

# **Rewarding Merit in Judicial Appointments?**

## **An Executive Summary**

A research project undertaken by the School of Law,  
Queen's University Belfast for the Northern Ireland Judicial  
Appointments Commission  
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This project was undertaken during 2012 and funded by the Northern Ireland Judicial Appointments Commission via a research tender process.

The research was carried out within the law school at Queen's and led by Prof. Philip Leith.

The other members of the team were Profs. Brice Dickson, John Morison and Sally Wheeler. Dr Marie Lynch provided research support to the team.

The research was guided by NIJAC's Research Steering Group through its tender documents and meetings with the group throughout the research period, though the views in this report as those of the authors' and team alone.

The Report was authored by Profs. Leith and Morison.

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# 1 Executive Summary

## 1.1 Introduction

This research involved carrying out an online survey using a number of vignettes/scenarios to explore understandings and attitudes to judicial appointments.

This sort of survey is relatively novel in this context and provided a useful way of understanding how a range of factors such as merit and seniority, career paths and connections, as well as gender and visibility, are perceived as operating within the appointments system.

The research also involved a series of focus group interviews with a number of individuals with various professional backgrounds and at different levels of seniority.

These, and a limited number of individual interviews, afforded an opportunity to explore more closely some of the themes arising from the scenarios as well as a chance to look in some depth at some of the views and concerns of a range of members of the legal professions.

Building upon the previous research project<sup>1</sup> this work was less concerned with revisiting earlier themes and more interested in exploring how the idea of “merit” as a governing factor in judicial appointment is seen as working in practice, and whether it is perceived as being most likely to be found within particular career profiles.

We also investigated issues such as the possible development of formal and informal pathways to a judicial career and practical problems such as how an applicant might become known to the senior judiciary, and the importance of this.

Overall our interest was primarily in developing an understanding of how gender is perceived to operate in the appointments process and how any barriers to recruiting women, particularly to the senior judiciary, could be further broken down.

## 1.2 The Research Methodology

We carried out an online survey of the legal profession in Northern Ireland asking respondents to assess six imaginary individuals who were considering applying for judicial office.

The individuals in the vignettes were designed to represent reasonably accurate representations of potential applicants. This view was confirmed by various “critical friends” from across the legal profession who kindly assisted the research.

The scenarios were constructed as to allow us to check how meritoriously the hypothetical applicants might be viewed. Respondents were invited to tell us whether they considered the imaginary individual to have sufficient merit ‘in an ideal world’ to be recruited to a judicial appointment.

Respondents were also asked whether they thought that merit would be rewarded ‘in Northern Ireland today’.

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<sup>1</sup> Research into the barriers and disincentives to judicial office by QUB and NISRA, available at [http://www.nijac.gov.uk/index/what-we-do/publications/qubresearch\\_executive\\_summary\\_october\\_2008.pdf](http://www.nijac.gov.uk/index/what-we-do/publications/qubresearch_executive_summary_october_2008.pdf)

Respondents then were asked to provide comments on why they chose a particular option. Our goal was to test whether respondents felt the appointments system under NIJAC was rewarding merit or whether there were other factors which were presumed to undermine the merit principal.

This work was followed up with a number of focus groups where a range of volunteers came together to discuss some of the issues raised in the scenarios and in the responses that we obtained.

There was also an opportunity for some more free flowing discussion on the general themes of merit, career paths and possible ways to improve the representation of women, particularly in the ranks of the senior judiciary.

The focus groups covered both experienced and relatively junior practitioners in both the solicitor and barrister professions. The groups were divided into male and female and were held separately. There was one focus group for lawyers working in the public and voluntary sectors where both sexes were together.

This sort of research does not have a robust sampling methodology in the traditional sense, and indeed it does not claim to be statistically representative.

The sample for both the online survey and for the focus groups was largely self-selecting (although we did avail of various contacts including in the Law Society and Bar Council to encourage participation - and we are grateful to them and to the focus group participants).

However the sample is more or less reflective of the legal profession at large in Northern Ireland and we do believe that we have a reasonably accurate and persuasive snapshot of views there. Most (but by no means all) of our respondents in both parts of the study had not applied for judicial appointments.

It follows that their views on whether meritorious candidates would be rewarded in the scenarios and in reality must have been based upon “common knowledge” (including more or less accurate gossip) within the profession.

However, perceptions are important and it was these that this research sought to capture. The marked scepticism we found should be a concern to those involved in the appointments process, and in the wider professions.

### **1.3 The Key Findings**

We found:

1. A general view that judicial appointments could and should be made from a broad range of individuals and that merit could be found in non-traditional candidates.
2. Sections of our respondents – particularly from the private bar – had a more traditional view of merit which suggested that extensive court experience was a necessary part of merit assessment. Other sections of our respondents – particularly solicitors, and those working in the public sector – held the view that they would positively welcome non-traditional (particularly solicitor) appointments.
3. There was generally a considerable amount of scepticism that merit is being rewarded by the current appointments system, particularly at the High Court level. At the same time it was acknowledged that appointments to the lower courts and tribunals may now be more reflective of the wider applicant pool following the work of NIJAC.

4. The current view of merit used in the appointments process was quite widely seen as based on qualities mainly possessed by the bar, and to be based on seniority and experience of advocacy in court. The judges were thought to reinforce this view of merit and ensure its dominance in the appointment process. Women generally believed themselves less likely to be seen as having this sort of merit or indeed have the opportunities to gain it.
5. Merit was often defined by respondents more widely than meaning technical legal expertise combined with court experience at the higher level. Frequent mention was made of qualities of empathy and judgement, good listening skills and experience as well as problem-solving. It was often stated that these were qualities that could transfer from a wide range of legal backgrounds and experience.
6. There were considerable differences in attitude between male and female respondents, particularly in regard to the nature of merit required for the High Court. Women respondents were generally more favourable to non-traditional backgrounds being seen as meritorious as traditional backgrounds.
7. Despite a general openness to ideas of merit being defined widely the idea of a “pecking order” identified in the earlier research remains. It was noteworthy that factors such as, particularly, age were often seen as problematic with many respondents describing candidates as ‘too young’ or ‘inexperienced’ when they were in their thirties to forties, and in other areas of life could hold senior appointments.
8. Many respondents were able to identify an informal career pathway to judicial preferment at the higher levels which involved taking on particular work, being appointed to various lists and to the rank of QC, maintaining high visibility and fostering the appropriate connections.
9. The failure to appoint a woman to the High Court was almost universally seen as a key factor affecting the legitimacy of the new appointment process.
10. There was recognition, particularly among more senior respondents, that women were not coming to the top of the professions and that responsibility for this – and for any possible remedy – lies with the wider profession.
11. There was a widespread misunderstanding of the role of consultees in the appointment process and many respondents maintained that the existing High Court bench operates an effective veto on appointment to the higher judicial offices.
12. There was some limited recognition of emergence of a more formal judicial career pathway in recent years where individuals were appointed to a succession of increasingly senior judicial posts.
13. Considerable doubt was expressed as to whether it was possible to rise up through the judicial system to the High Court from lower courts such as the District Court and the tribunals.
14. There was a view from some respondents that a part-time approach to judicial appointments (which might be appropriate for those with family responsibilities) did not match what respondents felt was required for a judicial post (i.e. a full commitment to the role).
15. While there were some reservations about part-time working, the view was expressed that more flexible forms of judicial engagement should be explored including part-time posts.

It was often commented that other professions had managed to institute such arrangements successfully and such experiences should be investigated.

16. While religion and political belief were not seen as figuring significantly as factors affecting judicial appointment, social class (and in particular having the right contacts) was seen as important, particularly for more senior appointments.

17. The application process was generally seen as legitimate, if demanding. However confidentiality, and the difficulties of maintaining a practice at the bar, or being regarded as a good team player in a solicitors' practice, when an application becomes widely known, were referred to frequently as a strongly negative factor.

18. The working conditions of High Court Judges, and the ethos of the back corridor of the High Court, were often reported to be negative features, particularly for women candidates.

19. There was general agreement that judicial careers should be brought to the attention of young or new members of the professions at an early stage and that judicial office, even at the highest level, should not be reserved as something to be undertaken at an age when many in the professions are contemplating retirement.

20. There was general agreement that NIJAC had made a positive difference but little consensus on what it should do next. There was recognition that many factors were beyond NIJAC's control and that the Bar Council and Law Society, as well as the professions at large, had a responsibility to ensure a diverse legal profession where merit could be recognised and developed.