” should have diversity built into its make-up from the outset. A notable weakness of the current system of small, *ad hoc* selection panels for senior appointments is that it exaggerates the authority of the judicial members, which may then give a particular advantage to barristerial experience. With selectors linked to existing post-holders, recent selection panels have had a preponderance of white selectors and few women.¹⁶⁴
- 4.38 Second, and relatedly, judicial influence is compounded by their role as statutory consultees and mandatory referees. This should be kept under review and in time, if a rigorous and fair system of judicial appraisal were introduced, this could replace statutory consultation for judicial candidates.
- 4.39 Third, all selection processes should enable non-traditional candidates to demonstrate the benefit of their experiences. Something as simple as a specific section on the application could in a small way compensate for the extra hurdles faced by candidates from non-traditional backgrounds. Selectors could devise and publish examples of good applications that will attract diversity. Juggling work and caring responsibilities could be an example of excellent organisational skills; working alongside part-time studies in order to qualify an example of perseverance and conscientiousness.

¹⁶⁴ The selection panels that chose six Court of Appeal judges and the Chancellor of the High Court in 2016 comprised three white men and two white women; the selection panel that chose our current Lord Chief Justice comprised four white men and one white woman; and of the six Supreme Court selection commissions convened 2008-13, all were majority male, one had no women at all, and all panelists were white. See *Appointment of Lord and Lady Justices of Appeal: September 2016*, September 2016, available online at <https://www.gov.uk/government/news/appointment-of-lord-and-lady-justices-of-appeal-september-2016S>; *Chancellor of the High Court: Sir Geoffrey Vos*, October 2016, available online at <https://www.gov.uk/government/news/chancellor-of-the-high-court-sir-geoffrey-vos>; *Lady Hale ‘disappointed’ at lack of female judge*, October 2013, available at <http://www.bbc.co.uk/news/uk-24370177> [accessed 21 March 2017].

- 4.40 Fourth, it is important that – particularly for crucial fee-paid positions that serve as entry points for experienced practitioners, like Deputy High Court Judge – the JAC and the SSC should endeavour to recruit for *potential* and not for particular qualifications or experiences. There is a perception that some selection processes are biased towards those with advocacy/courtroom experience. Selectors may unconsciously prefer barristers who can “hit the ground running” over bright, able lawyers with no courtroom experience. We appreciate that considerable work is already being done by the Judicial Office and the JAC, but this should be much expanded, and focus given to candidates from outside the independent Bar. Almost everyone consulted has expressed frustration that good, if “non-traditional” candidates are being inadvertently sifted out.
- 4.41 While unconscious bias can never be fully eradicated, other seemingly small changes could make significant differences. The gulf between the candidate deemed “the best” and the next best candidate may seem superficially measurable and objective, but biases will determine at least some of those gaps. Some of these suggestions are already being undertaken, in whole or in part. But they should be formally embedded in the processes.
- 4.42 The Working Party proposes some simple, cost-effective suggestions to improve selection:

Systemic changes to assist selectors

- a. Evidence-based training for selectors and judges. Research suggests that mere awareness-raising about the existence of bias is not very effective in and of itself. Training should be evidence-based and focus on tools that help people make more accurate decisions.¹⁶⁵
- b. Transparency. The JAC has recently made efforts to provide more information to candidates, including examples of how to satisfy the competences and information about previous assessments, including the qualifying tests.

¹⁶⁵ See note 86, I. Bohnet, *What Works*, Chapter 2, p.58: there has been some success with “specific tools that help people make better decisions” – rather than “mere awareness-raising about bias” which may even be counter-productive.

- c. Using evidence-based “decision aids”, such as skills-based tests and structured interviews, to compare candidates fairly and make institutional needs salient. One example is that selectors could use technology in real time – projecting on a screen the effects of various possible selections on the overall composition of the judiciary.
- d. Piloting the use of the “Equal Merit Provision” at sifting and short-listing stage (for example, in a large competition such as Recorder), and extending it to all senior judicial selection exercises if it is successful in improving diversity.

Systemic changes to assist candidates

- a. Devising and publishing a clear scoring framework, so that it is possible to tell the relative weight given to the various competences (for example, which are “essential” and which are “desirable”). This should also help to expose the degree to which undue weight is being given to barristerial experience.
- b. Scrutinising the language of advertisements and descriptions of the role, with expert advice, to ensure that they do not put off or favour certain groups (for instance, removing turns of phrase that are implicitly gendered).
- c. Providing individualised and more comprehensive feedback, targeted at those from underrepresented groups who may be especially deterred by failure, and who may be relying on non-standard evidence of competencies.
- d. Giving ample notice of vacancies (this would be facilitated by appointable pools, which as explained would require regular replenishment). Relatedly, monitoring the diversity of the field of applicants once a competition opens: if very few women or BAME people apply for a position, this is hardly a satisfactory field of candidates and it suggests that advertisement or outreach efforts have failed. A simple, cost-effective answer may be to re-advertise and extend the deadline, redoubling efforts to target underrepresented groups.

4.43 Undoubtedly, many other methods could be tried and tested as well. Selection processes should constantly be reviewed, and new methods refined. Effort needs to be made to learn from past problems with selection exercises. An important example is the continued disproportionate failure rate of BAME candidates in selection exercises.¹⁶⁶ There should be a thorough review to seek to understand why this is happening. Another example is advocacy-based role play exercises, which self-evidently favour certain types of candidates. Instead, selectors should test for judicial skills in a more neutral manner; it is understood that JAC is already experimenting with a new exercise, which is welcome. Many valuable lessons can be borrowed from both the public and private sector. For example, the Civil Service has recently asked the Behavioural Insights Team for help reforming its own selection process – to make sure good, diverse candidates are not missed.¹⁶⁷ The decision by some universities to pilot “name-blind” processes in response to UCAS’ report on unconscious bias is also a good example of experimentation and evidence-based practice.¹⁶⁸

Conclusion

4.44 In sum, much more effort should be made to understand why past processes have delivered poorly in terms of diversity, and there must be more willingness to test new techniques. External review, possibly by academics expert in behavioural research would be a useful tool in improving processes. There also needs to be more transparency about where problems have occurred and how to improve for the future.

¹⁶⁶ See note 146.

¹⁶⁷ Civil Service to pilot online recruitment tool to cut reliance on ‘outdated’ technology, available online at <http://www.publictechnology.net/articles/news/civil-service-pilot-online-recruitment-tool-cut-reliance-%E2%80%99outdated%E2%80%99-technology> [accessed 21 March 2017].

¹⁶⁸ UCAS Unconscious Bias Report 2016, available online at <https://www.ucas.com/corporate/news-and-key-documents/news/ucas-unconscious-bias-report-2016> [accessed 21 March 2017].

V. ATTRACTIVE, INCLUSIVE CAREER PATHS AND WORKING CONDITIONS

- 5.1 However good the processes, and however fair the selection, diversity will not be achieved unless more diverse candidates can be persuaded to apply. There are two strands to this. First, the need to create a genuine career path so that talented judges in the lower judiciary have a real, as opposed to illusory prospect of moving up to senior appointments;¹⁶⁹ and second taking measures to make the senior judiciary a more attractive career for non-traditional candidates. While this report is focussed on the experience of diverse judges, both will undoubtedly benefit all judges.

A judicial career path

There is something to be said for considering multiple entry points. Traditionally, we have taken people who are at the top of their profession, but we should think about taking younger people who would come in at the bottom and work their way up.

The Rt. Hon. Sir Gary Hickinbottom, 2012, *Judicial diversity: minority interest*, February 2014.

Figure 1: Current career path

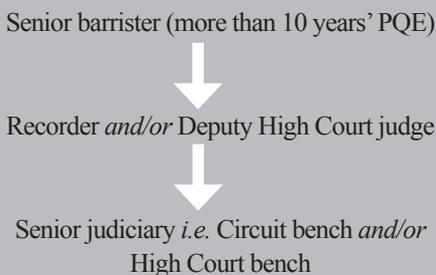


Figure 2: Possible new career path



¹⁶⁹ The Rt. Hon. Sir Gary Hickinbottom, 2012 *Judicial diversity: minority interest*, 24 February 2014, available online at <https://www.lawgazette.co.uk/practice/judicial-diversity-minority-interest/5039979.article> [accessed 21 March 2017].

Creating new entry points to the senior judiciary

5.2 Despite numerous recommendations to the same effect as Sir Gary's¹⁷⁰ – including by JUSTICE in 1972¹⁷¹ and 1992¹⁷² – at present there is no real “upward” career path to the Circuit bench or High Court.¹⁷³ Instead, there is a *de facto* route, leading to a later, second career, for senior barristers. They gain some sitting experience as fee-paid Recorders and/or Deputy High Court Judges, before becoming permanent, full-time judges.¹⁷⁴ Very few of those who reach the High Court break this mould. In contrast, lawyers from underrepresented groups (particularly people from a visible minority ethnic background) tend to cluster in the lower ranks of the judiciary, and stay there.¹⁷⁵ So, for instance, almost half of tribunal judges are women, 10% are BAME and 65% are not barristers by professional background.¹⁷⁶ Yet High Court judges are 21% female, less than 2% are BAME,¹⁷⁷ and almost exclusively come from the independent Bar.¹⁷⁸

¹⁷⁰ E.g. See note 3: *The Report of the Advisory Panel on Judicial Diversity* (2010), p.7, Recommendation 1; G. Bindman & K. Monaghan, *Accelerating Change*, p.60, Recommendation 16; *The Judiciary* (1972), pp. 26-28.

¹⁷¹ See note 2, JUSTICE, *The Judiciary* (1972), pp.26-28.

¹⁷² See note 2, JUSTICE, *The Judiciary in England and Wales* (1992), pp.20-21.

¹⁷³ See note 3, *The Report of the Advisory Panel on Judicial Diversity* (2010), p.7, Recommendation 1 – to develop the concept of a judicial career – remained “planned” as of 2014, see *Improving Judicial Diversity, Progress towards delivery of the ‘Report of the Advisory Panel on Judicial Diversity 2010’*, p.26, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438207/judicial-diversity-taskforce-annual-report-2014.pdf.

¹⁷⁴ Internal JUSTICE Working Party analysis (2016) showed that virtually all current High Court judges (more than 90%) were previously either Recorders or Deputies, and most were both. However, comparatively few held other judicial positions (see further Chapter I, Table 2).

¹⁷⁵ Some term this the “prestige theory”. See note 71, C. Thomas, *Judicial Diversity in the UK and Other Jurisdictions, A Review of Research, Policies and Practices*, p.48: “Any increase in appointment of ethnic minorities has only really been achieved at the lower levels of the judiciary... There is virtually no ethnic minority representation in the senior ranks... Women have had somewhat more success in gaining appointment but have no significant representation at the senior levels”.

¹⁷⁶ See note 15, *Judicial Diversity Statistics* 2016.

¹⁷⁷ *Ibid.*

¹⁷⁸ There have only ever been four solicitors on the High Court: Sir Michael Sachs, Sir Lawrence Collins, Sir Henry Hodge, and Sir Gary Hickenbottom.

- 5.3 This report has already suggested that senior practitioners from outside the Bar should also benefit from the *Figure 1* route. However, creating an “upward” career path along the lines of *Figure 2* has appreciable additional benefits for diversity. Although direct entry of experienced practitioners would continue, they would no longer have a virtual monopoly. In the “direct entry” route, lawyers become salaried judges straight from full-time practice, albeit with limited judicial experience as a Recorder or DHCJ (currently a minimum of 15-30 days a year). If this remains the only realistic way to become a senior judge, *but* becomes much more open to experienced Government lawyers, solicitors, in-house counsel and so on as well as senior barristers, then diversity would likely improve. But only the quasi-career path we describe would ensure that progress is sustainable for the long-term.
- 5.4 It is recommended that lawyers should, at a relatively early stage in their career, be able to take up a salaried entry-level judicial position, with a realistic prospect of eventually joining the Circuit or High Court bench. The current lack of a proper, upward career path may help to explain why the UK has a lower proportion of female judges than our European counterparts. The judiciary could take advantage of the high attrition rate of early-to-mid career talented female lawyers by offering them an alternative career in the judiciary: positions with a real prospect of meaningful promotion. Over the years the Government Legal Service has provided an attractive career for women from private practice who have appreciated more flexible approaches to work coupled with opportunities for promotion. A *Figure 2* model also takes advantage of existing ethnic diversity in the lower ranks of the judiciary and particularly the tribunal system.
- 5.5 With so much weight put on candidates to high judicial office being able to “hit the ground running”, it is axiomatic that people with many years’ experience as judges have much to offer. Additional entry points to the senior judiciary will provide greater variety of experience as well as increasing competition amongst those who choose the *Figure 1* career path, thus improving quality. As is clear from *Figure 2*, this report does not propose a complete shift to a continental-style career path; some experience of practice is valuable for would-be judges.
- 5.6 The problem is that there is currently a glass ceiling between these judges and the higher courts. The fact that it is presently *possible* to become a High Court judge having (e.g.) started out as a Deputy District Judge is belied by the virtual absence of senior judges who have ever taken such a route.¹⁷⁹ A theoretical career path is no career path at all.

¹⁷⁹ Sir Gary Hickinbottom worked his way from Parking Adjudicator to the Court of Appeal: see *Gary Hickinbottom*, available online at <https://jac.judiciary.gov.uk/case-study/gary-hickinbottom-high-court-queens-bench-division> [accessed 21 March 2017].

Effective talent management

- 5.7 There has been little progress towards establishing an upward career path, despite many past recommendations.¹⁸⁰

An Upward Career Path → Multiple Entry Points to the Senior Judiciary

Employment Tribunal Judge → Employment Appeal Tribunal Judge → Circuit Judge
District Judge → Recorder → High Court Judge
First-tier Tribunal judge → Upper Tribunal Judge → High Court Judge

- 5.8 There remains a perception of a strong divide between the tribunal and court judges. It is important to overcome this in order to both encourage tribunal judges to see themselves as having a career path, but also for selectors to fully appreciate tribunal experience and ensure that candidates have a full opportunity to show relevant tribunal experience. Efforts are already being made to allow tribunal judges to gain more experience across a range of judicial roles, and to lessen the “divide”.¹⁸¹ In terms at least of perception, more steps should be taken to ensure that the tribunal judiciary are equally represented to the court’s judiciary on key judicial bodies and generally have a stronger and more equal voice. This is one of those areas where there is a need for a “cultural” change, which goes further than merely stating that the tribunal judiciary is equal.

¹⁸⁰ See note 3: *The Report of the Advisory Panel on Judicial Diversity* (2010), p.7, Recommendation 1; G.Bindman & K.Monaghan, *Judicial Diversity: Accelerating Change*, p.69, Recommendation 16; note 1, *Judicial appointments*, House of Lords, Select Committee on the Constitution, p. 56.

¹⁸¹ Senior President of Tribunals’ Annual Report, February 2016, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/The-Senior-President-of-Tribunals-Annual-Report-2016-final-1.pdf>.

- 5.9 Though it is difficult to draw inferences without knowing dates of appointments or years of post-qualification experience (PQE), it is nonetheless revealing that a large proportion of judges in “entry-level” positions are over 60.¹⁸² Current arrangements are not compatible with a quasi-judicial career path that allows junior practitioners to get a “foot on the ladder” and work their way up to the top. Yet precisely this kind of quasi-judicial career path holds great promise for improving diversity.
- 5.10 Borrowing from other sectors, we also recommend an inclusive “**Talent Management Programme**” (TMP) – a concerted, coordinated initiative aimed at encouraging and promoting talented First-tier Tribunal and District judges so as to improve their chances of progressing up the judicial ladder. The idea would be to encourage and identify, from a very large talent base, people with the intellect and potential to join the senior judiciary in due course and, through sponsorship and training, realise that potential. Some aspects of the Civil Service Fast Stream could offer an appropriate model.
- 5.11 Those on the TMP would be supported, appraised, and actively encouraged to apply for a further appointment before their first appointment comes to an end. We are conscious that this programme will require extra resources. Such a programme would not be limited to underrepresented groups, however, there would be targets for entry to ensure that women, BAME and socially disadvantaged judges were well represented within the TMP. There would also be targeted support initiatives specifically aimed at helping BAME people, women, and those from disadvantaged social backgrounds progress their career.
- 5.12 The idea is that TMP participants would, eventually, be in a position to offer a reasonable length of service on the High Court (as is currently the preference when recruiting to the High Court).¹⁸³ As part of their responsibility to improve diversity, judges in leadership positions could spot potential candidates for the programme from the ranks of fee-paid judges. This then ties into the recommendations on targets and accountability.

¹⁸² See Judicial Diversity Statistics 2016, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/judicial-diversity-statistics-2december.pdf>.

¹⁸³ For an analogous approach, see the JAC’s advertisement for the most recent Deputy High Court judge competition under the heading “The Appointment”: <https://jac.judiciary.gov.uk/vacancies/044> [accessed 21 March 2017].

- 5.13 The Working Party is encouraged to learn that the Judicial Office has started to work on a career management framework to support judges with the capability and aspiration to be promoted on the bench. In devising career management for the judiciary, it is important that our judges – salaried and fee paid – be subject to formal appraisal, so that ongoing judicial experience can play a full part in promotion decisions. A proper, objective appraisal is one way to lessen the assumption that judges from traditional backgrounds are usually “the best” and allow for objective benchmarking in promotion decisions.
- 5.14 At present, the absence of any appraisal process means that selectors have very little evidence as to whether a fee paid judge applying to the High Court has been doing a good job in their judicial role. This is particularly important for Recorders/DHCJs who may wish to apply for permanent appointments. The Working Party appreciates that appraisals cost money and are resource intensive. However, they are a standard employment practice and the Working Party can see no good reason why they should not be introduced as the norm across the judiciary. Arguments about “independence” being impacted by appraisals are in our view misplaced. At present the President of the Queen’s Bench Division holds an annual meeting with QBD judges to discuss their work and career progression. This is a welcome initiative, though it stops short of a formal, objective appraisal system.
- 5.15 Appraisals strengthen performance across any workforce and provide valuable guidance and support to individuals in the process. They are a key method by which suitability and willingness for promotion can be gauged in a transparent and objective manner. This is to the benefit of all of those appraised, but is particularly important to diverse candidates who may otherwise fall victim to unconscious assumptions about their abilities.
- 5.16 With proper continuous professional development and support, bright judges from all backgrounds could also be cross-deployed from their primary appointment (e.g. as a Family District Judge) to a completely different area (e.g. the Tax chamber). The use of cross-deployment is in keeping with the Senior President of Tribunals’ vision of a flexible workforce,¹⁸⁴ and it would enable those on the Talent Management Programme to amass the evidence needed for applications to the senior judiciary. The Working Party welcomes existing pilot programmes cross-deploying people from the tribunals to the courts, and strongly support their expansion.

¹⁸⁴ See note 181, *Senior President of Tribunals’ Annual Report*, February 2016, pp. 8-9.

5.17 To ensure career progression, though, some sort of prioritisation for participants in applying for the next level may be necessary. One possibility would be a guaranteed interview scheme for TMP participants with excellent appraisals (based on their sitting experience and training). Whatever the TMP ultimately looks like, its overarching aim should be to fast-track the best and brightest junior judges up from the entry-level. It is particularly important for policy-makers to understand the unseen barrier between tribunals and courts, which we turn to next.

Shattering the glass ceiling

5.18 Movement from the tribunals to the senior courts remains extremely rare. Whether or not this arises from an “unspoken officer class mentality”,¹⁸⁵ it seems to us that one obvious solution for the diversity crisis is to increase appointments from the Upper Tribunal to the High Court. The Upper Tribunal as a whole is significantly more ethnically diverse than Recorders or Circuit judges (10% compared with 6% and 4%, respectively).¹⁸⁶ Likewise for gender; the underrepresentation of women in the Upper Tribunal is less pronounced (34%) than for QCs (14%), Circuit judges (25%) or solicitors’ partners (28%).¹⁸⁷ Moreover, the Tribunals system has had greater success in diversifying leadership roles: 29% of Presidents, Chamber Presidents, Deputy and Vice Presidents are female.¹⁸⁸

5.19 One might expect that, given their existing judicial experience, Upper Tribunal judges would be at an advantage in applying to the High Court. The Upper Tribunal often deals with complex points of law, and the majority of immigration and asylum judicial reviews were transferred to the Upper Tribunal several years ago. Yet almost no High Court judges took such a route. Short-term measures are necessary to create a meaningful expectation of progress, which coupled with the TMP should then become self-sustaining.

¹⁸⁵ Baroness Hale of Richmond, *Unrevised transcript of evidence taken before The Select Committee on the Constitution Inquiry on Judicial Appointments process*, November 2011, p.2, available online at <http://www.parliament.uk/documents/lords-committees/constitution/JAP/corrCNST021111ev7.pdf>.

¹⁸⁶ See note 15, *Judicial Diversity Statistics 2016*, and Table 2.

¹⁸⁷ *Ibid.*

¹⁸⁸ See note 15, *Judicial Diversity Statistics 2015*.

- 5.20 The same problem exists for Circuit judges, albeit to a lesser degree. They are comparatively better represented in the ranks of the High Court but, notably, Sir Gary Hickinbottom is only the second Circuit judge to reach the Court of Appeal.¹⁸⁹
- 5.21 To create a real career path, we suggest holding special recruitment rounds for Upper Tribunal and Circuit judges to become High Court judges. Of course there is no guarantee that any of those that apply will be appointable, but this simple measure would definitely increase the chance of lower ranking judges entering the appointable pool. By sending a strong signal that the glass ceiling is breakable, special recruitment rounds may in turn inspire able judges in the lower ranks to seek promotion.

Attractiveness and working conditions

- 5.22 To achieve diversity it is essential to have a critical mass of judges at each level and at each court centre, so that “non-traditional” candidates feel that it is a place they can happily work. The latest Judicial Attitude Survey¹⁹⁰ indicates that there are aspects of life in the judiciary which undermine the job satisfaction of serving judges. Concerns have been expressed to the Working Party about whether the senior judiciary is a welcoming and supportive environment for women and non-white people in particular, who at the moment are a distinct minority. There are a number of matters that should be addressed to allay these concerns.

¹⁸⁹ See Table 2. See also *Judicial diversity*, 31 October 2016, available online at <https://www.lawgazette.co.uk/law/judicial-diversity/5058535.article> [accessed 21 March 2017].

¹⁹⁰ See note 7, C. Thomas, 2016 *UK Judicial Attitude Survey*.

Lifestyle

- 5.23** Some aspects of the lifestyle in the senior judiciary were considered off-putting by consultees. Previous evidence suggests that the (perceived) requirement to go on Circuit is a real deterrent to some applicants, especially women.¹⁹¹ The Working Party has been reliably informed that no High Court judge has to go on Circuit unless they so wish.¹⁹² In theory then, those with caring responsibilities are not required to travel around the country. To avoid a dampening effect on the diversity of would-be applicants, this reality should be made as clear as possible, preferably by way of a published policy. It would also be helpful to point this out in job advertisements themselves. Research suggests that, in general, female applicants require more information about a job before they decide to apply for it than men.¹⁹³ It is also critical that a decision not to go on Circuit is not held against a candidate when they apply for future promotion.
- 5.24** There are also simple, immediate measures that could be made in every court centre and division to make fee-paid judges considering a permanent, salaried position feel welcome and supported. This may be particularly beneficial for women, who as a generality prefer to work in a more collegiate and welcoming atmosphere.

Remuneration

- 5.25** Considerable concern was expressed by some about the pay and pensions changes for senior judges. The Working Party shares the concern that recent changes may disproportionately deter women and BAME candidates. Arguably diminishing pension benefits mean that lawyers from the “less-moneyed” parts of the profession – for example, those practising in family law or crime, where there are higher proportions of women and BAME lawyers – may be less likely to apply for judicial appointments because they do not have the nest egg saved up by commercial or chancery lawyers.
- 5.26** The Working Party suggests that the effect of changes to pay and pension on the diversity of those applying for judicial appointments be kept under careful review.

¹⁹¹ See note 30, *Barriers to Application for Judicial Appointment Research*, Prepared for: Judicial Appointments Commission, June 2009, p. 3.

¹⁹² The Rt. Hon. The Lord Thomas Of Cwmgiedd, Lord Chief Justice of England and Wales, *Speech for City of London Solicitors' Company*, 13 March 2017, p.3: “No High Court Judge has, in practice, to go on Circuit, such is the demand to go on Circuit from High Court Judges.”

¹⁹³ See note 87, I. Bohnet, *What Works*, Chapter 7, p.59.

Return to practice

- 5.27** The inability to return to practice upon taking up a permanent, salaried judicial appointment may be particularly off-putting for BAME people, women and those from less advantaged backgrounds. It is these groups who are at greatest risk of feeling isolated or sensing that they do not fit into the prevailing culture of the senior judiciary. Some expressed the concern that they might be discriminated against if they were to join the judiciary, something they do not fear within their existing workplace. For some women and BAME people, comfortable in their current contexts, taking a senior judicial appointment and knowing that they cannot return to practice feels like too great a risk.
- 5.28** To allay this concern, the Working Party recommends that there should be a set period within which newly appointed judges could return to practice, for example two years. This would have a positive effect on numbers of applications, not just from diverse candidates.¹⁹⁴

Work allocation

- 5.29** A number of consultees have mentioned the allocation of work to serving judges as being an issue for career progression. In practice a candidate for the Court of Appeal, Supreme Court or Head of Division will need to show that they have been involved in very heavy cases, and have done other career enhancing work, such as reports on major initiatives. It is therefore essential that work is allocated fairly, transparently and without assumptions being made as to what kind of cases individuals should do. We appreciate that often work allocation will often simply be a product of who is available, and has existing expertise, however very close attention needs to be paid to ensuring that unconscious biases are not slipping in to these important decisions.

¹⁹⁴ We understand there is some concern about the position of the customary knighthoods on appointment. If judges were given a two year period in which they could decide to return to practice, then the knighthood could be awarded at the end of that period, i.e. when the Judge had decided not to return to practice.

Flexible working

- 5.30 Previous reports have emphasised the importance of flexible working arrangements in attracting a more diverse cohort to the judiciary.¹⁹⁵ A review of the success of the Government Legal Service in recruiting more women – indeed plundering talented women solicitors from the City – is in large part put down to its ability to offer flexible, family-friendly conditions of work. There is already one successful job-share arrangement in the High Court and we see no reason why this should not become more common. We suggest that the default position should be changed: all positions should be advertised as suitable for flexible working unless a cogent reason is given why a particular post is unsuitable.

Conclusion

- 5.31 There is a perception that the senior judiciary can be an inhospitable place for those who do not fit the traditional mould. Those consulted did not universally share this view; nonetheless, the perception may be a real barrier to some. There is also the well-documented problem of tokenism: if there are too few female or non-white judges, or too few from less-advantaged backgrounds, the risk is that they are saddled with unconscious stereotypes.¹⁹⁶ The recommendations in this report should be implemented promptly, with the goal of attracting and appointing a critical mass of “non-traditional” senior judges. This in turn should alleviate fears that the senior judiciary has an overly masculine, white, and upper-class culture.

¹⁹⁵ See note 3, G.Bindman & K.Monaghan, *Accelerating Change*, p.43, Recommendation 7; *The Report of the Advisory Panel on Judicial Diversity* (2010), p. 12, Recommendation 51. See also note 1, *Judicial appointments*, House of Lords, Select Committee on the Constitution, p.39.

¹⁹⁶ See note 86, I. Bohnet, *What Works*, Chapter 7.

VI. CONCLUSION

- 6.1 It has been 45 years since JUSTICE first raised concerns about judicial appointments procedures and the demographic composition of our judiciary. While the complexion of the judiciary has changed over this time, it has not changed enough nor at the same pace as the legal profession from which it is drawn nor the society which it serves. This has serious implications for the quality and legitimacy of our judiciary.
- 6.2 The Working Party has been impressed by the high level of recognition of and commitment to a more diverse judiciary among key decision-makers. The question is what to do about it. Simply leaving change to organic processes is taking far too long and, on current projections, will never deliver sufficient diversity to the bench. In recent years there have been a number of useful initiatives to help address the diversity deficit, but structural change is necessary to effect the level of change required.
- 6.3 This report identifies the lack of accountability for diversity to be a major challenge. No one person nor body is responsible for ensuring greater diversity, nor is it within any one body's particular gift. We need an integrated approach to both appointments and human resources management, which adopts proactive, progressive policies and processes for the recruitment and promotion of our judges. To focus minds and ensure action, this report proposes a new Senior Selections Committee which, alongside the JAC, would set targets for diversity for each level of the judiciary, reporting on its progress to a Parliamentary committee. Drawing on the experience of other industries, the Working Party proposes the use of appointable (or talent) pools as a way of understanding who the suitable and willing candidates for appointment to higher courts are and as a device to enable targets to be met.
- 6.4 At the time of writing the challenges posed by the absence of diversity are situated within a broader recruitment crisis for our judiciary. The Working Party believes that by reaching out to talent pools beyond the Bar, by developing an upward career path for serving judges in the lower judiciary and by focussing on ways of making the bench a more attractive workplace, the crisis can be mitigated and diversity increased. Some of the changes we recommend will be, at least initially, unpopular with some. However if there is to be meaningful progress some difficult decisions will have to be taken.

6.5 Any commentary on the operation of the judiciary is both highly important and, by definition, sensitive. Our senior judiciary performs a critical constitutional function in upholding the rule of law and the independence of the judiciary is paramount. JUSTICE's concern is, and always has been, to strengthen the legitimacy and quality of the judiciary through better appointment processes and by casting the net more widely for our judges. Those responsible for judicial appointments need to take up the challenge for innovation proposed in this report. Structural change – not tinkering – is required if the complexion of the bench is to really change.

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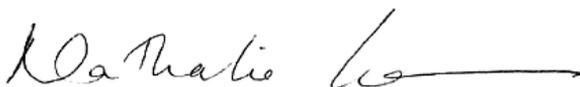
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Nathalie Lieven QC
Chair
April 2017

VIII. THEMATIC LIST OF WORKING PARTY RECOMMENDATIONS

Chapter II – Valuing Difference

1. Appoint the senior judiciary from a wider talent pool than just the senior Bar.
2. Include, among the various selection criteria, a candidate's ability to contribute to a diverse judiciary by reason of his or her background.
3. Regularly refresh the fee-paid positions of Recorder and Deputy High Court Judge by introducing reasonable time-limits on appointments.
4. The judiciary should continue and increase their public outreach efforts.
5. Encourage Crown Prosecution Service lawyers to get part-time judicial experience (other than Recorder); remove the requirement of Recorder experience before appointment to the Crown Court bench for experienced Crown Prosecutors.
6. Encourage retiring solicitors' partners to use their skills in public service by joining the senior judiciary. In general, employers (like large firms) that allow time for pro bono should also allow time for fee-paid appointments.
7. For fee-paid appointments, recruit for potential rather than particular prior experience.
8. Extend targeted support programmes like the Judicial Office's "Diversity Support Initiative". With guidance from selectors and the judiciary, introduce targeted pre-appointment training for women, BAME people and those from less advantaged socio-economic background.
9. Senior judges should provide sponsorship or mentoring to lower-ranking judges, e.g. tribunal judges, sharing their knowledge and supporting them in their careers.

Chapter III – Ensuring Accountability

10. Create a permanent, high-profile selection committee – the “Senior Selections Committee” (SSC) – responsible for appointments to the Court of Appeal, Heads of Division, and the UK Supreme Court.
11. Policy-makers and selectors should set ambitious “targets with teeth” for every court lacking gender or ethnic diversity. The “teeth” would be monitoring, transparency and reporting obligations on the SSC and JAC, which should engage in succession planning and publish plans of action to enable goals to be met. If there is persistent failure to meet targets over the next decade, strong consideration should be given to introducing quotas.
12. Selectors and the judiciary should improve data-collection and transparency around protected characteristics, *e.g.* publishing diversity data on Deputy High Court Judges.
13. The judiciary and the selectors have a shared responsibility to make the field of applicants much more diverse.
14. To help them discharge their diversity responsibilities the senior judiciary should be supported by a properly-resourced, integrated human resources function, responsible for *e.g.* targeted support programmes and talent-spotting.
15. Encourage direct recruitment of exceptional, non-traditional candidates to the UK Supreme Court and the Court of Appeal. Selection criteria should be reformed to enable legal academics to apply.
16. There should be open and constructive coordination between the judiciary and selectors to create a diverse field of applicants and to help to meet targets.

Chapter IV – Fair and Proactive Recruitment

17. Switch from reactive to proactive recruitment by creating (and regularly replenishing) “appointable pools”. This is a talent pool of candidates who meet the very high standard of appointability to a particular court. Selectors would then appoint from a pool as and when vacancies arise taking into account institutional needs, *including* for greater diversity.
18. As part of modernising the judiciary’s human resources, and to enable better succession planning, all senior judges should give a reasonable period of notice before they retire.
19. Selection processes should be designed to avoid implicit biases (i.e. decision-making errors) that disadvantage women, BAME people and those from less privileged socio-economic backgrounds. This requires both external auditing, and internal review e.g. to explain why BAME people are disproportionately unsuccessful in some exercises.
20. Reform selection processes to help selectors make better, fairer decisions:
 - a. Ensure ethnic, gender and social diversity on selection panels,
 - b. Apply the “tie-break provision” (the “equal merit” provision) at sift and short-list stages,
 - c. Review the role of judicial consultees,
 - d. Introduce evidence-based training for selectors and judges that focusses on “capacity-building”, i.e. giving people the tools to make better decisions,
 - e. Use evidence-based “decision aids” such as structuring interviews and making better use of technology.
21. Reform selection processes to assist candidates in applying for judicial office:
 - a. Re-draw and refine application criteria so as to attract more diverse talent and to enable candidates to demonstrate the benefit of “non-traditional” experiences,
 - b. Increase transparency around selection processes,
 - c. Devise and publish a more transparent scoring/weighting framework for competencies,

- d. Ensure advertisements are not off-putting to certain groups,
- e. Provide individualised, comprehensive feedback targeted at underrepresented groups,
- f. Give ample notice of vacancies and re-advertise if too few suitable candidates apply.

Chapter V – Attractive, Inclusive Career Paths and Working Conditions

- 22. Create a genuine “upward” career path from the District bench and tribunals to the senior courts.
- 23. Create an inclusive “Talent Management Programme” to support, appraise and fast-track talented junior judges (including cross-deployment opportunities), within which BAME people and women are well-represented.
- 24. Introduce a formal and objective system of appraisals for salaried and fee-paid judges.
- 25. Hold special recruitment rounds for Upper Tribunal judges and Circuit judges who want to become High Court judges.
- 26. Publish a formal policy and make clear in job advertisements that High Court judges will not be required to go on Circuit.
- 27. Review the effects of pay and pension changes on diversity of applications to the senior judiciary.
- 28. Introduce a set period, for example two years, within which newly appointed salaried judges could return to practice.
- 29. Review work allocation to ensure that work is being allocated fairly.
- 30. Make flexible working the default position for all appointments.



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