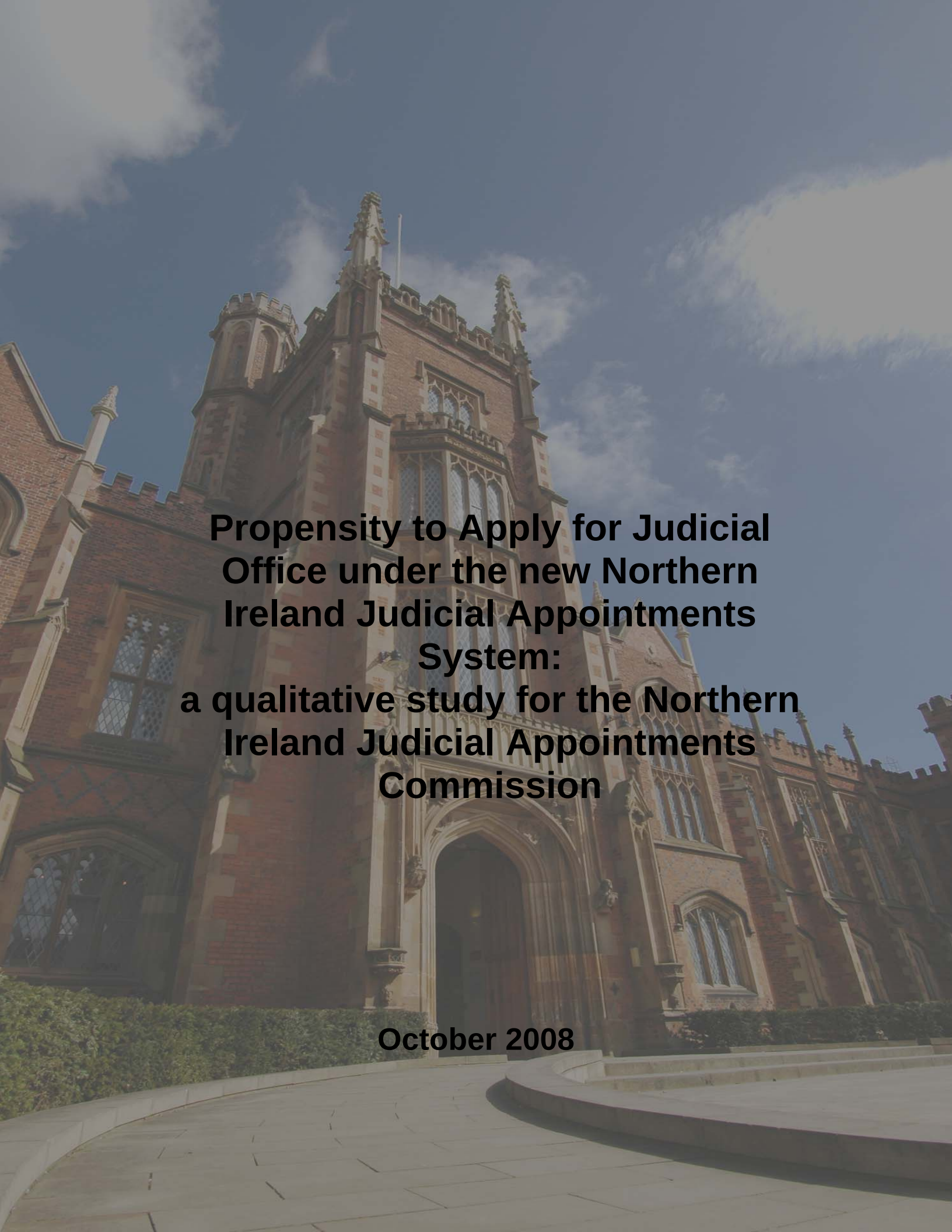

Propensity to Apply for Judicial Office under the new Northern Ireland Judicial Appointments System:
a qualitative study for the Northern Ireland Judicial Appointments Commission

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ISBN: 9780853899457

Foreword

The project team wishes to thank the Northern Ireland Judicial Appointments Commission (NIJAC) for the opportunity to undertake this research project. The project continues a longstanding interest which members of the Law School at Queen's have had in the structure, practice and procedures of the legal profession. The findings of the project are certainly not radical – they fit well with those findings of other scholars – but capture a Northern Ireland legal profession which is showing continual change.

We have avoided suggesting specific recommendations, but rather have posed discussion points pertaining to how NIJAC and judicial appointments may develop in future. No doubt each of the team has their own particular favoured options and we would hope to participate in future discussions.

Finally, we thank those members of the legal profession who kindly gave their time and views. Without them this project would not have been possible.

Professor Philip Leith
Project Leader.

Part 1: Summary of Findings and Discussion

1. Introduction

The Northern Ireland Judicial Appointments Commission was established on 15 June 2005 and is an independent executive Non-Departmental Public Body (NDPB) created under the Justice (NI) Acts 2002 and 2004. The Commission was established to enhance an independent process for the appointment of members of the judiciary and tribunals. The Commission has been conducting a Research Project regarding the issue of participation and representation in the judiciary. This Research Project involved two stages:

- First, a postal questionnaire which comprises the main element of the research project;
- Second, complementary follow-up work with a number of key informants and focus groups to explore more qualitatively the findings of the survey.

This report relates to this second stage of the Research Project, and was carried out by a team from the Law School at Queen's University:

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Ms Lisa Glennon
Professor Brice Dickson
Professor Sally Wheeler

The detailed corpus of materials from the project is provided in Part 3, together with an outline of the methodology followed. Part 2 of this report is a literature review covering the perceived 'diversity problem' and a description of the background which has led to judicial appointment commissions being realized.

The study of representation and participation in the judiciary is hardly novel. There have been substantial studies in a number of countries – often these have preceded the setting up of judicial appointment commissions – which have looked at the continuing problem of female representation in judicial posts. Prior to the setting up of the Northern Ireland Judicial Appointments Commission a study carried out by Dermot Feenan for the Commissioner for Judicial Appointments for Northern Ireland also looked into this topic and produced a large number of recommendations. What differs from the Feenan project, in this project, has been the number of individuals consulted in interviews and focus groups. This has allowed us to provide a detailed qualitative attitudinal perspective to enhance the questionnaire study undertaken as Stage 1 in this research project. Further, we have carried out this study after many of the recommendations made in previous research have been implemented.

Our interviews and focus groups covered a broad range of individuals – solicitors outwith and within Belfast (private and public service), barristers in private practice and public service and also barristers no longer in practice. We also sought responses from student lawyers. In total there were 71 respondents, with a typical interview/focus group length of 60 minutes. The group included candidates who had little interest in applying for judicial office, those who might consider this in future, and candidates who had applied for one or more judicial posts and who may or may not consider reapplication. We did not seek the views of successful candidates for judicial posts under the new NIJAC process.

The timing of this project, with interviews and focus groups held between December 2007 and March 2008, offers an early perspective on the whether the creation of a NI Judicial Appointments Commission has affected, and if so, in what way, the decision to apply for a judicial post. Generally, we found that there was a significant impact upon attitudes to judicial application which had arisen from the creation of NIJAC and that this was more positive than negative.

Note that we refer to 'Resident Magistrate', particularly in reporting interview findings. This title has now changed to District Judge (Magistrates Court).

The QUB research team has carried out this qualitative research work independently of NIJAC and the report's findings are the responsibility of the team and the views within are those of the authors and do not necessarily reflect the views of the Northern Ireland Judicial Appointments Commission.

2. Executive Summary

2.1 We did not find any substantial divergence between our qualitative findings and the Stage 1 quantitative findings. We found that our respondents had the same lack of legal family background, were to be found in similar gender located practice fields, etc, as did the survey data. What differences exist between our Stage 2 findings and those of Stage 1 may be explained by the fact that a higher proportion of our respondents had had a closer connection to NIJAC and the applications process (through, for example, being an unsuccessful candidate) and also that interview methodologies have a tendency to pick up more nuanced perspectives.

2.2 We found in our respondents' views that religion was perceived as irrelevant as a factor in applying for judicial posts. We did not ask what the community background of our respondents was.

2.3 We found that recent structural change in the NI legal profession meant that technical legal competence – and thus perhaps interest in a judicial career – was spread more widely than had previously been assumed. Thus most solicitors were likely to suggest that they had the competence to undertake some judicial role although a significant number felt that they did not possess the skills required for a High Court appointment.

2.4 We found a realisation – fuelled by appointments which would not have been expected under previous appointment regimes – that candidates who did not have the more usual bar-oriented background were being successful in appointments. This was leading to these individuals being seen as role models for others wishing a judicial career.

2.5 We found that those who were most positive about the new changes were solicitors and barristers who were to be found in the public sector. The methodology used by NIJAC to assess candidates – competence based assessment – was popular primarily with potential applicants who had a public service background. It was generally viewed suspiciously by others.

2.6 We found that many successful solicitors – who may be viewed as having sufficient skills and abilities for higher judicial office – were simply not interested in applying for judicial posts. They were not particularly attracted by the public service ethos, felt that the judicial role was lonely, and viewed such roles (on a full-time basis) as only suitable at the end of a career in practice.

2.7 We found a concern in the bar from female barristers that, should they wish a judicial career, they were being hampered by the difficulty in getting work in areas which were given higher status. There was a particular concern that other women – both at the bar and in solicitors' practices – were unhelpful

and that there was a lack of 'sisterhood' to match connections for men on the golf course and at the rugby match.

2.8 We found there were essentially two perspectives towards judicial office: the first covered County Court, Magistrates Court, Coroner posts and tribunal chairs. Most felt that NIJAC was operating satisfactorily in opening up this stream to non-traditional candidates. The second perspective – concerned with High Court appointments – was that NIJAC was being much less successful in overcoming traditional barriers and encouraging non-traditional candidates.

2.9 We found a concern that the High Court has no female judge, and that this reflects poorly upon the notion of a representative judiciary. The current High Court judges are viewed as being of very high quality, but there is a feeling that the local profession has sufficient female candidates for the High Court bench, and that a female elevation is overdue.

2.10 We found a belief that appointments of women to other (non-High Court) judicial posts under the NIJAC system were being viewed as successful and that these people may become role models for other women wishing to undertake this career route.

2.11 We found a lack of knowledge about exactly what a judge does and what pressures in terms of time, workload etc, are upon them. Most of our respondents believed that they understood the workloads, but pointed to different and contradictory elements. Clearly these could not all be accurate.

2.12 We found that the formal requirements for a post – e.g. for number of years standing – were simply viewed as inaccurate. There was presumed to be a set of conditions – age, experience, background – which were not formally outlined as part of the process. This was particularly the case for the High Court which post formally requires 10 years standing. Most respondents felt that even 20 years was too little for a person to be a serious candidate.

2.13 We found that applying for a judicial post is not viewed as something which one undertakes lightly. There are advantages to being a judge or tribunal chair – significantly pension rights, an easing of pressure from chasing work, or an escape from pestering clients – but overall it entails a very large sense of public duty which an individual must weigh against the collegiality of the bar or teamwork of the practice as well as a potential loss of income. There can be career reasons for becoming a judicial post holder, but it requires a personality which suits the role.

2.14 We found that NIJAC is generally perceived to be a 'good thing'. Most of those who have had close contact with it have been happy with the processing of their application for judicial post. There have been some

worries around assessment of technical competence – particularly with early assessment means – but we felt that these were partly due to the changing nature of who has an appropriate group of skills for a given appointment. Only those concerned with High Court posts felt that NIJAC had had little effect on the process or negatively affected the process.

2.15 We found that there is mostly an acceptance that lay membership of the process is a 'good thing', though the exact role and importance in final decisions of the lay members are not well understood.

2.16 We found that consultees can be a significant problem for some potential applicants, both in terms of finding useful individuals who would act in that role, and also – we believe – in making public an individual's application for a post. The profession in NI is very small and information passes around it quickly about any individual who has applied for a judicial post – particularly a senior post – and there is good reason to believe that this may be a major reason for individuals deciding not to apply for posts in the first place.

3. Discussion Points Arising from the Research Data

It does not seem to us to be appropriate to provide formal recommendations. Past research has done this and many of these have been accepted and included in either statutory form or as best practice. This research has examined a system which appears to be relatively well-run and well-received (especially given the very short period for bedding-in) and we have felt that a better and more useful approach is to outline various aspects which have come out of our research and which have struck us as important in the further development of NIJAC. Such aspects – when outlined – can be used as *loci* of discussion for that further development. Some of these would be difficult to implement (requiring a return to the basic statutory framework and all that entailed) but some would be easier to implement. Other aspects are simply outside the influence of NIJAC and require a cultural shift from the profession or their clients. We have not concerned ourselves with matters of ease or difficulty of implementation, simply suggesting that these points are worth consideration.

3.1 Who Feels Most Comfortable with NIJAC Process?

The new system has changed perceptions of appointments to judicial posts – as indeed one which moves away from a relatively secretive process which is based around soundings must. We found that for a number of reasons – some outlined below – there were some groups who felt emboldened by the new appointments process and some who felt disadvantaged (Part 3, p. 101).

Those who were most happy were those barristers/solicitors in public service. If from the bar, they had a barrister's sense of judicial office being a natural career development; were often significantly less well paid than judicial office holders; and were comfortable with interviews and the idea of competence based assessment (Part 3, pp. 74, 101 & 107). Those in this group who could approach potential consultees easily felt particularly positive.

Another group who were relatively happy with the new system were those barristers who we describe as having had 'portfolio careers' (frequently women) (Part 3, pp. 75-77 & 100). They had a barrister's sense of judicial office being a natural career development; could be interested in a full-time post as family responsibilities declined; were attracted by the income; and were often well versed in interview technique and may have had experience of competence based assessment. Access to consultees could be a problem for this group depending upon their career to date.

A group who were generally non-committal at present were solicitors in private practice. They felt that the system was an opening to them – and potentially

attractive – but they lacked interview and competence-based assessment skills. (Part 3, pp. 101 & 107). However, members of this group felt that skills could be developed to overcome these weaknesses. Access to consultees could be a significant problem for this group in that their pool of potential referees could be small (Part 3, pp. 105-106). Further, this group appeared to be the group least likely to see a judicial career as attractive - earnings might drop (Part 3, p. 90), the role was viewed as lonely (when most were recruited for team qualities, Part 3, pp. 53 & 83-84), and had never really appeared on their radar screen as a natural progression (Part 3, pp 82-83). Where a judicial career was considered, it was more often for reasons of personal interest (e.g. on a part-time basis) or from a desire to leave practice behind.

The group who we found to be least happy about the system were barristers in private practice (Part 3, pp. 98-99). The old system of preferment matched their professional skills – that is, was based upon critical assessment by colleagues who saw them display qualities in a professional context (Part 3, p. 104). The new system requires interview skills when most have never been interviewed in their life; form-filling when their professional skills were advocacy and strategy; and a system of competence-based assessment which is totally alien (Part 3, pp. 103-105 & 107). The only positive remaining is that they have easier access to good quality consultees. Female judicial office holders were also critical of the system and thought that current appointments process does not encourage promotion through the tiers of the judiciary, not least due to the difficulty sitting judges have in nominating consultees (Part 3, pp. 75, 86, 102, 104, 106 & 108).

There is a gender aspect in attitudes to the new system in that some of these groups which see benefit are better balanced in terms of female participation at the higher levels of experience and role – e.g. public service lawyers and portfolio lawyers – as opposed to the bar which remains more unbalanced at the senior levels.

3.2 The Consultation Process

The use of both automatic and nominated consultees was identified by respondents as one of the most difficult aspects of the appointments process (Part 3, pp. 105-106). Several reasons were given for this. It appears that practitioners in Northern Ireland fear the professional implications of being identified as an unsuccessful candidate for judicial office (Part 3, pp. 87, 99 & 109). The consultation process adds to this concern as the consultee is perceived as being the primary source of information through which the names of candidates are often leaked (Part 3, pp. 99, 102 & 108). Female judicial office holders were very critical of the lack of confidentiality of the system and all felt that these leaks were the result of the consultation process (Part 3, p. 102). In addition to being the most likely source of gossip, the consultation process is

viewed as problematic by both applicants and consultees (Part 3, p. 105). Solicitors, in particular, were put off applying because of the requirement to nominate consultees.[1] Not only does the concern about burdening the same busy people for references discourage candidates from making another application after an unsuccessful attempt, but those with fewest links to litigation had the greatest difficulty in selecting suitable referees who were familiar with their work and could comment on it in relation to the specific competencies (Part 3, p. 106). Another group who felt disadvantaged by the requirement to nominate consultees were current female judicial office holders who all thought that a sitting judge has particular difficulties in selecting suitable referees. They pointed out that one may not be able to ask judicial colleagues as they may also be applying for the post and all agreed that it would compromise one's judicial position to ask counsel to act as referee. They also made the point that it was very unclear how the comments of the consultees are taken into account, and how much weight they carry in the appointments process. It was suggested that rather than requiring consultees to comment on the candidate's ability to meet the core competencies, the reference form should only include the option of answering the basic question of whether they know of 'any reason why this person should not take judicial office' (Part 3, p. 106).

Consultees were also critical of the process. If they could not comment on the candidate's court craft and thus had to submit a limited reference[2], it was felt that this would damage the candidate's chances of appointment. As one consultee said, 'I really do wonder what good these references do' (Part 3, p. 106). Thus, we found that the requirement for referees with judicial status was most biased towards the private barrister and most biased against the solicitor in private practice (Part 3, p. 102).

The automatic consultation process also appeared to perpetuate the idea of the old boys' network in that 'secret soundings' took place which disadvantaged those who either do not network in the right circles, or whose professional work is not visible to the consultee community[3]. A similar point was made in research carried out in England and Wales where it was observed that the automatic consultation process 'smacks of an 'old boys' club' whereby senior judges will choose their cronies over other equally (or more) suitable applicants'.[4] In order to make the process more transparent and less of a disincentive to solicitors in particular, it seems that the consultation process needs some refinement.

[1] Earlier research revealed that females were more likely than males to find the requirement to identify consultees off-putting, NIJAC, *Survey of views about Judicial Appointments: 2007*, p. 84, Table 7.2.
[2] Comments from the consultee that do not relate to the specific competencies are disregarded.
[3] In a similar vein, the recent report of the Northern Ireland Judicial Appointments Ombudsman observed that the selection process 'retained too much emphasis on judicial views about candidates', Northern Ireland Judicial Appointments Ombudsman, *Annual Report* (2007) at p. 19.
[4] Judicial Diversity: Findings of a Consultation with Barristers, Solicitors and Judges, 2006, p 24.

Earlier research recommended that the automatic consultation procedure for High Court and County Court appointments should be abolished and replaced with a process of nominated referees.[5] It was further recommended that for all judicial appointments, the candidate should be required to nominate two judicial referees and two references from professional clients. While soundings from the existing judiciary may be regarded as a necessary a feature of the appointment process, concerns could be addressed by widening the range of persons whose opinions on candidates are sought. In a similar vein, the Law Council of Australia recommended in 2002 that wide consultation take place in relation to judicial appointments –

> *'for example, it would be appropriate for the Attorney-General to consult with: Judges; other members of the legal profession who are in a position to assess the candidate's work and abilities; and with office holders of organisations, such as the peak national women lawyers association'.*[6]

In England and Wales, the consultation process has been refined. The Judicial Appointments Commission no longer consults with a long list of automatic consultees but now publishes a list of JAC-nominated referees for each appointments process which *'includes, in addition to senior judges, close senior colleagues such as managing partners, heads of chambers or line managers'*.[7] A similar philosophy could apply to nominated consultees in that candidates could draw from professional colleagues outside of the judiciary. Including the views of non-judicial consultees also helps to dispel the notion that the preferred candidate for judicial appointment is one who embodies similar characteristics to the existing judiciary.

Questions have previously been raised about the efficacy of the current consultation process. It is not unusual for consultees to fail to respond to requests for references which certainly devalues this source of information.[8] While candidates must currently nominate between three and six consultees, thought might be given to reducing the required number to two or three. Consultees might thus receive fewer requests and so may be more likely to complete the form.[9]

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[5] D. Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland*, 2005 at p. 76.
[6] Law Council of Australia, *Policy on the Process of Judicial Appointments* (2002) at para. 7.
[7] Judicial Appointments Commission, *Annual Report 2006/07: Committed to Selection on Merit,* at p 18. In addition, candidates must nominate three referees, six for the most senior appointments.
[8] Commissioner for Judicial Appointments for Northern Ireland, *Annual Report 2005*, para. 3.15-3.17.
[9] *Ibid*. para. 5.20. In England and Wales, the reference form has been shortened to reduce the burden on consultees.

3.3 Include External Judiciary within the System

There was a general acceptance amongst respondents that there was a clear gender imbalance in some parts of the judiciary, particularly the High Court (Part 3, pp. 64-67). The calibre of the existing judiciary was not called into question, nor was it generally felt that the quality of decision making given by female judges would differ (although the female judges interviewed thought that having females on the bench does make a difference to the administration of justice, Part 3, p. 65). However, the gender imbalance was regarded as an issue because of representational concerns that the judiciary should be reflective of society (Part 3, p. 64) and because of the loss of competent individuals from the bench (Part 3, p. 67). It seems then that there is broad support for steps to be taken to address the gender imbalance. At one end of the spectrum, positive discrimination could be used to increase the number of female appointments (Part 3, pp. 96-97). However, most of the respondents did not support such methods and felt that this would, in fact, undermine the appointee (Part 3, p. 96).

Other steps though could be taken in an effort to make the appointments system more appealing to women. It seems that the core problem is the lack of female applicants. Indeed, earlier research revealed that males are more likely to have applied for judicial office, but that there was no significant difference between the success rates of male and female applicants.[10] There are many and varied reasons for the lack of female applicants, including the fear of not fitting in to the judicial culture[11] and not being known to the existing judiciary who, for senior posts, are consulted on the candidate's ability to meet the selection criteria[12]. To counter such fears, thought might be given to including external judiciary within the appointments system. Indeed, to show a commitment and willingness to take senior female judges seriously, female High Court judges from outside of Northern Ireland could be included within appointment panels, or as part of the consultation process. As an external voice, this would help to place all candidates on a level playing field in that none would be likely to be known to the external, either professionally or socially. Further, including a representative of the senior female judiciary within the appointments system would be symbolically important and may help to disrupt the notion that those who share the characteristics of the existing judiciary are more likely to be appointed.

[10] NIJAC, *Survey of views about Judicial Appointments: 2007*, pp. 29-30, Figures 3.1 & 3.2.
[11] *Ibid*. p. 47, Figure 3.11.
[12] The majority of the survey respondents in earlier research thought that 'being known to the senior judiciary' would have a positive influence on the outcome of an application for a judicial post, *ibid*. p. 77, Figure 6.1.

3.4 Part-Time Judicial Roles

Encouraging part-time/deputy judicial roles appears to us, based upon our respondents' views, to have advantages and some disadvantages (Part 3, pp. 75 & 95). The majority of female judicial office holders interviewed were adamant that there should be greater part-time and flexible working conditions, although one felt that this would need to be very carefully thought out to ensure that full-time members of the judiciary were not over-burdened (Part 3, p. 108).

A major advantage of part-time posts is that an individual can test their personality against the role – the requirements of judicial office are particular and it was accepted that not all who have the formal qualifications are suited to the posts. Part-time temporary posts enable an individual to try out these roles and determine whether they wish to seek full-time posts (Part 3, pp. 78, 81 & 83). Part-time posts could also fit in with lifestyle choice (Part 3, p. 76). Part-time posts could conceivably become a part of the assessment of an individual for full-time posts. Also, if a post does not require particular technical expertise in that field, the general court-craft (handling of evidence, say) should be transmissible.

However, there are a number of problems we found. First, it was clear that for solicitors firms any post which impinged upon the needs of the firm were viewed as unwanted. There was no perceived benefit to the firm, so there was no encouragement to undertake these roles (Part 3, pp. 74 & 84-85). The strength of this opposition to roles which competed with the firm was marked.

Second, the perspective of judicial independence could be affected, as an individual moved into a judicial role and back into client-oriented role (Part 3, p. 73). In other jurisdictions which are larger than NI, the task of ensuring clear space between one's own practice and judicial independence is easier. However, we do not view this as insurmountable – there are practice areas in the UK where deputy judges require an expertise which can only come from those who appear before that court on a near daily basis, and where impartiality of the deputy is a given. It may be that clients, in particular, would need to be educated by their lawyers on the essential need for independence of a judge: those repeat players who may be having their case heard one day by counsel who appears for them on another day could conceivably be a particular problem.

Third, there was a view that even if one undertook a part-time/deputy role, it would not be clear how this could be assessed as part of – if the individual wished to apply – an application for a full-time post. A judge or tribunal's court craft is rarely demonstrated in front of any other judges, and decisions can be found agreeable or disagreeable by other judges or tribunal chairs, and – even if decisions are appealed – they may be because they are simply very messy cases (Part 3, p. 106). Of course, it is not quite clear how professional knowledge and experience is currently being assessed, so this may be more of a theoretical than actual problem.

Fourth, we found a sensitivity of the barrister in private practice to undertaking a role which might be perceived as undermining their practice: that solicitors who brief them may move work onto others who they think do not have judicial ambitions (Part 3, pp. 86-87).

There is a clear gender issue with part-time work (in that it appears to fit in with traditional womens' responsibilities) but we believe that part-time/deputy posts would be attractive to both male and female lawyers[13].

3.5 Merit and Professional Knowledge

Merit was a concept which was at the heart of all our interviews. There was a feeling that it was the most important aspect which should be taken into account in judicial appointments. Even those who advocated a modicum of positive discrimination suggested that merit would not need to be ignored because there were plenty of female potential applicants who had sufficient merit. However, when we asked our respondents what they meant by merit, few were able to define this. Mostly, it is as though if you saw an elephant then you would know that it was an elephant (Part 3, p. 98). Thus, merit for the High Court appeared to be – viewed from both solicitors and barristers – intrinsically linked to success at the bar and appointment to silk (Part 3, p. 90). The bar were particularly prone to see the QC process as closely linked to judicial appointments, and indeed viewed colleagues at the bar on what appeared to be a very ordered hierarchy of where they stood in seniority and ability as a barrister, and thus as appointable to the bench (Part 3, pp. 94 & 98). Since this linked in with the status of the work which was received then those who felt – we found they were usually women – that they often received lesser status work felt that this impacted upon whether they were perceived to merit elevation to the bench (Part 3, pp. 60-63). In a similar vein, one female judge commented that 'family law experience counts for nothing in the High Court' (Part 3, p. 63).

There is thus clearly, to the bar, a link between success, field of practice and being ready for judicial appointment. This is potentially a problem for NIJAC because it imposes a bar-led notion of appointability upon candidates. No matter that, for the High Court, NIJAC may only require 10 years standing no-one we think would consider applying from the bar unless they met the bar's standards rather than those from NIJAC.

It was pointed out to us that there are many solicitors working with very high value cases, managing these successfully for demanding clients, and with

[13] In the survey study, flexible working options and the availability of part-time salaried posts were two measures identified by *both* male and female respondents which would encourage them to apply for judicial office, *ibid*. pp. 36-40.

proven leadership skills. Under the bar's ordering, they would not be perceived as having sufficient merit to be appointed to the High Court (Part 3, p. 69). This may indeed be the case, but our feeling is that NIJAC – should it wish to encourage a wider professional background in the higher judiciary – should consider what may be done to highlight what it perceives as the requisite elements which make up merit – in terms of professional legal knowledge – for each judicial post. Many of the female respondents told us that they were unwilling to consider applying for posts unless they knew exactly what was involved and whether it matched their particular experience and knowledge, so a fuller expounding of these issues may encourage a wider body of applicants (Part 3, pp. 76 & 87).

The gender issue here we found particularly relevant to female barristers developing a practice outwith 'chick law' fields. This was certainly possible, but some found it difficult and blamed their professional environment for this difficulty (Part 3, pp. 60-63). This is an issue which is relevant to – and correctable by – clients, those who brief for clients, and senior barristers who utilise junior counsel.

3.6 Competences

Competence-based assessment is viewed as an artificial process by many in the legal profession (Part 3, pp. 98, 101 & 103-105). We can see that it appears to offer a relatively objective manner in which applications can be matched to a required professional role. However, for many potential applicants the artificiality is viewed as off-putting[14]. One female judge felt the competency-based nature of the form favoured men who, she suggested, tend to be more comfortable in matching their skills to the competencies and giving appropriate examples of professional performance (Part 3, p. 104).

The form can also be viewed as complex and confusing by consultees (Part 3, p. 106). That some applicants feel that professional aid is required to complete forms in a suitable format is an indication of this mismatch between role in reality and testing of that role in an application process (Part 3, pp. 105 & 108). It is not clear to us what might be done to ensure that the negative perspective of competence-based assessment is reduced, but some considered that the Bar Council and the Law Society should have a larger role in training their members. For NIJAC there appears to be a need to persuade the profession that competence based assessment is a philosophy and practice which produces meritorious appointments.

[14] In the survey study, the application form was regarded by respondents as the most off-putting aspect of the appointments process (barristers (45%) were more likely to report it as more off-putting than did solicitors (37%)), *ibid*. pp. 83-84, Figure 7.5 & Table 7.1.

The use of competence-based assessment, of course, implies that the competences for a particular task have been extracted from the role and properly set out. Given that there is such a dearth of study of the judicial task, it may be that the artificiality which our respondents noted was linked to poorly delineated competence criteria. We cannot comment upon this.

We found no particular gender elements here: female participants in the process were as likely to be critical as male participants.

3.7 The Application Process

We found that most of those who had undergone the process – and who had responded to our request for interview – felt relatively positive about it and viewed it as a fair and open process (Part 3, p. 100)[15], although one female judge was very critical of the lack of constructive feedback after an unsuccessful application (Part 3, pp. 108 & 109). Our interviewees were mostly those who had been shortlisted but were unsuccessful or had not been shortlisted and therefore would have been expected to be critical. There were some concerns about order of process, assessment methods of professional skills, form-filling, role of consultee information (prior or post interview) but these were not the type of concerns which would put individuals off applying again.

The off-putting factors were: first that it was too public (information leaked profusely and corrosively, apparently from consultees); that for some, approaching consultees again would be difficult and too demanding of the consultees (Part 3, pp. 101-106); or that one felt that one's interview skills were not sufficient (Part 3, pp. 107-108).

The use of lay members was not objectionable to the applicants, but there was a degree of confusion about just what their role and the impact of their views might have on a professional panel (Part 3, pp. 110-111).

We did not find a relevant gender aspect to the general application process. The feeling was that individuals would be assessed in a gender free manner and that the best candidate would be appointed. The female unsuccessful candidates for non-High Court posts who we interviewed were happy that the person/people who were successful had been appointed on a merit basis.

[15] Just under four out of ten respondents to the earlier survey reported knowledge of how the appointments process worked. However, there were significant gender differences in that more males (46%) than females (31%) reported knowledge of the process, *ibid*. p. 83, Figure 7.4.

3.8 The Workload of Judges and Skills Required

There is no doubt that the workload faced by judges is in general a disincentive for people who are thinking of applying for a judicial post, even if not many practising lawyers seem able to provide details about the typical working day of a judge (Part 3, pp. 67-70 & 93). At the top end of the scale we learned from senior barristers that not many of them relished the prospect of an even higher workload than they currently experienced and – along with it – greater responsibility, lesser social mobility and a cut in annual income (Part 3, pp. 91-93). At the lower end of the scale, particularly within the magistracy, the workload was not cited as a particular disincentive (Part 3, p. 93). It was felt that the paperwork involved, and the duty to deliver written judgments, impacted much more severely at the High Court, County Court and tribunal levels. It was suggested by some that women lawyers were generally less workaholic in attitude than men lawyers and that therefore relatively fewer of the former would therefore be interested in applying for a job where the workload was very great, but we also interviewed women who appeared to work just as committed to their work.

There is also the obvious point that some women, particularly those in their thirties and forties, will prefer (more so than men) to work fewer hours as a professional lawyer in order to spend more hours with their children. But we were not always convinced that the lawyers we spoke to were fully aware of how precisely becoming a judge would impact on their family commitments (Part 3, p. 87). However, we did not detect much flexibility in the judicial appointments system to allow for permanent but part-time positions. There appears to be an *idée fixe* that being a judge has to be an all-consuming, identity-changing, occupation. We can see how the need to develop respect for the law and its institutions requires those appointed to judicial appointments to behave judiciously (and above all independently), but this does not mean that they need to be slaves to the job and avoid the assumption of *any* other commitments.

We were struck by how little respondents knew about the day-to-day work of a judge. This was a significant factor which held many women back from applying for judicial appointment (Part 3, p. 87). There were diverse views about the time involved and the balance of work between the court, backroom, research and private life (Part 3, p. 67). The problem with this lack of knowledge is that it led to perceptions that holding judicial office involves a heavy workload, particularly for senior posts, that it was not particularly family-friendly (Part 3, p. 87) and that it would be a lonely and isolating (Part 3, pp. 67, 83-84 & 91-92)[16]. However, respondents were generally unclear whether this was, in fact, the reality but this lack of knowledge is certainly a strong disincentive for those thinking of applying. Other negative factors regarding the judicial role were listed as the increasing case load; the pressure vis-à-vis targets and the lack of flexibility (Part 3, p. 93).

[16] Similar factors emerged in the earlier survey study as aspects of judicial office that did not appeal to respondents, i*bid*. pp. 45-50.

Respondents who had litigation experience felt that they had some knowledge of the working conditions of a judge by their observations from courts or tribunals, but we were struck by the range of descriptions of these conditions which means that there are clearly misconceptions about what the job actually entails (Part 3, p. 67). These details concerning what is involved in undertaking a judicial position are of great import as it is commonly appreciated that once a judicial post is undertaken it is difficult for solicitors to return to their former positions and impossible for barristers to return to the bar (Part 3, p. 86).

Respondents were also unclear about the skills set required for judicial roles. Most said that while they could carry out lower level judicial functions, some felt intimidated by the skills required of a High Court judge (such as substantial research skills and ability to produce good quality judgments, Part 3, p. 68). This seemed to impact upon solicitors' views of whether they had skills which would be transferable to this judicial role. Though many solicitors interviewed felt that they had the skills to be a judicial officer most felt that the transition to a High Court position would be beyond their ability (Part 3, pp. 68-70 & 88). Some expressed the view that the most important skill of a partner in a solicitors' firm was business management which would not necessarily be relevant in the courtroom environment (Part 3, p. 68). There was also a general misapprehension as to the appropriate age to apply for a judicial position (Part 3, p. 89)[17].

Respondents were generally very unsure about the level of training which is provided before taking up a post (Part 3, p. 67). Those who had previously applied for judicial office had received the application pack from NIJAC which provided some information. However, as this is only sent to prospective applicants, it does not educate those who have not considered making an application. Concerns about the level of training provided also seemed to discourage solicitors, in particular, in applying for judicial office. Indeed, it appeared to us that solicitors seemed to be very unwilling to step outside of their professional comfort zone (Part 3, p. 88).

We felt that a greater effort could be made to address many of the misconceptions that are commonly held regarding the undertaking of a judicial position. Many of the features which would make the job more welcoming and attractive to women should be rigouroulsy promoted. In particular, we would suggest that there needs to be much greater awareness about what judicial roles actually entail through perhaps the development of work shadowing programmes (Part 3, p. 83); professional newsletters; workshops or seminars/lectures given by female judicial members and organised in conjunction with the Law Society

[17] Most respondents in the earlier survey study believed that being aged 41-50 or over 50 would have a positive influence on the outcome of an application for judicial office. The majority of respondents believed that being aged 30-40 would have a negative influence, *ibid*. pp. 63-64.

and Bar Council.[18] As an example, in England, the DCA provides a booklet and DVD which includes personal 'case studies' about the real experiences of members of the judiciary. Information of this nature is extremely helpful in dispelling myths about the workload and the skills/professional knowledge required of judicial office-holders. It would be helpful if this sort of information was disseminated not only to prospective candidates, but to practitioners at an early stage of their career. Solicitors in private practice did not generally regard the judiciary as a career option, or as a means of career development (Part 3, p. 74). Part of this was due to their concern that their increased specialisation rendered them unsuitable for a judicial role which, they perceived, required breadth of knowledge and experience. If, however, detailed information was provided at an early career stage, this could put the possibility of judicial office on peoples' radar which might help to dispel the notion, held by some, that it is simply a public service role that one may undertake at the end of a successful career.

3.9 The Work Experience of Applicants

In so far as gaining a wide experience of legal work is seen as an advantage to applicants for judicial posts (and this was certainly the message we received from interviewees and focus groups – Part 3, pp. 60-63), it is obviously of benefit to some barristers that they are included in the panels of counsel who are called upon to do Crown work or work for insurance companies. We did not see any evidence that there were inappropriate barriers to being included on these panels but we were not able to verify whether the panel for Crown work is 'equality-proofed' in the sense that those who compile it take into account the obligations imposed on public authorities by section 75 of the Northern Ireland Act 1998. Insurance companies, as private entities, do not have to have regard to section 75, but it would seem that, like public authorities which maintain panels of legal advisers,[19] they are still required to comply with the various anti-discrimination laws. We note that Regulation 13 of the Employment Equality (Sex Discrimination) Regulations (NI)[20] extends the protection of the Sex Discrimination (NI) Order 1976 to office holders.

On the whole, the experience gained by solicitors does not seem to be fully appreciated when the rules on eligibility for judicial appointments are examined.[21]

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[18] In the survey study solicitors, in particular, cited 'practical information about the nature of the work' as one of the measures which might encourage them to apply for judicial office, *ibid*., p. 37, Table 3.5. This was also identified, in particular, by female respondents, p. 39, Table 3.6.

[19] *Kelly and Loughran v Northern Ireland Housing Executive* [1999] 1 AC 428 (House of Lords, 3 v 2).

[20] SR 2005/426.

[21] In the earlier survey study, the vast majority of respondents perceived that 'being a barrister' would have a positive influence on the outcome of an application for judicial office: NIJAC, *Survey of views about Judicial Appointments: 2007*, p. 53. Solicitors were more likely to hold this belief (89%) than barristers (70%) or judicial office holders (67%), Figure 4.4.

We heard evidence from some solicitors that judges were often condescending towards solicitors (Part 3, p. 78), a practice which, if it is prevalent, could be countered by ensuring that more solicitors reach the bench. It also seems that the teamwork and management skills which many solicitors acquire in the course of their career are not of great use to them when trying to convince a panel that they have the requisite skill set for the bench (Part 3, p. 68).

We found substantial evidence that promotion to the bench was an attractive career move for lawyers employed in the public sector (Part 3, pp. 72-74), but the statutory requirement that lawyers must have a number of years of practical experience may militate against the eligibility of some such applicants, particularly if their years of private practice were not in the recent past.

3.10 The Solicitor – Counsel Relationship

We were told by several counsel that they would be reluctant to have it made known to solicitors who regularly briefed them that they were applying for a judicial post. Apparently there is a fear that if it were common knowledge that barrister A was on the look-out to leave the bar, solicitors would not want to risk continuing to brief barrister A and instead would brief barrister B. It would seem that a somewhat similar attitude can display itself within solicitors' firms once it becomes known that a member of the firm has applied for a judicial post. It is as if the person in question can no longer be trusted to give his or her work their undivided attention.

This is of course an irrational position to take, from the perspective of other professions, but is rational to the individual barrister. To those outside the legal profession, if a barrister or solicitor applies for a judicial post it would be viewed as a sign that he or she has been encouraged by others to apply because they consider him or her to be worthy of the position. But openly displayed ambition is not considered a virtue in the legal professions and we have to acknowledge that it is no real answer to the problem simply to assert that members of the solicitors' and barristers' profession should be more mature in their attitudes to ambitious colleagues. Both professions are intensely competitive and colleagues may not look too kindly on their associates who 'get above themselves' by thinking they are judicial material. Probably the only way to counter such prejudice is for NIJAC to reiterate constantly that it welcomes applications from a broad range of applicants, that failure to be appointed to a particular post should not be taken as a sign that the person in question is generally non-appointable to that kind of post, and that the candidates most likely to be good judges are those who are really keen to receive the requisite training for what the job entails.

In line with previous research (Feenan, 2005) we detected that many women barristers feel at risk of being discriminated against by solicitors (both male and

female) because the client has indicated that he (or even she) would prefer to be represented by a male barrister (Part 3, p. 61). Preventing this kind of discrimination should be a key goal of both the Law Society (see next section) and of solicitors' firms (see next section but one). Of course this should cut both ways. There is no reason why a male barrister, for example, cannot very effectively represent a female client in family or matrimonial work. It was depressing to hear so many female lawyers tell us that female clients in this field did tend to insist upon using female barristers (Part 3, p. 54).

3.11 The Law Society's Role

The solicitors' profession is much larger and more diverse than that of barristers. Arguably its governing body, the Law Society of Northern Ireland, should be playing a greater role in urging its members to get themselves into a position from which they can make a good shot at applying for a judicial post. For the higher judicial posts the odds are stacked against solicitors because the assumption continues to be made – wrongly, we think – that long experience of court procedures and of advocacy skills are absolute prerequisites to appointment. We found a very strong sense amongst most of our interviewees, and all of the solicitors and barristers who took part in our focus groups, that no-one should apply for a senior judicial appointment unless they had considerable experience of how to behave appropriately and effectively in court (Part 3, pp. 69-70). This feeling was also echoed by the female judicial office holders in the focus group (Part 3, p. 69). But when we tried to pin down exactly what was meant by this, and why the requisite knowledge could not be acquired through pre-service training, we did not receive what to us were convincing replies. There is a firm belief that to be a good judge one has to have been a good barrister - a patently false proposition as noted by Baroness Usha Prashar[22]. This is a bit like saying that to be a good referee of a football match one has to have been a good footballer.

There is a good case for the Law Society to advertise transfer to the bench as a real badge of distinction, not just for the individual solicitor concerned, but for the solicitors' profession as a whole. It could be made to seem as a natural career progression, as it is in the eyes of many barristers, especially those in public service (Part 3, p. 72). The Law Society could also assist by promoting more generally the value of diversity within the legal professions, including the judicial branch. The Society itself needs to be a place within which people of either gender, and any religion, race and ability, feel comfortable.

[22] Judicial appointments: A new system for a new century, Speech, March 2007.

3.12 The Role of Solicitors' Firms

Our research has unearthed evidence showing that firms of solicitors, especially the larger and more prominent ones, are not always happy when one of their partners or senior members of staff leaves the firm in order to take up a judicial post. They do not necessarily view elevation to the bench as a "feather in the firm's cap" (Part 3, pp. 84-85). This is, again, an attitude which is difficult for people outside the profession to understand, since the natural conclusion is surely that some of the kudos attached to becoming a judge would rub off on the firm for which the solicitor was previously working. It seems, however, that firms feel a sense of ownership over their partners and staff, in whom they have supposedly invested so much. To have that investment cut short, and the talent redeployed for the benefit of society as a whole, is not always palatable to them. Firms cannot advertise the fact that such-and-such a former partner is now a judge, nor can they in any other way legitimately profit from the partner's appointment to the bench. Of course they can try to discourage transfers to the bench by making life as a senior solicitor a more rewarding one in many ways, but they should also bear in mind that working for society as a whole is a noble calling that deserves to be applauded.

Solicitors' firms could also encourage female solicitors to apply for judicial appointments by facilitating whatever different working patterns they might prefer while they are practising as solicitors. If such women can experience, for example, a family-friendly environment within a busy solicitors' practice, it is more likely that they will have the confidence to apply for a post within the judiciary and to expect the same level of family-friendly environment there. It was disappointing to discover, as Feenan had done (2005), that firms were not particularly supportive of women on their staff who were thinking of applying for a judicial post and that they did not seem to think that part-time work on the bench would make a solicitor a better practitioner (Part 3, p. 80). Firms can help as well by ensuring that their partners and staff acquire experience in a wide range of legal areas, allowing them to specialise where they have a particular aptitude for a subject area

3.13 The Need for Training in Court Craft

In order to counter the assumption that appointment as a judge can be deserved only if the applicant has already mastered the necessary 'court craft', the Northern Ireland Judicial Appointments Commission might consider the precise extent to which such mastery really is a prerequisite to serving as a judge. To the extent that applicants may lack the experience or knowledge deemed necessary, the Commission might want to ensure that appropriate training in the skills and awareness involved are supplied to the applicant immediately after appointment.

Selection could then focus on the applicant's *potential* to acquire these skills and awareness and on his or her *aptitude* for judicial work. It should be remembered that the main task of judges is to judge, after weighing up competing arguments and conflicting evidence. The job does not itself involve advocacy, only the appreciation of advocacy. A very good knowledge of the rules of evidence is obviously important (for court work if not for tribunal work), but this can quickly be taught if not already acquired. Those who teach law in universities are familiar with the fact that students who already have experience of other walks of life often learn the law much more quickly and effectively than students who are asked to devote three or four years to the subject after leaving school. There is every reason to believe that judging is also a job that can be learned quite quickly. If both the intelligence – intellectual as well as emotional – and the commitment are there, the appointee can usually be guaranteed to rise to the challenges demanded of him or her.

3.14 Knowledge of NIJAC

Overall we found an appreciable disparity of knowledge over the existence, basic purpose and role of NIJAC. Those who had the most information on the Commission were those who had either an interest in applying and/or had previously applied for a judicial post (Part 3, p. 97). This lack of knowledge was chiefly prevalent in the solicitors' profession. It was suggested to us that NIJAC should be more pro-active in seeking out applicants particularly outside the greater Belfast area. Other solutions that were submitted to us were that NIJAC could run seminars or recruitment drives focusing on the judicial role as a career option. These could be held in academic institutions with a view to encouraging young women to consider the judicial office and in the west of the Province as a means of encouraging those who felt isolated from the Belfast legal network.

3.15 The Bar Council's Role

As the professional body representing barristers in Northern Ireland it was generally felt that the Bar Council had an important role in addressing the issue of diversity of the bench. A significant feature of our research was the fact that many solicitors interviewed had not considered the judiciary as a career move (Part 3, pp. 82-83). This aspect was not as evident in our contact with female barristers where, although they were more aware of a judicial office as a career option, we found that they either did not want to apply; were generally content staying at the Bar or, significantly, felt that they were being hampered from building a CV through sexist briefing practices (Part 3, pp. 60-63).

The term 'chick law' continually arose in our research (Part 3, pp. 56 & 61). This relates to the concern of many female barristers who complained about the type of work being sent to them. Women in the profession were finding it difficult to gain experience outside areas such as family and conveyancing law[23]. While solicitors accepted that their briefing practices can be gendered, some pointed to the fact that senior counsel do not tend to use younger women as juniors in complex trials which, in turn, led to difficulties in convincing a client that they had sufficient experience to take on non-family work (Part 3, pp. 61-62). The difficulty that female barristers experienced in securing good quality non-family work was felt to be disadvantageous to development of their careers in that they were not gaining wider experience available with the practice of other fields of law. It also had the added disadvantage of making them less visible to those who could be used as consultees in judicial applications[24]. Evidence also arose that a dismissive attitude towards these 'female areas of law' was taken by male barristers (Part 3, p. 56) and that the bar was sexist. (Part 3, pp. 56-58).

This negative attitude and the issues of work distribution are issues that the Bar Council should address. The Bar, along with the Law Society, should stress the value of all work and that it should be distributed without gender discrimination

A very distinct aspect of our research which continually arose is the issue of the current changing nature of the legal environment in Northern Ireland. A notable concern which arose through the course of our research was the considerable casualty rate at the junior bar (Part 3, p. 59). It was suggested that there exists a much harsher environment for barristers than one experienced a decade previously. This is due not least to the significant changes to legal aid policy and payments which makes it increasingly difficult for junior barristers to establish themselves. As a consequence many potential judicial candidates may be lost at this very early stage of their career.

The shifting nature of the solicitor's role was also making it difficult for the young barrister to find work (Part 3, p. 60). As the solicitors' profession gains advocacy and procedural expertise and the confidence to undertake these roles, these developments could have a serious impact on the value of a barrister's expertise. If this trend is to continue, it could have a bearing on a barrister's decision on whether or not to stay at the bar and gain the experience required for high judicial position. The changes which characterise today's profession need to be addressed by the Bar Council, though of course, whether they can effectively turn back history and return to the halcyon days of a less technically expert solicitors' profession is a moot point.

[23] See also NIJAC, *Survey of views about Judicial Appointments: 2007*, p. 24, Table 2.10.
[24] See D. Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland*, A Report Commissioned by the Commissioner for Judicial Appointments for Northern Ireland, June 2005, para 6.9.

3.16 Female Support Systems at the Bar

A striking feature of our findings was the lack of fellowship shown by females to other females. This was a trait that was in evidence in both the solicitors' and barristers' professions. We were told that female solicitors did not tend to instruct female barristers unless it involved family law (Part 3, pp. 60-63). When women were successful it was generally viewed that they were reluctant to assist other women. In the course of our research we were given little indication as to why there was such a lack of a 'sisterhood' in the profession. Most seem to put the practice down to habitual performance. However, a few did indicate that their client did specifically request a male advocate (Part 3, p. 61).

Whatever the reasons for the practice, the consequences of the lack of such 'sisterhood' have meant that it is all the more difficult for females to do well in the profession unless perhaps they have influential family ties (Part 3, p. 61). Changing the perceptions of clients may be a difficult issue to address, however, a more practical measure would be for the Law Society to actively promote the briefing of female counsel. The Bar Council and influential senior counsel should encourage the use of female junior counsel in complex trials thereby highlighting their expertise and fostering their image.

4. Conclusion: Understanding the Judicial Role

What has particularly struck us has been the limited amount of information which is known about the actual practice and pressures of judicial office. Few major studies have been carried out in this field. Two notable works are Alan Paterson's *The Law Lords* [25] and to a lesser extent – since it focuses on witnesses rather than judges – Paul Rock's study of a Crown Court [26]. Given the large output of research materials into the legal system in the UK, such a limited insight into how judges judge must surely affect how attractive a judicial career actually is: no-one has ever suggested that knowledge of what barristers do will discourage a law student from seeing the bar as a possible career, and it therefore does not seem to us that knowing more about judges and their day-to-day practices (studied in ethnomethodological detail) would make that a lesser career option. Openness is, we feel, more likely to demonstrate the kinds of skills required and technical and personal challenges of the judicial task and make it more attractive to those who perceive they have the personality and ability.

[25] A. Paterson, *The Law Lords*, MacMillan, London, 1982.
[26] P. Rock, *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green*, Oxford UP, 1993.

There is a measure of opposition from the Bar to part-time or alternative judicial employment models which may be made available which derives from a concern that the jurisdiction is too small to allow this to function well and that conflicts of interest may impinge upon the judge who is not full-time. We feel that part of understanding the judicial role would include investigating whether this is a problem in practice areas in the rest of the UK and/or other countries and whether there are feasible solutions.

NIJAC has been tasked with making the appointments process more open and transparent with the aim of encouraging more diverse applications. We think it natural that a judiciary which itself is more open and transparent will also encourage more diverse applications.

Part 2: Review of Literature and Context

"[w]e know from authority, as well as experience, that …. Women could not sit on juries … and they could not be judges".[27]

[27] Willes J in *Chorlton v Lings* (1886) 4 LRCP 374 at 387-392. Quoted in Hayes, *Appointment by Invitation* NLJ April 11 1997 520 at p.533.

1. Judicial Appointments: Fundamental Principles

When considering the judicial appointment system it is important to note that there are certain fundamental principles that are peculiar to the judicial profession which must be taken into consideration. These are judicial independence and appointment on merit.

1.1 An Independent Judiciary

An almost unique element which characterises the judicial body is the requirement that they undertake their work with complete independence. Judicial independence is considered an inherent aspect of the rule of law and essential to ensure public confidence in judges as a means of upholding the law. There are a number of regional and international agreements and conventions which advocate judicial independence, and though they are not legally binding, they do represent how universally important this principle is. For example, the "Basic Principles on the Independence of the Judiciary", adopted by the UN in 1985; the European Charter on the Statute for Judges, adopted by the Council of Europe in 1998; the Latimer House Guidelines for the Commonwealth 1998 and the Bangalore Principles of Judicial Conduct, 2002. More recently the Constitutional Reform Act 2005 enshrines in statutory form the protection of judicial independence.[28]

1.2 Independence from Who or What?

Any mechanisms that are introduced to protect judicial independence are designed to ensure that the judiciary will not be influenced by external or internal forces. One such perceived threat is from the executive. The executive may want to influence judges to decide cases in a particular way or in the interests of the state. It is also important in a democratic society that the public has confidence that judges will interpret the law impartially and, if necessary, stand up for the rights of individuals irrespective of the wishes of the state. It is also in the interests of justice that judges need to be independent of the legislature so that they can decide cases free from political pressure.

Other sources of influence may come from parties to a case. Anyone who has an interest in the outcome of a case, whether it is the defendant's family or the

[28] Sec. 3.

accused in a criminal case, may try to influence the subsequent judgment. Judges may also be subjected to pressure, both directly and indirectly, from their peers and superiors on the bench.

1.3 Securing Independence

There are a number of mechanisms, conventions and practices which have been introduced over the centuries to ensure judicial independence. One such measure which was established in The Act of Settlement 1701 is security of tenure. Full-time judicial office is held until retirement and the powers to remove a judicial office-holder are extremely limited and rarely exercised. The principle works on the presumption that since judges' jobs cannot be taken from them by the State, its capacity to exert undue influence over them is considered limited. This way we can ensure that judges perform their duties impartially and without fear of the consequences.

The Act of Settlement 1701 also provided that judges' salaries were to be 'ascertained and established'. This was included as it was generally considered that the independence of judges could be seriously jeopardised if the remuneration they receive is so inadequate that they are readily open to bribery, or exposed to the temptation to seek other sources of income, or have their financial well-being depend on the outcome of the case before them. Other methods designed to ensure judicial independence are mechanisms to ensure transparency. These include the fact that cases are heard in open courts and that judges provide written judgments which may also include the dissent.

The judicial appointments procedure also plays an important part in ensuring an independent judiciary. Here the focus is that process does not result in politically-biased judges. A member of the bench should not owe their office to the executive, or feel obligated to any individual or organisation. This in turn helps to ensure that the judges who are appointed are able to act independently, free from political or other improper pressure in office.

1.4 Appointment on Merit

One of the most enduring principles linked to the judiciary is that judges should be appointed on merit. The objective of this principle is to guarantee that the best-qualified candidate is always appointed to the position. The principle ensures that the selection process will always produce a judiciary which is highly competent, politically impartial, has high standards of integrity and is one which avoids any form of unfair discrimination. The concept of 'merit only' is designed

to assure that appointments to the bench are above suspicion of patronage and are of the highest quality.

The elements of 'independence' and 'appointment on merit' are unique factors which distinguish the judicial appointment process from other occupational appointment processes. They are not just mere principles but have been to date strict requirements which has characterised and distinguished the judicial appointments process. Any debate or discussion concerning the issue of diversity will invariably revolve around whether 'judicial independence' and 'appointment on merit' will be compromised or accommodated.

2. The Judicial Appointments Process in England and Wales

Previously the Lord Chancellor had personal responsibility for appointments, or for advising the Queen on the appointment, of all members of the professional judiciary in England and Wales. All senior judicial appointments (namely appointments to the Court of Appeal and above) were made by invitation only and for all other appointments a system of openly-advertised competitions was introduced in the 1990s.

The Lord Chancellor had a high level of autonomy over the recommendations, selecting those to be recommended following confidential, informal discussions with the senior judiciary. This was largely a closed system.

2.1 Criticisms

A number of major concerns had existed concerning the procedures for appointing judges. These included the fact that the system was not fully open or transparent; the obvious control of a government minister; the lack of a job description; no application process; no references and that there was no structured interview process. Much criticism was reserved for the consultation process where much reliance was placed on the views of the present judiciary and senior members of the profession. It was viewed that this led to a 'self-replicating' or cloning judiciary, where 'like-appoint-like' and that talented people were being excluded without good reason.[29]

[29] C. McGlynn, *Judging Women Differently: Gender, The Judiciary and Reform,* Chapter 5 at p.90 in *Feminist Perspectives on Public Law*, S. Mills & N. Whitty (Ed), Cavendish, 1999; G. Drewry, *Judicial Appointments,* Comment 1998 Public Law 1 at p. 5; and R. Stevens, *Unpacking the Judges,* Current Legal Problems 1 at p.3.

2.2 Developments

In response to such criticisms a number of changes were undertaken with the aim to 'formalise and professionalise' the appointment process. These included the introduction of interview panels; the publication of an annual report to be presented to Parliament and available criteria for all judicial appointments. A work-shadowing scheme was also brought in. This was designed with the view to allow lawyers who may not have previously thought about a judicial career, or those who do not know much about the role of the judge, to have an opportunity to find out what it would be like to sit judicially before deciding whether or not to apply for judicial appointment.

2.3 The Peach Report

In 1999 Lord Irvine commissioned an independent audit of judicial appointments.[30] One of the central Recommendations of the Report was for the creation of a Commission for Judicial Appointments. The Commission would not advise on the appointments but would monitor the process and publish an annual report. The Commission was to be headed by a part-time First Commissioner who would be assisted by a number of Deputy Commissioners. These developments were seen as positive improvements; however, the Lord Chancellor retained the right to take the final decision on individual appointments.

2.4 The Current System - Judicial Appointments Commission

The introduction of the Constitutional Reform Act 2005 brought significant changes to the judicial appointments process. The Act established an independent Judicial Appointments Commission (JAC), which started work in April 2006. Crucially it moved responsibility for the process of selecting judges from the executive to the JAC and made the system more open and transparent.

The JAC is an independent, Non-Departmental Public Body which consists of fifteen Commissioners, a lay chair, five judicial members, two members from the legal professions, five lay members, a tribunal office holder, and a magistrate. The Commissioners are appointed by The Queen on the advice of the Lord Chancellor in accordance with the procedures set out in Schedule 12 of the Act, which is designed to ensure appointments to the JAC are non-partisan. The appointments process is also regulated by an independent Commissioner for

[30] *An Independent Scrutiny of the Appointments Process of Judges and Queen's Counsel* in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach, December 1999.

Public Appointments who ensures an open and transparent process and guarantees that appointments are made on merit.

3. The Judicial Appointment Process in Northern Ireland

Since 1973, the Lord Chancellor had been responsible for all judicial appointments.[31] The appointments of the Lord Chief Justice and Lord Justices of Appeal were made by the Queen on the recommendation of the Prime Minister, following the advice of the Lord Chancellor. The appointments of High Court judges and County Court Judges were made by the Queen on the recommendation of the Lord Chancellor, following the advice of the Lord Chief Justice. The Lord Chancellor's responsibility for judicial appointments did not change under Northern Ireland Act 1998, as the appointment and removal of judges in the North was classified as 'excepted'.

This was to change with the establishment of a JAC. Such a body was a central recommendation of the Review of the Criminal Justice System.[32] For Northern Ireland, the Review was of the opinion that from most parts of the political divide, there was strong support favouring the establishment of some form of a JAC. Among the reasons supporting this proposal was the belief that such a body would help secure the independence of the appointments process from political manipulation. Given the political and community divisions that exist in the North, the Review did not believe that it would be feasible, particularly from the perspective of judicial independence, to leave the discretion on appointments with Ministers of the Executive.

3.1 The Northern Ireland Judicial Appointments Commission (NIJAC)

The Justice (Northern Ireland) Act 2002 provided for the establishment of the Commission on devolution of justice functions to the Northern Ireland Assembly. The Justice (Northern Ireland) Act 2004 enabled the Commission to be established prior to devolution. There are 13 Commission members, including the Chairman, the Lord Chief Justice of Northern Ireland, Sir Brian Kerr. The Commission members include 5 members of the judiciary; one from each of the different judicial tiers;[33] one representative nominated by the Law Society, one by the Bar Council and 5 lay members.

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[31] Northern Ireland (Modification of Enactments - No. 1) Order 1973. Prior to that date, he shared the responsibility for certain judicial appointments with the Governor of Northern Ireland. The transfer of these responsibilities to the Lord Chancellor was deemed a necessary move so as to secure and demonstrate the independence of judicial matters from any political office that were closely associated with political and security developments in Northern Ireland.

[32] See *Review of the Criminal Justice System in Northern Ireland*, TSO March 2000.

[33] The judicial tiers are: a Lord Justice of Appeal, a High Court judge, a County Court judge, a Resident Magistrate, a Lay Magistrate. They are nominated by the Lord Chief Justice.

Following a recommendation of the Review of the Criminal Justice, the First Minister and deputy First Minister appoints the Commission nominees of the Lord Chief Justice and the professions and secures the appointment of Commission lay members through procedures in accordance with the guidelines for public appointments (the Nolan procedures).[34] All Commission members have been appointed for an initial period of 3 years.[35]

The composition of the Commission also follows a recommendation of the Review. The Review had suggested a 'strong' judicial representation drawn from all tiers of the judiciary, including a representative from the lay magistracy. Of note, and unlike other Commissions (for example, the Judicial Services Commission in South Africa), NIJAC does not include any members of the Assembly or political nominees. This was considered necessary in the Northern Ireland context so as to keep any suggestion of political input out of the appointments process.[36]

The lay members are selected on the basis of the additional value which they would bring to the Commission's deliberations, including such qualities as experience of selection processes, the court users' perspective and the ability to assess the personal qualities of candidates. The Review recommended that the lay members should be drawn from both sides of the community, including men and women. It was deemed that a balance of lawyers and lay people on the Commission would ensure that a proper account was taken of legal and judicial ability and of the need for a broader awareness of issues in society.[37]

The Commission has four key roles. These are to conduct the appointments process and make recommendations to the Lord Chancellor in respect of all appointments up to and including High Court Judge; to recommend candidates on the basis of merit and to secure, so far as is reasonably practicable, a judiciary that is reflective of the community. They are also required to publish an annual report setting out their activities and its accounts for the past year.

4. The Scottish Appointments Commission

One of the first appointments commission to be introduced in the United Kingdom was the Judicial Appointments Board for Scotland which was set up in 2002. The Board is required to make recommendations on merit, but in addition to consider ways of recruiting a Judiciary which is as 'representative' as possible of the communities which they serve. In addition, as an aid to monitoring diversity, all

[34] Para 6.104.
[35] http://www.nijac.org/Live/NIJAC_Site.htm.
[36] Para 6.104.
[37] *Ibid.*

applicants are asked (but not required) to complete an equal opportunities questionnaire focusing on gender, nationality, ethnicity and disability.[38]

It is of note that Appointment Commissions have also been established in other countries. These include: the Republic of Ireland, South Africa, Canada, Spain, Italy and Germany.[39]

5. The Issue - Diversity [40]

Perhaps the area that causes the most concern amongst commentators on the judiciary is the actual composition of the bench in the United Kingdom. Pressure to make the judiciary more diverse and more representative of the community in which it operates comes from all quarters including the then Lord Chancellor, Lord Falconer: "This is not about political correctness. It is about the effectiveness of the justice system. Without a diverse legal profession and a diverse bench, the justice system will not adequately reflect the society it serves, and it will not command the full confidence of the public".[41]

The area of representativness has in itself gone through an evolution. The awareness "that judges come from a fairly narrow social background", [42] began to manifest itself in the early seventies.[43] Although concerns about the class composition of the judiciary remain, other aspects to cause issue have also arisen, including not only the gender but also the race and colour composition of the judiciary and most recently the appointment to the bench of those with a particular disability or sexual orientation.[44]

5.1 Reasons for Diversity

[38] The Committee commented that: "It was also particularly welcomed by those who regarded the old system of appointment as too open to political influence, too secretive, or too dominated by those practicing in Edinburgh". See July 2003 the House of Commons Committee on the Lord Chancellor's Department. http://www.justice.govt.nz/pubs/reports/2004/judicial-appointmetns/#39.
[39] K. Malleson, *The New Judiciary the effects of expansionism and activism,* Ashgate, 1999*,* at p.135.
[40] D. Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland*, A Report Commissioned by the Commissioner for Judicial Appointments for Northern Ireland, June 2005; K. Malleson and F. Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office,* Lord Chancellor's Department, Research Series No.2/00, The Law Society, *Broadening The Bench,* October 2000.
[41] Baski, *Falconer Widens His Net For Judicial Appointments*, LSG 10 March 2005.
[42] *The Judiciary,* The Report of a Justice Sub-Committee 1972, at p.32.
[43] *Ibid.*
[44] See L. Moran, *Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings* Sydney Law Review 2006 Vol. 28: 565 at p.566.

There are generally a number of main reasons given in support of a diverse bench.[45]

Legitimacy: The legitimacy argument rests on the point that the judiciary is a political institution and therefore democratic principles require that its make-up is diverse. Equal participation of men and women in the justice system is an essential feature of a democracy.

As Dame Brenda Hale stated: "In a democratic society, in which we are all equal citizens, it is wrong in principle for that authority to be wielded by such a very unrepresentative section of the population".[46] Malleson also suggests that a more representative bench would be a means of demonstrating their accountability and democratic legitimacy which in turn would secure public support. This public support is all the more vital as scrutiny and criticism of the judiciary increases. "Since the judiciary cannot comply with the democratic requirements of electoral accountability, this method of social accountability amounts to an essential form of legitimacy".[47]

Public Confidence, Ease and Understanding: A diverse bench is also considered a means of securing public confidence. Public confidence is vital for the judiciary as Alexander Hamilton famously pointed out; the judiciary possesses neither the power of the sword or the purse.[48] The judiciary has no means of enforcing its decisions, and accordingly depends on the confidence and the trust of public to function. Having a bench which is more diverse will enhance confidence.

Research carried out in 1999 supported the claim that lack of representativeness has an adverse effect on public confidence. The author concluded that: "although the public regard the courts as important, there is some lack of confidence in the fairness of hearings, a belief that the courts serve the interests of the wealthy, and that the judiciary are remote and out of touch".[49] More recently Lord Falconer stated: "A more diverse judiciary is essential if the public's confidence in its judges is to be maintained and strengthened".[50]

Moreover it is considered that members of society are more likely to respect and trust courts whose judges include people like themselves and will not feel

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[45] Mrs. Justice Dobbs, *Diversity in the Judiciary* Lecture Queen Mary, University of London 17 October 2007 http://www.judiciary.gov.uk/docs/speeches/diversity_judiciary_171007.pdf, K. Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 Feminist Legal Studies 2003 1-24.

[46] Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?* Public Law 2001 489 at p. 502.

[47] K. Malleson, *supra* fn.39 at p.114.

[48] *The Federalist,* http://www.constitution.org/fed/federa00.htm.

[49] H. Genn, *Paths to Justice: What People Do and Think About Going to Law*, Hart, 1999 at p.246. See also, *Increasing Diversity in the Judiciary* CP 25/04, 13 October 2004.

[50] Lord Falconer*, Increasing Diversity in the Judiciary*, *ibid* at p. 9.

uncomfortable appearing before the courts believing they are being judged by a society to which they do not belong. The Bar Council of England and Wales had stated in 1996 that in order to ensure public confidence in the judiciary it was important that people should see "people like them, as far as possible, on the bench". In 2005 Lord Falconer expressed the opinion that judicial diversity would: "assure the public that the judicial office holders have a real understanding of the problems facing people from all sectors of society with whom they come into contact".[51] Later that year he stated: "We will not continue to have judges who carry the confidence of their communities unless we increase their diversity".[52]

The Feenan Report also found that the inclusion of more women would enhance confidence in the judiciary. As one consultee stated: "The majority of judges here are men and quite a large proportion of people using the courts are women and I think it would increase the court users' confidence if there was a broader cross-section of the community who actually were involved in judicial office".[53]

Different voices: Many also consider that it is desirable that different voices should be heard in the market place of judicial ideas. Sir Sidney Kentridge, when addressing the issue of diversity in a court of final appeal, with particular reference to a Constitutional Court said: "Diversity in a final court of appeal is in my view a good in itself. This does not mean that a woman judge on the panel or a judge from a different ethnic background will necessarily decide a case differently from a white male judge. But their presence could enrich the court".[54] A senior judge also felt that it would be beneficial to have more female experience on the Bench. Sir Brian Kerr held the view that he would welcome the contribution of women: "I have just finished a case in which I would have liked to have had the comments of a woman on the case".[55]

A broader bench was also seen by the Judges' Council as beneficial, particularly at a stage when the courts are likely to find themselves increasingly concerned with sensitive issues such as those affecting females, such as abortion, the status of embryos and stem cell research, and issues primarily affecting ethnic minorities such as racial discrimination. "The court is not of course a representative forum, but, nevertheless, the judiciary needs to be more diverse so that a wider range of experience can be drawn upon".[56]

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[51] Lord Falconer, *Increasing the diversity of the Judici*ary 13 July 2005.
[52] Lord Falconer, *Increasing judicial diversity: the next steps Commission for Judicial Appointments,* Millbank Tower, London 2 November 2005.
[53] D. Feenan, *supra* at fn.40 at p.60.
[54] S. Kentridge, *The High Court: Selecting the Judges,* Cambridge Law Journal 62 (1) March 2003 55 at p.60.
[55] D. Feenan, *supra* at fn.40 at p.59.
[56] See the Council's response to the Consultation Papers on Constitutional reform. 17 Jan 2005: Column 590.

Utilitarian and Quality: A further justification is the utilitarian argument which focuses on the loss of potential judicial talent through the absence of well-qualified lawyers from non-traditional backgrounds. Diversity represents a prudent use of human resources, as society should not lose the intellectual capability of so much of their population. Baroness Ashton explains: "The critical point about why diversity is relevant now is that we are losing out on talent. We have hugely talented people who are simply not coming forward. We want to see them do so".[57]

In all areas of life, increased diversity has also increased quality. A country that fails to develop, recognise and promote the skills of 50 per cent of its population is not maximising on its talent. This also applies to the judiciary. A country in which you are much more likely to become a judge, if you are a man rather than a woman, is losing out on a whole range of people who have potential to become judges.[58]

Equity: The equity principle considers that it is wrong in a democratic society for an authority, such as that afforded to the judiciary, to be wielded by an unrepresentative section of the population. The argument is that all properly qualified and suitable candidates should have a fair opportunity and an equal chance of appointment and of being considered impartially.[59] The principle of equity requires that women have an equal opportunity to participate and that their absence undermines the democratic legitimacy of those bodies.[60]

Encourage More Women to Apply: It is also argued that greater diversity enables women and black and minority ethnic (BME) practitioners to act as role models for new entrants to the profession.[61] Increasing the number of women in the judiciary may make such appointments a 'more common aspiration' and serve as role models for other females. In the Feenan Report a number of female barristers, solicitors and judges referred to this factor. One female judicial respondent said: "I think it would lead to more confidence and it would lead to more applications".[62]

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[57] Baroness Ashton of Upholland 18 Oct 2004 Col. 631 http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo041018/text/41018-31.htm

[58] This argument also applies of course to Black and Minority Ethnic groups (BME).

[59] B. Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?* Public Law, 2001, 489 at p. 490.

[60] K. Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, (2003) 11 Feminist Legal Studies 1 at p.2.

[61] Mrs. Justice Dobbs, *Diversity in the Judiciary* Lecture Queen Mary, University of London 17 October 2007 http://www.judiciary.gov.uk/docs/speeches/diversity_judiciary_171007.pdf

[62] D. Feenan, *supra* at fn.40 at p.61.

5. 2 Diversity – The Facts

The attention focused on the composition of the judiciary is in fact well warranted. Consideration of the statistics reveals the extent to which the judiciary remains the preserve of the white male barrister. Women and those from BME are largely excluded from the ranks of the higher judiciary, despite the fact that over the past ten years their participation in both branches of the law has increased dramatically.[63]

In Northern Ireland, though women make up over half the population, some 51%,[64] they comprise only a mere 21% of judicial office holders.[65] There are no female judges in the High Court and it is not until you view the statistics for the County Court, that their actual presence becomes evident.[66] The Lord Chief Justice of Northern Ireland, Sir Brian Kerr has acknowledged the issue when he stated: "we do have a problem in relation to the under-representation of women".[67]

The situation in England and Wales is not much better, there is only one female in the House of Lords, and as McGlynn points out,[68] the very name of the UK's most senior court, *"is suggestive of exclusively male membership".* Prior to Dame Brenda Hale's appointment, the most senior female judge in the UK was a Head of Division, and since her retirement, there are no female Heads of Division.[69] As of April 2007, there are 3 female Lord Justices of Appeal, but this is just 8.33% of that category. There are 10 High Court Judges but again this is just less than 10%. It is only when you look at the numbers in the lower courts that the numbers marginally improve.

Taking these details about the judiciary in England and Wales, it highlights the fact that in the most senior judicial offices, those for whom the law-making function of the judiciary is most relevant, there are only 14 women.

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[63] http://www.judiciary.gov.uk/keyfacts/statistics/index.htm.

[64] Gender Equality Unit, *Gender Matters: A Consultation Document*, Office of the First Minister and Deputy First Minister, Northern Ireland, 2004, Annex 3. The 2001 Census indicates that the number of females in Northern Ireland was 863,818 and the number of males was 821,449. See the Northern Ireland Census http://www.nicensus2001.gov.uk/nica/public/index.html

[65] *Equity Monitoring of the Judiciary in Northern Ireland and Recruitment Schemes*, NIJAC October 2007.

[66] There they make up 25% of the County Court numbers. See Feenan, *supra* at fn.40 at p.16.

[67] Minutes of Evidence, Select Committee on Constitutional Reform Bill, United Kingdom Parliament, 6 May 2004, cl.1020.

[68] C. McGlynn, *Judging Women Differently: Gender, The Judiciary and Reform,* in *Feminist Perspectives on Public Law*. Chapter 5 at p.88.

[69] In 1999 Dame Elizabeth Butler-Sloss was appointed President of the Family Division. When she was first appointed to the Court of Appeal she had to take the same judicial title as a man, as The Supreme Court Act 1981, states that "'The ordinary judges of the Court of Appeal…. shall be styled 'Lords Justices of Appeal.'" Barristers referred to her as 'My Lady, Lord Justice Butler-Sloss'.

The situation appears to be better in the Republic of Ireland where one in five judges or 21% are women.[70] However, these figures bear no relation to the gender balance in the population,[71] or to the substantial numbers of females that have been entering and practising in the profession for some time.[72] In Australia there have been continuing calls for the appointment of more women to the Bench.[73] In other jurisdictions such as Canada, 26% of the federal judiciary are women; and one-third of judges are women at provincial level. In Finland, 46% of judges are women.[74]

Recent research, undertaken by the European Union Social Affairs Commission found that in: Italy, France and Spain (despite the fact that women now make up half the judges in these countries) - the career progression of the female was much slower. The expectations and ambitions of the female judge were centred on the next highest level of the judiciary, in contrast to the male who frequently targeted even higher levels as their ambition. The Research also reported that women considered family responsibilities as reasons for not wanting promotion.[75]

In jurisdictions where females have reached the higher ranks of their profession, they have been the exception. For example, in New Zealand the first and only female judge to sit as a member of the Supreme Court is the Chief Justice, Dame Sian Elias. The Canadian Supreme Court (Chief Justice Beverley McLachlin) and the Supreme Court of Israel (Chief Justice Dorit Beinisch) are also led by women.[76]

The under-representation of women on the bench is, as one survey has found, a global phenomenon. Preliminary results issued by the International Bar Association have concluded that less than a quarter of judges around the world are women.[77] At an international level, Baroness Rosalyn Higgins who was

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[70] I. Bacik, C. Costello& E. Drew, *Gender inJustice*, Trinity College, Dublin, 2003 http://www.tcd.ie/Law/WomeninLaw.html#About%20the%20Project.

[71] The 2006 Census Report states that the female population is 2,118,677, the male population is 2,121,171. See http://www.cso.ie/census/.

[72] It was found that two-thirds of all full-time undergraduate enrolments in Law at university nationally (66%) are now female. Also women have made up half of all Law enrolments since the mid-1980s and more than 30 per cent since the mid-1970s. In practice, 39% of solicitors and barristers are women. See I. Bacik et. al., *supra* at fn.70.

[73] In 1999 the Australian Women Lawyers Association issued a public criticism of the virtual absence of women judges in the higher federal courts. Australian Attorney-General's Department, Judicial appointments – procedure and criteria, AGPS Canberra 1993, the Australian Law Reform Commission 69, Chapter 9 and *Solicitors Support Call for More Women Judges* Law Institute of Victoria, 25 March 1999.

[74] I Bacik et. al., Drew, *supra* at fn.70.

[75] NIJAC *Survey of Views about Judicial Appointment* 2007.

[76] E. Salzberger, University of Haifa, *Judicial activism and the debate about judicial imperialism in Israel: Possible lessons for other jurisdictions,* Conference paper delivered at *Exploring the Limits of a Judge's Power,* School of Law, Queen's University Belfast Annual Conference 4-5 April 2008.

[77] Taking cultural, social, educational and temporal factors into account, the survey said developing nations "may be doing better than developed nations with respect to women in the

elected President of the International Court of Justice in 2006 is the only female judge to be appointed to the Court.[78] The situation in the European Court of Human Rights is marginally better; of the 49 judges sitting on the Court less than a third are women.[79]

6. Why the Paucity of Female Judges?

Taking into consideration the statistics concerning gender imbalance and judicial appointments, the obvious question is why the paucity of female judges? In the UK, the traditional response has been similar to that given by a former Lord Chancellor, Lord Mackay, namely that the composition of the bench is entirely dependent on the composition of the legal profession in the age groups with the necessary degree of seniority.[80] The current judiciary can therefore be described as a reflection of those who entered the legal profession approximately 15 to 30 years ago, when women were a minority and "as more women progress through the profession, it is to be expected that the numbers of women within the judiciary will increase".[81]

This lassiez-faire, 'filter-up' or 'trickle-up'[82] attitude has its critics. The argument that history can be used as justification for the very low numbers of women judges is considered not sustainable. Studies that have been undertaken to investigate this issue show that women were disadvantaged at the Bar and in the judiciary with the result that they were not succeeding as they should.[83] In particular, one study showed that despite the large influx of women called to the Bar in the 1970's they were not as readily selected as their male counterparts and that other sources discriminated against them indirectly.[84] One study also found that women take longer to be appointed in terms of both age and experience,[85] and women, if and when appointed were better qualified and had more experience than male barristers appointed to same post. These reports underscore the fact that women have been entering and remaining within the

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judiciary". In countries such as Kenya, Uganda and Brazil, more than 20% of the judiciary was made up of women. In continental Europe, only the UK, Northern Ireland and the Republic of Ireland recorded less than 20%. *The Law Society Gazette,* 95/48 16 Dec 1998 at p.6.

[78] http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1.

[79] http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Court/.

[80] *The Law Society Gazette,* 39 30 Oct. 1991 at p.7.

[81] Lord Mackay, NLJ 145 1995 at p.514.

[82] D. Malleson & F. Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office,* at p.4.

[83] TMS Consultants, *Without Prejudice? Sex, Equality at the Bar and in the Judiciary,* 1992.

[84] 14% of barristers with 15 years experience were women yet only 6% of QC's were women. LCD 1998.

[85] The average age on appointment for men was 45.3 and for women 46.7. The average length of call on appointment for recorders was almost 21 years, with men averaging 20.8 years and women at 22.7, averaging at two more years' post-qualification experience than men. Law Society commissioned survey. *The Law Society Gazette,* 19 22 May 91 at p.9.

legal profession in large numbers for a number of years, without the 'trickle-up' that had been projected.

Other research conducted in England and Wales, the Republic of Ireland and recently in Northern Ireland, has identified a number of common concerns.[86] In particular: the lack of openness, the continuing role of patronage, the dominance of an elite group of chambers and the need to be 'known' in order to be appointed. All of these were identified as weaknesses in the processes and a deterrent to applications from under-represented groups.

Dissatisfaction had centred on the consultation process, in which the views of judges and senior lawyers are sought about the suitability of individual candidates. It was believed that this system unfairly disadvantaged those lawyers outside an "inner elite and led to a system of self-perpetuation". One respondent also highlighted the difficulties faced by those whose work took them to a variety of courts, such as arbitration, leaving them less visible to the consultee judges. This was a particular problem for females as it was felt that women tend to get channelled into certain specialised areas of the law. This may include office-based areas such as conveyancing, probate, matrimonial and family law. These areas are neither as profitable nor as high profile as some of the cases in the more male-dominated, court-centred areas of criminal law. As a result, women will not get the same exposure as their male peers, (either in the courts, or in the media), nor will they appear as financially successful, working as they do in the less prosperous sector of the law. Selection for the bench is taken from these legal personnel, and those with the higher profile. A recent survey undertaken by the NIJAC has reported that there are significant gender differences in work areas, with two areas in particular, child Law and matrimonial, being more frequently reported by females than males.[87]

Not surprisingly perhaps, the greatest obstacle to women's career progression was the problem of balancing work with the needs of their families. The difficulty of achieving a balance of family life with the ethos of the long working hours that exists in the arena of legal practice had a particular impact upon women who have the predominate caring role.[88]

Another suggested that women lacked confidence in their abilities, which inhibited them from applying for silk or judicial office. Lord Irvine had similarly attributed low application rates to women undervaluing their talents. Addressing the Association of Women Lawyers, he said that the lack of confidence that women had in themselves was 'robbing him of good candidates': "There will never be more women judges unless more women lawyers put themselves forward for appointment".[89]

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[86] K. Malleson and F. Banda, *supra* at fn.82.at p.23 and I. Bacik et. al., *supra* at fn.70.
[87] NIJAC *Survey of Views about Judicial Appointment* 2007 Figs. 2.4 and 2.5.
[88] I. Bacik et. al., *supra* at fn.70.
[89] 11 Feb. 1998.

Similar findings as to the barriers to women's career progression were identified in the Republic of Ireland's investigation into this issue.[90] With many women believing that an 'old boys club' still exists within the professions, and they feel excluded from sporting and social networks that are highly influential in furthering a legal career.

One of the most recent reports undertaken for the Department of Constitutional Affairs (DCA) in January 2006, *Judicial Diversity: Findings of a Consultation with Barristers, Solicitors and Judges,*[91] found that the majority of their respondents' reasons for not applying was because of passive rather than active barriers. They reported the fact that a great number of respondents (particularly solicitors) had simply never considered the judiciary as a possible career route. It appeared that people simply do not know enough about the judiciary, and they were generally not making the effort to find out more, rather than actively avoiding it as a career. Those that did apply found the application procedure discouraging, particularly the initial application form, which was considered time consuming and daunting.

Evidence of these passive barriers was also found by the recent NIJAC sponsored research.[92] They identified that there was a 'considerable' lack of knowledge of how the appointments process operated mainly among solicitors and females. Females in particular were reported to have found certain aspects of the appointments process off-putting such as: the interview process, the requirement to identify consultees, and as in England and Wales, the application forms. Ignorance of the work involved across the range of judicial offices was also found particularly among solicitors.

The NIJAC Survey also reported on factors believed to contribute to a successful judicial appointment. Most respondents believed that being a senior counsel; having higher court experience; experience as a deputy or part-time judicial office holder; being a barrister and being on a Government civil panel or engaged as Prosecution Counsel would have a positive influence. The respondents also considered that being known to the senior judiciary; being in the right social networks and being aged over 41 and working in the Greater Belfast area would benefit a candidate. Of note is the fact that 38% of solicitors thought that being a solicitor would have a negative influence, and that 68% of females thought that being male would have a positive influence.[93]

7. Addressing the Issue – Suggested Solutions

[90] I. Bacik, et. al., *supra* at fn.70.
[91] http://www.dca.gov.uk/publications/reports_reviews/jd_cbsj06.pdf
[92] NIJAC *Survey of Views about Judicial Appointment* 2007.
[93] *Ibid.*

As the complacent 'filter-up' attitude, is an inadequate response to the problem, one Report undertaken specifically to address gender and the judiciary and undertaken in Northern Ireland, has produced a number of recommendations.[94]

Work Allocation: A primary recommendation was that the Bar Council and the Law Society should stress that work must be distributed without gender discrimination. This would enable women to gain experience outside the traditional areas of family and conveyancing law and become more visible in areas such as the Crown Court. A lot of emphasis was further placed by the Report on capacity building initiatives; these would involve tasks such as the newly-established Commission liaising with the academic institutions and professional bodies with a view to encouraging women to consider appointment to Silk and judicial office. This would be something similar to Lord Chancellor Irvine's, 'don't be shy apply' campaign that was initiated to actively encourage candidates from under-represented groups.

It was also suggested that the Commission should consider conducting a pilot scheme of judicial work-shadowing for junior barristers and solicitors and that the Bar Council and the Law Society make provision for mentoring and confidential careers advice.[95]

Part of NIJAC's duties is to embark on "a programme of action" to ensure that a range of persons are available for consideration for judicial appointment.[96] One method of achieving this, as suggested by Sir Brian Kerr, is to eliminate certain perceived chill factors.[97] The Feenan Report recommends that there should be gender-neutral language throughout the process of judicial appointments. They suggest for example, that the title of the Office of 'Lord Chief Justice' should be replaced with the title of 'Chief Justice', that the terms 'Master' and 'Chairman' should be replaced with gender-neutral terms.[98]

To address the apparent ignorance of the judicial appointment process and criteria required, many of the recommendations centred on ensuring that all applicants were provided with "the right information, in the right way, and at the right time". The criteria for appointment to judicial office should be subject to stricter equality proofing to ensure that they do not directly or indirectly discriminate against women. Moreover a method of targeting women such as that which was introduced to address religious imbalance (the company particularly welcomes applications from…) in the workplace was also suggested.
It was also recommended that the Commission should conduct a review every five years of the gender profile of applications and appointments to judicial office

[94] D. Feenan, *supra* at fn.40 at pp. 68-88.
[95] *Ibid* at p.69.
[96] http://www.NIJAC.org/Live/NIJAC_Site.htm
[97] Rt. Hon. Sir Brian Kerr, QC, Examination of Witnesses (Questions 1007 - 1019) 6 May 2004.
[98] D. Feenan, *supra* at fn.40 at p.80.

and that the Court Service should, in order to monitor trends, retain data on the gender of those who seek application forms for judicial office.

Target Applicants Early: Findings from a 2006 DCA Report into Judicial Diversity,[99] further identified that many of the perceived problems with the judiciary were seen to apply to the legal profession as a whole and that there was discrimination against females and ethnic minorities from the outset. The Report considered that unless these issues were resolved, the pool of applicants for the judiciary would never be wide enough.

It was recommended that there was a need to encourage people to think of the judiciary as a career option at an earlier stage of their legal career, not just when they reached eligibility. The DCA Report also identified a need for raising awareness about what the judicial roles actually entailed, as well as greater transparency around the application procedure. Respondents had suggested that they would welcome further information and encouragement from the DCA, for example, through regular reminder letters and from more road shows. Work shadowing was seen to be a positive measure; some even felt that it should be made a compulsory part of legal training.[100]

The NIJAC Survey 2007 has recently identified the top 5 measures which might encourage females to apply for judicial office or for higher judicial office. The top factors given by half the respondents were: better guidance/training on the competence requirements (50%); flexible working options; practical information about the nature of the work; better guidance/training on the appointments process and providing the option of part-time salaried posts. Of note, only a small proportion of respondents identified changes related to the appointments process, or changes to the eligibility criteria. [101]

This information could be used by NIJAC to encourage more females to apply for judicial appointments. They could also utilise and emphasise the data from the survey which identified the aspects of the judicial office which appealed most to female respondents. The Survey had found that for the female respondents the most appealing aspect of the judicial office was the interesting work, (63%). Other highly appealing aspects of the job were the pension arrangements (54%), the public service/making a difference element of the job (49%) and the salary (43%). Other factors which bore some appeal were the job security, the work life balance and the change of career element of the appointment process. Of note was the fact that the status and prestige of the office was not highly rated by either the male or the female respondents.

[99] *Supra* at fn. 91.
[100] *Supra* at fn. 91.
[101] NIJAC *Survey of Views about Judicial Appointment* 2007 Table 3.6.

Effort could also be paid to addressing what was considered by the female respondents as the unappealing aspects of the judicial office.[102] The most unappealing aspect was found to be the isolated nature of the judicial office (49%); this was followed by the increased public profile and scrutiny (41%) and the judicial establishment and culture (39%). For the female respondent the security considerations for the and family and the actual disruption to family and private life were also a significantly unappealing aspect of the job (37%). Other aspects that were considered notably unappealing were the increased work load, the peripatetic nature of some of the judicial offices and the loss of flexibility. It is noteworthy that the reduction in earnings and the loss of the self employed status were considered a more unappealing aspect of the job to the male respondents than the female respondents.

Eligibility: As for eligibility the Feenan Report was recommended that there should be no minimum period of standing for appointment to judicial office and the Appointments Commission should give consideration to opening up the judicial office to non-practising barristers and solicitors and academics or legal executives.[103]

The Appointment Process: With regard to the actual appointments process, it was suggested by the Feenan Report that new methods should be introduced which would be based on best practice in human resource selection methods that would test competency across a range of skills and abilities suitable for the adjudicative role. Facilitating this would be the introduction of Assessment Centres for applications to judicial office. It was also recommended that the automatic consultation procedure should be abolished and replaced with a process of nominated referees.

A practical recommendation of the Feenan Report was the suggestion that the Court Service should explore the possibility of extending part-time court sittings, and also a range of other adjustments including annual hours contracts; flexible rostering; term-time working; school-time working; voluntary reduced working; secondments; and alternative fixed-work patterns such as job sharing. These recommendations would enable women to continue with their careers and maintain their responsibilities as the primary carer.[104]

Other Suggestions: Procedures have also been suggested that would provide an opportunity to demonstrate merit. These include measures that have been

[102] *Ibid.* Table 3.13.
[103] D. Feenan, *supra* at fn.40 at p.71.
[104] *Ibid* at pp. 75-78.

used elsewhere such as competency-based assessment,[105] which will work towards a system that most effectively appoints on the basis of merit.[106] The Scottish Judicial Appointments Board is looking to supplement the traditional interview procedures. Their proposals include the establishment of one-day assessment centres, similar to those piloted in England and Wales, where case studies and role play form part of the tasks given to the candidates.[107] Other measures considered are psychometric testing and in-tray exercises. The latter is where applicants are given a variety of paperwork which members of the judiciary may have to deal with daily and are assessed on how they approach the task.[108]

The Creation and Use of Appointments Commissions: One method seen as a means of addressing the problem of diversity within a jurisdiction is to establish a form of an independent appointments commission. The increasing number of appointment commissions being created worldwide is due to a number of factors. Increasingly the judiciary has been required to adjudicate on more cases; this in turn has necessitated the need for more judges. Experiences of other jurisdictions has also indicated a trend whereby substantial increase in judicial activism has been followed by calls to secure judicial appointments from partisan political pressure, while at the same time making them more open and accountable.[109] The action taken to satiate these requirements is to replace judicial elections and executive appointment by some form of commission.[110] This tendency follows recommendations from international standards such as the Tokyo Principles,[111] which recommends the actual appointment of a Judicial Services Commission or the adoption of a procedure of consultation with organised associations of lawyers as a means of safeguarding the proper appointment of judges.

With regard to diversity, the creation of an appointments commission is considered as a means of opening up the bench to candidates who may in the past not have thought of applying for a judicial position. Research has also shown that applicants and potential applicants for judicial appointment would largely support the idea of an appointments commission: “I would be in favour of

[105] “One female solicitor referred to experience of competence-based assessment in the civil service. ‘I see that competence-based interviewing works and…if everybody was aware of what the competencies were and how exactly they were going to be assessed against those competencies, I think that could only be an advantage.’” D. Feenan, at p.74.
[106] Sir Colin Campbell, *Commission Is First Step To Reform,* LSG 101.4 (14) 29 January 2004.
[107] This follows a recommendation of the Peach Report and those made by the Joint Working Party. Report of the Joint Working Party on Equal Opportunities in Judicial Appointments and Silk, September 1999.
[108] See http://www.judicialappointmentsscotland.gov.uk/judicial/files/Criteria.pdf
[109] K. Malleson, *The New Judiciary,* at p.127.
[110] C. Thomas and K. Malleson, *Judicial Appointments Commissions: The European and North American Experience and the Possible Implications for the United Kingdom.* No.6/97 at p.16.
[111] Art.10 (d). Drawn up at the LAWASIA Seminar in Tokyo in July 1982.

an appointment commission …If it would be part of the process to make it more public and less mysterious, then it should be encouraged".[112]

The establishment of a JAC is also seen as a way of addressing certain concerns such as the problem of a 'self-replicating' judiciary. This identified problem is where like-appoint-like (for example, a white middle class, middle aged male will appoint a person of similar characteristics) or cloning. It is considered that an appointment commission, composed of various members, is less likely to appoint a judge of the 'same mould', thus ensuring that the judicial body is more representative. Linked to this issue, the Review of the Criminal Justice in Northern Ireland considered that the involvement of lay persons would be a way of demonstrating that every effort was being made to open up the appointment process to suitable candidates from as wide as spectrum as possible.[113]

8. The Diversity Requirement

What may assist most in redrawing the diversity balance on the bench is the fact that in common with most appointment commissions worldwide,[114] the Judicial Appointments Commission for England and Wales has a diversity requirement. The Constitutional Reform Act 2005 obliges the Commission to "have regard to the need to encourage diversity in the range of persons available for selection for appointments".[115] The incorporation of such a clause was considered beneficial as it was found that the judicial appointments commissions in other countries that were more successful in broadening the diversity of the judiciary "are those which have been specifically tasked with this aim and have the political backing to achieve it".[116] Likewise the non-statutory Judicial Appointments Board of Scotland is required to consider ways of recruiting a judiciary which is as representative as possible of the communities which they serve.[117] In a similar vein, the Northern Ireland Judicial Appointments Commission is charged with securing a judiciary that is "reflective of the community".[118]

8.1 Reflective or Representativness?

[112] K. Malleson and F. Banda, *supra* at fn. 82 at p.27.
[113] Paras.6.101 and 6.104.
[114] See K. Malleson's submission Para.340. Chapter 4: *Judicial Appointments And Discipline (Part 3 Of The Bill) Select Committee on Constitutional Reform Bill First Report.*
[115] Sec. 64 Constitutional Reform Act 2005 http://www.opsi.gov.uk/acts/acts2005/50004--f.htm#66.
[116] *Supra* at fn.114.
[117] http://www.judicialappointmentsscotland.gov.uk/judicial/files/Annual%20Report%202003-04.pdf
[118] http://www.NIJAC.org/Live/NIJAC_Site.htm.

It is of note that the Northern Ireland Judicial Appointments Commission has a different focus to the other appointment commissions in the UK in that they are charged with securing a judiciary that is "reflective of the community".[119] Northern Ireland is not unique in this particular requirement, in New Zealand one of the primary criteria for judicial appointment is "reflection of society". This requires that the successful candidate is "a person who is aware of, and sensitive to, the diversity of modern New Zealand society". In that jurisdiction, it is considered crucial that the judiciary is composed of those with experience of the community of which the court is part and can demonstrate their social awareness.[120] In Ontario, the Judicial Appointments Advisory Committee's statutory criteria require recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments.[121] Not surprisingly, in South Africa the composition of the Bench was of great consideration and the Constitution stipulates that "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed".[122] On an international level there has been an emergence of an approach which advocates an inclusionary principle. This has been termed as the principle of fair reflection of society by the judiciary and is reflected in Art.2.13 of the Montreal Universal Declaration on the Independence of Justice, which states that: "The process and standards of judicial selection shall give due consideration to insuring a fair reflection by the judiciary of the society in all its aspects".[123]

8.2 Why have these jurisdictions opted for the requirement of reflectivness?

Why have these jurisdictions opted for the requirement of reflectivness and why have they preferred this in preference to representativness? In Northern Ireland, considering the concerns over the lack of representativness of the judiciary in the past, it was hardly surprising that this issue arose in the Review's recommendations. Although merit and the ability to do the job, was continually emphasised by the Review as the key criteria in determining appointments, they did recognise that the extent to which the composition of the judiciary reflects the

[119] The Commission must at all times engage in a programme of action which it is designed to secure "that appointments to listed judicial offices are such that those holding such offices are reflective of the community in Northern Ireland" Section 3(10) Justice (Northern Ireland) Act 2004, http://www.opsi.gov.uk/acts/acts2004/40004--a.htm#1.
[120] The Report of the Royal Commission on the Courts in 1978 put the point as the need for "a good knowledge, acquired by experience, of New Zealand life, customs and values". http://www.justice.govt.nz/pubs/reports/2004/judicial-appointmetns/#30.
[121] *Annual Report For 2003 Judicial Appointments Advisory Committee* at p.10 http://www.ontariocourts.on.ca/judicial_appointments/annualreport2003.pdf.
[122] Art. 174(2).
[123] S. Shetreet, *Who Will Judge: Reflections on the Process and Standards of Judicial Selection,* Australian Law Journal Vol.61. Dec. 1987 766 at p.776.

society to which it serves is a confidence issue and has implications for its perceived legitimacy.[124]

The Review favoured the word 'reflective' as opposed to 'representative' when referring to this topic. Their reason for this is that they considered that when a judge carries out his/her function, s/he does not represent a particular section of society, instead s/he should apply objective and impartial consideration to the facts of the cases before them, regardless of the background of the parties. Moreover if a judge were to believe that a factor contributing to his/her appointment was the extent to which they represented one part of society, this would, concludes the Review, have serious implications on his/her impartiality.[125] Those undertaking the Review considered that it was desirable that there should be greater correspondence between the composition of the North's population and that of its judiciary as it may go some way in redressing the perceived and actual imbalance that previously tainted the image of the bench. The use of the word 'reflective' was the most suitable way to address this without the appearance of the judiciary speaking or acting for one particular element of society.

It will be of interest whether the choice of language, whether it is reflective or representative will make a difference in the objective it is trying to achieve. It is of note that one English High Court judge from a BME background approved of the former term and its aims. "Whilst one can see historical reasons for the need to reflect the community in Northern Ireland, there are surely, in our multicultural society, similar imperatives?"[126]

[124] "The larger the field from which members of the judiciary is chosen, and the more demonstrable the commitment to equality of opportunity, the greater the confidence that the best possible candidates are being appointed".
[125] The Review of the Criminal Justice System of Northern Ireland, paras. 6.85-7.
[126] Mrs. Justice Dobbs, *Diversity in the Judiciary* Lecture Queen Mary, University of London 17 October 2007 http://www.judiciary.gov.uk/docs/speeches/diversity_judiciary_171007.pdf.

Part 3: Interview Findings and Methodology

1. Status and Sources

This appendix covers findings which have been extracted from a variety of interviews and focus groups. The sources for these findings are:

> **Interviews** with 31 individuals (around 36 hours) which covers a wide range of view - applicants, non-applicants, chairs, non-interested in judicial role, etc. from both solicitors and barristers. The solicitors interviewed were from Belfast, L'Derry, Ballymena, Dungannon and Strabane. Email communications were also used with two other individuals.
>
> **Focus groups** with:
>
> - newly-qualified female solicitors - 4
> - mixed gender mid-level and senior solicitors - 7
> - final year law students - 8
> - mixed senior barristers - 8
> - young female barristers - 7
> - female judicial office holders - 4

This comprises a total sample of 71 individuals.

The quotations have been – where necessary – edited to remove any indication of source. Editing of quotations has also taken place to reduce redundancy and improve readability.

2. Religion

One of our questions related to whether religion might affect success in judicial applications. All of our informants suggested that religion was not relevant. For example, one solicitor suggested:

> "Religion? No not at all – not any more – in the past, yes it was highly relevant, but I would like to think that that has been consigned to the past."

And another:

> "Religion is not a problem. In Derry I would never think about what religion a magistrate is."

This was the tenor of all replies. One public sector solicitor however suggested that although class and religion were once connected, and there was now a disconnection, she felt that class remained important.

At the student level, too, none of our respondents felt that religion was a factor in judicial appointments.

3. Structural Changes/Gender in NI Legal Profession

3.1 Solicitors

The economic situation in Northern Ireland post-peace process has affected the structure of firms, particularly in the commercial sector. This has led to larger firms, with more focused expertise. In the past, Northern Ireland was significant for the general purpose nature of practice, but we clearly saw in our interviews that specialism was becoming more the norm. We deal with this below and how it impacts upon potential application for judicial roles.

A second factor which was clear to us was the increasing number of women entering the profession, where there is a 'bulge' at the lower end of the profession. There were two views on this. First, that it was welcomed generally and was reflective of the other professional fields. One commercial solicitor suggested:

> "More women in law – I don't think that is a problem. I have to stop every so often and pinch myself and recognise that all the people at a meeting are women – that is very healthy. I am not a rampant feminist but I am glad to see a movement – I can now speak to a female bank manager … but would have as good a relationship with male colleagues."

The counter view was put that, first:

> "In future it is going to cause horrendous problems in terms of maternity leave and it has concerned me when the best candidate is, yet again, the bright young female. It is refreshing when you sometimes get the bright young male."

and that possibly the feminisation of practice would lead to a fall in income or that 'balance' would be lost:

> "I have never had any difficulty [with my gender] – there were 75 in the class and 9 women. Now we have got to a situation with 90% women and 10% men (I exaggerate for effect) and don't tell me that that is good. Every profession needs balance – now we have got to the stage with medicine, law and teaching where you don't get men going into them and that is a disaster in my opinion. "

Why has this rise in female representation come about? Partly because female students get the best marks at University, but also because they are most effective at interview. One commercial partner who recruited suggested:

> "In terms of the style of person [our firm] looks for, the applications we get for our training contract all tend to be very similar in terms of academic qualifications. We expect they are going to know the basics when we get them. They are all going to reach a certain threshold. So that's assumed that they have that. So what we look for is someone who is able to hold their own, be good with clients, be someone you could leave in a room with a client and they would be able to hold a conversation. We don't look for real academia here and I suppose it is hard to know – but you know when you come across it. I would interview and I suppose it is people who would be perceptive, or conduct themselves well, taking into account that they are going to be nervous. And for some reason it is the girls who come across better than the boys.
>
> [Interviewer: Team players?] Yes, that is in part what we look for. The girls are always or generally better prepared. They come in; they know what is expected in a commercial firm; they ask questions. I am sure that the boys are just as keen but they are not as responsive. You ask them a question and with the girls you nearly need to stop them. I don't know why that is or if it is a recent trend but they definitely are more able to cope with the interview situation than the boys – in general, of course. We have brought on a male trainee this year and last year and they have been good but that would be more unusual."

Another recruiter of young women blamed the young males themselves:

> "What's putting boys off doing law? [Interviewer: I'm asking you] I think you have to look at the reasons as to why there is under representation – at the top it is because of discrimination – at the bottom it is because boys are underachieving, but I don't think it is discrimination – it is underachieving which is different …"

But that seems a bit harsh - recruiters are looking for skills (verbal, social) which some might suggest are more broadly feminine rather than male.

None of the female solicitors who were interviewed felt that they were in any way affected by their gender or had been held back by male or female colleagues. This included women who had been in practice for 30 years. The general view was that being a woman was not problematic except for the usual family pressures:

> **"**I have not been prejudiced in any way being female because I became an equity partner 20 years ago and indeed became a partner when I was

> on maternity leave with my second child. So it has never been a problem – apart from the normal juggling of family and work in whatever career you would pursue. "

However, there were issues about networking where the male solicitor was seen to be at an advantage – golf, rugby not being open to most women. Some firms attempted to encourage young women to find other networking fields.

A noticeable factor in interviews was the notion of 'team players' in solicitors' firms:

> "Being a team player is very important. So much of our work needs to knit together and it is an essential and so you do have to be able to work together. It is an important talent for any lawyer, I think nowadays."

As noted above, team players were looked for when young entrants were being interviewed. We were consistently told that team playing was highly important within the profession – not that responsibility for ones own work was diminished – but that comment and communication between solicitors in a practice was the norm. One partner suggested that team playing was necessary to reach partnership level, which differed from bar attitudes: "In private practice you aim for partnership and it's the team thing. You would be going way off from all the skills of the comfort zone [if you wanted to be a judge]. It's obviously not as big a jump for the bar." In fact, this was an indication that practice in NI still differs from practice in, say, London and the larger provincial English towns. These non-NI solicitors firms have been affected by the culture of 'rise or leave' where each member of a firm competes with other members in income generation and those who fail in competition leave the firm. In that culture (one characterised by 'knives in the back') the primary skill is not team-playing but playing one's cards close to your chest. There may be an element of this in solicitors firms in NI, but it did not manifest itself in any interview we carried out.

There is an assumption that women in solicitors firms are parcelled off into certain areas (family law). In our interviews we did not find any particular evidence of that – quite the contrary: women were doing commercial, personal injury, criminal as well as family. Conveyancing has been seen as one of those feminised areas, and perhaps there is a tendency for this to be something of which women tend to do more. One practitioner in that field suggested that attention to detail (which was not, she – along with other women solicitors – seemed to believe, a male quality) made women particularly good in that area:

> "I happen to think that female lawyers are particularly good at conveyancing work because so much of it is detailed and you have to be careful. I just think that female lawyers happen to be better at that, whilst corporate lawyers are big picture people and detail isn't such an issue."

Expertise which is localised and difficult to transfer to judicial roles may act as a disincentive to apply for judicial roles and we discuss this later. There may be – as indicated by common belief - a gender issue within Northern Ireland solicitors' firms, but this was not found in our interviews. Quite the contrary – women solicitors were consistently briefing counsel in areas which were male-oriented at the bar (see below).

But this does not mean that all is gender-neutral in solicitors' practices in Northern Ireland. In the mixed solicitors' focus group, two participants said that in their firms, the matrimonial work is carried out by women. There was a feeling that this practice was client-driven. Some said that firms would not be keen on men doing matrimonial work because clients prefer female solicitors when dealing with these issues. One said that a female colleague, who specialised in matrimonial law, did not want a male solicitor covering her maternity leave because she thought that she might lose some clients as a result. When asked whether male clients facing similar issues would prefer a male solicitor, there was a feeling that men may not seem to care about the gender of their solicitor but that female clients appeared to want female solicitors to deal with matrimonial/family issues. In the group of recently-qualified female solicitors, one agreed with this and said that women are perceived as more emotionally-intuitive and thus better placed to deal with domestic violence and child contact issues.

One female participant in mixed solicitors focus group said that the 'predominance of women coming through is not filtering through to senior levels of [the] solicitors' profession never mind the judiciary'. Another recently qualified female solicitor commented that a significant number of her female peers did not aspire to be partner as they 'did not want to deal with the hassle' of having to balance family and work commitments. They wanted a more balanced life and for that reason 'they don't even want to get to the level of partner and the judiciary or anything beyond that certainly wouldn't be something they would be thinking about'. One recently-qualified female solicitor suggested that they seemed to want, and be content with, a 'good job to a good level but not seeking to go beyond that'. She said that if women' careers plans have this attitude even before they have qualified then 'you are going to end up almost with a structure like certain parts of the medical profession where there are certain types of medicine that are just completely dominated by men because it's just not female/family-friendly to go into them'.

Another female partner agreed with the pressures:

> "I don't know if it is just based on gender, but you have to be practical about it. At this stage of my career – I am in my mid-30s and have a young family – the number of women who are able to commit the time required to progress their career seems to drop off quite dramatically. It is not because it is pure discrimination but because men are able to commit their time to progression. "

This generally appeared to be the situation in most practices. Women were being employed, were being encouraged to develop, were showing they had the skills needed to achieve very high roles within the profession, but only the dedicated resisted succumbing to the attractions of a balanced family life.

One female solicitor we interviewed came from another part of the UK. She had felt at a disadvantage when first moving over (arriving with a local husband) and the sense of being a geographical outsider has stayed somewhat with her, despite making many contacts in the profession. She did not feel that she was any more disadvantaged in a professional context but was unsure whether her status as an outsider might affect any aspirations to judicial office. We note this here because our main concerns with judicial diversity were with factors such gender and professional knowledge/background. Race was not an issue because the profession in NI remains predominantly – if not totally – white, and nationality was not a major issue because it remains predominantly locally grown. Further, although we are well aware of disability issues, these did not rise in interview. Some of the issues which we did not focus upon in this study may arise in the relatively near future – for example, there appears to be a growing number of solicitors from other countries wishing recognition with the Law Society of Northern Ireland.

3.2 The Bar

The bar has always been a location of intense competition – work of the kind desired (well paid, interesting) can be hard to locate. It is commonly held that the first 3 to 5 years is the period when fall-out occurs as young barristers assess their income and their potential career opportunities. This does not appear to have changed during the past decade or so – despite the increasing investment and rise of litigation in Northern Ireland: there are still too many barristers competing for too little work. As with the solicitors' profession, there is a growing 'bulge' of women at the lower end of the profession.

Interviews with women barristers were strikingly different in tone from those of solicitors. All but one respondent indicated that they felt being female was a distinct disadvantage at the bar. Partly this was due to the briefing tactics of solicitors (below) but also just that women were felt to be their own worst enemies:

> "Women always pull the ladder up behind them. It is a very rare woman who will help another woman. Women are dreadful like that. What you will find is that those men who are uncomfortable with women will pick a woman who they are comfortable with and nurture her and then she is away ahead of the pack."

> "Women not very good at assisting others – I'm not sure why."

> "The women were the most hard on the women who were making it."

The well discussed pressure to work in certain 'female areas' of law was also noted by female barristers:

> "I found as a young female barrister – although I had some contacts – that it was quite difficult to really crack into that field of criminal law where my interests lay."

And that a dismissive attitude towards these female areas was taken by male barristers. Several female interviews reported the notion of 'chick law' as one which was common at the NI bar:

> "Family law is intellectually challenging but viewed as 'chick law' – junior members in solicitors' office are usually given this work. It is viewed as low quality in NI but not England or the Republic."

And that to resist such pressures required a strong will:

> "I made a conscious decision to come out of family work. I was always ambitious ... I was ruthless about the other demands. I planned my pregnancy to ensure that my baby was born in the summer vacation. God was kind and it worked."

Someone with an interest in undertaking public appointments in parallel to working at the bar said of those roles:

> "The bar did not take well to that … I was not encouraged in that … [Interviewer: Above your station?] Exactly, and was I stealing a march on them, and I would have known a lot of senior people in the province then and that was a source … it is a very envious profession – particularly for an able woman."

One interviewee who took the counter view seemed, to the interviewer, to utilise a strategy of ignoring such pressures and concentrating upon her own belief in her abilities:

> "[I] never really thought that I wouldn't get [good work] because I was a woman. I don't think because I am a woman I won't get that work – I know that is a view of some women."

Surprisingly or unsurprisingly, the male view differed. There was an acceptance that the bar was competitive – in interview the phrase 'dog eat dog' was used by

the interviewer and few respondents challenged it too strongly. The view was that male and female had the same skills and abilities. Clearly when work was given to a male barrister he would not stop and consider whether he should offer it instead to the nearest female barrister:

> "I don't think being male intrinsically gives you advantages in being male – there probably are advantages in the work you will be given and how you are viewed by clients – that is not to say that is how it should be, but that is the sad reality – females tend to be sent family work much more than men, and tend not to be able to move away from family work than men. Women who are more interested in doing criminal work can find it difficult – sometimes because of client's preconceptions – there are those who do it but they are the exception rather than the rule. People say the bar is sexist, but the bar is not sexist, it is the people who are sending them the work who are."

We deal with briefing practices below, but there were certainly strong views put that the bar was indeed sexist. One QC complained about an attitude where she was effectively ignored in court:

> "Male colleagues [on the other side] will refer to the submissions of male colleagues. I am the QC but my submissions just get ignored and the judge will allow it. The judge should be saying, what about X's submisison. Male colleagues will just ignore the female. Exclusion is a form of bullying."

And that the bar – being competitive and attracting large personalities – tended to attract alpha male behaviour:

> "Males have male values and devalue female work. Sensitive males are not welcome either. If a judge is badly behaved an alpha male will take that as a challenge .."

One female QC indicated that change would only come when the structure of the bar itself changed:

> "The more female silks there are who establish themselves at the Senior Bar, the easier it will be not only for new female silks to establish themselves, but also for female juniors to feel there is a way for them to progress in their careers and for those females starting at the Bar to have a reasonable chance of a successful career in anything other than family law. For these reasons it is important for able women to remain and make a long term impact at the Senior Bar in a way that it is not for men."

This is certainly an issue for the bar itself, but so far as the research here is concerned, if there is sexist allocation of work or sexist practices, it could affect

the make-up of judicial post holders, since women are unable to effectively compete on work carried out to date.

3.3 Professional Knowledge

The traditional division of professional knowledge between the solicitor and barrister was that the solicitor was effective at client interaction, and collection of materials required (for trial, say) and the general administration of case work. The bar had the three skills of advocacy, knowledge of law and knowledge of procedure. We found that this division was breaking down and that there was a developing expertise within the solicitors' profession which meant that a solicitor's knowledge of relevant law was frequently as good as (and some claimed better than) that of a briefed barrister. The primary reason for this was that of client expectation:

> "Your commercial client will come to you and expect you to know the answers – that is what you are being paid for. It would be a very high value or high value piece of commercial advice before they would not raise an eyebrow at you instructing counsel. I do a lot of corporate support work where there are a lot of employees. I would be expected to advise on what happens to those employees and the best way to go about it. It would not be appreciated if I were to go running to the bar ... Here [in NI] there was a tendency to instruct counsel for everything, but that is weakening. I think solicitors are expected to have expertise in their field and to instruct counsel more for advocacy than for their legal opinion."

Another, in a similar commercial environment stated:

> "I look at the barristers we would use. They are very, very astute professional operators, but I don't get the feeling that we defer to their advice. Clients expect us to give advice without always palming them off and getting a barrister's opinion. I don't know if there has been a shift in the power relationship but I don't feel any less able to give advice than barristers – certainly more senior people yes – but equally we have very senior people in the firm."

All interviewees from the solicitor's side saw this happening, though – of course – this didn't mean that all work was specialist. The practices outside Belfast or smaller practices may have significant specialisms which they felt was attractive to clients, but most also took what work was available where they had the expertise.

Another factor was that there was a movement of solicitors from English firms coming 'home' to NI. These had worked in larger firms and were more likely to

expect to be able to work in similar specialisms to where they had trained. It was pointed out by partners that the locally-produced solicitors were usually every bit as good and knowledgeable as those coming from larger London practices, which is itself perhaps an indication of the expected level from newly qualified solicitors – and that they are able to meet this requirement.

This change in relationship is effectively a change in the power structure between bar and solicitors. It is well known in the literature that the bar has been viewed as the senior side of the profession and in part this has been because of their ability to provide counsel's opinion. If this opinion is no longer always required for even difficult questions, then the status of the barrister must fall. This may feed through into perceptions of the required skills in judicial roles.

One solicitor suggested of the career environment of younger barristers:

> "I think it is a much harsher environment for barristers than it was 10 or 15 years ago. There is a huge casualty rate in the junior bar, because the Legal Aid Commission are slashing fees and many barristers are going to the wall. I think more solicitors are becoming more confident about presenting cases – either because they have to or because they are more confident. I look at the younger bar and see them specialising at a very early stage, even those who entered at my date had a wider case range as opposed to those entering now. They tend to get stuck in one area of law – if at a very early stage you get stuck in one area then it is difficult after 30 years in family law to become a judge in a criminal court. It is different when for the first 10 years you hover around all sorts of courts; then you have expertise that you can fall back on. But now they are being forced to specialise at a much earlier point."

What does the bar offer then if it doesn't offer legal knowledge? It certainly retains the two skills of advocacy and procedural knowledge, if not always a higher appreciation of law:

> "We would view it that we were the ones retaining the specialist knowledge and we were hiring an advocate and that yes some are very good on strategy – some of the judges [*before their appointment*] when I instructed them in [this field], they always brought strategic direction to a case. I would have a full knowledge of what the legislation said and what the legislative regime was and would even have done it ten times but they would have done it 100 times and would have the strategic direction. But in terms of the law that's where you would feel equal and some of the time you would feel that you knew the law better than some of the barristers."

With potential developments in solicitor advocates, even these skills may be challenged by the solicitors' profession.

3.4 Solicitor Advocates

There are currently several solicitor advocates in NI, including one at the QC level. This research did not actively seek to interview these, but there is evidence to suggest that their position is currently fragile (in terms of perceived status) and not too well received by the bar. One solicitor advocate seemed to suggest that while the bar opposed solicitor advocates becoming judges, judges could also be dismissive towards them in court:

> "The bar do not want solicitors on the bench – they may tell you something different – I was at a benchers' dinner – the derisory comments made across the table were terrible – one comment was "I had to work six months for nothing" [*the time a young barrister may have to wait for first payment*] – that was a QC in his sixties … The judiciary have the same view. The fight for solicitor advocates – the comments from the judiciary – barring barristers from appearing with solicitor advocates is indicative of judicial bias. … Solicitors are treated with contempt by the judiciary."

Current possible developments in legislation and legal aid payments may radically increase the number of solicitor advocates – for example, currently legal aid payments will be offered for counsel's opinion even when the solicitor feels that this is unnecessary. A revision of legal aid practice would mean that the solicitor could charge the legal aid budget for providing that opinion and remove the need to approach counsel at all. Such a move would increase the pressure upon the bar's income. It could also lead to further erosion in its expertise as the solicitor's profession gains advocacy and procedural expertise, the two remaining core skills possessed predominantly by the bar at present.

3.5 Briefing and 'Sisterhood'

We were struck by briefing practices whereby solicitors pass work to the individual barrister. In a bar library system, work goes directly to an individual rather than to an individual via a chamber's clerk. In the latter system, the clerk has the possibility to move work from a desired barrister to another, perhaps more junior (female) member of chambers. There may need to be persuasion from the clerk to encourage a solicitor to brief a replacement, but it is relatively commonly done. In Northern Ireland, work which cannot be taken on is passed by the solicitor directly to a competitor. The solicitor is thus sole locator of counsel.

But this was not what struck us as unusual, rather that there appeared to be a gender factor at work and that there was very little indication of a 'sisterhood' in

the profession whereby female solicitors support female barristers. Women appear more likely to brief male barristers, except in family law where they brief female barristers. One solicitor in the west of the province noted:

> "Female solicitors do not tend to instruct female barristers in non-matrimonial work. I don't use any female barristers in litigation and never have. I only use them for them for family law. I don't know. It's probably an ingrained prejudice because I always worked in practices (prior to setting up my own) that were dominated by men and they didn't use female barristers. So I suppose I just continued with that. I have no problem with female judges."

One female barrister also suggested there was a problem with male solicitors:

> **"**Male solicitors are suspicious of female counsel – easier to blame if something goes wrong.

She gave an example of a male solicitor dismissively holding an opinion of hers between thumb and forefinger and then saying to the female solicitor, "I'll be watching this carefully." She was also told by a solicitor that work was to be lost because "the clients were not happy with female counsel" – but wasn't sure if that was actually true or if there was some other reason. Another said **"**I have had cases taken off of me – I remember one occasion a brief was given and then taken off of me – a very embarrassed solicitor phoned me and said really sorry, the client wants a man … I know you can do this …"

Female barristers generally complained that good quality non-family work was not being sent to them, and that this was disadvantaging their careers and keeping them in 'chick law' fields. Women solicitors in a firm, in this view, have instruction lists and few women manage to get onto these lists – produced (it was suggested) by males who interact on the golf course or at rugby matches. The exceptions (where women do well) are based upon nepotism and family ties, was the view of one female barrister.

Panel lists are certainly important, particularly those from insurance companies and for Crown work. There was criticism that the former are heavily biased towards males while the latter are relatively balanced. There appear to be no records available from the Crown departments detailing briefs by gender, so it is not possible to confirm this.

Solicitors will accept that their briefing of counsel can be gendered but don't necessarily accept blame. They turn the criticism back to the bar and the way in which younger women are not used by senior counsel as juniors in complex trials or suchlike and so do not develop sufficient expertise to be sold to the client as a good bet:

> [Interviewer: Give work to women?] As a sisterhood? It is something which I have been debating. I have three solicitors I work with – three females – and I was challenged by various members of the bar that I do not tend to instruct females and I was being asked why. I came back to the team and said, 'why don't we?' It is a catch 22 situation because the level of work we are doing tends to be high profile for commercial clients who are only going to court because there are significant implications for them. For me to instruct anybody I would be saying to the client that I will be instructing X and they will say why? And I will say because they have done 20 [court submissions] for me and they are viewed as a leading lawyer in that field and they will say, yes that's fine. If I say, she is a very good lawyer I am told – I haven't instructed her before but she is female – I don't feel – in areas where you don't have such high maintenance clients as we would have – where you almost tell the client afterwards that I have instructed Ms X and they would take that as read, but certainly the more sophisticated clients would not accept that and you have to justify the appointment.

The response from the bar to such assertions is to suggest that it is the solicitor who usually chooses both junior and senior counsel, and that blaming the bar is moving the blame from its true source. A similar response would be given to another criticism of the female bar that they didn't appear to be very interested in the work available:

> "I would say firstly because of the work I do that I do brief the majority of male counsel. There are one or two QCs – there is one who specialises and we do tend to use her a lot. But for younger female barristers they don't tend to be that interested in [this area of] work. We have tried to brief a few, but very, very few young female barristers – I don't know whether they lack confidence or there is just more family work there for them – yes I do brief more male barristers but that is because they do more [of this] work or are more specialist, not because they are male."

It is impossible to objectively report whether these reasons are relevant and accurate, but it does appear clear that the pressures for work are found across all areas of the bar. A senior male suggested that men may be feeling the pinch over insurance work just as much as women and that there was, in effect, a special pleading being made:

> "I haven't seen anyone held back who was female … that would surprise me a little. The good ones are working away … I can't make a defence … it could depend upon your sources … there are some here who would feel put down because we don't have a crèche … my view is that this is a private body – we are not a company – so why should I be putting into something which would be for a competitor? The insurance work – everyone has a complaint about the insurance work – there are two or

> three solicitors who have taken it over and there are two or three seniors doing it all, so a lot of barristers have lost it."

Work from insurance panels had also changed with insurance companies refusing to brief seniors because of the expense, and some barristers believe that this attitude will spread to other 'repeat players' in the system. And they felt that while solicitors' rights of audience may not have made much impact to date, solicitors attitudes were generally changing with solicitors holding on to the paperwork right up to trial to keep in house as much work and fee income as possible.

It appears to us that – if our sample is representative – there is a large measure of discontent from most (but not all) women barristers about work loads and work type available to them. Whether this affects judicial appointments is, of course, a different matter. It may be particularly relevant for appointment to silk, but that also has potential impact on elevation to the High Court so is certainly relevant to understanding diversity issues. Interestingly, one female judge who participated in the focus group felt that 'family law experience counts for nothing in the High Court'.

3.6 Chambers v Bar Library

One issue which was raised in interview in response to the feeling that women were being given lesser work in the current system was whether working under a bar library system was disadvantageous. There was some slight feeling that it might be an aid, because the bar system was currently disorganised and barristers were too individualised and atomised. One barrister who had left private practice some years before agreed with this:

> "I think part of the problem is the way the bar is organised. I always felt if it was more of a chambers system there would be more support – more structured, more collegiate rather than every man for himself. Women – this is a sweeping generalisation – like that sense of belonging, getting support and work best in that kind of environment."

That was the strongest support given for the chambers system in our interviews, and other support was generally more lukewarm – in large part because of lack of knowledge about the actual system as it operated in England. The opposing views – supporting the current system – were that it would be too expensive to move to a new system for each barrister: the costs of equipping a building, renting it, staffing it etc. would be out of the reach of all but the best earning barristers. This was particularly relevant given the expenditure upon the new Bar Council building.

A senior barrister also suggested that the library system was more efficient and led to lower costs for the client. Thus rather than solicitors become involved in expensive negotiation by letter or interlocutory hearing, this barrister suggested it was possible for the two barristers to simply get together and resolve a problem quickly and efficiently. He also believed that the grass was not as green as might be suggested in England and that it could undermine advocacy skills:

> "I am not sure if things are good in chambers system as you imagine … I have a daughter … she grumbles about the clerk …. Chambers develops a whole system of barristers who are solicitors … Advocates are mouthpieces … the quality of the bar is the skill to cut out the chat, to have a logical mind with a target, and having skills to present in court. I wouldn't have skills in handling clients or getting papers and evidence …"

Certainly the specialist bar in London contains many barristers who have never seen the inside of a courtroom for years and who process papers and are rarely aware of the outcome of cases for which they have provided counsel's opinion. Such a situation would mean a radical change in the workload of the NI bar which has primarily been an advocacy-based system.

4. Understanding of and Attitudes towards Judicial Roles

4.1 Gender imbalance – does it make a difference?

There was a general acceptance that in some parts of the judiciary – particularly the High Court – there was a clear gender imbalance. We asked interviewees whether they felt this mattered. The feeling mostly was that this was a problem, not so much that the quality of decision given by female judges would differ, but because of the representational issue where the judiciary should be reflective of the society at large. One non-practising barrister suggested that not having a female High Court judge did matter:

> "Of course it does. Women just have a different approach. [Interviewer: Yes, but they are a single individual] Well, I think in the same way that I think it is very important for people in the High Court to be made up from a variety of backgrounds – we are slowly moving away from that – it is important that our QCs and judges are not all white, male, and middle class with public school backgrounds. You need to be middle class to survive at the bar."

Also, the view was taken that the dearth of High Court judges was itself an indicator of possible discrimination against women:

> "Yes, it is a problem because you look at the number of barristers and look 10 years later who is at the bar – with QCs there is probably only 20% who are women."
>
> "In terms of admin of justice it is not a problem. In terms of women wanting to progress their career it is a problem."

A female QC strongly argued for the 'representational' argument as well as the symbolic:

> "It does matter if there is an under representation of women in judicial roles - for a variety of reasons: a) If a lawyer sees a judicial appointment as the pinnacle of a legal career, then it would be very dispiriting indeed to be of the opinion that one was unlikely to achieve that position because of one's sex. It might discourage women from becoming lawyers. b) Judges wield a great deal of power when they are making decisions about all aspects of the lives of human beings. I think it is important therefore that the judiciary should be tuned in to and reflect society. Adult society comprises men and women, and if there is an under representation of women in judicial roles, this means that there is a deficiency in the breadth of understanding and experience that a healthy judiciary should have.
>
> The public in my opinion would be likely to become increasingly more disenchanted with a judiciary in which there was a habitual under representation of women, when women are reaching "the top" in other careers."

The literature on gender and judging certainly refers to the notion that having female members of the judicial grouping would change attitudes (through simply being in the 'back corridor' and a group of men having to behave in a different manner to accommodate a different sex). Certainly all female judicial office holders in the focus group thought that having females on the bench would make a difference to the administration of justice. More specifically, they felt that female judges have a different attitude and tend to be more empathetic. For example, one said that women have a better understanding in sex cases and another noted that even in civil cases, women would give greater value to domestic labour when assessing damages.

This practical view was not too frequently put by our interviewees. Rather it was mostly the more symbolic nature of having women as judges (so that they became role models for what could be achieved) and the fact that there were plenty of women around who were viewed as having suitable skills and expertise to undertake these judicial roles:

> "Just because they are all of the same class you can't say that they all have the same views and outlook. They don't. But it is still not acceptable

> to have no women High Court judges. It makes a difference in terms of other women's expectations just as when some women did law and were successful, they came in in droves. So it breaks the ice. That symbolic value is useful."

There were certainly one or two common assumptions made about the nature of women as more caring:

> "Maybe more of a human element but I think you tend to find patience, more care for an individual – maybe not, but just from my experience."

And as many suggestions of the opposite qualities. For example, one solicitor who appeared in the County Court and instructed frequently in the High Court:

> "It is invariably easier to deal with men that to deal with women ... Women can be difficult in a way that men will not be difficult – that is a gender issue – women can be difficult just for the sake of it. Some women can be more cantankerous than others."

Another solicitor agreed but indicated a sexist interpretation of behaviour:

> "I don't think it does make a difference who you appear in front of as long as they are courteous. There are a few [women] who are very snappy, I have to say. They tend to be maligned as crabby and bitchy whereas if it was a man they would just say that he was sharp. They tend to make more personal comments about women on the bench."

Male behaviour, too, was given a broad brush description:

> "I don't agree that [men bring different skills], it is too simplistic. Men always believe that there has to be a hierarchy … They bring in different assumptions not necessary different skills. The fact that they assume that does not mean that they are the best person – you see that over and over again."

Generally, there was a belief that other factors – apart from competence – were to blame, a few taking it as clear indication that equality law had failed:

> "Women are every bit as capable and there should be equality of representation and it is not just because it looks nice in terms of numbers. Women are every bit as capable of sitting and passing judgment in the High Court as men – so I make no apologies. I don't know how the system has worked up until now, but if you consider all the equality legislation at the forefront you have the legal profession which has been supposed to espouse equality and defend and cherish the principle of equality and yet

> the very profession is under-represented in terms of women at the very high level."

These perspectives were particularly related by interviewees to the High Court: this lack of a female High Court judge was seen to be a problem by most (but not all) women interviewees, but not as a problem for the administration of justice (no-one complained about quality of adjudication in our interviews at all) rather as a problem of representation and loss of competent individuals from the bench. However, as noted, all female judges in the focus group felt that having more females on the bench would make a difference to the administration of justice.

4.2 What does a judge do and what skills are relevant?

One important element of deciding that a judicial role may be attractive is in knowing what is involved on a day-to-day basis. We were struck by the diverse views on something as basic as the time involved, the balance of work between court, backroom, research and private life. For example, some felt that the Magistrate worked a 9-to-5 day, while others suggested just a few hours before going off to the golf course. We were drawn vignettes by some barristers of High Court judges getting together over sandwiches and salads at lunchtime and others of these same judges weighed down by the pressure of the workload and unable to get a moment to have lunch. Judges and tribunal chairs were sometimes viewed as being collegiate and other times as lonely individuals who rarely saw colleagues during the working day.

Some felt that training and support were part of the judicial package – particularly at entry – but didn't know whether that was a perception or an accurate statement. They could not give any indication of level of support or training. Those already in a post – such as Industrial Tribunal chairmanship, of course, had a clearer view of that organisation's support system but not of any other sector. Once the decision had been made to apply for a post, more information became available. One applicant felt that after having received the NIJAC application package there was little left unsaid:

> "I knew from a practitioner's point of view what [the role] did – [list of tasks given] – and presumed there was a fair bit of administration with it. The documents which came set out the post in a great amount of detail … the competences and qualities which were viewed as being relevant for the job, so I find it hard to believe that it could be found unclear."

But an information package of that nature is only currently sent to those who request it and – by default – will not educate those who haven't considered applying for that post.

We felt generally – simply due to the different images being presented – that there is a lack of knowledge about the working conditions of judicial office holders. Some interviewees felt that they knew these conditions simply from being around the courts or tribunals, but since they could not all be correct there were clearly misconceptions abroad.

The skills which were suggested as being required included detachment, insight, people skills, and the ability to make a decision:

> "You have to be bright, decisive – able to make a decision and stand over it – have a sharpness of mind."

> **"**You need sound skills so that you can understand the law, but you also require good skills of time management, people management and the most lawyerly skill is handling evidence. You also need to be able to spot the case because often enough in tribunals there are issues which are not run of the mill – particularly in tribunals which are inquisitorial with unrepresented people, so the onus is on you to recognize it."

On levels of intelligence required, there was a clear distinction made between most judicial roles and that of the High Court. Most interviewees felt that they had the ability to carry out lower level judicial functions, but few felt that the High Court bench was an easy task or that they were capable. Frequent mention was made of the difficulty of producing good quality judgments – 'essay writing' some referred to it as – which necessitated substantial research skills, insight into what the core problem was, and an ability to produce a judgment which fitted these elements all together into a considered package. One QC, though, suggested of the High Court:

> "I don't think you have to be scholarly but you have to be smart. There are different types of smartness."

It was suggested by the interviewer to partners in solicitors firms that the skill set which they had – case management, etc. – might be transferable to the judicial role. Most agreed somewhat with that, but the point was put that the most important skill of a partner in a solicitors' firm was that of business management which was not a relevant skill for the courtroom:

> "If you put some of the people [currently on the bench] into private practice – they have no idea of the getting of business, retention of business … It is a business and we are running a business. On the bench it is not a business skill – there is no business at all."

Did this mean that solicitors would not have the skill set required for high judicial office? Not necessarily. One QC who suggested that partnership was in many

ways equivalent to being at the silk level (due to responsibility, experience) believed:

> "Will solicitors get up there? I think they will. And they will be good at it. There are horses for courses, so I don't think it has to be barristers. Solicitors who have reached the top of their profession will make excellent High Court judges."

Advocates all emphasised the importance of advocacy skills – being part of the process which happens in the courtroom – for the judge. A judge or tribunal chair who lacked these would miss out on what was happening in front of him (and perhaps have "the wool pulled over his eyes"). The female judicial office holders in the focus group felt that while 'personality and experience are what counts' and 'jobs can be learnt', ultimately advocacy skills were important for a judge (although they also said that some judicial posts may suit a solicitors, such as Chair of the Lands Tribunal). Most barristers interviewed felt that solicitors who wished to operate well in the courtroom required advocacy skills, and that they were essential. One QC put it as:

> "I think substantial experience of litigation and advocacy is essential. Within the Bar, the title of QC is an objective indicator that a certain high standard has been reached by that practitioner. Some solicitor advocates are currently building up the necessary experience and therefore within a few years some solicitors may be suitable candidates for the High Court bench. I think that a competent judge needs to have substantial experience of litigation and advocacy so that he or she has a broad knowledge of the practicalities of running a court case; can properly control the barristers who will engage in all sorts of forensic jousting if they think it is to their client's advantage and that they can get away with it; and can ensure that the barristers are not setting the judge up for an intellectual fall and straight into the appeal court."

Another QC confirmed this perspective, suggesting that while lack of advocacy skills may be a problem at present, it was not necessarily one for the future:

> "One issue not solved, one of most crucial bits of training is handling evidence – running a case quickly, being able to object quickly. Most solicitors don't have training in that and they don't really understand evidence issues (I frequently have to tell them you can't use evidence). For judges you need to have experience – an experienced counsel has a feeling for evidence handling and you don't waste time in court. That's why I would always have defended that judges should have been advocates. But there are more and more solicitors wanting to go to the bench – they are ok in the County Court but with criminal or Diplock cases … solicitors wouldn't have that experience. But once the door opens, people will prepare for it and get good at it …"

We were, though, struck by the conservative nature of most of our respondents. Legal academics are used to thinking about how change might be brought about and how improvements can be made. These were not the perspectives that we got from our interviewees when we asked whether one reason for wishing a judicial role was perhaps to improve the system from within (that presumes, of course, that it is not currently perfect). The interviewer cited the practice rules recently brought into the Patents Court in London to speed up hearings, reduce submissions and witnesses etc. Most felt that it would be difficult to do this – partly because the judicial role was perceived as being more and more a civil service function where the judge is told what to do and also because – particularly at the High Court – those already on the bench being very strong characters who would not be easily persuadable, and that an advocate is anyhow in a strong position to push for change: "I think I will give more and achieve more as an advocate rather than as a judge."

One solicitor partner, though, thought that change and revival were as important on the bench as in practice:

> "A problem is people staying on till 70 or 75. … It is this idea that people are in jobs for 25 years. You need new blood. I am not being ageist. The world is constantly changing and this idea that you stay on until you are 70 or 75 is nonsense it is crazy. It stunts the growth – someone is wondering whether this person is ever going to retire …
>
> [Interviewer: What do you do with old judges?] Once you leave private practice – I would have no desire to return – surely they could give their services to society in some other way – people have to make room and leave room for other people to come through the system. I say the same about practitioners – staying on in their partnerships until 70 and not allowing the new blood – younger members – to come up and get a slice of the action … There is a natural life for everyone, including practice, so if you have worked hard for most of your life then you are not able to do it much beyond 60.

One barrister who had never practised suggested of the judicial role that:

> "There is sometimes a view that being a judge is a mystical thing. It is just a job where you try to acquire the skills and abilities to do it."

In our interviews we didn't feel that there was a perception of the role being mystical. We were surprised that most of our interviewees felt that they had the general skills to judge at some level or other, indicating that for most potential applicants there is no obvious barrier to applying excepting, perhaps, that of a lack of knowledge of day-to-day tasks of what is involved in a judicial role.

5. Why Apply for a Judicial Post?

'Judicial post' is, of course, a wide ranging concept covering a variety of adjudicating roles within the court system and the tribunal system. It covers full-time posts which require significant life affecting commitments (such as judge in the High Court or County Court etc.), full-time tribunal chairs, part-time regular tasks (say Chair of Industrial Tribunals) or infrequent roles such as Special Needs tribunals where one may sit only several days a year. Given this, it would not be surprising that we found a wide range or reasons for considering applying for a post.

In our interviews, we found that the High Court was viewed as distinct from the other judicial roles, so deal with it separately below.

5.1 Out of Interest and task is different from day-to-day legal work

We found it not uncommon that those with legal skills in one area felt that they could derive some measure of enjoyment from working with another area of law. The reason for applying for a post was certainly a sense of giving to the community (in that tribunal posts were not hugely remunerative – around £450 per day's for a Special Needs tribunal hearing including preparation – and for some may involve a lower daily rate than they would otherwise expect [127]) but also that this public service would bring some pleasure or well-being to the individual involved. This was particularly the case with Special Educational Needs tribunals where we found that there could have been a familial reason for wishing to be involved: a disabled child within the family perhaps.

For example, one male barrister involved in public sector work had applied for a chair's post in the Special Education Needs tribunals because he wanted to expand his experience outside his day-to-day field of expertise. His wife was a teacher and the insight he received from her knowledge was that it was a serious and interesting position. But importantly, that there was quite a bit of law involved. Although not all lawyers find law pleasurable (we interviewed one who disliked it, though recognised her ability to do it well [128]) for someone with an appreciation of law skills, there are attractions in being able to do law and use their skill set in a different area. He was, he said, very keen to undertake the task but that at the stage of his life where he had applied it was certainly not a career move, more community service. "I would get something outside my usual field of law – gain from just doing another job." Status simply didn't come into it because it would not attract any.

[127] Full information at http://www.justice.gov.uk/docs/judicial-salaries-2007-8.pdf
[128] "No I don't like the law, I find the law very difficult. I am very good at it but I don't like it."

A solicitor who was a partner took the same kind of view. Status was not relevant, but having contact with a disabled child, the issues around educational provision were relevant and interesting:

> "I have a Special Needs tribunal post – maybe only 2 or 3 days a year. [Interviewer: Do skills transfer?] It's quite different – a lot less of holding meetings and much more of reading and drafting documents and less correspondence with clients, so the particular work I do doesn't transfer. It involved a steep learning curve. I have been doing this for some years."

This person had not considered applying for the post until one of the current High Court judges (before his elevation) had suggested it might be a post of relevance to her:

> "When he – out of the blue – said [that he felt I would be a good candidate] it probably gave me the confidence to go for it, because I am not involved in any litigation."

For both of these individuals, the feeling was that the task was not onerous enough to impact upon their obligations to their office or practice. It was something that was not necessarily supported by their colleagues but was viewed as something which was of personal interest and so long as it remained a minor activity, it would not attract criticism. Neither would it be viewed as part of a CV for future career development purposes.

5.2 Career Development

We found a particular interest in full-time judicial appointments from barristers who were in public service, and who saw a judicial role as one which would have increased status as well as increased income. This arises, we suspect, from the relatively lower salaries for equivalent responsibilities in the public sector. We also clearly picked up the sense that there was a natural progression from the bar to judicial office which meant that it was not viewed as a career change, but a career step.

As outlined above there is a high rate of 'casualty' at the bar for a large percentage of those who enter. One relatively successful public sector barrister when asked why he had left a career at the bar told us:

> "At that time it would flattering to use the term 'building a career'. The bar is competitive and while I was getting work … I didn't find private practice suited me – there are those who are comfortable in that environment – it is extremely competitive and requires a huge amount of self-confidence and at the time, I just didn't feel it was for me. Posts came up [with the

> government department who were briefing me] and it wasn't a big step because I knew the work and know people who worked. In terms of salary I was doing better than I was doing in private practice."

The salary for a Resident Magistrate is currently £98,900 which is substantially more than many public sector lawyers in senior grades would receive (e.g. £56,100 to £78,540 for Grade 5). This means that with increased salary and the notion of natural progression, many are led to considering the possibility of a judicial career as an attractive career step.

However, as we continually found in our research, there could be a definite change in attitude when someone in a similar position managed to make the career leap. That success story becomes a role model (rather than an exception) who has set out a path which can be followed by others. As one public sector barrister told us:

> "One ex colleague had left to become a [judge] so it was on my radar that a judicial career was a possibility as a career progression. Another became [another judicial role] after that. The precedent was there – I had been thinking about it for a number years and had got the information packs but never applied."

There would have been advantages for some who were looking to career advancement to have built up expertise and their CV by applying for a part-time post but this could be viewed as problematic for, say, someone who was involved in the same field of law – for example, acting as a member of the prosecuting authority one day and a judge the next. We were told by one applicant that this was why a career option as coroner was considered:

> "I always felt it would difficult for me as a prosecutor to apply or sit as a part-time Resident Magistrate and thus I would be at a disadvantage to apply for a full-time post – understandably – someone with experience as a deputy is likely to have experience. That is why [this post] was attractive – there was less chance of someone having experience as a deputy because there was only one post. Plus it was made clear that previous experience was not necessary."

We have discussed above there are attractions to being a lawyer for those who enjoy their legal skills and like legal work. For someone who has worked their way up the civil service, these legal skills can be underutilised and a return to law business – rather than policy or management – is an attractive step both backwards in terms of content and upwards in terms of status and income for their career. In response to the question 'Why leave the public sector?' one emphasised the attractions of straight law work:

> "As a lawyer it is a natural progression to become a judicial figure of some sort. Possibly because I began at the bar, but I think it is a normal progression for anyone who studies law. [Interviewer: I haven't seen that] Maybe it's because I started as a barrister. In the work I do now – as an assistant director – I have been responsible for various numbers of staff – my career … will continue as a managerial career. I would rather be a senior lawyer than a senior manager. The law is really what I am drawn to."

One interviewee suggested that those who are in the public sector are often very good lawyers and seek the public sector because it can be more law-oriented than can solicitor's practice:

> "The public sector in terms of legal services would not be seen as an easy option. You have to differentiate between private practice and the administration of a practice – the business aspect. I can think of one person who is extremely bright and able lawyer. I know that he went into the public sector because he didn't want the hassle of employing staff, going to see the bank manager … all those things you have to do when you are running a business. It may be that the more able lawyer goes into public sector because they can concentrate upon legal issues. So it is not more able people who go into private practice, it is those who are more keen on the business aspects of practice. If I were in government service there is always a layer of administration … You may get more challenging work …"

We found that there was a growing perception that for the public sector lawyer a career development into the judiciary, Coroners post, or tribunal chairmanship – at some level – was a very real possibility. We believe, too, that at the relatively senior levels of the civil service there is a general balance in gender. It is not clear to us from interview, though, whether this necessarily means that all senior civil service lawyers see this same career path as equally likely or whether it is more attractive to males.

For solicitors in private practice, we found a different attitude to career building. None of the recently-qualified female solicitors viewed a lower-level judicial role as a career step. No one in that group saw a tribunal role as a move which would advance their career in private practice or as a way to progress through the ranks of the judiciary. We put it to the conveyancing solicitor in the focus group that she would have the skills/experience to sit, for example, as chair of the Lands Tribunal. She agreed with this but did not regard it as a serious career prospect unless she wanted to come out of private practice. Also, she felt that you would have to be very senior (i.e. be a partner) to get the post and if you were at that level, why would you bother? There was a definite feeling that firms would not encourage you to take a role like this. Thus, none viewed judicial office as a way

to work your way up the ladder of private practice. Indeed one said that taking a part-time judicial role is 'the start of the way out' of private practice.

One barrister who had become a full-time judicial officer told us that, on balance, his career development had been positive:

> "Yes, but I miss the crac, the gossip, the camaraderie – but that may not be as much a factor since they moved into the new building. You hear from friends that they never see anyone – you can go months before you see anyone. I don't miss the stresses and strains of practice …"

The collegiality of the bar library clearly casts a long shadow over many who been called to the bar, and a career which takes one away from that must offer sufficient to counterbalance what is being lost.

In terms of career development *within* the judiciary, the female judges in the focus group all felt that it is very difficult for a sitting judge to progress through the ranks of the judiciary. Thus where one enters the system is very important because promotion is by no means certain. By contrast, they cited the situation in the Republic of Ireland and England as examples of where there is promotion through the ranks of the judiciary.

5.3 As an integral part of a portfolio career

There are a number of individuals who may have left the bar during their early years, remained within the broad church of the legal profession and undertaken a career which is neither straight employment in terms of one role nor of a permanent nature. In Northern Ireland the range of public sector commissionary roles has enabled some to do this.

Also when pressures on academics to research and publish were less, there was a tendency for legal academics to be involved in professional roles on a part-time basis. At that point it was conceived that this kind of work fed back into the academic's value to the law school. We have seen this lessen over the past few years but there is still an opportunity for parallel careers to be developed by lawyers – where the academic is never quite sure which is their real career preference. We can group this disparate collection into those where various roles are seen as part of a part-time portfolio. This might include a part-time policy role, part-time education, paid membership of a government advisory body, part-time chairmanships of tribunals, etc..

To this group, there are attractions in either full-time or part-time judicial role on a tribunal. They have the skill set which comes from some litigational experience at the bar before they left, frequently roles of significant public worth, and

therefore a confidence that they can operate as independent judicial agents. As one suggested, the loneliness which is sometimes perceived as a disadvantage of a judicial role can actually be an advantage to a personality who enjoys their own professional company:

> "I am a lone wolf – I like to be responsible for my own decisions. But I don't think that is gender specific."

Family commitments have sometimes been the cause of the portfolio approach since it offers flexibility – one can take on roles and leave roles to provide a balance of home and family life as children are born and grow up:

> "… two or three years ago the Coroner's post was interesting because it did not go to the sitting deputies. I didn't go for that because I had young children … I have a part-time portfolio [outlined various posts] … Now thinking that I would like to go for something full time. I chair hearings all the time – have a lot of experience all the time – inquisitorial forum, writing decisions etc – don't see myself in mainstream as Magistrate or County Court judge because I have no experience of these fields .. I really don't feel that I have the range of experience … With Coroner's post you don't need to be particularly expertise …

Over and over again, our interviewees who had applied for posts would refer to the fact that there seemed to be a changing environment in judicial post filling: the system appeared to be more open and people who would not in the past have been appointed were being successful. To those who were occupying these part-time portfolios and who were effectively outsiders with skills, this new situation gave them the feeing that they had a chance in the application process.

It is presumably women who most frequently occupy these portfolio roles – because in part they offer family flexibility. But the roles being sought were not the more traditional ones of Magistrate or County Court judge because these were viewed as requiring experience which was not usually to be found in the part-time portfolio. However, we do not think this would not exclude application if there appeared a role model who demonstrated that there was a pathway available.

In interview, we found no shortage of confidence amongst the women that they were up to the tasks, but perhaps the worry was that their lack of actual expertise in the role would affect their chances:

> "I am absolutely satisfied that I could be a very good Coroner but I was not as good at demonstrating that [in interview]. If I had had a period to do the job – some kind of an apprenticeship – I am sure I would have been good at it. But how can you decide that in 45 minutes."

We discuss (below) the difficulty applicants found with this notion of being interviewed for a post with which one had no actual experience even though the documentation suggested that no experience was required.

5.4 As a Career Change

It is clear from the literature as well as our interviews that the bar see a judicial role as a normal possible option (a 'career change') during their career. This is not to say that all wish to be judges – we deal with that below – but that there is a naturalness of the career change from bar to bench. One barrister who had a civil practice but admitted that he was struggling for work – "usual thing" – became a deputy judge and then became a deputy tribunal chair. This was an example of a career being built upon part-time beginnings, something which was not problematical at that point, but which has become so:

> "[t]here was a period when a crowd of us became deputy chairman and still practiced. Looking back on it, it was probably wrong. There was a lot to be said against it but no-one looked at it in those terms at that time."

As outlined above, there is no sense of natural movement from solicitor's office to judicial role. Students choose a route on entry to the profession and by and large expect that to be their career path through their professional life. The strength of that attitude seemed to us to be demonstrated in interview by the perspective that one solicitor had made the move from practice to County Court and on to Recorder of Belfast was perhaps read as an indication that the exception proves the rule rather than that a pathway was being created.

Diversity in the judiciary should, of course, imply a judiciary which encompasses both barristers and solicitors, so we should expect there to be an increase in the number of solicitors seeking a judicial career and that they will be successful. One solicitor in interview pointed that this could happen and could be well received. She highlighted that a solicitor from one specialism had been appointed to handle cases in a different field, and:

> "We did think, 'Do they have the background for this?', but they are excellent. I don't know if they would have had much or any experience in appearing in front of people. But everyone went hhhmm, but they really are excellent."

In fact, our interviews primarily demonstrated that there was little real desire from those who had been successful in a solicitor's career to move to the bench. Most were not actively seeking such a post, though appeared to view it as being something which could be done at the end of a solicitor's career:

> "At this stage of my life I may be interested in a certain type of position, but not in the past – where you are in terms of life, maturity where you want to be."

And another partner in a solicitor's firm who had some experience in tribunal work:

> "Yes, it would be viewed as a second career option. The work we do is very stressful from the point of view of just the legal work. There are [XX] partners and there is a lot of management. While it is very remunerative, at the same time, at some stage, you might like to think there may be an easier way of doing things. [Interviewer: Are you there yet?] Not yet, but it is something I would think about and the tribunal experience is useful for that."

It was not uncommon for solicitors who we interviewed to suggest that one reason – the only reason – they would consider seeking a judicial appointment would be to improve judge's behaviour towards solicitors:

> "I cannot see that I would apply for a judicial post but the one thing which would make me would be to run a civil court because there is a hell of a lot of arrogance about it – and I hate it. I hate to see some of our judges arrogant and rude – but that is not a very good basis upon which to judge cases."

However, there are those solicitors who are younger – mid-career – who do consider that a judicial career is feasible and attractive. One partner, perhaps not incidentally having young children, had decided to reduce her commitment to the partnership. Her partners were surprised but she felt that the pressures on her time were great and had begun to resent the time being spent on the firm's needs. By moving to a different role within the firm, it would free her from the business of running the business to see if work/life balance could be better. This appeared to have worked and she found she was enjoying the work for clients more. At the same time as this resetting of her solicitor's career she had applied for a full-time judicial post. It seemed to the interviewer that seeking this post was made easier by the decision to alter her work/life balance and without that decision the application may not have been made.

Another saw even part-time posts as potential methods, having seen someone move from solicitor to Resident Magistrate and understood that there was a possibility of moving to judicial roles. Even though the posts which he had applied for were part-time he thought:

> "If I liked [the work] and was thought suitable it might have become full-time."

A barrister noted that a friend who was a solicitor has a similar view of part-time posts as a conceivable pathway to a full-time career and an escape from practice:

> "I have a friend who is a solicitor who is very keen to achieve judicial appointment and one of the things he sees is a lack of judicial experience and so he is keen to apply for posts such as a part-time Magistrate to get some details onto his form … I think he is just sick of practice and sees that as a nice way of getting out of practice. It seems to me that it is not worth doing something that you don't enjoy just to get judicial experience. In terms of chairing tribunals – social security appeal, employment, vat – none of those areas appeal. The thought of them makes me shudder."

We found, though, that there were quite substantial pressures preventing solicitors changing career and we discuss reasons below. Knowledge that it was possible to change career and had been done in the past, seemed to us to be an important factor. Not all of our interviewees were really aware that this had happened as frequently as it had, and so the path was not as obvious to them as it was to more knowledgeable others.

5.5 For Financial Security

The bar can offer very high incomes to the successful but for all barristers, working as self-employed individuals, there must be proper planning for retirement and the future. Sometimes a disregard for this can lead to seeing a judicial post as attractive for pension reasons if nothing else. One barrister, asked whether pension rights were attractions for the bar, replied:

> "I think you are right. Very often people at the bar often don't plan for their pension properly and I am sure that I fall into that category. As I mentioned before – there can be an effective cut in pay – but the prospect of a pension as you are getting on may become more attractive allowing "catching up quickly".

And one of our interviewees substantiated that and suggested it should be highlighted as one of the positive aspects of judicial roles:

> "One of the biggest criteria has to the pension – it is a major factor. You have to want to go that way [i.e. judicial role] but if you are thinking that way – I know it was for me a big factor – the government could play it up as a bigger factor – you need the personality but it is certainly a big factor."

Pension rights had changed for some posts and the requirement, for example, that 20 years service should be completed before full pension entitlement implies that if financial security is the target, then early move from the bar is something which has to be considered mid-career.

5.6 Because a judicial post is appealing in terms of the workload

Being successful and a partner in a firm, or being a well paid barrister does not necessarily mean that one would be an effective judge – though the tenor of most of our research participants would suggest that it is necessary. Neither does relative failure in private practice mean that one does not have the qualities which would make a good judge. Some feel that it is a task they could undertake and would do so effectively, giving them both satisfaction and providing a public service. One barrister noted:

> "There are people who apply for judicial post who apply for the wrong reasons but there are plenty of people who apply for good reasons. They think it will be interesting work, they feel that they have something to give and they have a genuine sense of public spirit and this is something I can be good at and I can bring fairness to the job. … There are people who enjoy judicial practice more than private practice and who are just more suited to it than others. Some people will enjoy the post for many reasons. Some people will apply for wrong reasons, and there will be people who much prefer independent practice and can't see why anyone would want to be on the bench."

In most European countries, those who see themselves in that role would enter judicial school immediately after law school. In the UK that route is not available – it is only through the medium of reasonably successful private or public sector practice that a judicial role of any status really becomes available.

5.7 It makes one a better practitioner

Few solicitors felt that judicial roles would feed back positively into their day-to-day work. To barristers who had judicial experience, though, experience in the role could be positive:

> "But that is one of the advantages of being a deputy – despite the criticisms in NI whereas in England you would sit outside your area – you cannot get that knowledge without actually doing it … it is only when you find yourself sitting up there and having to make a decision … I spent years putting up more and more outlandish arguments to the bench and I

> didn't have to make a decision … I simply bowled it up to them and thought – if you make a mistake I will have you at the court of appeal …
>
> You suddenly realise why they used to get so cross with me when I was doing x y and z as an advocate. It was only when I sat on the other side of the bench that I could understand why it was annoying or when I couldn't get my point across."

We had a number of interviewees who mentioned the tetchiness of judges and this interviewee's perspective perhaps partly explained that.

5.8 A part-time role gives feedback on future judicial career options

For a barrister or a solicitor who is considering a career change there are advantages in seeking part-time roles. Most of our interviewees felt that they were perfectly capable of being judicial officers of some sort. However, that is different from actually doing it permanently. One barrister who had experience of a deputy judge's post noted that:

> "one or two judges have gone to the bench and within one or two weeks after having been relieved at having got rid of one or two horror briefs, reality strikes. You think, "why are they so crotchety?" .. they clearly hate it, and obviously wish they were back at the bar. Being a deputy doesn't tell you everything but it does give you an inkling. I have sympathy that a successful barrister could be persuaded – "You would make an excellent judge" – be flattered and then do and then suddenly find yourself three weeks down the line thinking, "What have I done". I have seen a few like that."

Personality is clearly a very important factor in being a good judicial officer, not just technical legal skill or court management skill. A personality which does not suit the bench can be determined through part-time, deputy posts.

6. What stops someone applying for a judicial role?

Once again, we exclude the High Court from this section and deal with it below. Generally, we found a number of reasons which negatively impact upon considering applying for a judicial post, covering a wide range of factors.

6.1 It is not on the radar screen

A significant number of solicitors we spoke to simply did not perceive that there was a role which they might undertake. Partly this is because they occupy a world where the focus is the client and where there is a lack of relevance about the detail of judicial roles.

> "Yes, when you rang I said that I didn't know a huge amount about judicial appointments and I thought perhaps I should look it up – but then I thought I shouldn't – it is a lack of knowledge – especially in my area – I haven't been at the High Court since I was two years qualified – friends at the bar would operate in a different world."

But also because there was a feeling that information coming out about these roles did not appear to be targeted at them. One solicitor noted that information from NIJAC was always arriving in her morning's mail and usually ended up – quite quickly – in the bin. Her view was that this may be a gender issue:

> "I do think that women are less inclined to volunteer themselves – we do see it with our younger women solicitors – they have wonderful technical expertise but sometimes you have to tell them to push themselves a bit more and have some chutzpah about it. I do wonder whether if you were really serious about it, you would nearly – rather than just send around a circular – that there may be a bit of headhunting required. But when I think about it that probably then is against the idea of everyone applying on a level playing field."

This mirrors the solicitor above who was encouraged to apply for a tribunal post by a senior barrister (now judge) when her suitability was highlighted to her.

For solicitors, of course, this whole process of blindness to the judicial role begins at the earliest stage. Although generally we found students who took part in a focus group to be well aware of many of the issues around appointments and career choice, the group had little knowledge of how judges and other judicial office holders are appointed. Some said that it probably does not form part of an individual's career plans but that it is something 'that may just happen over time'.

One took the view that solicitors coming from general practice would have a better opportunity of being appointed to judicial office due to their breadth of knowledge/experience, although others in the focus group disagreed. Some were unclear about whether solicitors were eligible for appointment to higher judicial posts or limited to appointment in more minor courts. There was a definite feeling from most participants that barristers would be more likely to be successful in applying for a variety of reasons. In particular, they were more likely to be known to members of the judiciary and had more relevant experience in the courtroom than a solicitor.

These students believed that more information and education was needed about the judiciary as a possible career path, including how to apply and what the role entails. Most favoured the idea of work shadowing programmes to see beyond the courtroom side of judicial office. Asked about their view of continental systems and the notion of a career judiciary, most thought that this would be a very attractive option.

Our respondents did mention that part-time experience would be useful. One partner who did have a part-time tribunal role thought that the:

> "[o]pportunity to work as a deputy or part-timer allows you to develop an understanding of the job. As a part-timer you are not so involved in administration but it gives you a feel of what it is like to go out and sit behind the desk … keep control of what's going on, and keep control of proceedings. I am in favour of the deputy or part-time role. There is a tendency away from using the deputy or part-time. I think it is a useful training school. I know there are issues about conflicts of interest but I think those could be resolved if you want to."

This was a view – that part-time, deputy roles allowed insight - which we consistently met in our interviews. Having these available may enable judicial roles to appear more obviously and earlier on the career radar screen.

6.2 It is not perceived as attractive in comparison to private practice

Above, we noted that team work was highly valued in the solicitor's profession. This was an aspect which was perceived to be missing from the judicial role – working together for the benefit of the client, on interesting cases with clever colleagues could be described as 'fun'. One senior solicitor whose practice was mostly with issues heard at the High Court did believe the fun would be lost:

> "With the High Court why do I not want to [be a judge]? …. But I just think it is not – maybe few people view their work as fun, but I am fortunate to be in an area which is quite dynamic and quite interesting and where you got a lot of interaction with a lot of people. I would have clients who are good fun to be with and you could get stuck in a long case but there you have the camaraderie of the team. There you are all consulting late, you are all eating pizza in the library at midnight, so to that extent you are part of a team you are working together and you are focused on what you are seeking to achieve. … I think your only friends are within the judiciary and even when you take the XX commission, there you feel we are going off for lunch and having a laugh for half and hour or focusing on getting some evidence finished or whatever, whereas the commissioners are going

> away and eating their sandwiches on their own in the room. So there is that feeling of isolation and you are not part of a team and you are almost – its not that you can really push for a particular position … You are sitting there listening to x and listening to y and reaching this independent personal result. Maybe I think it is a difficult job, but it's not fun."

It was a common view amongst solicitors who disliked the idea of losing control over their work that you were a recipient rather than active player:

> "It would be, but do you want to listen to the same things day in day out – tedious, certainly I see many of the people on the bench are frustrated, ill-mannered. If that's what it does to you then you are better not being on it.
>
> With private practice you never know what is going to come in the door. It is challenging. It is not a soft option … but it suits some people more than others. You are your own boss. You are not going to be dictated to by an organisation or some civil servant somewhere. You prepare your own brief on a daily basis and it's not handed down to you. It is multifactorial."

As we discuss below in relation to the High Court, many barristers feel exactly the same way about the undesirability of full-time judicial office. Whereas once, perhaps, the role of judge was seen as independent, now it is seen more and more as just an offshoot of the civil service – controlled by the Court Service and required to achieve targets set elsewhere.

6.3 The firm would see this as a competing activity

In the literature there has been a suggestion that women solicitors might be encouraged by their firms to see judicial roles as possible. We did find one example of this who had sought a Deputy Magistrate's role where the firm appeared to welcome this:

> "I had to tell my senior partners that I was applying – it was a public exam – it is such a small world that it would be bound to have got back to them. I had to ask them if they would release me and they agreed – I think they viewed it that it would be prestigious for the firm to have somebody in that position."

In part, this partner felt that there was a passing opportunity to undertake this since a new solicitor had been employed and there was some slack in this smallish satellite office. But this was not the usual response we received. More likely the desire to undertake a judicial role was seen as undermining the needs of the firm, particularly for those who were at the partner level:

> "You are serving two masters. You are taking your eye off the ball and letting things pile up. You are putting undue pressure on your partners."

And even if the partner decides to leave, there are significant transition issues to ensure that clients are kept happy and remain with the firm and are not lost to other firms:

> "I think it is different for partners than for employees. It is also difficult if you have a reputation. … It is different for the bar. In private practice you have to manage the client relationships in a different way. We had one partner who went off to be a [judge] and I just thought that was a really weird thing to do and it was just something that she decided to do [Interviewer: Was it that the partnership was being let down?] I don't think I was let down – it was ok as she was in an area where there was another partner. If I left then the firm would have to think about whether another partner would have to be made to take over my area to show clients that we were serious about the area – she had a communications strategy – if a client you have worked with for 10 years and they hear from someone else – you don't have that problem as a barrister."

Barristers do indeed have similar problems. An indication that your practice at the bar may be being wound down or that you have other career targets will – with the fickle briefing practices of solicitors – be a concern to the barrister. A career at the bar is unlikely to have passed without some personal experience of losing work to someone else for no discernible reason. This was an aspect of the public nature (even when the process was supposedly non-public) of some judicial competitions which was particularly unwelcome and which we discuss below.

Also, similar concerns that the firm may not be best served by encouraging solicitors to leave is also reported at the lower end of the firm:

> "Probably the firm would have to be convinced it was to their advantage to do it. I don't think they would mentor and then have them leave because it can be hard to train people and it is quite a competitive market for good solicitors in NI. We find it quite hard to recruit good people – not at a very senior level. We can get apprentices and 2 to 3 years, but not 3 to 7 year band. So I will be interested to see if there was a role which would benefit the individual and the firm. They are not likely to support it otherwise."

Most of our respondents felt that there were no judicial posts which would actually benefit the firm at all, so convincing a firm to mentor in this way would appear an unlikely goal to reach.

6.4 Perceptions that role may not be a good career step

There are two aspects to this. First, if you have no personal knowledge of the post, how can you know that such a role suits your personality? We interviewed many solicitors who believed that they had the necessary skills to be a judicial office, but that is not the same thing as actually making a career change. Once the step is taken – and it turns out to be a mistake – what are the possibilities of returning to one's previous post? It seems unlikely that a simple step back could be taken – the position in the firm would have gone and anyway it would look bad returning to the same firm, since that would suggest that you had never really left the firm despite being a member of the judiciary at some level.

But also, for the barrister who is serious about a judicial career, careful and strategic consideration has to be taken both about use of time, but also where on the judicial hierarchy one might aim:

> "[Interviewer: Would you apply?] No – I would not have spare time. A part-time post does not hold any attraction – it is difficult enough to juggle your commitments and keep everyone happy. As a busy barrister it is difficult to take days out. A lot of people would also not like to do that because they may be pigeon holed – "he's a tribunal chairman …" or he's on the Magistrates' bench and is pitched at that level and is not going to move on. There is a view that it is difficult to move up the judicial ladder – it does happen but is not common – so people are careful about where on that ladder they might step because it could be difficult to climb up that ladder."

This view was also expressed by female judges in the focus group who felt that it is very difficult to gain promotion through the tiers of the judiciary.

We were clear from our interviews that successful lawyers were always instrumental – so far as they could be – in their career development. Solicitors may not be able to return to their previous practice, but a good solicitor should be able to find work in a different firm. For the barrister who becomes a judge, the situation is much worse:

> "No you can't go back. That is part of the frustration for some – I will not name names, but they clearly regret having done it at all, or done it at a certain stage when the pressure was put on them that if you don't apply now ….
>
> Once you have done that, you cannot go back. But sometimes I do wonder do some of them think enough about it. The appointments commission can't be responsible for that.
>
> In other areas, you could say come and sit with us for a week – you can't do that. If someone spots x down the back corridor – word would get back very quickly. But having said that a member of the bar should have some idea of

> what it is going to be like … but it is – from my own experience – a huge change of environment. I had the advantage of having done the deputy [judicial post]… I knew if I didn't like it there was no going back. You can't do that experimental thing .. The only option is London and arbitration."

It is not just when a barrister has been successful at getting a judicial post and finding that the work is not congenial, but those who seek and fail to get the post may be badly affected. Work at the bar is difficult enough to get when things are going well and confidence in one's abilities are found from solicitors who brief that barrister, but any hint of failure in applying for a post could damage a barrister's career.

6.5 It is not family-friendly

This was an issue which was raised by several of our interviewees but when we asked for more detail about why it was not family-friendly as opposed to the working hours and practices at the bar or the pressures of pestering clients, little detail was given. We felt that those who raised this as an issue were often those who had least knowledge of the day-to-day activities of a judicial officer. They may well be right, but equally their conception of family-friendliness may be wrong.

6.6 Lack of Knowledge of the Post

Lack of knowledge – perhaps because the possibility of judicial role has not been considered – is a clear factor for many women:

> "One thing which would make me think about applying would be knowing more about the job … not gender holding me back … I am not a person who flies by the seat of his pants … I have a [male] partner who can do it … I would need to know who trains magistrates, how many hours training, who mentors you, in County Court are you going anywhere … knowledge would help me know better whether I could be trained in that role."

This notion that women need to be well-prepared (in comparison to men) was indicated to us quite frequently.

6.7 Feeling that one does not have sufficient expertise/suitable skill set

As outlined above, we found that most solicitors felt that they had the skills to be a judicial officer at some level. What was clear was that there was a perception from most – even though they were expert in the legislation and law – that the level of the High Court was not just above them, but would also involve a very difficult transition for a solicitor. One solicitor who was confident that her technical legal expertise was equivalent to that of the male barristers she briefed, when asked whether it was feasible to become a solicitor advocate and apply for a High Court post, thought that the real weakness would be the lack of cultural and advocacy (particularly procedural) expertise:

> "The problem is that you definitely feel that there is an old boy's network with the senior bar and the judiciary and that's perhaps where solicitor advocates are put off. If I was to do my examination and get my qualifications the thought of turning up at the Judicial Review court to do my own case, I would probably not feel welcome. I would feel incredibly nervous, probably because you are outside your comfort zone and setting yourself up for a fall. But if you were on the other side of the bench and you got all the old boys in front of you I think there would be a lot of resentment – I may be doing them a disservice – but I think there would be a degree of, well, resentment and they would try to make your life hard. Because our weakness is the procedure … It is more of a career move for barristers. Maybe after 13 or 14 years, they begin to think maybe next year …"

Below, in discussion of the High Court, we look more closely at this issue.

6.8 Feeling that application process is off-putting

We deal with this below in discussion of NIJAC.

6.9 Gender

Would gender itself be a barrier to a judicial post? For almost all posts, our interviewees thought not:

> "Gender? No, a capable woman before a reasonable panel, if they have the capability they will secure the position and it will not be gender based. … A lot of women don't put themselves forward. Men are not to be blamed for that. Women make decisions for many reasons whether it is

> marital position, their own life choices in terms of where they want to go, spend their time … I think that women are much more calculating and would take a longer, harder look at these things. That is not a gender thing – just a gender difference."

There is a clear understanding that at the highest judicial level there is commitment to public service. It was suggested by more than one female we interviewed that men were more prepared to undertake that public giving:

> "[c]ertainly at the bar the QCs who have become judges in the last number of years have taken a significant income cut and there may be life-style reasons for that, but you just also do feel that there is an element of them giving back to the wider community than maybe – I'm not a psychologist – are women less willing to do that? …. I think there is probably a distinction between the High Court bench and the lower tribunals. I just see the lower tribunals as something which is a career move for personal reasons I would have thought rather than it being something that someone is aiming for necessarily. "

But, once again, this was not really seen to be relevant for most judicial posts, and was anyway a broad brush description to which there would always be (and we found) exceptions.

6.10 Age

There is a perception that judges in particular are of a certain age and that it would be pointless seeking posts until you had arrived at a suitable age – no matter what the NIJAC job description said. For example, one male participant in a mixed solicitors' focus group suggested that there is a perception that there is no point in going for judicial office when under the age of 48. Barristers in focus groups thought that younger practitioners don't see a judicial post as appropriate at 35 or 40. The current requirement for a High Court position is ten years as either barrister or solicitor. This would imply a feasible early application age of around 33 or 34.

In interviews similar suggestions were made. One female barrister – mid career – had held a very senior post outside NI at a very young age. She had interest in developing towards a senior judicial career, and had just applied for a tribunal post partly to develop her CV but also because of a public service perspective, but her next target would clearly be the title of QC rather than judge. Thus barristers who are seeking the highest posts have an extra hurdle which must bring age issues into the equation.

6.11 Income Drop

As well paid as most full-time judicial posts appear from the perspective of public servants, many would involve a substantial income drop for those who are successful in private practice.

6.12 Lack of Status in Post Title

Some tribunal posts are seen to be highly technical in terms of legal understanding required - for example, the Industrial Tribunals. For those around this particular tribunal we were pointed to the fact that in England chairmen would in future be referred to as Employment Judge. One chair told us:

> "Yes, it is only right that we should be called judge. You always have this difficulty in being asked what you do – it would be easier if you were an employment judge. Status-wise we do resent that we are not viewed as part of the mainstream judiciary – the also-rans. Industrial tribunals have never been informal - they have always been the most formal. Where you will see law quoted more often is down there rather than the County Court. I could go and do a County Court case with no preparation – it is mostly based on facts and basic legal principles – but you couldn't do that with our stuff. We certainly think that we should be called employment judges. It would define your role. I don't think it would make any difference over who would apply for the job."

A female solicitor who was particularly interested in employment issues, though, suggested that if the status of the industrial tribunal was improved with the use of the title, 'judge' then women applicants could lose out as more men applied for the posts.

7. The High Court

As stated above, in our interviews the High Court was continually set apart from other judicial roles. Partly this was because it was perceived to be the final male bastion, but also because the requirements to be considered suitable for the post were substantially above that of any other role. Further, the perceived relationship with the QC appointment process – currently contentious with regard to recent results – complicates the issue further.

That the High Court had no women and no ex-solicitors was consistently noted. Some solicitors suggested an easy solution. One who noted with some outrage:

> "I don't think any study needs to be commissioned to see that there are no women whatsoever on the High Court bench. And women are under-represented on all levels on the bench. If you look at Dublin you will see that women are represented at all levels of appointment. It beggars believe in 2007 that we don't have any women High Curt judges."

felt that positive discrimination was the only way forward (we discuss this below). Interestingly in terms of assessing the quality of the current High Court judges, her views were identical to all our respondents: "I am very impressed by judges in the High Court." This essentially is one of the problems for those desiring change – there is no failure of the High Court in terms of merit and competence, only in terms of make-up for those who believe that representation should reflect society.

We found that there were a substantial number of perfectly understandable reasons why a senior barrister would not apply. One senior who had, he said, used the excuse of security issues during the troubles admitted that this may have been as much a cover as the fact that the post was simply not attractive:

> "I never wanted to be a judge. The atmosphere of the back corridor would not suit my personality – it narrowed you down, reduced your friends. The judges' personalities were different to mine – security was irrelevant but it was being used as an excuse. My pupils have been asked to take judges posts and refused – they say I influenced them. Also on the family – human side – I would lose more … the back corridor was just not for me. [Outline of travel in Republic] That was my rationalisation and you had to have a view in case they approached you and said that you would be a suitable person..."

Despite the intense competition for work, the bar is collegiate and moving to the bench would mean a loss of those positive relationships built up during one's career, and the replacement by others which can never be the same:

> "A judicial appointment makes one socially different and on occasions rather isolated. No matter what friends one had in one's practice at the Bar, there definitely will be a difference in the relationship between a judge and his or her former legal colleagues on a social basis once the elevation has taken place. Judges sometimes kid themselves that there is no difference and that socially things can be, and even are, as they formerly were. They assume that when they are invited to parties or if they join the company and all heads turn to them, that it is because they are still pals. Affection for the judge can still be there, but added to it, almost imperceptibly and often not deliberately, are elements of sycophancy and manipulation by the recipient of the judicial presence."

We found in interview and focus groups that there was a conflict of view on whether there was a collegiate atmosphere amongst the senior judges themselves. Some asserting there was and some that there was little. For a collegiate senior to consider losing friendships for unquantifiable relationships in the back corridor was a significant step. No-one mentioned the resignation of Mr Justice Laddie from the High Court in London, but it is significant that his reason for leaving the bench was “isolation” on the bench and missing what he called the "fun and mutual support of working in a team". One respondent felt that there was indeed a ‘team element’ in today’s judiciary, but not the kind of team membership which was particularly welcome:

> “I do think that judges have to be team players and are employees. They are of course individuals in their own court room, but the impression I get is that they are part of a team; they have very little freedom; they are expected to toe the line and go to the courts where they are sent and when they are sent; they seem to have little control over their time off; they seem to be required to attend lectures, judicial studies, and social functions connected with these matters; and if they drop a clanger or become individualistic in any way, I suspect the Lord Chief Justice may have a quiet word with them to straighten them out.”

The majority of female judges in the focus group found the judicial position to be a lonely one, particularly if one is the only female judge in that environment. While they found the job very satisfying professionally, they felt that they had to maintain a distance with their former colleagues at the bar.

It is not just personality we were told that could affect temperament for a High Court post, but the field in which one practised and it may be that solicitors were sometimes better prepared for the bench:

> “… you want a quiet man on the bench and the solicitors may be more solid and could be terrific. They always used to say that the personal injury barristers who become judges were the worst – they were used to fighting with their colleagues … aggression ... Chancery men would come in and say ‘calm down’ …”

A focus group of senior barristers could easily give us a list of reasons not to apply, which included:

- That judges are perceived to be worked very hard with an increasing case load;
- Someone cited a study in England which suggested they were more prone to depression, loneliness and stress;
- The Court Service enforces more control;
- The Lord Chancellor exerting more pressure on LCJ vis-à-vis targets;
- Substantial step down in income;

- The bar is in control of its hours.

A senior suggested that the work itself was becoming less attractive to someone not interested in more esoteric human rights case law rather than the testing of truth and the more traditional problems of clients:

> "… they want to do everything on paper. … They don't want to hear witnesses – whether they are lying or not. They want to do judicial reviews of whether prisoners are getting their sausages on a Monday – and they are getting legal aid – and some man who has lost his leg can't get legal aid any more. "

One QC also took a striking psychological oppostion to judging itself:

> "The fact that a person volunteers for such a position may reveal aspects of his or her character which are somewhat unhealthy - an appetite for judging and controlling other human beings; and an elevated sense of one's own worth - and some QCs may prefer not to see themselves in that way."

A perspective which, when asked for clarification, became even more strident.

Therefore, the post of High Court judge was seen as much less attractive than it may have been in the past for variety of reasons – apart from security which had lessened (though still affected where one might live). One barrister noted that it was not just pressure which was growing upon the High Court since they had seen County Court judges handling very difficult cases.

However, whilst one woman barrister suggested "I can say I will work on that day or that day and will pick up the kids … that is a difference between the bar and being a judge. That is important – the buck stops with women", another put the opposite view: "A barrister doesn't have flexibility. You can't tell anyone looking after kids when you will pick them up – it could be 2 or 3 hours later. A Magistrates position could be very very attractive to women with younger kids."

The senior barrister group did view a Magistrate's post as more welcoming and attractive for a number of reasons. One noted the short working hours would be of interest to someone not at the top of the profession:

> "even with long lists – the number of days the court was empty by 12 … Still think a magistrate's position is attractive to someone who has been at the bar for a few years – you could even be upping your income."

Even at this senior level there was some debate in the group about whether a Magistrate left early or as one presumed, "is still there until 4 or 5".

What the High Court did offer was status, pension rights, and imporantly a different kind of work – it was the ultimate career progression operating at a standard of excellence which was continually expected, occuring in a public space.

We felt two factors arising. The first was that it was really a strong sense of public duty which encouraged only some senior barristers to consider the High Court bench as an option and that status – including the status of the professional level at which one was working – was somehow linked to that; but, second, also a feeling that women were not getting a fair chance to show they could undertake the role. The unhappiness about there not being women High Court judges may be linked to women's perception of their own status at the bar and the QC appointments system.

The women's concerns were, they felt, real. The details of a recent High Court appointment process (advertised in September 2006) were apparently known throughtout the bar: rumour had it that there had been eight applications, including two women, but only the six men were interviewed. One of the women suggested it was: "… appalling … they should have interviewed them all … I was disgusted … a lot of this is perception … it made an example of women .. It was as if to say you are a joke … " The female judges in the focus group also said that this particular High Court appointment process, in failing to interview female applicants, sent out a very poor message to potential female applicants. They viewed this as a very significant barrier which would discourage women from applying in the future.

We were aware that there is a highly attuned hierarchy at the bar, with everyone mentally slotting other barristers into their correct location on the ladder (and one's own view of one's own location not always being shared by others). We were surprised that – in this heirarchy – some viewed there being very few women who would be suitable for the High Court bench. One QC told us that there was only one woman who was ready for elevation and who was 'the bar's favourite'. This barrister also suggested dark machinations were part of the appointments process. Perceptions of readiness were something which we could not consider in this research – as outsiders we have no objective measure – but we certainly did receive conflicting views on the number of High-Court-ready women.

However, this view was not total. One barrister suggested that there were some at the top of the junior bar who would have sufficient skills to judge well on the High Court bench:

> "What constitutes the right woman? Being at the top of the bar (QC) and demonstrating knowledge and expertise, not necesarilly across all areas. I

would not exclude the top of the junior bar at the non-QC level since they could be every bit as qualified."

One issue which was raised about High Court positions and women was whether part-time court roles would make a difference in the attractiveness of the post. There was a clear feeling that this would be attractive, but that it would also lead to problems in work allocation and perhaps resentment from other judges. Given this, it was felt by one of our respondents that part-time working should only be available under family circumstances:

> "One way of increasing the attraction of the post for females would be to let it be known that a request for part time working by the successful candidate would be favourably received because women have greater difficulty in working full time than do their male colleagues. If you do not tie the part time nature of the post to family commitments, you lose the underlying justification (an employer indirectly discriminates against a female employee if he/she fails to give a request for flexible working serious consideration) and the opportunity of making the post more attractive to women who may otherwise have held back. I think there is a difficulty in allowing anyone to become part time because that is what they want because it will increase the burden of taking on complex lengthy cases on those who remain full time but who are being paid the same pro rata as those men or women who chose to work part time. It's not fair. And it could be that everyone would want to work part time but the work required a significant proportion of the bench to be full time. So while a small minority could be accommodated on a part time basis, the option could not be available for all. "

There may be a sense, though, in which some younger women – at the senior end of the junior bar - are now perceiving that they might view the High Court as an achievable goal, despite the concerns of the current female senior bar. Compare the two views, one describing a barrister who left private practice after being called in the late 1970s:

> "Someone said to me when I was doing pupilage that I could be the very first female High Court judge and I just laughed at the very idea. That seemed such a remote possibility that I could aspire to that – there appeared to be no connection between being successful and being a good lawyer. That I suppose is a sort of self-defeating attitude."

And one junior barrister currently in private practice being asked whether the High Court was a feasible target:

> "I would like to think I would be in a position to apply some day. I would like to think some day. So it is useful to build up experience."

Finally, it may also be that the bar as a whole is becoming more concerned with family issues. One QC noted that – unlike in her early career – family responsibilities were seen as a weakness:

> "It has become a lot easier – for example men are all into family life now – we want to go to sports day, pick the child up from the crèche. And women are more demanding. I would never have left a consultation early to pick up my child because I wasn't going to have them saying those wee girls are just playing at it. But there is a sea change in work life balance thinking and that sea change is affecting both genders and therefore I do think that it is much more acceptable to demand some balance in family life."

Whether this more family-friendly expectation will cause a change in attitudes to what professional experience and status is required for the High Court bench will play out in the coming years.

8. Positive Discrimination?

We asked our interviewees whether positive discrimination in some form would be an acceptable method – where required – to increase the female count in any judicial role. This has, of course, been an element of recruitment in the PSNI so is not totally novel. When asked what we meant, we suggested a lower order of preferment: that when two identical candidates – one male and one female – were in front of an interview panel, that the woman should always be preferred.

There were some who considered that this could be a possibility simply because the statistics in some areas demonstrated – in their eyes - clear discrimination:

> "They have to have positive discrimination and see what would be the proper representation on the bench. There is no shortage of possible candidates. They have to look at how they can put more women on the bench …"

Such a strong view was quite rare. Some women thought that it could have a place (one female judge in the focus group was in favour of a mild form of positive discrimination saying that it already exists within the PSNI), but most of our interviewees thought that this would somehow affect the perspective in which the candidate would be later viewed in their professional career.

> "I am not a great fan of positive discrimination. You automatically undermine those who are appointed. I would not like to have that label of tokenism. [Interviewer: What if there were two equivalent candidates?] Maybe that is more subtle but how is it perceived? … A relation in HR in England said that if you had two candidates and one was black you had

> better appoint the black person – the white person would shrug their shoulders but the black person would mean a much greater probability of a racial discrimination claim. I would not like to see the same thing happen with women and judicial appointments."

One solicitor also suggested:

> "I don't think it necessarily produces the results that you want. You have to be there on merit."

We brought to some of these the point that there was effectively positive discrimination in the US Supreme Court with 'a slot' for a woman and that this had not affected the way in which the present occupant of the slot was treated. This did not appear to change our respondents' views and most remained generally suspicious of such a development.

One barrister, not in private practice, who was used to the idea of individuals being 'recruited' according to religious or political status onto Commission bodies suggested that some of the recent promotions under NIJAC had the appearance of positive discrimination in order to signal a change of appointment environment, though her views were not typical.

9. NIJAC

The roles which NIJAC has been assigned of seeking candidates, conducting interviews and recommending on merit have been undertaken for a relatively short period. We found quite a disparity of understanding of the precise details of NIJAC, but generally there was an understanding of its role as an independent agency and why that role had come about. Those who knew most were, of course, those who had an interest in applying and/or had applied. Those who knew least about the details were those with little interest in applying:

> "No – I don't know anything about it at all. I haven't paid attention and haven't been interested."

Even with taking that detached position to the process itself, we found that most were interested in who were going forward, being interviewed and being appointed in those areas which were of relevance to them.

9.1 NIJAC & the High Court

Once again, it seems to us necessary to divide responses into two sections, one dealing with High Court positions and one with all others. The High Court was

generally seen as either not being positively influenced by NIJAC or being adversely affected by NIJAC. One person thought NIJAC simply got in the way:

> "I don't think the NI Judicial Appointments Commission is any added value at all.
>
> [Interviewer: Leave it to the judges] Yes, exactly. … It gives them an official layer. … And also you get good people who do not put their hat into the ring. Same thing happened with public appointments because [barristers] are not going to put in a form in to a civil servant and sit for interviews. You lost very good people …
>
> I personally think it is a step backwards this Judicial Appointments Commission and this competency thing. You know an elephant - you know what it is when you see it. You don't need competences and lay people. We know who the operators are and who the smart people are because we work with them. We understand the dynamics – no different from playground in P7. You don't bring the school dinner lady from 60 miles away to decide what wee boy is going to give the dinners out next week. You get the dinner lady who is there and has seen it herself – to give it to the boy who didn't spill it, throw it against the wall, or give his mates all the big stuff or keep it for himself."

Why such a negative attitude? It seemed to us that the bar has a very ordered perspective on the qualities required for senior judicial office and which individuals had these qualities. There was a clear perception that forms, 'competences', interviews did really not aid in determining the qualities for that post – and indeed deflected from achieving merit-based appointments. This was a group from within which senior posts were filled, and they saw little need for anyone to come in and muddy that process.

Of course, NIJAC – as with all judicial appointments commissions – were partly brought in to open up these kinds of in-house promotions to others and it would not be surprising if the group which saw itself as a potential 'loser' in the new system was unhappy. One solicitor was an observer of bar complaints:

> "All I ever hear [from the bar] is criticism, but that is probably from the white protestant males who are not getting positions. There is a perception that there is a positive discrimination but that may be the white protestant males. Recently I heard one candidate who queried their non appointment and they got back this letter …. When they then queried this they got back a second letter with a different reason ... so when there are stories like that going around the profession there isn't that much credibility yet
>
> There is an assumption that [NIJAC] was set up to stop white protestant males and that is their role … maybe at certainly levels but not at the High

> Court level. It may work for the lower positions but for the higher positions I don't think people are putting their head above the parapet ... candidates who would not have been your usual suspects."

But the issue – we think – is not really about colour or religion but perhaps of loss of control. One barrister, not in private practice, suggested that part of the problem was that it was just another incidence of increasing difficulty in the life of the bar:

> "The bar are being shaken up by the new judicial appointments – that some people they don't know are getting jobs, that some women are getting jobs … not at the High Court …"

There was also a feeling that NIJAC had created a new environment where everyone knew everything. In the old days of 'taps on the shoulder' the process was much more secret. One senior barrister suggested "In a very small jurisdiction there is lots of interest in who has applied. The fact that people know about the last post is an indication that it is no longer secret". Another suggested that "sometimes the process is so transparent it hurts". And there was a general feeling that such openness could put you off – "putting yourself up for that kind of focus."

Certainly the entire bar seemed to believe they knew who had applied for the most recent High Court post (advertised in September 2006). One presumes that the information did not come from NIJAC, which suggests that referees or the candidates were the informants. The legal profession is well known as one where information disseminates quickly without respect for the UK's new privacy law ('reasonable expectation') and we heard of an instance with the QC appointment process where an unsuccessful candidate was told unintentionally by a member of the appointment process before formal acknowledgement. With this kind of information flooding the bar library, it is little wonder that some worry that good applicants will not come forward:

> "It was talked about – most people knew who was applying. Prior to that no-one knew and you may have been able to keep it secret. I thought it was ok that it was being talked about. But when people were disappointed – all the 'failures' were in the glare of the bar. There were comparisons between X who got it and Y who didn't."

It seems, therefore, that the bar have a number of worries concerning the new system, and that this is particularly relevant to the application process for the High Court which is perceived to be of very high interest.

9.2 Is NIJAC a 'Good Thing'?

Generally we found that most of those who had little interest in applying for judicial roles had little understanding of NIJAC or the process. One solicitor who had agreed to being interviewed did not know what NIJAC was, but most were basically aware of it as an organisation even if the details were not familiar to them. There was a general understanding of the reason for its introduction and most were of the view that 'taps on the shoulder' were no longer an appropriate method to appoint judicial representatives.

We found that those who had undergone the application process were generally happy with it and thought that – despite some problems and a lack of understanding – that it was encouraging. One solicitor who was interviewed, when asked whether she was happy with her application and interview said:

> "It was a God awful process! [Laughs] No – I think you have to put the thing in context of modern day recruitment process and part of what we were being asked to do – hard to think of an alternative – I am sure that the procedure could be improved – but as I wouldn't think that in any general way there is much room for departure from that type of selection procedure."

A barrister – one of the portfolio group described above – suggested:

> "The whole NIJAC process is very positive. If it wasn't for NIJAC I wouldn't have been going for that post. And there are a whole lot of people out there – people who left the bar and went into [various posts]. There are lots of opportunities as a lawyer … And the hope with NIJAC is that these people will get back into the system … "

Some of the appointments to date were received positively as a development which augured well for the future. One solicitor outside Belfast suggested that NIJAC did seem to be working to the benefit of a wider inclusion to judicial roles:

> "Yes – I would point to XX – I think that annoyed people but it was excellent because they are excellent. It was not the case of the most senior man gets it, but of ability. And I think XX is a very capable and effective [judge] and I don't think they would have got it under the old system but did under the new one."

Our group of respondents covered a number who had applied and not been interviewed or applied and had been interviewed. There were some criticisms of process but by and large the closer that lawyers got to NIJAC, the happier they appeared to be with it. Our sample was perhaps low in terms of private practitioners from the bar who had unsuccessfully sought County Court or Magistrate's posts and this may have affected our interpretation. However, we

had made significant attempts to attract the barrister from private practice and can only conclude that – if they were unhappy with NIJAC and the process – they were not unhappy enough to feel that they wished to contact the research team.

9.3 Does NIJAC Communicate Well?

There were two views. First was that NIJAC were not particularly pro-active in seeking out applicants. This was a feeling which was stronger amongst those who were outside the Belfast area:

> "There aren't any seminars or recruitment drives apart from an advert in the writ. No seminars to say come along and see whether you could be a judge … I have never been made aware of any conferences on joining the judiciary. I would attend, certainly."

For those who had taken the step to apply, the packages of information which were sent out were seen to be full and informative:

> "I have a pending application – I was impressed by the amount of information – as a candidate you are very well informed …"

However, there were issues raised by those who were being interviewed, for example, or were taking part in an assessment prior to possible short listing where they were unsure about exactly what was being asked of them. For example, issues were raised about set problems – some felt that they were given incorrect information on what was involved in the problem and how it should be answered.

9.4 Perceived Problems with the Process?

A number of issues were raised concerning the process itself and which related to the backgrounds of candidates and potential candidates. The most frequently cited was that there was particular bias towards one professional sector. A very commonly put complaint was that the 'competences' methodology for assessing candidates was biased towards public sector lawyers and most biased against the private barrister; that interviews were also biased towards public sector lawyers and most biased against the private barrister; and that the requirement for referees with judicial status was most biased towards the private barrister and most biased against the solicitor in private practice.

One tribunal member complained that the system was not as efficient as the old method – when a tribunal member was quickly required (the Mental Health

Review Tribunal) to fulfil its statutory requirements, this could not be done without a long drawn out process. In the past urgency would have produced a candidate with suitable experience and knowledge with those who knew who had that professional expertise and knowledge.

Confidentiality

The legal profession is well known for the speed of transmission of gossip. We found a common complaint that the system leaks confidential information like a grounded oil tanker, and that that information can affect an unsuccessful applicant's future and present career:

> "Well everybody is scrabbling for work to a greater and lesser degree. If you think that someone is thinking of a different career then why should you cultivate him? And then do you want to be associated with someone who fails. I don't know – it's terrible – there is no secret who applied. They know who was short listed and who wasn't. It has gone on since times immemorial. It used to leak from the court service and I know that for a fact. You only had to be at certain parties with a few drinks taken and you would get all the information you wanted. One of the big things is references – people talk about references, some of the posts – if not all of the posts – officially or unofficially go past all the other members of the bench and there is a leak there. NI is such a small profession.
>
> I think it is just gossip and everybody wants to know. It was always – people are speculating as we speak about who will be the next LCJ, who the next County Court judge is. It is bad enough to put yourself through the system without that."

The consultee process does appear to the primary source of information – presuming NIJAC is not the source – with candidates having to seek references from individuals who feel little compulsion to keep confidences.

In the focus group with current female judicial office holders, all were extremely critical of the lack of confidentiality associated with the appointments system. While they accepted that in a jurisdiction of this size this was not totally unavoidable, as there would always be informed speculation, they thought that the names of candidates are leaked through the consultation process. One said that 'anonymity is now a thing of the past' and all regarded the lack of confidentiality as an 'off putting factor' of the current appointments system. The female judges confirmed the fear that barristers have of being seen as an unsuccessful applicant for judicial office. One said that:

> 'I know of a barrister who had not applied for a judicial position but people thought he had and his work dropped off'.

Competences

The notion of a competence-based appointments process was perhaps the most controversial aspect of NIJAC that we met. This has already been raised in respect of High Court appointments, but we found unhappiness with it throughout the range of appointments which our interviewees had been involved with. The problem was that it is seen as being artificial and therefore unrelated to the task to which the applicant is aiming. For example, one unsuccessful candidate suggested:

> "It is producing people who are experienced in competence based interviews. And people who have a background in thinking in that way [Interviewer: from the pubic sector?] Yes, by and large, it is not the ability to do the job but to do the competence based interview which I see as the biggest obstacle. … I feel that an intelligent person performs well on a genuine exchange – a stretching interview – where one question lead to another and you have to expand an argument and defend your point of view. I can do that. An intelligent person does not necessarily perform well in a very rigid mechanical exercise. … You have to take everyone step by step through a process and what you did. If you are not very good at that process and think more about the issues than about yourself, you are not going to perform as well.
>
> It is a technique which can be learned and if that is so then a monkey can do it."

This was a very common view. Her solution was that training should be offered in competence based interviewing for everyone. For those in public sector appointments, though, the view taken was that there was indeed an advantage to them in the process but, so what? It was open to others to develop the skills required as those in the pubic sector had had to do:

> "I think the process includes competence based interviews and those in the public sector are comfortable with that. If those in the private sector are not prepared to apply themselves and build up the skill, I think that is a matter for them. I have been involved in competence based interviews both as an applicant and sitting on a board and I there is no doubt that helped me in making those [judicial] applications."

The competence based nature of the appointments process is one which was raised by many of our respondents and is certainly a sensitive issue in terms of encouraging applications. The critical nature of the comments must mean that some must be put off applying, feeling that they will not perform well in a situation which is doubly artificial – that is, both an interview, and an interview under a

competence-based philosophy. One female judge in the focus group also felt that the competency-based nature of the form favoured male applicants who, she thought, were more comfortable than women in matching their skills to the competencies and giving appropriate examples of professional performance.

The form-filling aspect was also found to be problem with respect to how you transmit 'professional knowledge' about someone. One or our interviewees – who had never applied but who acted as referee in the QC appointments system suggested that both NIJAC and the QC system were affected by the same formalism which – other failing aside – the old system did not have:

> "I wrote references for QC and thought the forms were ridiculous – forms were designed to cover them not to elicit information – one heading was integrity, marks for 1 – 5. In the bar we are pretty clear – the bulk have very good integrity and the odd one not. "Can you remember when he stood up and told them about something which completely destroyed their case". He would already have told them earlier that that existed – he is not standing up and doing it in court. I thought the whole system (of marking) was ridiculous.
>
> I wasn't allowed to say anywhere in the [QC] form that "I thought this was the best prepared person at the bar and he is brilliant in court and no-one would ever have a word about his integrity". There was one person I could have said that about, but the way that it was in the form, I would not have been able to say that.
>
> The system misses out on the professional feel –that is the key to get you the good QC. If the Chief Justice had been doing it, he would have done soundings – they might have said, you are missing x or y. I understand the forms system, but it misses things. We would joke about a couple of County Court judges who wanted to go the High Court. There are some flaws which you might not want to write or which would be tricky to put into a form – but it can be clear to professional people …"

There was a worry that the focus on a competence process which was formal and detached was leading to a lack of focus on the actual competences needed for the role:

> "The focus on competences … framing of the competences is important – it is the type of competences which we have problems with …"

It was clear that the 'devil was in the detail' to many potential applicants. For example, one solicitor suggested that the overall goals of NIJAC were commendable from the solicitor's perspective, but that the current concern was getting the procedure correct:

> "It is a good procedure. It allows lawyers to be assessed in some way for judicial post. Any system which does that for us is better than the system of the tap on the shoulder which used to happen 10 years ago when the bar were appointed to judicial posts and no-one knew how it was done, why it was done … Any process which takes us there is 100 points up … but we are not criticising the reason behind it, but we are looking at the detail … Any process which has structure and which allows lawyers to apply for jobs and then be judged by transparent criteria – any system like that is clearly a bonus."

There appears to be usage of professional advisors to help complete forms in the requisite 'competence format' and some of those who hadn't utilised these would consider using such advisors in the future:

> "It takes a very long time to fill in the form and even then you are not sure if you have given them what they want. I just felt at a loss … If I was keen on a job again, I would get professional advice. A friend does HR consultancy work and she said to me that a lot of public jobs have horrendous applications and they help to fill them in. It costs money … but next time I would definitely look for advice. I would certainly think about help for interviews."

'Competences' are a new idea to many in the law profession and they are not persuaded that this is the best method to get the best candidate for any given post.

Referees (Consultees)

The consultee process is not just viewed as most likely source of gossip, but is also viewed as problematic by both applicants and by consultees. For example, for applicants, most thought acquiring referees one of the most difficult parts of the application process, particularly for solicitors. One who had been interviewed, was asked whether she was to apply again responded:

> "I don't know if I would again. One of the reasons is that you have to go and ask very busy people for references and obtain a reference from a judge and others. Just not sure if it is appropriate to go back an knock on people's doors again – it is not something I would feel very comfortable about – apart from that, now having made a decision to move into the role I now have, is that not a more suitable role than the one I was seeking
>
> The judge I asked was happy enough. It would certainly be easier for members of the bar – even the type of relationship between the barrister and the judge and the solicitor and the judge which is a much more distant one – that would be less of a hurdle for a barrister to contemplate."

And for a barrister in the public sector, attitudes towards re-applying were affected by considerations of who might be approachable as a referee:

> "If I were to apply again, getting the references is the hardest bit – I have the form done. Interviews are difficult and stressful but it is competence based and I should be able to sell myself but after the last experience I thought I would leave it for a while because I don't want to be a burden, because it is a burden."

All who had undertaken the process had carefully considered who might be usable. Some had more difficulty than others, but clearly those with fewest links to litigation were those had the most difficulty.

The female judicial office holders in the focus group also highlighted the difficulties, for them, with the consultation process. They all agreed that a sitting judge has great difficulty in nominating three consultees - your judicial colleagues may also be applying for the post in question which means that you cannot ask them, and all felt that it would be inappropriate to ask counsel to be a referee as this would amount to a conflict of interest thus compromising one's judicial position. The majority of the female judges were in favour of removing the automatic consultation procedure as there was a feeling that this detracted from the impartiality of the process. The female judges also highlighted the concern that it was unclear to them how the comments of the consultees were taken into account in the process.

Even those who acted as consultees were critical of the process. A full-time tribunal chairman told us

> "One problem of references is that I give these because there is a list of who can do it – a part-time chair will ask me and I tell them that I have never seen them chair a case and may have seen their decisions, some of which I agree with and some I don't. Some may have been overturned but it may have been an awful case – I'm not sure that the references I write are really worth the paper that they are written on. If I have to limit myself I am almost damaging the person, it is just that I have never seen them in operation – I can't say anything about their court craft. I may have known them in practice, but …
>
> Then with the higher judiciary, through no fault of your own – your limited areas of practice, you may not have seen these guys. I really do wonder what good these references do."

In interview one solicitor suggested that it was not uncommon for the consultee and applicant to get together in the same room write the reference.

Interviews

An issue was raised about whether references should be used prior to interview or post-interview. One of our respondents who felt that he had not done himself justice at interview believed that he would have done better if his references had been taken up. Another – for a tribunal post – felt that given that there were sometimes personality conflicts with those who one felt necessary to use as a referee, that post-use was better. Both felt that information on precisely when the referee's views were to be taken into account would be helpful.

Generally, there was a feeling that interviews were difficult for many at the bar and in solicitors practices. Many barristers would never have been interviewed for a post in their life and many solicitors would only ever have had one or two interviews. One barrister (not in private practice) who had a number of public appointments agreed that there was an advantage to those with interview skills, but that this was simply a requirement of any 'modern' appointments system:

> "I have that skill. I am not a typical barrister. I have interviewed for many jobs. I understand a bit about discrimination and understand how a proper appointments system should work and I think people at the bar are really struggling and struggling badly to get to grips with what a proper transparent, lawful appointments process should be. I understand they don't know how to fill in a form and do an interview and that there is a lot of disquiet. In the old way, barristers were almost groomed by judges for the next step and you could see these things developing. For the [*applied for*] post – any one of us I am sure could have done that job very, very well – but someone has got to make the decision about appointable people falling by the way. The problem with the old system was it was less clear why good people were falling by the wayside – less scrutable – under the present system, good people who don't get the job can request feedback. It is more transparent and more suitable. The problem with the old system was you couldn't be sure that good people were being kept out – other considerations such as personalities, religious, gender based prejudices of other people. Those should not be coming in any more. NIJAC's process should be better – more objective."

The public sector lawyers certainly felt more confident about the interview process than others and felt that practice was very useful. One who had been interviewed several times suggested:

> "The more interviews you do, the better you come at them – you can spot the questions. So perhaps if NIJAC wanted to put off a vexatious applicant like myself they should think of asking different questions."

One or two solicitors felt that having got through to the interview stage they did not feel that professional help was required for form filling, but that they certainly would consider using professional help to prepare them for competence-based interviews in future.

When asked what improvements could be made to the system, the female judicial office holders in the focus group cited the following:

- the use of assessment centres and role plays to assess potential for judicial office;
- greater use of work-shadowing programmes;
- more part-time and flexible working conditions (although some felt that the logistics of this had to be well thought through so that other full-time members of the judiciary were not over-burdened);
- eliminate the need for automatic consultees (one felt that the reference form should only include the option of answering the question of whether 'there is any reason why this candidate should not be appointed to judicial office');
- improving the feedback provided to unsuccessful candidates (giving constructive guidance on how to improve one's application and encouragement to apply again).

Confidentiality and Shortlisting

We have already mentioned the problem around the assumed knowledge of the High Court application process – that everyone believed they knew who had applied and who had not been interviewed. This lack of confidentiality is also a problem with other judicial roles. One observer of an application for tribunal posts noted:

> "The short listing over tribunal posts caused more hurt than not getting the job. 99% of them were deputies and some had been doing it for less time than others, but not to be shortlisted … Some of them had no great expectation that they would get the job – some were there to get the experience because other posts were coming in – but they certainly found the hurt.
>
> I have sat in a number of tribunal cases and you think that's only a shortlisting case and you think it won't be a significant hurt to feelings. It can – I have found – be far worse. I think it was far worse for the two High Court applicants. I haven't heard an explanation of why they were not shortlisted. The only explanation for not interviewing them I have is to ensure that the interview panel didn't have to sit for so long …"

It is clear from out interviews that confidentiality – and potential affect to career – is at its highest when the applicant applies but does not get through to the interview stage. At that final stage they have passed the basic test of competence to do the job and all observers will realise that – on the day – only one can succeed. As for the rest who did not get to that stage, their professional status may be negatively affected.

Feedback

Comments from those who had not been interviewed and which reported as hearsay were often critical of the feedback which had been received: letters which didn't clarify or which were unhelpful. One female judge was very critical of the lack of constructive feedback after an unsuccessful application. We found that some took up the offer to have feedback by letter and not face-to-face:

> "I think if you are offered feedback you should take it – see what you can learn from the experience – I used the standard offer and didn't feel there was a need to meet with chair – I felt the feedback was reasonably accurate in how I had done …"

Most, though, felt that the written format was not too useful:

> "If I was being hypercritical then I could say that the written feedback is a bit bland – it is pretty hopeless, but when I asked for a meeting I found it pretty helpful."

Similarly:

> "The letter I received told me absolutely nothing but hoped I found it helpful – very dismissive – was pp'd by a secretary rather than coming from the chair of the selection committee. When I went to meet him, I wouldn't have needed to meet him if the letter was better and also about letter not coming from him. He took the point on board. … You need to improve the process. I am not sure that the person giving feedback had been trained. I would hope that JAC would have sent him to be trained, but I would have been surprised … My main problem was with the process as much as with the feedback (the letter was poor). As far as the meeting, some comments were helpful and valid … "

Feedback, face to face, appeared to be more useful and whether it came from a lay member or legal member, did not always seem to be important:

> "I asked for feedback and was given this be a lay member and I was extremely impressed by the feedback and he took a lot of trouble and completely au fe with the issues and I found it extremely helpful … On

> another occasion I was given this by a legally-qualified member and that was equally helpful but I would not say that one was better than the other."

Lay involvement was something which our interviewees were unsure about.

Lay Involvement

Some of our interviewees were opposed to the increasing involvement of lay members, and – once again – these relate to the notion of professional expertise as being something that is best ascertained within professional circles:

> "I am a little bit concerned about lay people. I am not a big fan of that. I don't know what an external lay person can bring. I think the legal profession knows what the qualities required for a position are and knows how to spot them. I wouldn't want to see the balance between members on NIJAC go towards the lay people. Not because I am against lay people, but because you don't see doctors handing over to lay people appointments to major consultancy positions. You have to have trust in a profession that they will make the correct appointments which are right for the profession and for society – they recognise the skills and the qualities. I am just very hedgy about people not involved in the legal profession understanding what the skills required for presenting a case before a judge, writing up a case, analysing a case – coming at it from the legal perspective – your whole training is brought in to that. How can a lay person comment on that? Apart from saying that a person must be trustworthy or be of good reputation – what apart from that can they add? So I would not be a fan of that. I think the legal profession is in danger of watering itself down and handing over power to other people … I just feel as a general rule – judicial posts are drawn from the legal profession and so it should be that profession who makes the decision.

One applicant who had been interviewed gave a practical example of this problem of lay members understanding technical professional issues:

> "One question which often comes up is to describe a difficult decision you had to make – would you make a different decision next time – well, I have answered that a few times giving a particular example and have felt that the lay members may not have grasped the complexity of the example – that may be my fault because one of the requirements of a judicial post is to engage with members of the public who are there to give their evidence or two have their evidence listened to. So it is not an excuse and I should be able to get the complexities across to the lay member. But having said that the interview is quite a pressurised situation – it's unreal and time bounded – it might take half an hour to do that and it would be readily

> understandable by a member of the public or a lay member. I have struggled to explain the complexity but not to oversimplify. But is that a reason for not having lay people? I think not."

Generally, there was a view that lay involvement should be welcomed as representation from the community, though there was frequently a suspicion that it would take a lay member with substantial confidence to go against the view of a chair who was, for example, a High Court judge. Further that it would be welcome to have NIJAC chaired by someone who was independent of the legal profession:

> "[NIJAC] is controlled by the legal profession. You look at the composition of the JAC - do they not have a majority? … The chair is the Lord Chief Justice. I think you should have an independent chair. They don't question that. I believe that the appointment of judges is a matter for society as a whole."

10. Methodology

Tying together statistical analysis and interview ('the ethnomethodological approach') methodologies is sometimes viewed as simple. However, as the debate in the literature of sociology makes clear, there are two different assumptions which underpin each approach. Statistical analysis takes a relatively formal approach, and assumes that it knows the general problems and that these can be tested in a neo-scientific manner. The interview method suggests that we look to the day-to-day concerns of individuals and basically describe their 'folk methods' for handling the world around them ('ethnomethodology')[129]. This project, though, had few such problems and probably differed because substantial numbers of interview-led projects has led to a reasonably well understood level of knowledge from which a statistical survey can be applied.

Our findings did not produce any radical disagreement with the statistical survey, purely – as the project was requested to do – filling in with more specific perspectives. We undertook the interviews and focus groups in relative isolation from the statistical survey because we did not want to unconsciously mirror those findings: the fact that our results do actually mirror the survey information, only heightens our sense that we are both (quantitative and qualitative) providing accurate research descriptions of the environment we are studying.

The general technique which we believed to be most useful in assessing the matters at the core of this research was in-depth interviews with members of the

[129] The classic ethnomethodological approach often requires the observer to be a participant – for the best UK example of this see John Flood, *Barristers' Clerks: The Law's Middlemen*, 1983, Manchester UP.

profession who would be considered eligible for a judicial role. Discussion – particularly with those who had tried and failed - would only produce honest perspectives in the context of one-to-one. In setting these in-depth interviews, we targeted barristers and solicitors broadly proportionately. However, greater numbers in the solicitors' profession allowed us to explore the varying experiences of solicitors working in different geographic areas, or types of roles in firms, and to gain information which will compensate for the under-representation of solicitors in previous research [130].

The second technique was to focus on group perspectives using focus group discussion since it is less likely that representative groups will discuss their own personal experiences and thus require the anonymity of the single interview situation.

Typical contact was either directly via the research team or through institutional contact via NIJAC. The latter was used because we wished to contact unsuccessful candidates and only NIJAC had contact information: they drew up a random list and invited members of that list to make contact with the research team. For those that were contacted directly by the team, we used public lists from the Law Society and Bar Council and extracted randomly, but reflecting geographic location so far as solicitors were concerned. We also biased our requests for interviews towards female solicitors, given that a significant interest of the project was gender.

Formal letters were sent to chosen potential interviewees, and this was followed up by phone call (sometimes several). For the solicitors some suggested that they didn't have the time or interest, some failed to return calls, but interviews were arranged with almost 50% of those who were first contacted. We eventually interviewed 16 solicitors in full one-to-one interviews.

The second group comprised individuals (unsuccessful candidates) who had been asked to contact us by NIJAC. We do not know what percentage of this group we met, but it was interesting to us because it included barristers who were in pubic service and who had portfolio careers which we would have found difficulty in locating in any other way. This was, in large part, the most interesting part of our group. We interviewed 8 from this group in one-to-one interviews.

The bar was the hardest to make contact with. Formal letters were sent to a random selection from those currently members of the Bar Council. Few replied (and were harder to locate by telephone since they were not office based) though interestingly some of those who were contacted by letter agreed to participate in a senior barristers focus group arranged by Brice Dickson. Eventually we did

[130] In part because of solicitor's under-representation in previous research and also a judicial career being less likely to be perceived as a normal part of a solicitor's career structure. Judicial office is commonly known to be desired goal of even relatively young barristers. See Morison J & Leith P, *The Barrister's World*, Open University Press, 1990.

arrange interviews with barristers covering the junior to the most senior. Views were also gleaned via email with two senior barristers. In total this gave us 9 interviews/contacts.

Focus groups were arranged in a similar manner – invites were made on a relatively random basis ('young female solicitors') to ensure a good spread of view. Numbers were:

- newly-qualified female solicitors - 4
- mixed gender mid-level and senior solicitors - 7
- final year law students - 8
- mixed senior barristers - 8
- young female barristers - 7
- female judicial office holders - 4

There is only one method in determining whether one has sufficient participants in a process like this – one reaches a stage where you interview individuals/hold focus groups and receive no new views or perspectives. We believe that we reached that point before we completed our interviews.

Finally, it should also be noted that one member of the team has substantial expertise over a number of years using this kind of investigative technique, including research into the general barristers' profession itself and also one area of the specialist bar. Further, the technique has been used previously by one of the team in a transnational project into the patent profession and judiciary.