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SCHOOL OF
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REWARDING MERIT IN JUDICIAL APPOINTMENTS?

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Rewarding Merit in Judicial Appointments?

A research project undertaken by the School of Law,
Queen's University Belfast for the Northern Ireland
Judicial Appointments Commission

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This project was undertaken during 2012 and funded by the Northern Ireland Judicial Appointments Commission via a research tender process. The research was carried out within the law school at Queen's and led by Prof. Philip Leith. The other members of the team were Profs. Brice Dickson, John Morison and Sally Wheeler. Dr Marie Lynch provided research support to the team.

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

The Report was authored by Profs. Leith and Morison

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1 Executive Summary

1.1 Introduction

This research involved carrying out an online survey using a number of vignettes/scenarios to explore understandings and attitudes to judicial appointments. This sort of survey is relatively novel in this context and provided a useful way of understanding how a range of factors such as merit and seniority, career paths and connections, as well as gender and visibility, are perceived as operating within the appointments system. The research also involved a series of focus group interviews with a number of individuals with various professional backgrounds and at different levels of seniority. These, and a limited number of individual interviews, afforded an opportunity to explore more closely some of the themes arising from the scenarios as well as a chance to look in some depth at some of the views and concerns of a range of members of the legal professions.

Building upon the previous research project,¹ this work was less concerned with revisiting earlier themes and more interested in exploring how the idea of “merit” as a governing factor in judicial appointment is seen as working in practice, and whether it is perceived as being most likely to be found within particular career profiles. We also investigated issues such as the possible development of formal and informal pathways to a judicial career and practical problems such as how an applicant might become known to the senior judiciary, and the importance of this. Overall our interest was primarily in developing an understanding of how gender is perceived to operate in the appointments process and how any barriers to recruiting women, particularly to the senior judiciary, could be further broken down.

1.2 The Research Methodology

We carried out an online survey of the legal profession in Northern Ireland asking respondents to assess six imaginary individuals who were considering applying for judicial office. The individuals in the vignettes were designed to represent reasonably accurate representations of potential applicants. This view was confirmed by various “critical friends” from across the legal profession who kindly assisted the research. The scenarios were constructed as to allow us to check how *meritoriously* the hypothetical applicants might be viewed. Respondents were invited to tell us whether they considered the imaginary individual to have sufficient merit ‘in an ideal world’ to be recruited to a judicial appointment. Respondents were also asked whether they thought that merit would be rewarded ‘in Northern Ireland today’. Respondents then were asked to provide comments on why they chose a particular option. Our goal was to test whether respondents felt the appointments

¹ *Research into the barriers and disincentives to judicial office* by QUB and NISRA, available at http://www.nijac.gov.uk/index/what-we-do/publications/qubresearch_executive_summary_october_2008.pdf

system under NIJAC was rewarding merit or whether there were other factors which were presumed to undermine the merit principal.

This work was followed up with a number of focus groups where a range of volunteers came together to discuss some of the issues raised in the scenarios and in the responses that we obtained. There was also an opportunity for some more free flowing discussion on the general themes of merit, career paths and possible ways to improve the representation of women, particularly in the ranks of the senior judiciary. The focus groups covered both experienced and relatively junior practitioners in both the solicitor and barrister professions. The groups were divided into male and female and were held separately. There was one focus group for lawyers working in the public and voluntary sectors where both sexes were together.

This sort of research does not have a robust sampling methodology in the traditional sense, and indeed it does not claim to be statistically representative. The sample for both the online survey and for the focus groups was largely self-selecting (although we did avail of various contacts including in the Law Society and Bar Council to encourage participation - and we are grateful to them and to the focus group participants). However the sample is more or less reflective of the legal profession at large in Northern Ireland and we do believe that we have a reasonably accurate and persuasive snapshot of views there. Most (but by no means all) of our respondents in both parts of the study had not applied for judicial appointments. It follows that their views on whether meritorious candidates would be rewarded in the scenarios and in reality must have been based upon “common knowledge” (including more or less accurate gossip) within the profession. However, perceptions are important and it was these that this research sought to capture. The marked scepticism we found should be a concern to those involved in the appointments process, and in the wider professions.

1.3 The Key Findings

We found:

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

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

13. Considerable doubt was expressed as to whether it was possible to rise up through the judicial system to the High Court from lower courts such as the District Court and the tribunals.
14. There was a view from some respondents that a part-time approach to judicial appointments (which might be appropriate for those with family responsibilities) did not match what respondents felt was required for a judicial post (*i.e.* a full commitment to the role).
15. While there were some reservations about part-time working, the view was expressed that more flexible forms of judicial engagement should be explored including part-time posts. It was often commented that other professions had managed to institute such arrangements successfully and such experiences should be investigated.
16. While religion and political belief were not seen as figuring significantly as factors affecting judicial appointment, social class (and in particular having the right contacts) was seen as important, particularly for more senior appointments.
17. The application process was generally seen as legitimate, if demanding. However confidentiality, and the difficulties of maintaining a practice at the bar, or being regarded as a good team player in a solicitors' practice, when an application becomes widely known, were referred to frequently as a strongly negative factor.
18. The working conditions of High Court Judges, and the ethos of the back corridor of the High Court, were often reported to be negative features, particularly for women candidates
19. There was general agreement that judicial careers should be brought to the attention of young or new members of the professions at an early stage and that judicial office, even at the highest level, should not be reserved as something to be undertaken at an age when many in the professions are contemplating retirement.
20. There was general agreement that NIJAC had made a positive difference but little consensus on what it should do next. There was recognition that many factors were beyond NIJAC's control and that the Bar Council and Law Society, as well as the professions at large, had a responsibility to ensure a diverse legal profession where merit could be recognised and developed.

2 The Research Study in Detail

2.1 Introduction: Goals and Framework

This research follows on from a previous piece of research which involved a large number of contacts with the profession through one to one interviews and focus groups. That research highlighted a number of aspects of the work of NIJAC and fed into their strategic planning process. This project is a re-visitation of that work using slightly different methodologies. It is less focused on the detail of NIJAC recruitment processes but rather it tries to gather information on a number of key themes through survey methods and with a small number of focus groups. The survey technique used is relatively novel to law, gathering perceptions of reality through using scenarios which describe life-like situations. The focus groups augment the material gathered in the survey and look more deeply at ideas of merit and pathways to judicial careers.

The terms of the project set by NIJAC were:

to re-visit earlier findings regarding the real and perceived obstacles and difficulties experienced, in applying for, and securing judicial appointment, and in particular by women in line with the Commission's statutory responsibilities to establish if NIJAC's strategies for increasing diversity in judicial appointments in attracting, recruiting and appointing applicants have led to positive change to explore the concept of a judicial career to re-examine the extent to which, women in particular, consider applying for judicial appointment and the subjective and objective reasons for these career decisions to determine a range of initiatives e.g. flexible working, mentoring, and assess their perceived value.

Also:

Within the framework of the overall aims the research will seek:

to confirm if factors previously associated gender imbalance, particularly in the top tier of the judiciary, still apply; and if new factors have emerged to consider, in the context of the overriding statutory imperative that appointments be made on merit, what additional strategies to improve the gender balance in the judiciary might have application in Northern Ireland.

Our earlier research had looked at the broad range of judicial appointments and generally found that NIJAC was seen to have been a positive development and where recruitment was not seen as problematic in terms of, say, offering careers of a judicial nature to those women who wished a number of fee paid posts, or sought appointment in the tribunal system. What had been highlighted by that research was the problem at the higher judicial levels and notions of 'merit' that were employed there. This seemed to suggest that merit – at least according to one influential group – required a certain background and a particular expertise. In particular we were

interested in recruitment to the High Court and how merit was regarded in this context. It also involved exploring whether there were formal or indeed informal pathways to appointment and this entailed looking at perceptions of what background and experience were thought to be necessary and, in particular, the perceptions about the possibility of recruitment to the High Court from lower courts, or from non-traditional and female applicants.

The research team thus designed the project to carry out two functions:

First: a survey using scenarios which were representative of the kinds of people who might consider applying for judicial roles. Respondents would inform us whether they saw the candidate as being a potentially successful candidate in an ideal world ('meritorious') and also whether they considered that candidate might prosper in the Northern Ireland of today. The goal, of course, was to detect perceptions of where Northern Ireland was 'failing' against the ideal in terms of rewarding merit.

Second: a number of focus groups where we presented the findings from the survey as a basis for a more open discussion of how merit was understood and the background and expertise that are thought to be required for appointment to the senior bench. It was at this stage that we explored what respondents believed would be necessary practical steps for NIJAC or other stakeholders to take in order to ensure that the 'ideal' was achieved.

We did not concern ourselves with religion, our earlier research indicating that this was no longer seen as problematic in recruitment to the NI judiciary. This was largely confirmed in this study by its absence.

Section 3 below reports on the survey in detail while Section 4 provides an account of the focus group discussion in terms of the salient themes produced by the survey material.

3 The Survey

3.1 Format and Outline Methodology

The project goal was to collect perceptions concerning the manner in which professional lawyers view the process of becoming a judicial office holder. Perceptions such as this are complex and difficult to access outside an interview methodology – there the interviewer can challenge the statements of the interviewee so that issues are teased out and properly followed up. There was insufficient time and funding available to do this fully for this project, but we were sceptical that a traditional style of questionnaire would answer what we wanted to know. We decided therefore to use a less frequently implemented methodology – based upon *vignettes* or *scenarios* (we use the terms interchangeably) – which would then provide the basis for our questionnaire. This approach has been used in medicine (accessing views of what treatments physicians might use with an invented patient and their symptoms) and has been used to an extent in other social sciences. It is not generally used in legal research although we believe it to have particular utility here.

The methodology requires a carefully crafted scenario to be created which evidences real world issues. None of the scenarios in this questionnaire relate to any actual individual but they are – to a certain extent – informed by our previous research work and also by the relevant issues in judicial appointments today. These were worked on by the team and advice was provided by NIJAC's Research Steering Group and by a number of individuals in the professions. Each scenario attempts to unlock a number of key themes. For example, Helen Black, comprised a number of issues: gender, a local NI solicitor who might not be known widely in Belfast, interested in substantive law (as a lecturer), and working part-time. Two questions were asked and the respondents could answer either or both with Agree/Disagree/Don't Know:

Helen - in an ideal world - would be successful in achieving a judicial career

Helen - in Northern Ireland today - would be successful in achieving a judicial career

These initial questions were set to test the match between whether the respondent felt that the individual was a good candidate 'in an ideal world' or whether there was scepticism about the candidate being successful in Northern Ireland under the NIJAC regime. 'Merit' is a subject which is easy to talk about in the abstract but difficult to pin down in any detail, but these scenarios allowed us a way to try to unpick what respondents felt comprised 'merit' in terms of judicial posts. This is not as obvious as some believe: the oft made comparison with European judicial posts shows a different kind of view of merit – the best law students are recruited for judicial school and then, depending upon performance in lower roles, they move up the system. But even in Europe, the vast majority of senior judiciary are male. Since we know that representation is lower, we wanted to know whether there was a *perception* that women with a very good CV were being disadvantaged at the upper

levels of the judicial scale rather than a perception that they were not interested in judicial office.

We invited respondents to optionally provide textual information as to why they answered as they did. The kinds of responses we received were interesting and covered a variety of views, which can be linked to the professional role of the respondent. For example, three differing views on Helen were:

"I think Helen's first hurdle would be her age. 36 is quite young. I do not think that the fact she is based in Derry would necessarily prejudice her chances but unfortunately that she is now part time due to her having children might disadvantage her. If so I think this is very wrong. She seems very well rounded in teaching business/tax law, and working in family and criminal circles. For the reasons above I do not know if she would be successful in an ideal world and my main reason for saying this is her age. Perhaps when she is a little older she would be deemed to be more suitable. For this reason I do not agree that she would be successful in achieving a judicial career in Northern Ireland today."

"As a working mother I feel that Helen would face an obstacle in achieving judicial office especially in light of the fact that she would wish to undertake this work on a part time basis."

"But it's not an ideal world. Helen's appointment would depend on her written test results? IF shortlisted then on interview ... apparently. Technique in answering questions, the attitude of markers and a confident approach to role play could see her through. She would be as good a candidate as any one else ... if the equality regime and expressions on judicial diversity from NIJAC are accepted. Her sex will not be an disadvantage, probably an advantage ... but a male respondent would say that ????"

This question provided 121 textual responses – some longer, some shorter – so is an indication of the quantity of material which can be gleaned from such an approach. Clearly, it is not as effective as interview techniques but it is an efficient way in which to provide a 'snapshot' of professional perceptions of the NI judicial appointments process.

A further advantage of this technique is that it is relatively simple to anonymize the data and use it in other research which, perhaps, might compare the NI views with those of the rest of the UK.

A warning, though, is that most of the responses which we gleaned were from those whose experience of the judicial appointments system was limited, and clearly much has changed in the appointments system over the past decade. Would this make their views less than useful? We think not: we were working with a group of well educated individuals who operate in a small world where, as we know well, information transmits speedily and becomes part of the common currency of knowledge. The survey responses are thus useful, but in terms of understanding the detail of NIJAC and its operation, probably not as accurate as one might wish if that was our research target. This project, though, was not about the detail of NIJAC – it

was about perceptions of merit and appointability in Northern Ireland from the perspective of the professional lawyer.

3.1.1 Target respondents

The project attempted to locate and encourage anyone in Northern Ireland who had a professional legal qualification to respond. We also made contact with those who teach students who are undertaking professional training, requesting they respond. Overall, we had 212 respondents who began the questionnaire. These (excluding those who did not provide information) could be broken down into:

Female: 101
Male: 89
Bar: 52
Solicitor: 143

We also asked whether the respondents occupied any judicial role or had applied for one. A small number occupied these and a larger number had applied or were thinking of applying.

A more detailed breakdown of the professional roles of the respondents is given in the figure below, where it can be seen that private practice provided the highest response rate. The 'Other' categories included non-practicing barristers and solicitors and also two full time judicial officers (both with solicitor backgrounds). Our responses included 8 fee paid judicial office holders.

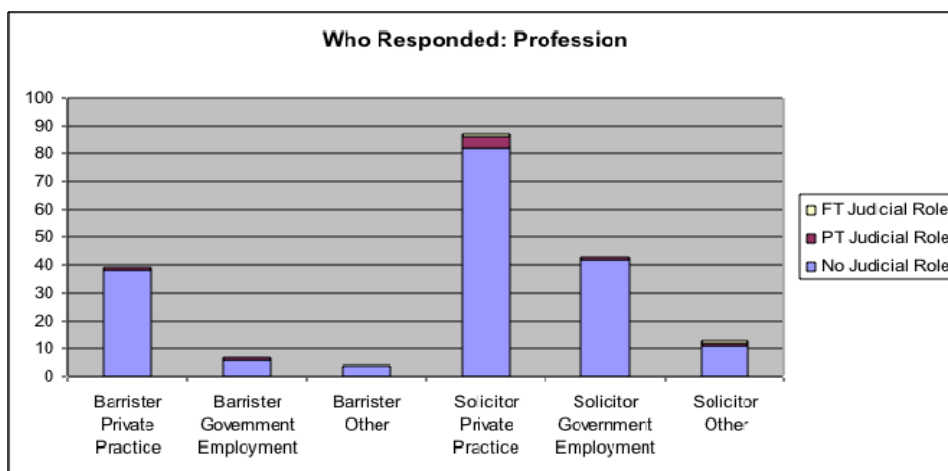


Figure 1 - Breakdown by profession

3.1.2 Gender

We can group gender and age together to demonstrate that our breakdown shows our respondents were not hugely biased towards any one gender or any age bracket apart from the oldest group. The two age groups which were almost equal in

number of responses were the youngest and the 'Age 51 to 60' group. For the over 60 age group, there were only two male responses.

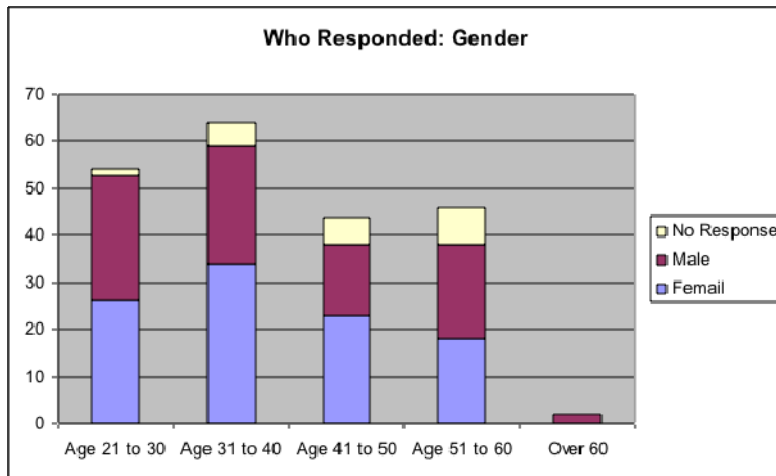


Figure 2 - Gender Breakdown

3.1.3 Who opened the survey but didn't respond?

Our survey tool collected responses when one or more questions were answered. The first question required information about the respondent. Those who answered this question did not always go on to complete either all or some of the questions. Those who did not answer any further questions at all totalled 26, though not all provided full information (e.g. they may have provided professional role but not gender). The breakdown of information we collected for those who answered no other question is:

Female Non Responses	11
Male Non Responses	11
Solicitor Private	11
Solicitor Government	4
Bar Non practising	1
Have applied unsuccessfully	2
Have applied been successful	2
Considering applying	2

Table 1 - Non completions

This does not appear to suggest that any particular group of individuals found the survey method problematic. We cannot, of course, say why they did not respond to the survey apart from filling in the details of the first question.

The total of useful collected responses is thus 186. We consider this a reasonable response rate.

3.1.4 Students

The survey gave the option of indicating whether one was a student or not, and 10 indicated that they were. All of the respondents gave their gender (5 male, 5 female) and 4 of these were barristers and 5 solicitors. The age ranges of the groups were,

4 in the '21 to 30 group',
2 in the '31 to 40 group'
3 in the '41 to 50 group'
1 in the '51 to 60 group'

We had expected any students who responded to be in the younger group, and had been prepared to treat these separately from the main professional groups. Given, though, this age spread we have treated their responses along with the other non-student responses.

3.1.5 Approach to Survey Analysis

A large amount of material was made available and we are able to view perceptions from a variety of differing views. The two main windows which we will use in this analysis are:

Solicitor vs Barrister – clearly interesting because each group has its own concerns about the NIJAC process: for example, the Bar are concerned that advocacy/court expertise might be undervalued and solicitors are concerned that advocacy experience is viewed as too important a requirement in the process.

Gender – the European-wide failure to see females rise to senior judicial roles to reflect their percentage at lower levels as well as concerns about local senior courts which are free from female representation are a major issue for those involved in judicial recruitment.

We will thus look at each of the scenarios in turn using these windows, and then look at a less vital window:

Judicial Office Holders - the perceptions of the small group of respondents who already hold either a fee paid or full-time judicial post will be viewed to see if they radically differ from those who have not held such a post.

Then, finally, we will bring the discussion together with an analysis of what this tells us about what we have learned of the judicial appointments process in Northern Ireland as a whole.

3.2 Responses: Barrister and Solicitor

3.2.1 Helen Black

Helen Black, 36, is a solicitor based in Derry for the last 12 years. Over the past four years she reduced her workload to have children, and is now part-time. She has also taught law part-time at the University of Northern Ireland for the business department. Her work has been primarily family law though some criminal work has always been part of her career, but her intellectual interests (and teaching) have been tax related. The idea of a judicial career appeals, but she is unsure how her skills could be used, or whether she should return to full-time to practice.

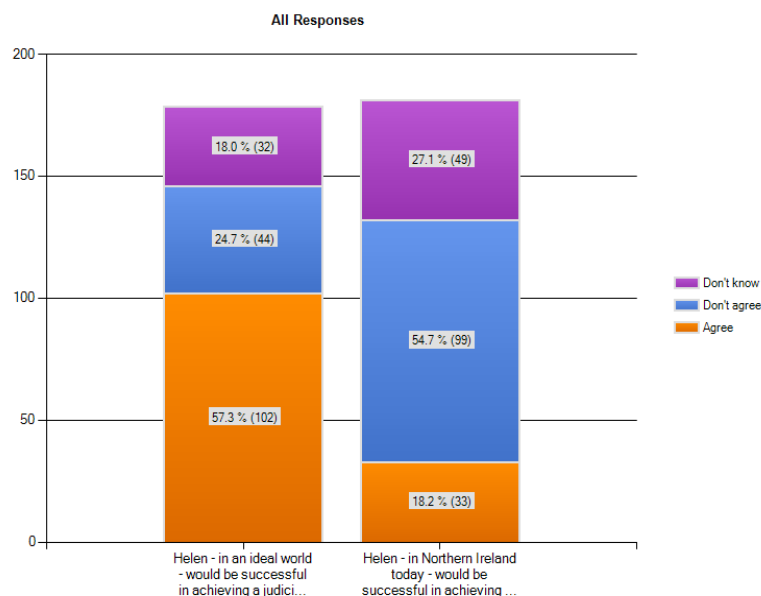


Figure 3 - Helen Black, ideal vs actual

The overall response to this question demonstrates a significant level of scepticism that merit would be recognized: 57% viewed the candidate as succeeding on merit in an ideal world, and 54% believing this would not be the result in practice. The difference between those who see her doing well in the ideal world but not in NI being 39% – a quite substantial percentage of the respondents. By looking at the different backgrounds of the respondents, we see a general agreement in level of scepticism but also differing views of whether she merits advancement. For example, the bar (both private and government) are less persuaded by her merit with the private bar respondents being sceptical but also less willing to believe that Helen is meritorious in the first place (36%):

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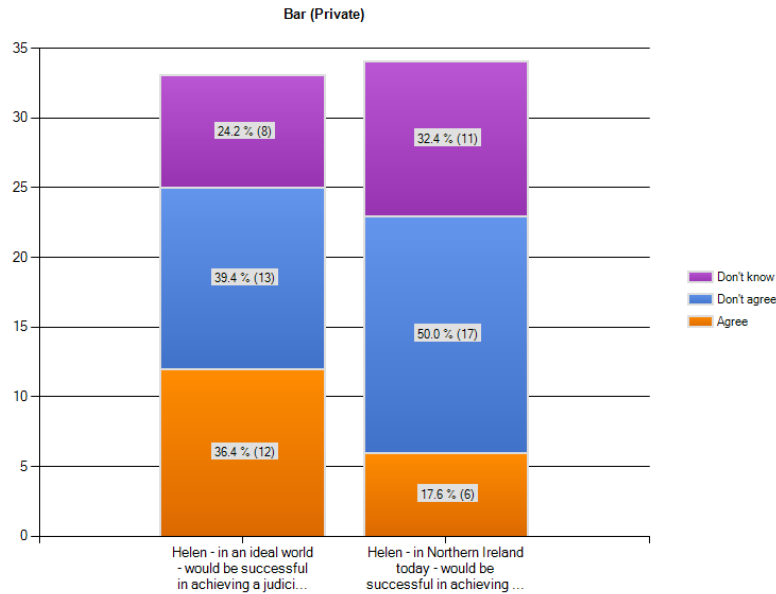


Figure 4 - Helen Black, Private Bar view

A high proportion of those barristers employed in government service see her as with merit. However, the low numbers involved may have affected the responses:

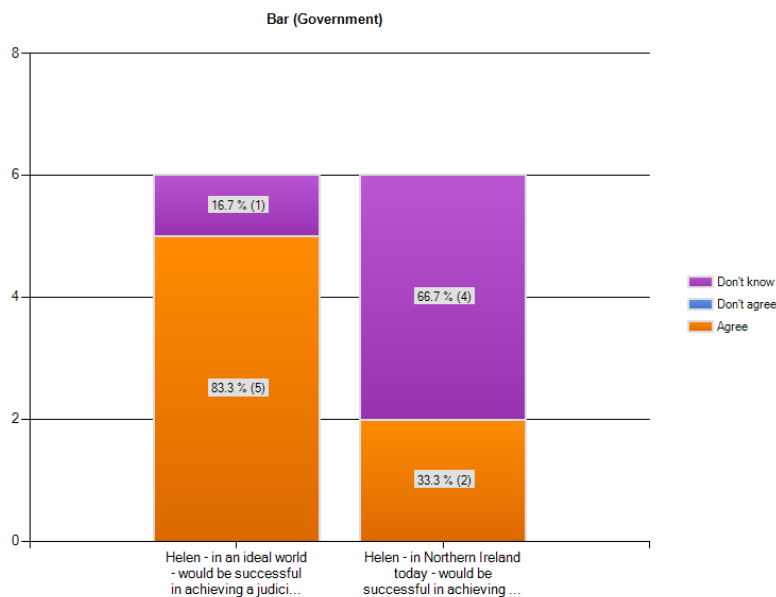


Figure 5 - Helen Black, Government Bar View

When we move to the solicitor's view of whether merit will be rewarded we see very high levels of scepticism that merit will be rewarded:

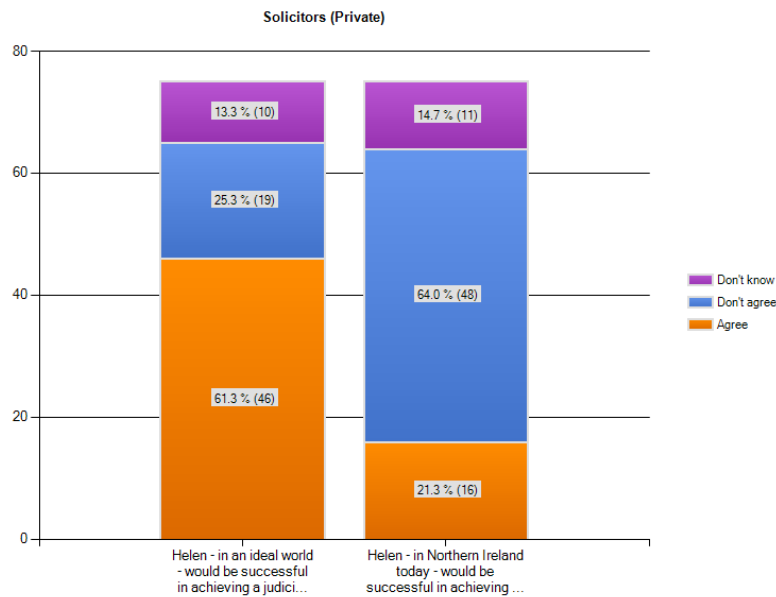


Figure 6 - Helen Black, Private Solicitors View

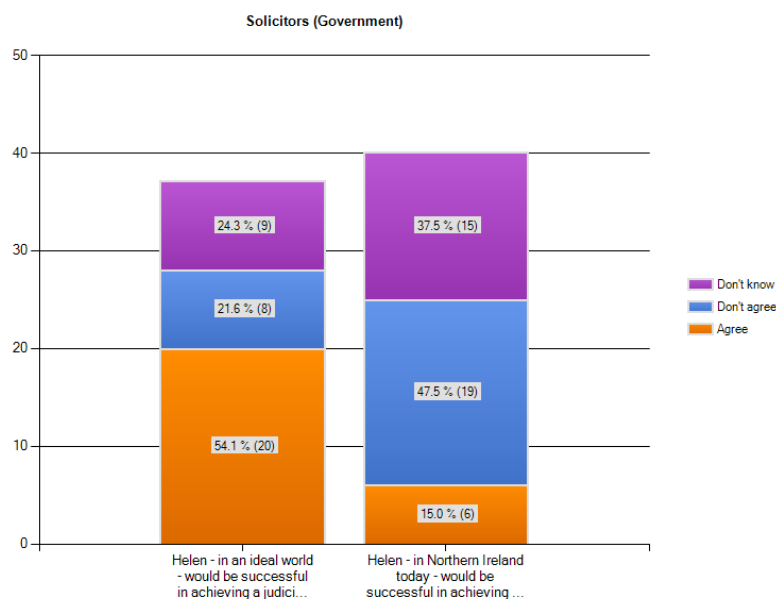


Figure 7 - Helen Black, Government Solicitors View

What views underpin these perceptions? The comments which were gleaned from female private solicitors who saw Helen as meritorious but likely to be unsuccessful indicated that she was a working mother and this would be an obstacle; that she was 'too young, too female'; not high profile enough (that is, being in Derry and out of the view of Belfast, we presume); a lack of determination (shown by not being able to decide where she wanted to be); and had the 'stigma' of being a mother.

Those female respondents who did not see her as meritorious concentrated upon her young age and relative lack of experience (including litigation) but there was also a feeling that dedication was necessary to achieve judicial office (a 'fight' model, perhaps). For example, one female respondent who neither saw her as meritorious nor likely to succeed suggested:

“I’m sorry, but judicial posts should be awarded on merit. I just don’t see that playing the “female with dependants” card is a bar to a judicial career if one is clever and dedicated enough to do the job.”

What was striking in the comments provided by all the respondents to this question was a lack of the much argued advantages which women would bring to the judicial task. Our responses were always put in terms of career of the individual rather than what the recipient of justice might get from having women in judicial roles.

3.2.2 Malachy Gray

Malachy Gray qualified as a barrister in 1993. After six years in private practice in Belfast he decided that he preferred a regular income as a civil servant in the legal department of the Department of Organic Farming where he has risen to a senior level with a staff of 30. Much of his work has been negotiation with the European Commission, but he has also been responsible for all litigation involving the department, though he almost never appears in court himself. Malachy has a disabled son and this encouraged him to sit on the Special Educational Needs and Disability Tribunal, a role which he has undertaken for three years and which he has enjoyed. Salary levels of a District Judge (Magistrates Court) are attractive (civil service pay has fallen behind and looks set to remain low) and Malachy wonders how he could best prepare his CV for a possible future role as a District Judge.

Overall, around half (49%) of all respondents indicated they felt that Malachy had merit and slightly less (43%) thought he might be a successful candidate. The bar took a less positive view of Malachy’s merits, but a higher percentage considered he would be successful: implying that Malachy’s merit would be over-rewarded by the current system.

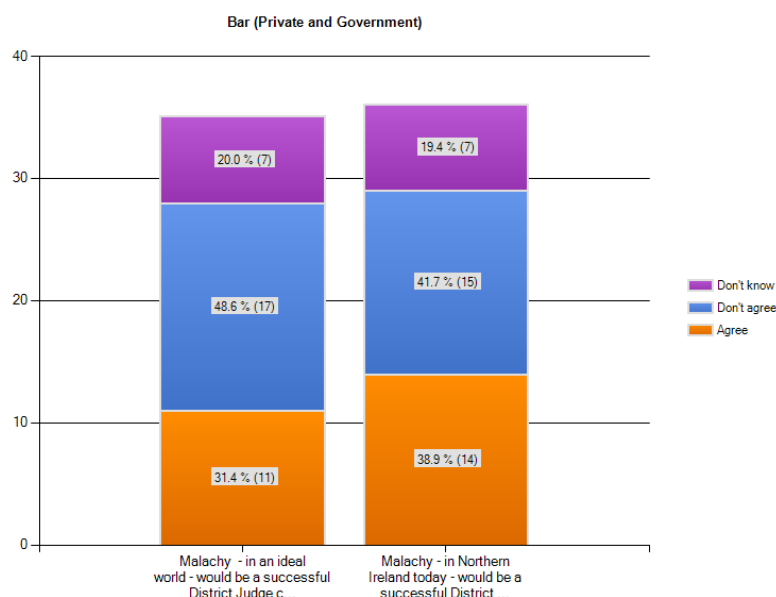


Figure 8 - Malachy Gray, Bar View

When we look, though, at the differences in perception between the private bar and those from Malachy's own background (i.e. government service), there is a distinct divergence of view. The private bar sees Malachy as being significantly over-rewarded by the current system, whilst the government bar see under-reward (but we must remember the small numbers in this latter sample):

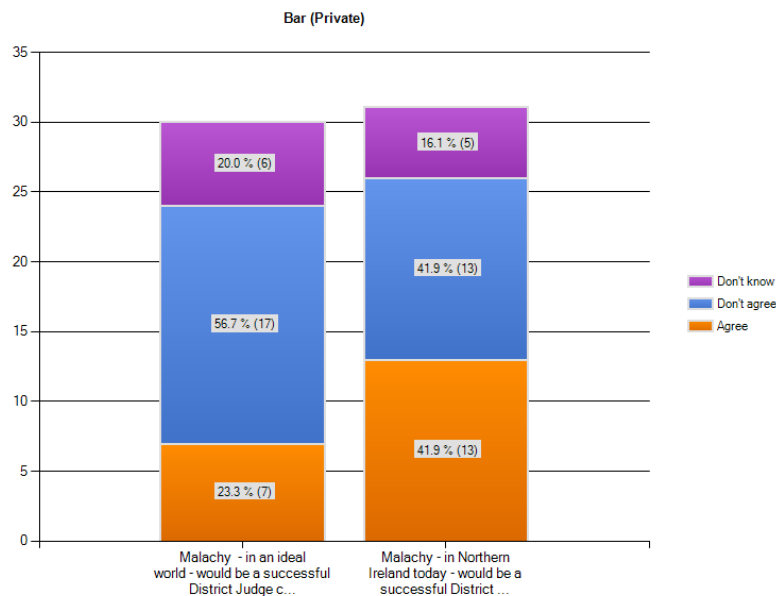


Figure 9 - Malachy Gray, Private Bar View

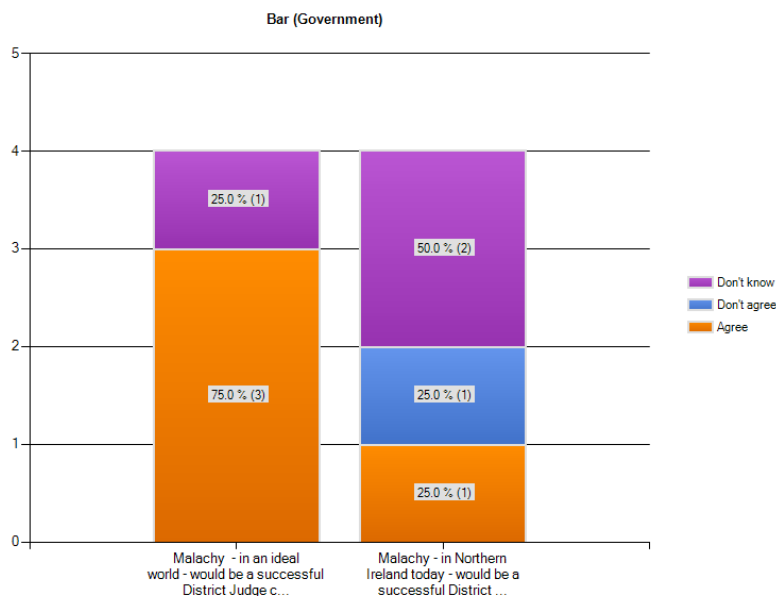


Figure 10 - Malachy Gray, Government Bar View

What perceptions underpin the view of the private bar vs the government employed barrister? Comments from the latter group suggested that lack of court experience would be a problem. None of the male private bar who provided comments felt that Malachy had merit 'in an ideal world'. Those who suggested he was not suitable pointed to him being out of practice for too long – that is, merit for judicial office was

being seen as related to practice at the bar. When we move (below) onto the female private bar, around half of the comments were provided by those who thought he had merit (the rest indicating a lack of court experience as undermining his merit) through having had a judicial role.

Solicitors generally followed the overall response – except when it came to those who are government solicitors (related to Malachy’s background in that they were private professionals who left private practice) where they were more convinced of Malachy’s merit:

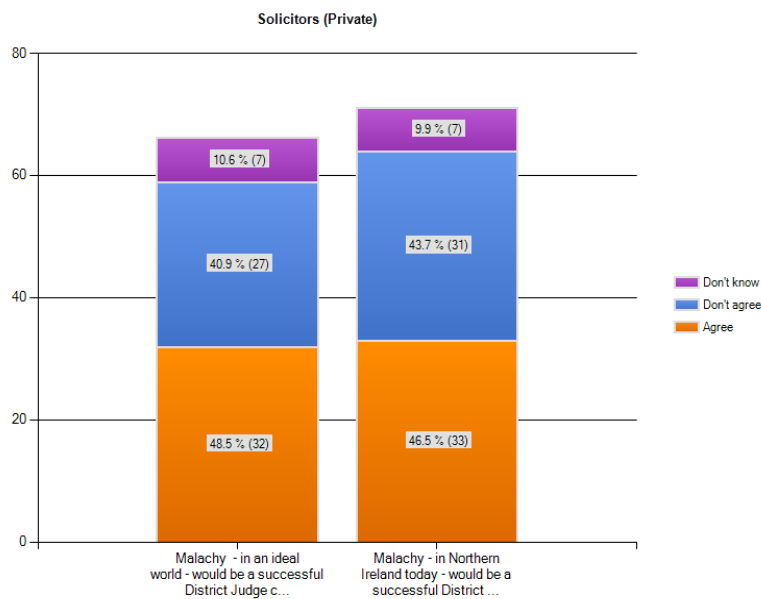


Figure 11 - Malachy Gray, Private Solicitors View

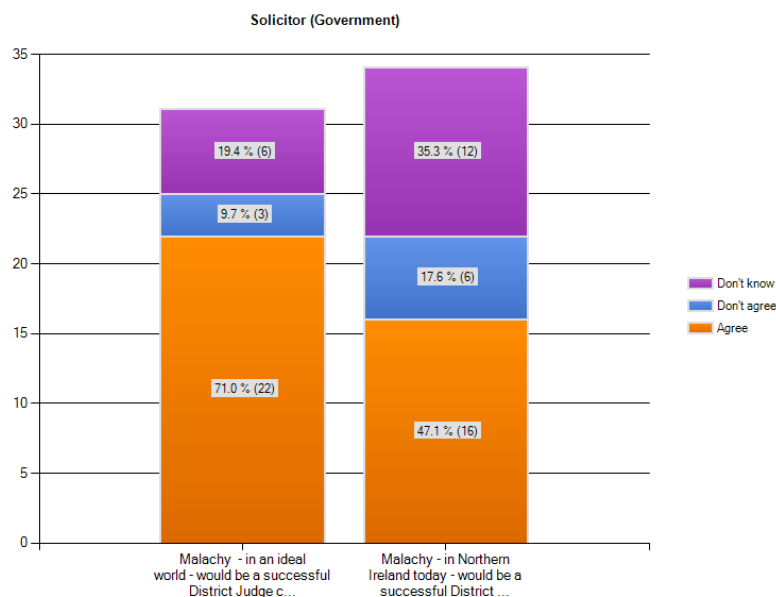


Figure 12 - Malachy Gray, Government Solicitors View

What responses did the government employed solicitors give to support this strong view of Malachy's merit? While those who thought he did *not* have merit indicated a lack of court experience, those who thought he had merit pointed to the difficulty of his workload and general experience. From this group one respondent suggested the wider requirements of a judge:

“Although his experience of appearing in Court is somewhat rusty, he nevertheless obviously has good advocacy skills and an understanding of the judicial system. He clearly knows litigation processes inside out and also has experience of sitting on a Tribunal. That experience, coupled with having a disabled son, would enable him to have a very open-minded, fair and non-discriminatory approach, which is important in a District Judge.”

The group positive to Malachy pointed to their lack of confidence that public service experience was properly accommodated in the appointments process but nonetheless did generally agree that Malachy's merit would be rewarded.

Apart from the private bar, we could say that our respondents thought positively of Malachy and his abilities to sit successfully on the court at District Judge level.

3.2.3 Sally Cobolt

Sally Cobolt, 34, has been a solicitor in private practice since qualification, apart from a short period of three years to look after her twins immediately after pregnancy. Her expertise was employment law and – just before pregnancy – she had been appointed as a fee paid chair of the Industrial Tribunals. During her period away from practice she continued to sit on the Industrial Tribunals. She is now back in harness and not sure where she wants to be in 10 years time. Her ideal would be two days in practice working in her area of expertise (rather than on anything which came through the door), with a few fee paid judicial posts providing three or four days work per month. She feels comfortable with applying for judicial posts as they become available, rather than fixing her sights on any particular role. Alternatively, she might just look for something law related but part-time.

Sally is the second of our female scenarios, but one with experience of a judicial role but also the problem of coping with the demands of colleagues in practice. We found in our previous research that most solicitor firms saw no advantage in staff either leaving for judicial office or sitting in fee paid roles and often saw such as competition to the needs of the firm. Sally, we thought, would thus be particularly interesting in terms of how the solicitors viewed her in terms of merit. We asked a slightly different set of questions, requesting respondents tell us whether (i) Sally was reasonable in thinking about a judicial career, (ii) she should think about full time practice, or (iii) look for work elsewhere. Generally – across all groups – respondents considered a judicial role a reasonable goal for which to aim (63%) and this view was generally mirrored by the bar:

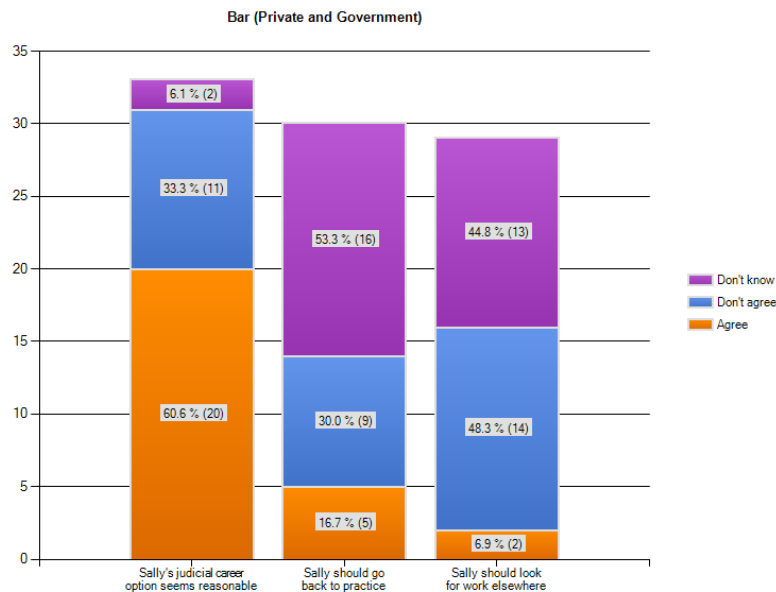


Figure 13 - Sally Cobolt, Bar View

A slightly higher number of solicitors agreed that Sally's judicial career options seem reasonable, but there was also a strong view that practice was a suitable location for her skills. A surprisingly high percentage (20%) felt that she would be better looking elsewhere.

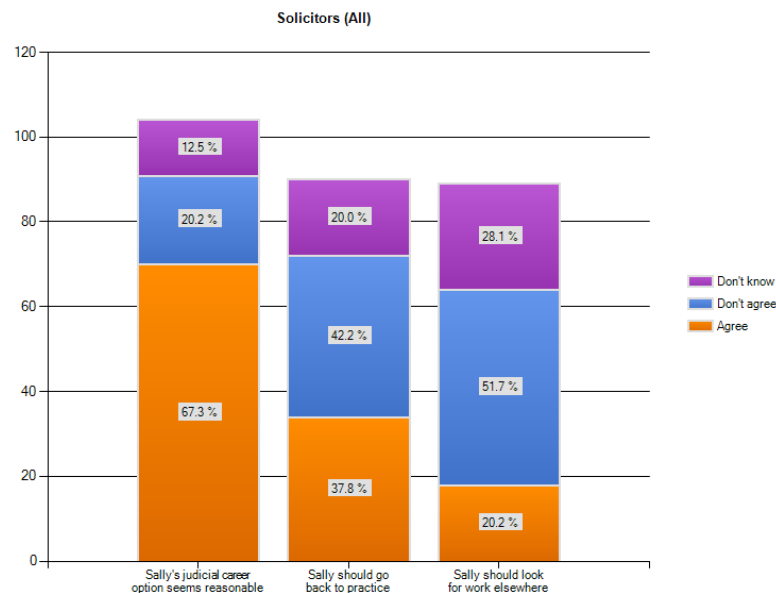


Figure 14 - Sally Cobolt, Solicitor view

The judicial option and the 'go back to practice' views were higher in the private solicitor sample, and the 'look elsewhere' option was very slightly higher in the government solicitors group:

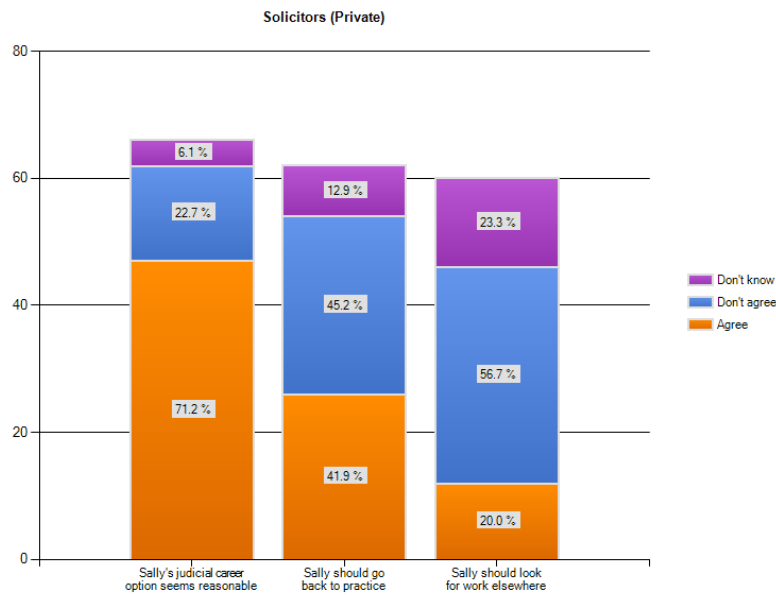


Figure 15 - Sally Cobolt, Private Solicitor View

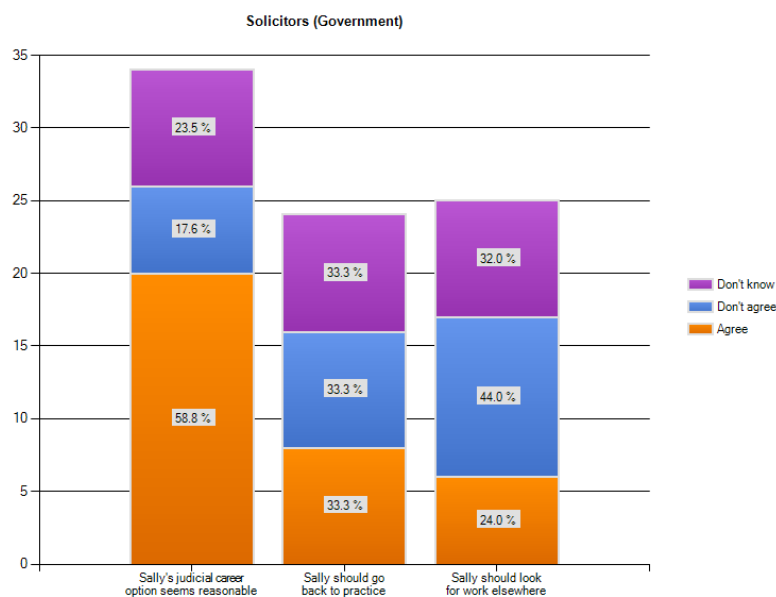


Figure 16 - Sally Cobolt, Government Solicitor View

The most interesting responses from the female private solicitor respondents were the two who felt her judicial career would *not* be reasonable because:

“I am not sure if it is possible to pick up judicial posts which only require one to work 3 or 4 days per month.”

“Sally does seem to want to have her cake and eat it. It is very rare in such a small jurisdiction as Northern Ireland that she would be able to cherry pick in this way.”

This directly contradicted our earlier research which indicated that there are individuals who have been able to locate judicial work which suits a ‘part-time’ diary.

With Sally, this same female private solicitor group (but those who were positive) noted that benefits could arise to the judicial system by having someone with rounded experience on board:

“I don't like that she does not wish to take cases that come in the door. I think a person seeking judicial appointment should be aware of the problems of people who just come through the door. Specialisation may be good if she is to continue in practice but I would like to think of a person judicially appointed would have more rounded experience.”

“Sally will have the benefit of keeping in touch with solicitors practice and the issues of day to day life in an office. In my view this would keep her grounded in the real world along with sitting in a judicial role. It is my view the judicial role can sit comfortably with private practice and does not have to be an all or nothing position. Having had an experience of applying for a judicial role in my view you are penalised for being a practising solicitor in the private client area of law as you can show no court experience, are not known to the judiciary and unless you have an exciting case load or one large case to showcase on your CV you are unlikely to progress through the process. Yet the day to day experience in the office in my view is excellent grounding for a judicial role as you are used to dealing with all kinds of clients and have to apply common sense and day to day reality to any case!”

One of this same group, who suggested she look elsewhere, noted a lack of commitment to a judicial career as she ‘only wants a few days a month’, clearly taking the view that a judicial career is a career in itself rather than a part of a career.

3.2.4 Jane Brown

Jane Brown QC, 43, wishes to return to Northern Ireland (where she first practised) from London. She has had a successful career in London with a large firm as a solicitor advocate, but has most recently been operating as a sole specialist advisor and advocate in the field of construction law. During her period in London she remained a solicitor in NI though her caseload was infrequent. She has also acted as arbiter in high value commercial property disputes. She has, on a number of occasions, sat as a recorder hearing Technology and Construction Court cases in the Central London County Court. She has written a well regarded text on commercial litigation in Europe. Her interest is in a judicial position, and she views herself as having the necessary skills to sit on the High Court in Belfast.

None of our previous scenarios were suggested as potential candidates for a High Court role. With Jane, though, we move to a different kind of applicant and one who might well be viewed as suitable for recruitment to a senior judicial role. Jane has sat as a judge, is a QC, has worked with high value commercial cases, is a solicitor/advocate, and – perhaps worse – has not practised in Northern Ireland for some years (we did not say how long). We were interested in whether a *portfolio*

career (a patchwork of roles making up a whole) of this sort was viewed positively or negatively by the NI profession.

Generally respondents viewed Jane has having substantial merit (67%), though those who thought her most meritorious were solicitors and government barristers. The private bar were impressed, with just over half seeing her as being appointable in an ideal world. When we turned, however, to the reality of Northern Ireland today, there was certainly scepticism that she would be appointed, but also a slightly lesser degree of optimism that she would be appointed. That is, for all respondents, 42% felt she would not be appointed but 36% that she would. The view from the private bar was generally favourable to her (53% seeing her with merit) and agreed with the general view that her merit would be rewarded, if not as substantially as her merit suggested:

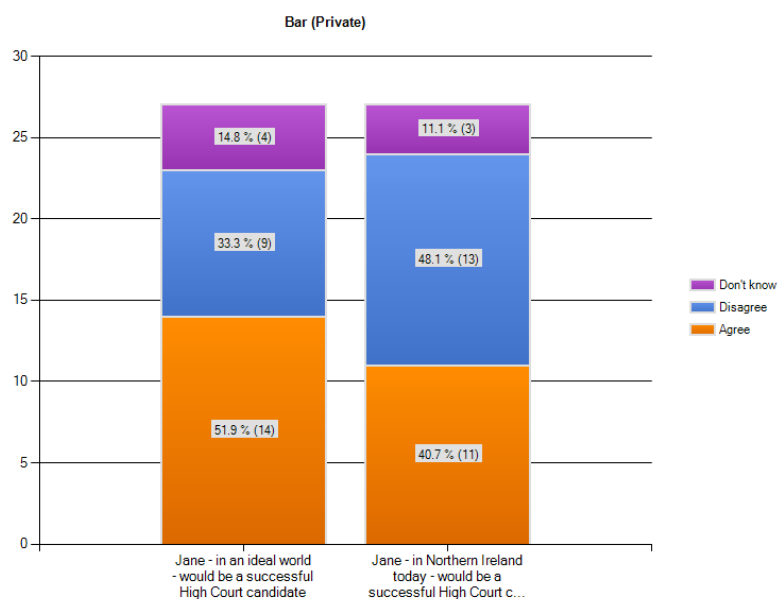


Figure 17 - Jane Brown, Private Bar View

The comments received from the barrister respondents who felt she did not have merit pointed to having “no present in depth knowledge of any day to day court activity in Northern Ireland”; was inexperienced in the High Court; and was better for a role as District Judge. Merit here appeared to being seen in a relatively traditional manner – but also required experience in Northern Ireland itself and that judicial skills were not necessarily transferrable from one jurisdiction to another. None of our small sample of government barristers thought her not meritorious, but did not see merit as necessarily being rewarded:

Rewarding Merit in Judicial Appointments?

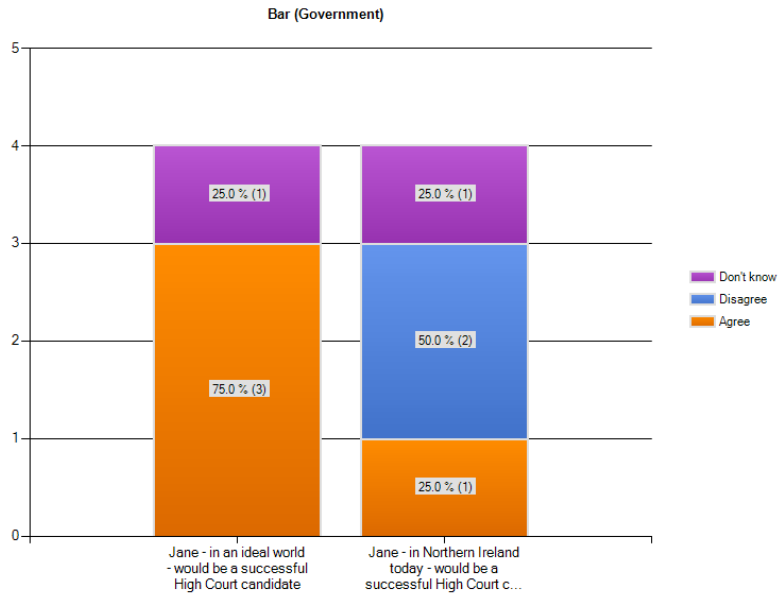


Figure 18 - Jane Brown, Government Bar View

The mismatch between recognition of merit and belief that merit would be rewarded was most significant amongst the solicitor group, with 70% of all solicitors seeing her as a meritorious candidate yet fewer solicitors than barristers saw her as being a potentially successful candidate:

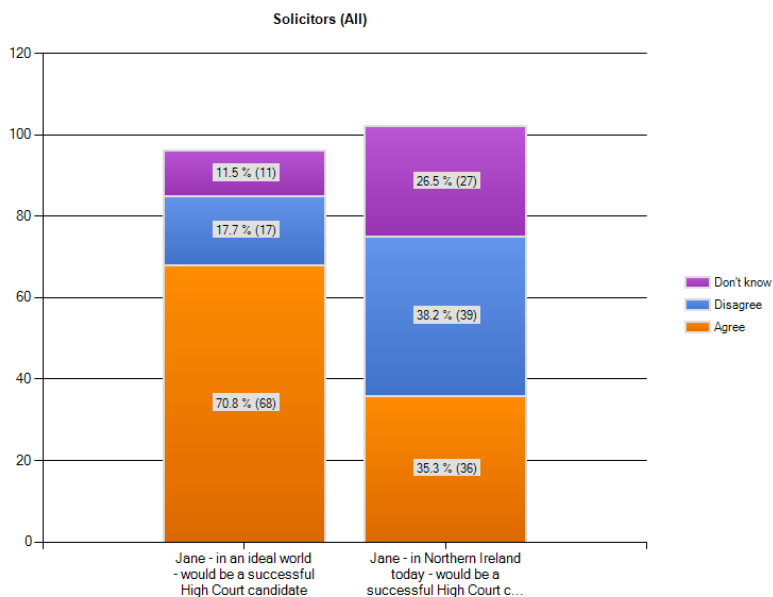


Figure 19 - Jane Brown, All Solicitors

There does not appear to be a significant difference in views between the private solicitor and the government solicitor as to her merit or the likelihood of reward for that merit:

Rewarding Merit in Judicial Appointments?

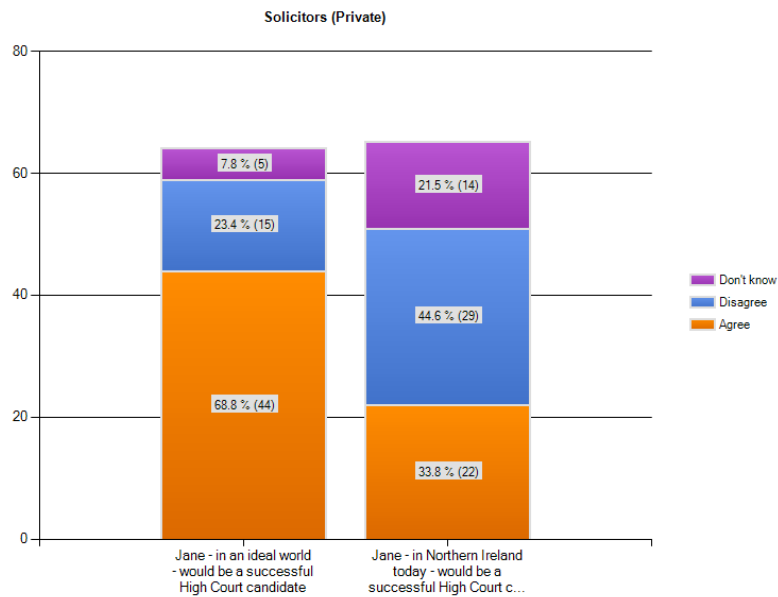


Figure 20 - Jane Brown, Private Solicitor View

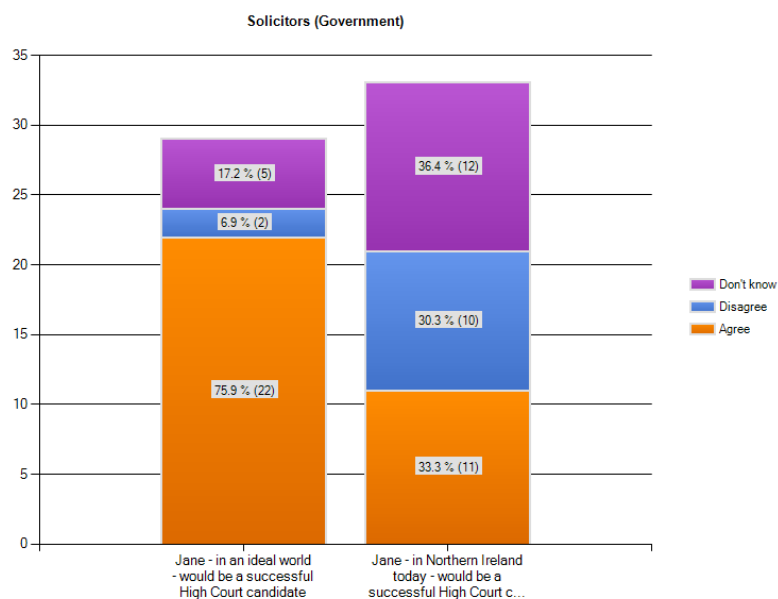


Figure 21 - Jane Brown, Government Solicitor View

Solicitors who were favourable to Jane but who felt she would not be rewarded on merit commented that she had not made “the right connections in Northern Ireland”; would have “difficulty in obtaining proper references”; could be too specialist for Northern Ireland; “there is little evidence of any transfer of skills from GB in the NI context being either valued or desirable”; “she’s a solicitor”. Clearly we see a view that Northern Ireland is a place apart and that appointment to the bench may be jurisdictionally based rather than based on merit. We also see a belief that being a solicitor is not helpful to a judicial career at the highest level.

3.2.5 Ingrid Rose

Ingrid Rose, 57, has been a District Judge for nine years after a career at the private bar. By common consent she has been very successful and is well regarded. Her caseload in the County Court has been efficiently run and covered everything from mundane family matters to reasonably complex matters of property rights. Several of her written judgments (such as one on intestacy and gay partners) have – though unreported – been discussed in the legal literature. In a number of appeals on points of law her reasoning has been supported by the Court of Appeal. Her ideal judicial post would be on the bench of the High Court.

Ingrid is the second of our potential High Court judges but differs from Jane in having been a judge for several years. However, that role has been at the lower judicial level. In Europe it would be a relatively traditional step to move up the judicial hierarchy as one developed skills and demonstrated competence. That has not been the case in the UK where the requirement for a senior post has been seen to require skills which match more closely those of the successful private barrister, so that a stream of entrants from the private bar to the High Court has essentially blocked entry from those holding lower judicial posts. We were thus interested in having a scenario where the potential candidate was seen as intellectually strong yet only had experience of dealing with a lower order of case than are dealt with in the High Court (and although we mentioned County Court work did not specify her as a full County Court judge). What would be the view of respondents?

It is interesting that there was a high percentage in all groups who saw Ingrid as a meritorious candidate. Only 16% of the private bar viewed her as not having the required merit for such a post:

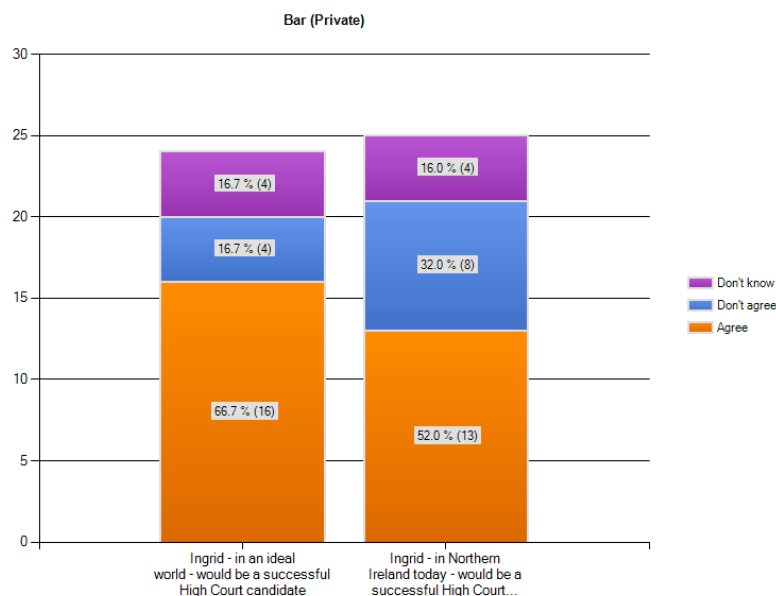


Figure 22 - Ingrid Rose, Private Bar View

Perhaps most surprising was that the barrister respondents were those who felt most optimistic that her merit would be rewarded – 66% seeing her as meritorious and 52% seeing that merit as being rewarded. Comments from the private bar pointed to her having “applied herself at all levels of the Court structure and has demonstrated her abilities”; “has a feeling for the courts”; “Ingrid is the closest thing to the ideal ... so far”; “well qualified”; “why not”.

However, negative comments were made: “no female High Court judges” (implying there was some blockage to this); “High Court is too big a gap”; “clearly best suited for a role as a District Judge”. A fuller response than most outlined the reason why one respondent felt that elevation beyond District Judge was unlikely and that our scenario was too good to be true in reality:

“Cases within the District Judge's Court rarely give rise to weighty questions of law, so her record appears remarkable and unique, but I also cannot envisage such a figure truly existing in NI at present. The ability to manage lists efficiently etc. will clearly be a vital skill, and the likely length of her career in private practice and judicial career to date render her more than suitable for consideration at the least. But if she truly wanted a High Court post I would recommend seeking to become a County Court judge first and then a High Court judge, although in light of her age this may not be considered a viable option by her.”

Despite the respondent's view that appointment was not appropriate at this present time, they still felt that a more conservative route could be appropriate. Thus, despite the negative comments, it is striking that a District Court judge was viewed as potentially appointable to the High Court by the private Bar.

The solicitors were, despite seeing her as more meritorious than did the bar, more sceptical of Ingrid's merit being rewarded:

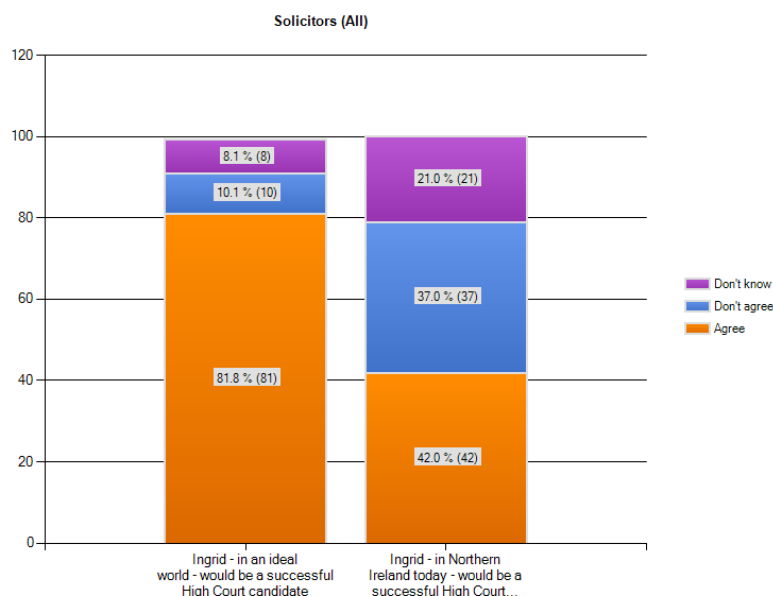


Figure 23 - Ingrid Rose, All Solicitors View

There was more scepticism from the private solicitors that Ingrid would be rewarded than from the government solicitors:

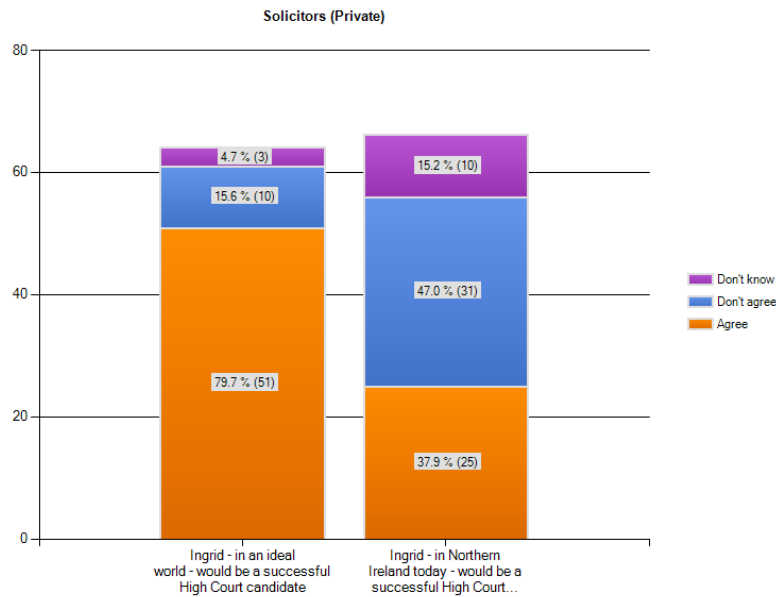


Figure 24 - Ingrid Rose, Private Solicitors View

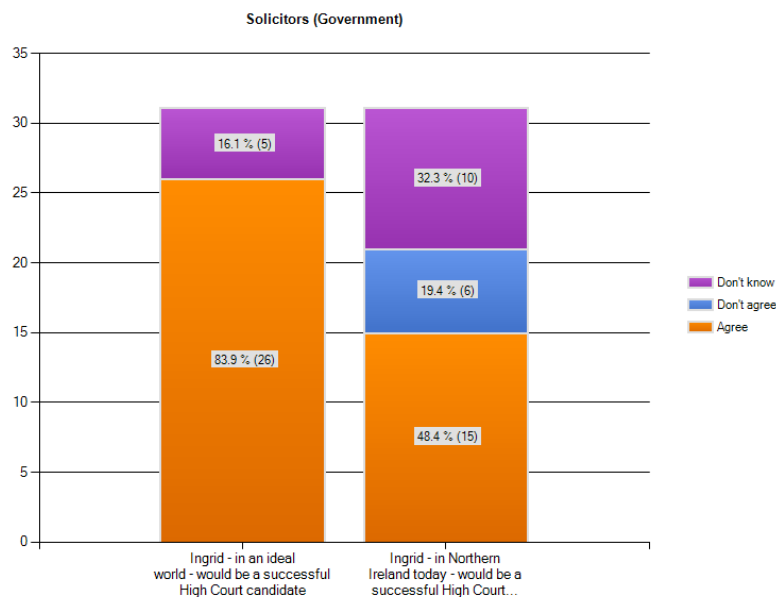


Figure 25 - Ingrid Rose, Government Solicitors View

Solicitors' reasons for believing that merit would not be rewarded included: "How many High Court female judges has NI ever had?"; no-one had successfully made that transition before; too old; would be the victim of her own success and would not be moved; female. It was surprising to see several respondents refer to Ingrid's age (57). Given that retirement age for High Court judges is 70 (and many UK judges including the most senior – Lord Saville of Newdigate for example continues to do commercial arbitration after retirement from the House of Lords – continue working in other roles long after retirement) seeing Ingrid as too old suggests age discrimination.

It may be that recent experience in NI where one judge with a solicitor background had not managed to make the jump to a full-time role on the High Court was seen as particularly relevant to solicitors.

3.2.6 Roger Blue

Roger Blue, 44, has practised at the bar in Northern Ireland for 19 years. He has been building a very successful advocacy practice in civil matters. One legal directory suggests that “he has a brilliant mind and is able to put a winning argument over to both judges and juries in even the least likely to win cases.” He is on the Treasury Counsel panel and has handled complex litigation well. He thinks he might aim for a judicial post in the High Court. He doesn’t want to wait about and wonders whether applying earlier (without yet being QC) would be successful or affect any later chances through being seen as ‘too forward’.

‘Merit’ is a difficult concept to tie down to absolute terms and our final scenario was an attempt to determine how respondents viewed the traditional ordered stepping stones towards high judicial post – that is, junior counsel, QC then High Court. Our candidate is successful, male, viewed as intellectually able as well as being a high quality advocate. The only difference perhaps between the traditionally perceived ‘good candidate’ and Roger is age – how would our respondents view an early assault upon a High Court post without waiting for a ‘bothersome’ appointment as QC.

Generally, our respondents overall appear to view Roger as being someone with the merit to be a High Court judge (62%) , but do not think he would be successful in achieving his goal at this time (22%). When we look at the response of the bar, though, we see that the view that Roger has merit is less than for all respondents (though the view that he would be unsuccessful is roughly similar – 52% as against 50%):

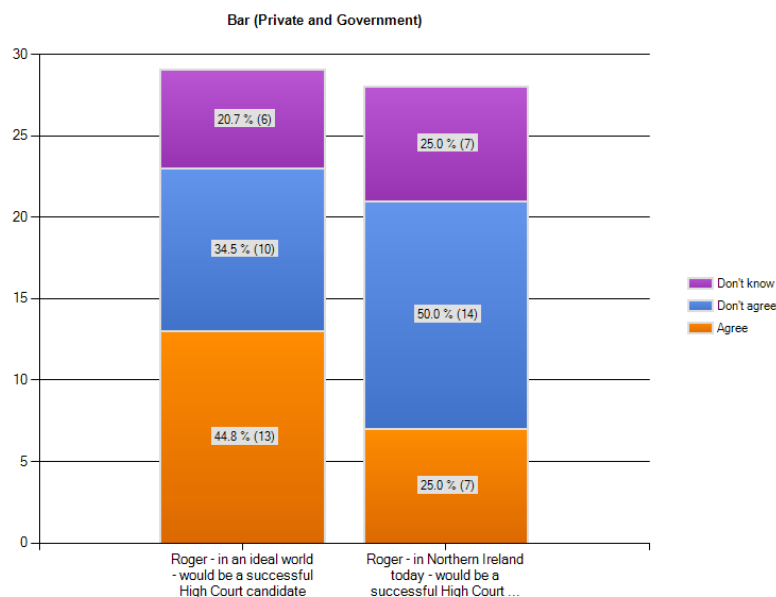


Figure 26 - Roger Blue, All Bar View

The private bar view Roger as least meritorious and least likely to succeed.

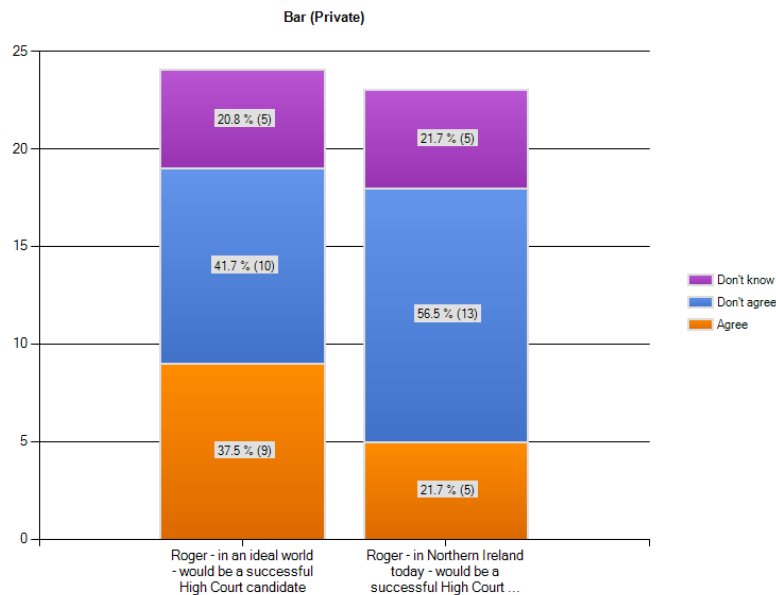


Figure 27 - Roger Blue, Private Bar View

The responses from the private bar who saw Roger as meritorious noted: “he will be an ideal candidate once he gets QC”, lacks experience as leading counsel; “QC would be a natural stepping stone”; “unlikely to be appointed from junior bar”. Those who viewed him as not having sufficient merit also concentrated upon the lack of status/experience as leading counsel.

Solicitors were more positive towards Roger, and similarly sceptical towards Roger being rewarded for his current merit. Mirroring the bar, the feeling from respondents’ comments was consistently that lacking the status of senior counsel was an appointment killer:

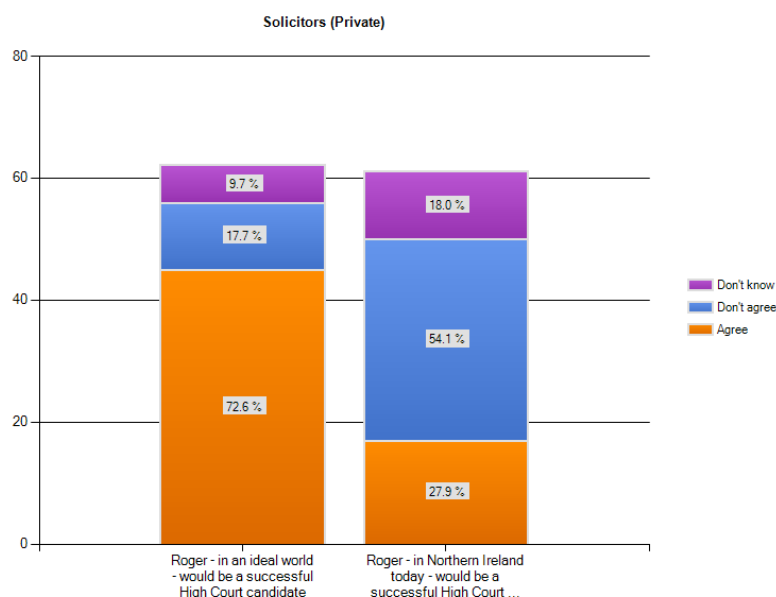


Figure 28 - Roger Blue, Private Solicitors View

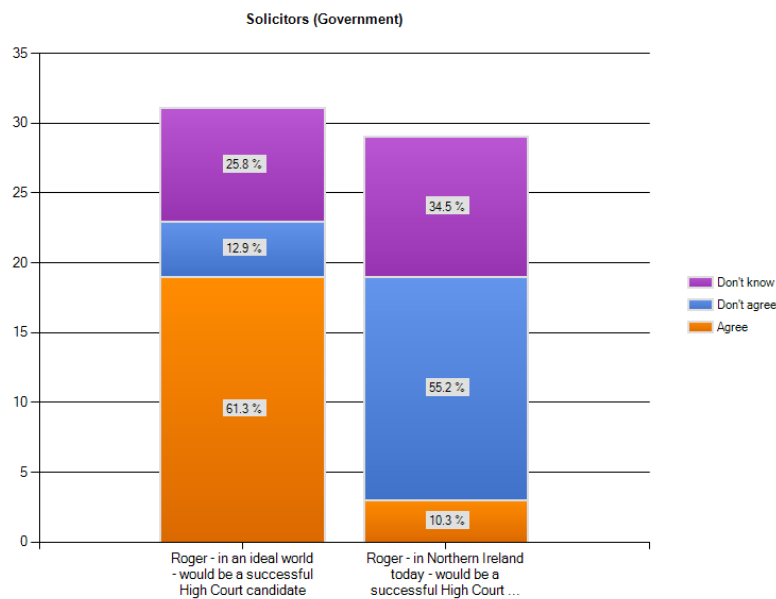


Figure 29 - Roger Blue, Government Solicitors View

Is the profession generally supportive of non-traditional candidates? It seems that this is indeed the case for those outwith the private bar. However, even though non-traditional candidates are viewed as having sufficient merit by many parts of the profession in NI, there is also a very clear belief throughout the community that the problem lies with the appointments system which is not rewarding non-traditional merit. Roger is not – in absolute terms as demonstrated by commercial CEOs – young at 44. The lower age of judicial retirement which is now current means that if promotion to the High Court bench is only seen as appropriate in one's mid to late 50's, then this causes difficulties for the Court of Appeal (which recruits from the High Court) since the Court of Appeal can expect only a few years of work from a judge who has had to wait until late in life for a move to the bench. Indeed the Court of Appeal in London has just this problem with around one third of the judges reaching retirement age within a very short period of time. The Supreme Court has a similar retirement age of 70.

3.3 Which Candidate is most suitable for the High Court?

Three of our scenarios dealt with potential High Court candidates. Which of these, we asked our respondents, was the most meritorious candidate? Despite her age, Ingrid Rose was conceived as best overall. She had judicial experience, had high quality decisions which had withstood scrutiny from high courts, and was viewed as highly competent:

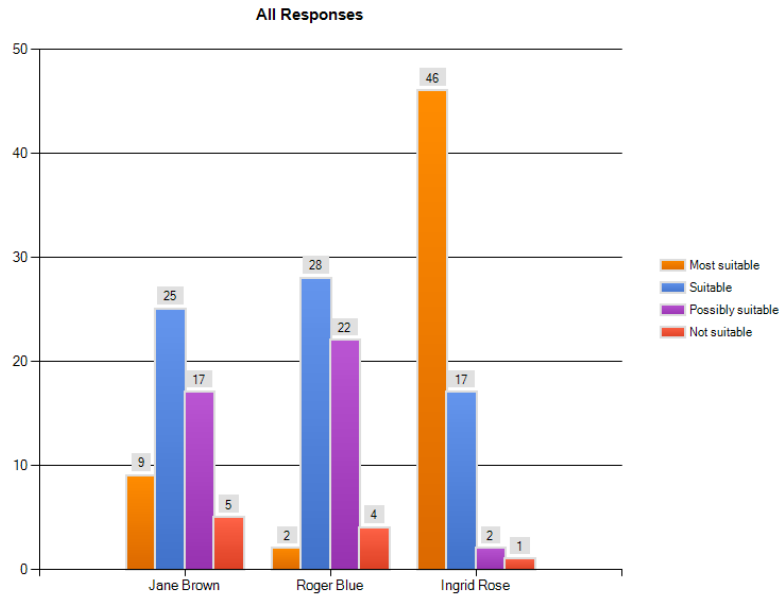


Figure 30 - Who is best for High Court, All Views

The private bar also took the view that Ingrid was the most suitable candidate, though Roger was viewed as 'possibly suitable', perhaps indicating that his only failing was the lack of QC status:

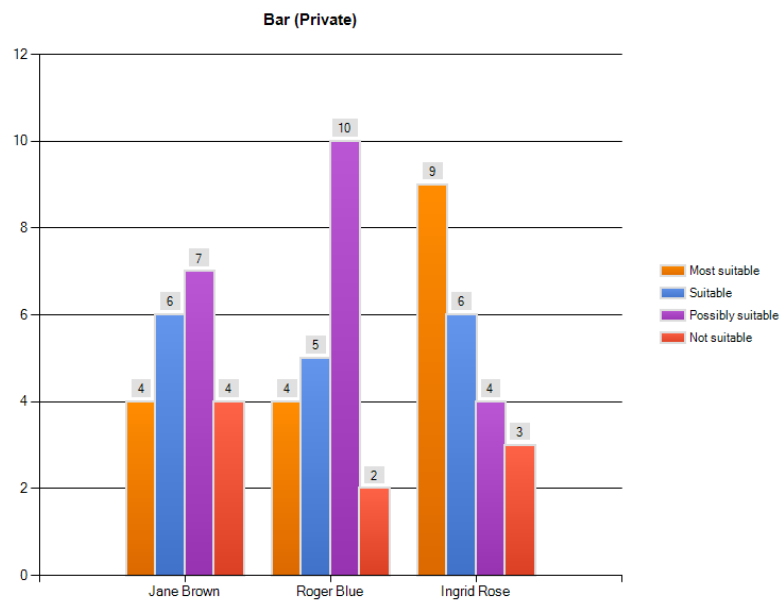


Figure 31 - Who is best for High Court, Private Bar View

Generally, solicitors were less critical of the applicants than the private bar, fewer indicating that they thought that certain candidates were 'not suitable' than had the private bar.

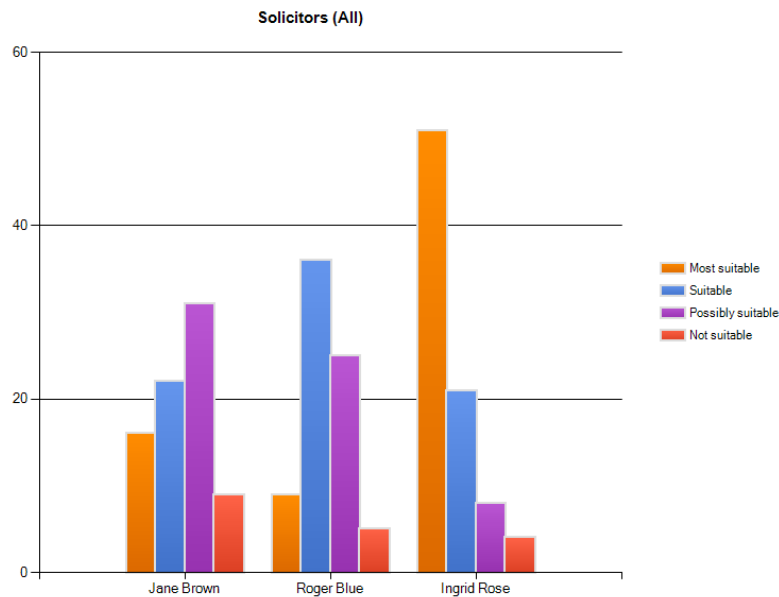


Figure 32 - Who is best for High Court, All Solicitors View

Of course, we have to remember that these were non-traditional candidates for the High Court and our question was not “Which would be successful” but “Which is best out of these three” – that is, which demonstrates the highest level of merit. Even so, there is clearly a consistent view across all parts of the profession on what constitutes merit for higher judicial office, and our Ingrid Rose vignette appears to demonstrate what that ideal of merit is.

3.4 Responses: Gender

We have already seen comments on gender and appointment – where the respondent feels that although the female candidate is meritorious, their gender will affect the outcome. In this section we look more closely at this.

3.4.1 Helen Black

Gender as an issue is highly marked in the case of Helen Black, where we see a distinct difference in attitude between female and male respondents. 73% of the female group see her as having sufficient merit, whilst only 38% of male respondents do. There is also a slight difference in response rates between male and female as to whether she would be rewarded or not:

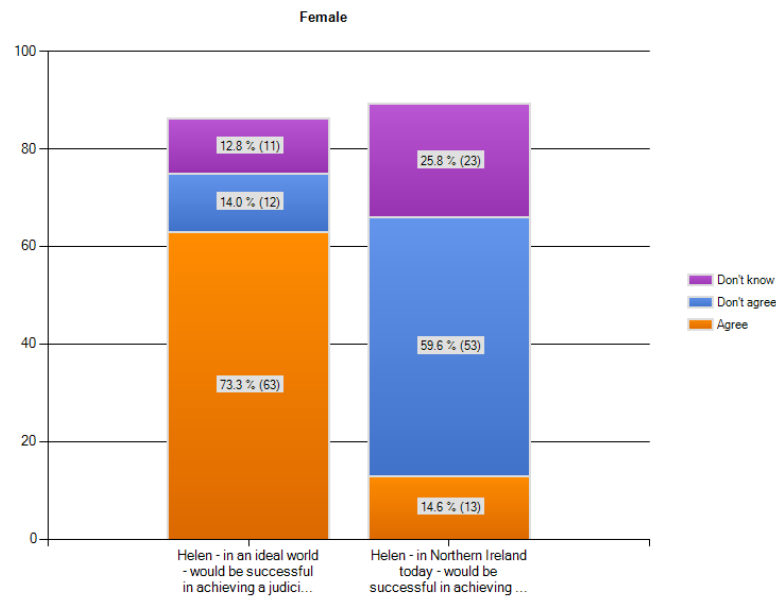


Figure 33 - Helen Black, Female View

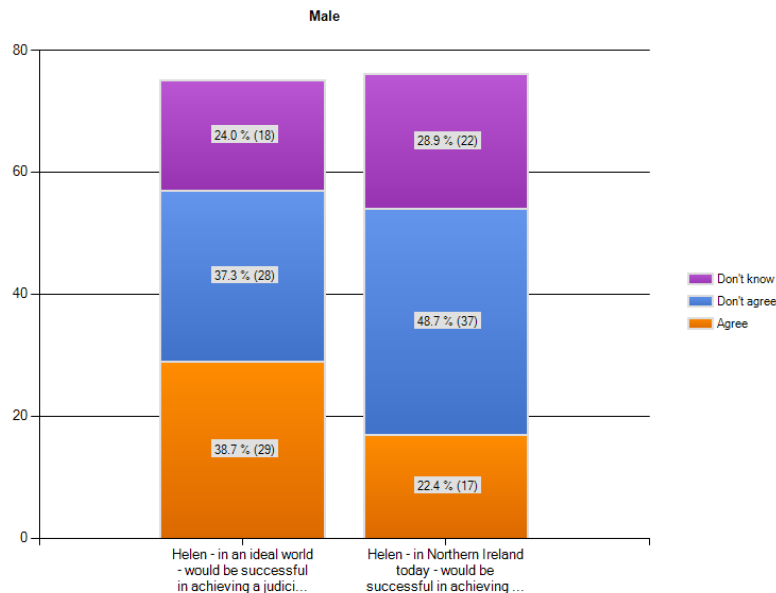


Figure 34 - Helen Black, Male View

When we look at the comments from the female respondents, there are certainly comments concerning her sex but a larger number of responses relate to the part-time and family-related issues of the scenario. It is thus not so much her sex which is the problem, but that she has commitments as a female responsible for child-bearing and upbringing. These factors then cause other elements to creep in to the equation: part-time working and relative lack of experience make one a poor colleague and a poor judicial applicant. One female respondent put it as:

“As a female I feel that the law profession, particularly in Northern Ireland, is not family, nor indeed female, friendly. In addition, I feel that any request to an employer to support family friendly and flexible working is not looked upon kindly by employers. I am not currently married and I do not have children yet but I feel that when I do I may have no option but to leave the profession

entirely. I feel that this will be a waste as I work in a very specialised area of law and I have always worked hard and spent a number of years building my expertise and a good reputation, however, having seen how very talented older female colleagues (i.e. in mid to late thirties) have been treated when they start their families, I cannot see how I could continue in this line of work. In respect of potentially applying for a judicial appointment, although this would be something that I would at one time have been interested in, I think that I will be forced out of the profession long before I would be in a position to potentially apply for such a post. It would be interesting to examine or commission a study to ascertain what I would perceive to be the high rate of women that leave the profession entirely by their mid-thirties and hence are not in the pool for a potential judicial appointment. This is particularly interesting given that during my university studies and at the IPLS, the majority of the students were female.”

Other female respondents who were not so positively oriented towards Helen’s merit reminded us of the lack of ‘sisterhood’ which we reported in our earlier research:

“I believe only people who have worked full time in law have the real experience to become judges. Their work should also be relevant to the type of cases they hear.”

“She lacks the practice to elevate to the bench. Without throwing yourself into a busy practice it would be impossible to deal with the daily decisions for the bench.”

Family responsibilities are thus not always viewed by women as factors which ‘the system’ should accommodate: rather they are irrelevant, and the proper model for judicial recruitment should be the male, committed, career dominant one and it is up to the individual woman to match that ideal.

When we turn to male comments, there are certainly some which indicate that women suffer poorer appointment opportunities than men (“It’s an old boys club”) but the primary comments relate to lack of experience – either of court, or practice, or through being part-time. One male commented:

“Practising only in family law, she would appear to have little practical experience of other areas. An academic knowledge of tax law will be of little to no assistance.”

This is a restatement of the complaint from the female profession: they feel pushed into areas of practice which they consider as undervalued in terms of appointment to judicial posts.

3.4.2 Malachy Gray

Almost twice as many women respondents viewed Malachy as a meritorious candidate as did male respondents:

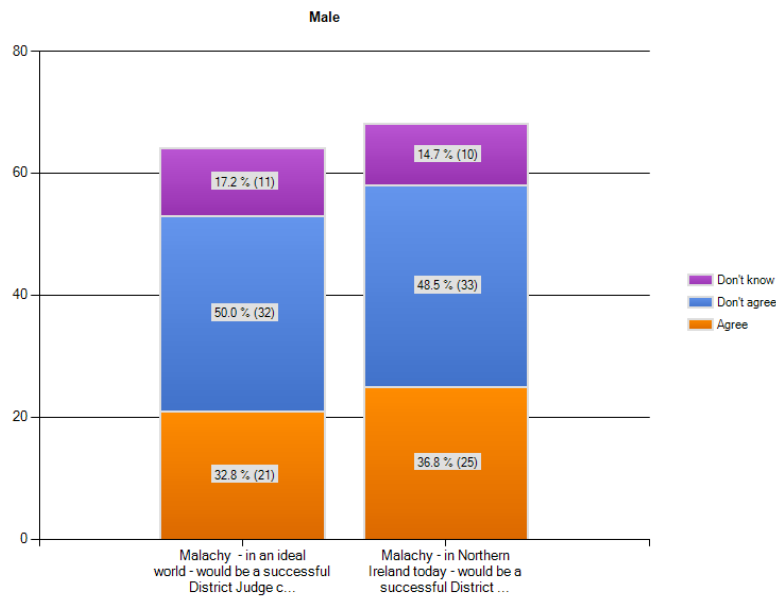


Figure 35 - Malachy Gray, Male View

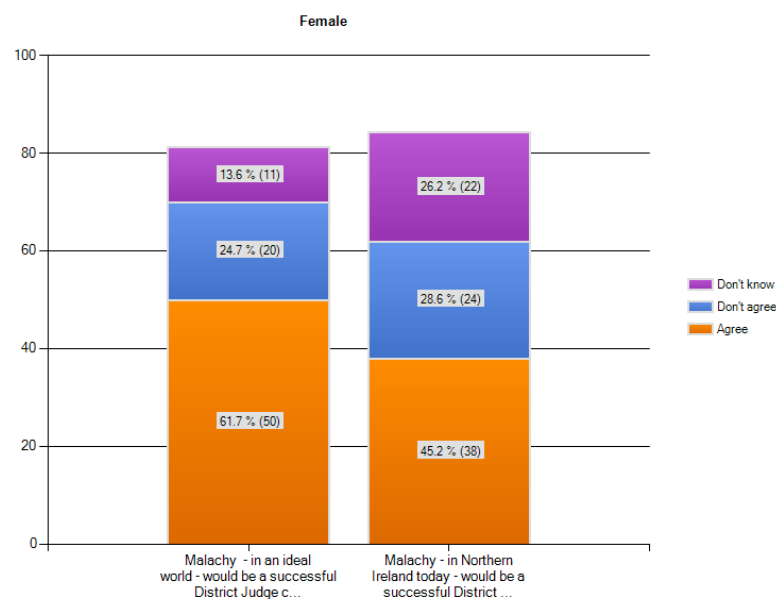


Figure 36 - Malachy Gray, Female View

When we look at male responses there is a consistent view that Malachy – as a civil servant – lacks experience. Comments were that to be a successful District Judge one needed to understand solicitors; that he would be totally unqualified; that six years in practice was too limited. There was a belief amongst some respondents that Malachy was the ideal of what NIJAC were attempting to recruit, and that merit wasn't necessarily part of the equation:

“My view is that this is the type of character that the NIJAC fall over backwards to recruit. An unjustified preference is shown for those who have been employed in the public sector or who have engaged in public service in the past. No future preparation required!”

But the opposing view was also put by one male who thought that Malachy had merit but was unlikely to be successful:

“I don't feel the appointments process values judgment, experience and knowledge of the law gained as a public sector lawyer. The process seems to be heavily weighted in favour of lawyers who have an intimate understanding of the procedural rules governing, in particular, civil and criminal litigation. While such rules are of undoubted importance, ultimately, in my view, they are only procedural matters, not legal principles. I don't feel the appointment process appreciates the deep understanding of the law developed by public sector lawyers, often across a broad range of work. Such an understanding is developed in a practice environment dedicated to the practice of law and devoid of the need to earn fees which, as a primary goal, necessarily drives all private practice work.”

Overall, though, the view of Malachy by male respondents was that he was out of touch with the judicial system as a whole and this was a failure when assessing him in terms of merit.

The female view differed somewhat, though a very strong strand remained that he did not have sufficient experience of court work. The comments from those who thought he had merit and would be successful came from diverse thinking – that he was “male and barrister despite never appearing in court himself”, through to having both experience of litigation and management skills. For those who thought he had merit but may not prosper in NI, the general trend was to see his expertise as unrewarded and a resultant of the current selection process:

“Malachy will face the same problem as Helen in that his day-to-day role, which is senior and involves taking litigation decisions, as well as high-level negotiations and exercising management functions beyond the remit of a standard private practitioner (especially a barrister), will not play well in an experience-focussed competition. He is clearly a high performer but is not able to demonstrate that through examples of “traditional” court work. This is a specific problem which is likely to hamper NIJAC in obtaining a diverse pool of candidates and, in due course, the judiciary. In particular, the higher proportion of women in the public sector and academia creates a gender issue. By the way, I observe that all your examples are still quite near the practitioner end of the spectrum – those with even less traditional legal careers are, given the focus of recent competitions, likely to face even greater difficulty if I am correct in believing that NIJAC has in the past 12-18 months moved from a relatively pure competence based approach to one based on experience. There is also a risk that roles are being described (by the incumbents) in ways which will select candidates which replicate the current make-up of the Bench at that tier.”

The female view also suggested that more thought that Malachy would be more successful than the male view thought – perhaps a view that being male would give an advantage.

3.4.3 Sally Cobolt

There were close identical male and female perceptions of what Sally should do, though the comments were wide ranging, suggesting that although seeking a judicial career was reasonable, it may not be possible or that it was possible.

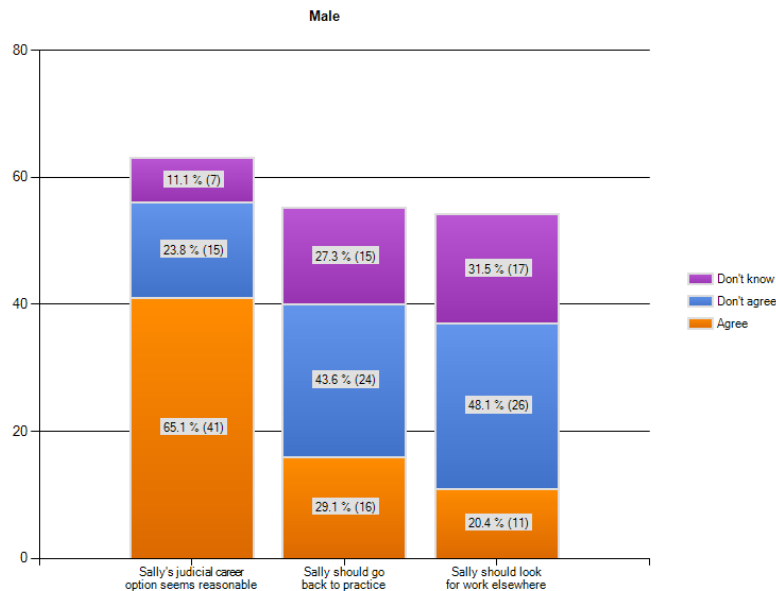


Figure 37 - Sally Cobolt, Male View

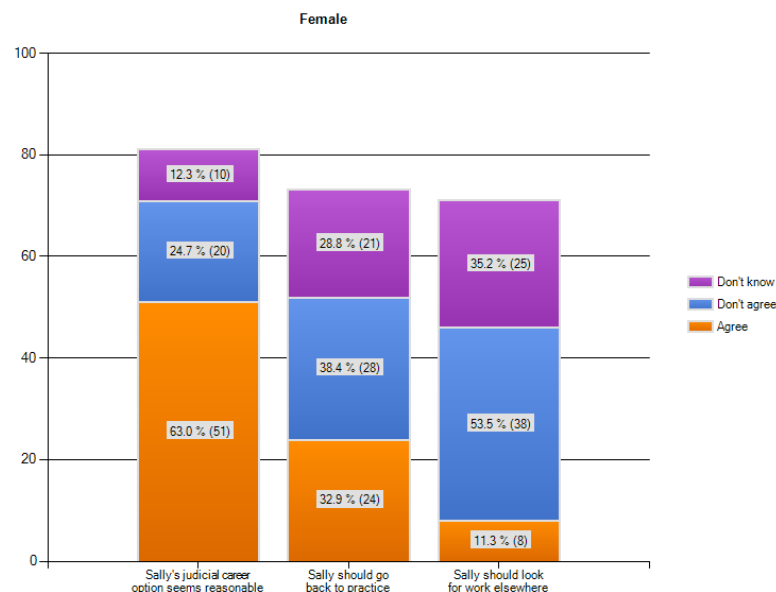


Figure 38 - Sally Cobolt, Female View

For example, two female but opposing views were, first that motherhood had got in the way:

“Sally will not get a full time salaried judicial post in her current position - as a "young" woman and mother of twins. The earliest she will have qualified will have been at age 23, and she's had 3 years out for her twins, so she'll only have been actually working for 8 years. She probably doesn't have the profile or the experience for the kinds of judicial posts she wants. She needs

to build up her experience, in the law before she thinks of applying for more judicial posts.”

And, second, that this scenario was actually happening in practice:

“I already know of people working like this. I see no reason why she couldn't expand on this. Again, already sitting on a tribunal means she knows how to get through the recruitment process and it also means she has some form. This must presumably make it easier to get another post.”

And the male views were just as diverse:

“Such a person has a lot to offer.”

“This person sees being a judge as an option to earn money without having any specialist technical skill in any particular area of law. Her objectives are vague and centred around self interest rather than bringing knowledge and expertise.”

where the same scenario could invite accusations of both selfish instrumentalism and providing public benefit.

3.5 The High Court

Appointments to the High Court have been viewed by some as problematic: a male bench is perceived as missing out on qualities that women might bring, and the continued lack of appointment of a woman was consistently pointed to as a failing in our previous research. We can see that the three candidates were viewed as meritorious by respondents with the female view being more positive generally (e.g. 85% thought Ingrid was a meritorious candidate). Views as to whether the candidates would prosper under the current system were also generally comparable, apart from the male view of Roger (the “young” junior counsel) where 65% (as against 44%, female) thought he was unlikely to be appointed. Yet, despite the positivity, there was more significant scepticism that merit would be rewarded for the female applicants.

Rewarding Merit in Judicial Appointments?

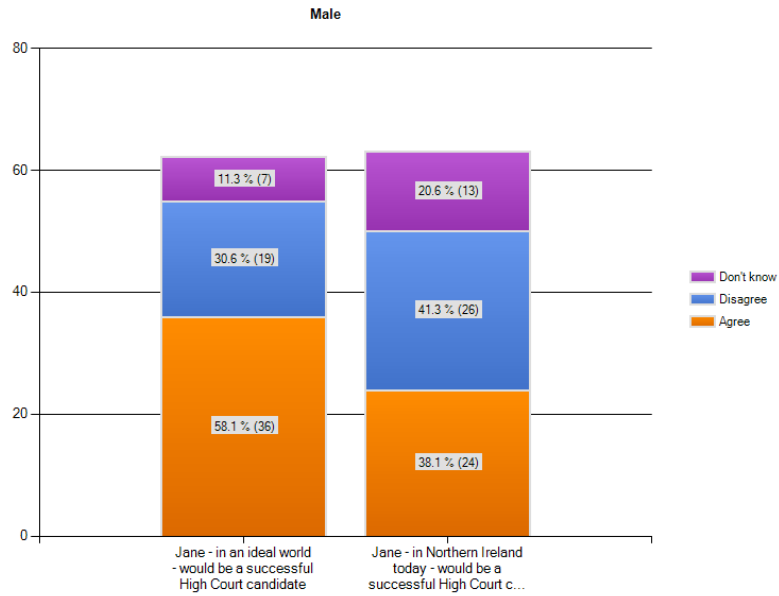


Figure 39 – Jane Brown, Male View

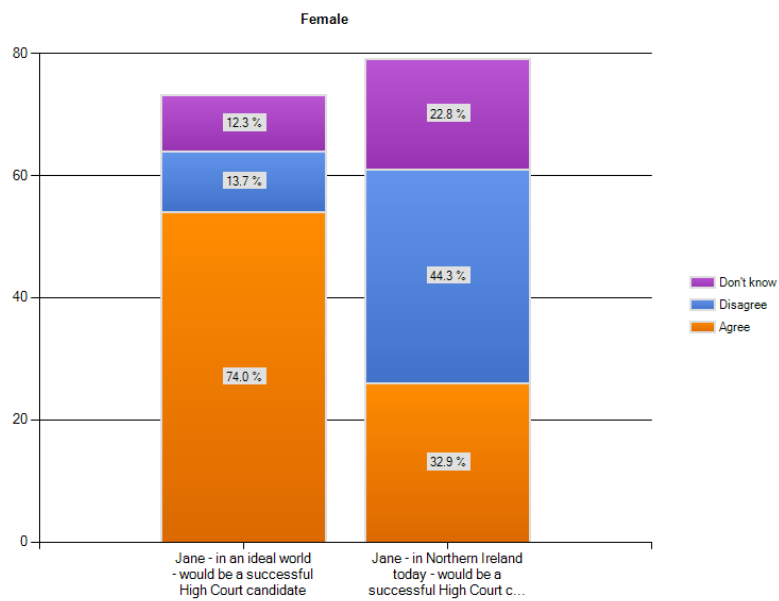


Figure 40 – Jane Brown, Female View

Rewarding Merit in Judicial Appointments?

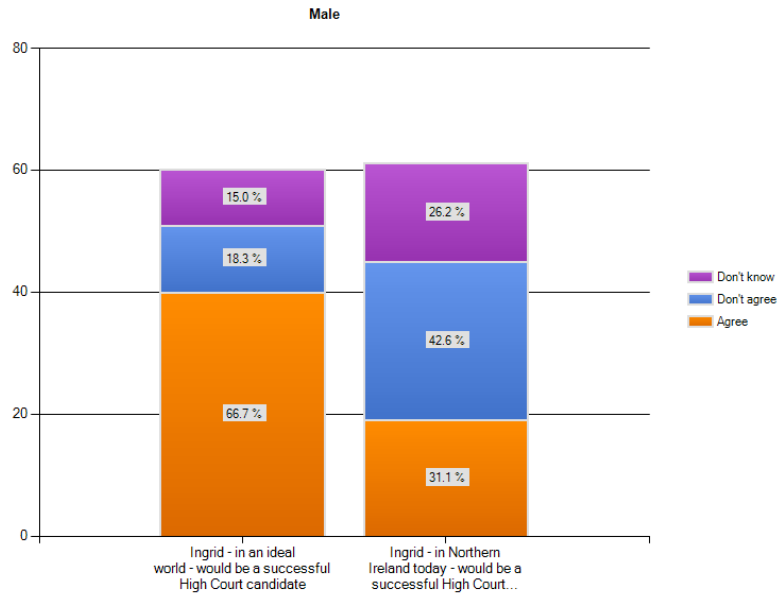


Figure 41 - Ingrid Rose, Male View

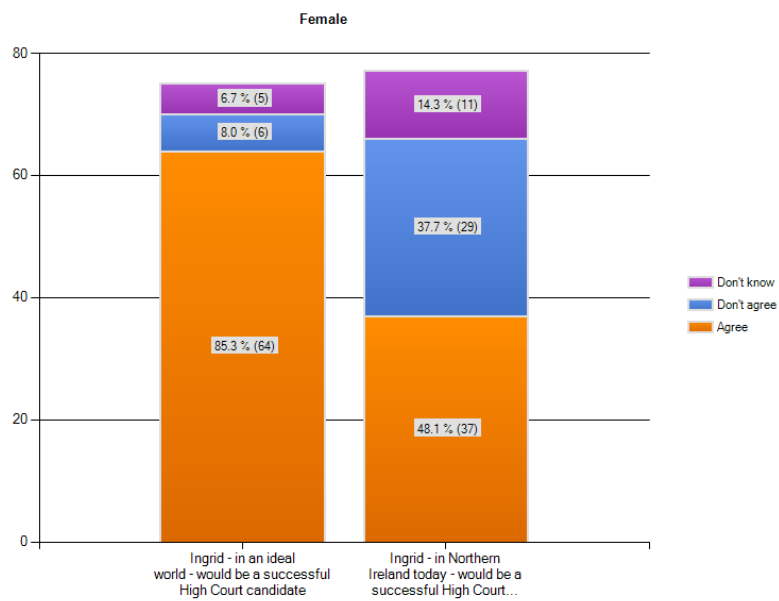


Figure 42 - Ingrid Rose, Female View

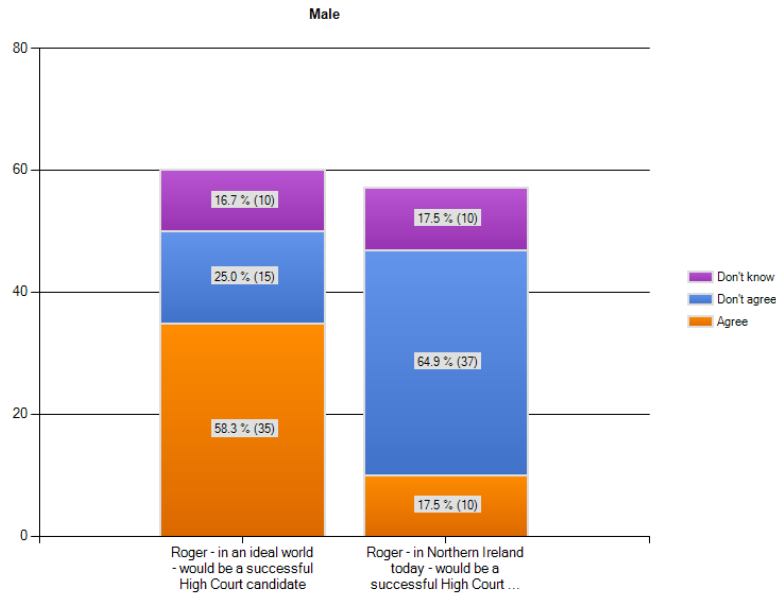


Figure 43 - Roger Blue, Male View

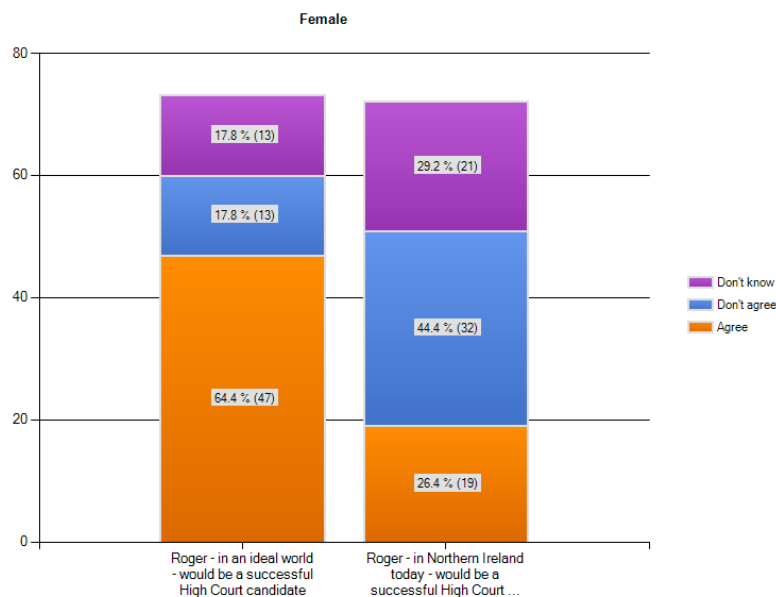


Figure 44 - Roger Blue, Female View

The comments from male and female respondents for each of the candidates were similar: for Jane the focus on a lack of Northern Ireland-based expertise; difficulty of getting references; too young; too specialist; lack of criminal background; and – reiterating a complaint made in our earlier research – that she was not on the relevant list:

“Every woman who has applied for the High Court bench to date in NI has been more than qualified but not appointed! I feel this is because the successful applicants have, in the vast majority of cases, previously been on the civil list. Being appointed to the civil list means that the barrister represents the government in a variety of cases. This usually results in more work and of a higher and more diverse calibre. The problem is this: the applications for the civil list are open to all but shortlisting criteria are applied

to narrow numbers. These criteria give priority to those applicants who have either been for the government or against the government in previous cases. The most obvious way someone can meet this criteria is by way of judicial review practice. And this is an area dominated by male applicants. Therefore, using this as criteria means that very talented women who do not practice judicial review are not subsequently shortlisted. Given that the successful applicants usually form the pool for future judges, the system perpetuates male dominance, but in a seemingly "merit based" way...."
[Female respondent]

Responses from males echoed the lack of past appointments of women to the High Court bench as explanation for why Jane would not be rewarded:

"Jane also has the added difficulty of her gender - there are currently no female High Court judges in NI"

to the suggestion that (despite not being meritorious) she was ideally what NIJAC were seeking:

"This is again a loaded question showing NIJACs underlying objective in this survey. This person has no present in-depth knowledge of any day to day court activity in Northern Ireland. Her field is in a non-contentious field and her career has diverged from contentious litigation of any type. She would be appointed as NIJAC clearly have a set objective."

The very high percentage (85%) of female respondents who saw Ingrid as meritorious is striking, yet there was a feeling – as mentioned earlier – that: age might be a problem; being seen to leapfrog the County Court; or that the preferment for males would be her undoing. One female who thought Ingrid had merit but may not succeed suggested the question of 'what [the judicial] their skill set should be' might come from a widening of the bench (which can be seen as a restatement of what constitutes merit):

"The appointments for posts in the High Court thus far have always been to NI qualified barristers with significant experience - judicial appointments are seen as the final phase of a career at the Bar. No solicitor or solicitor advocate has been appointed to the NI High Court as for example in GB although there are solicitors among the current judiciary. There could be innovative thinking that judicial appointments are seen as they are for example in other jurisdictions e.g. France as a specific career path for those with the requisite ability and aptitude for judicial office once they have experienced some years in practice. This could lead to the required change in the more effective conduct of court business and the reduction of delay and provide swifter justice and the required independence from the legal professions and more effective courts for the court users. Ingrid has judicial experience and practice experience and should be an ideal candidate and could "transfer" but equally a diverse appointments system should mean that the fact that someone has previous judicial experience does not put them at an advantage over those who don't have this experience. This raises the question as to the desirable skill set of

the judiciary and how experience is evaluated and whether this experience has to be acquired in NI.”

Such a relatively optimistic view of being the harbinger of change to the court system seems a heavy duty to hang upon one individual’s shoulders, but does indicate that there is a well entrenched desire to change the way that the courts operate.

Our sample included more solicitors than barristers, so when views are being represented in percentage terms we have to remember that a bias exists towards solicitor respondents. It may be the solicitors who are most desirous of change: wanting access to a career path which they consider has been blocked to them; wanting a different kind of judge on the bench (who comes from their own ranks); and perhaps wanting a system which fits their needs more.

3.6 Which candidate for the High Court?

Comparing the male/female spread of views on which would be the best candidate perhaps shows that the male respondents are more willing to indicate more negative views (‘possibly suitable’, ‘not suitable’) than are the female members. Ingrid clearly is viewed as the most meritorious by all respondents who indicated a view, with males seeing Roger as a better candidate than do women.

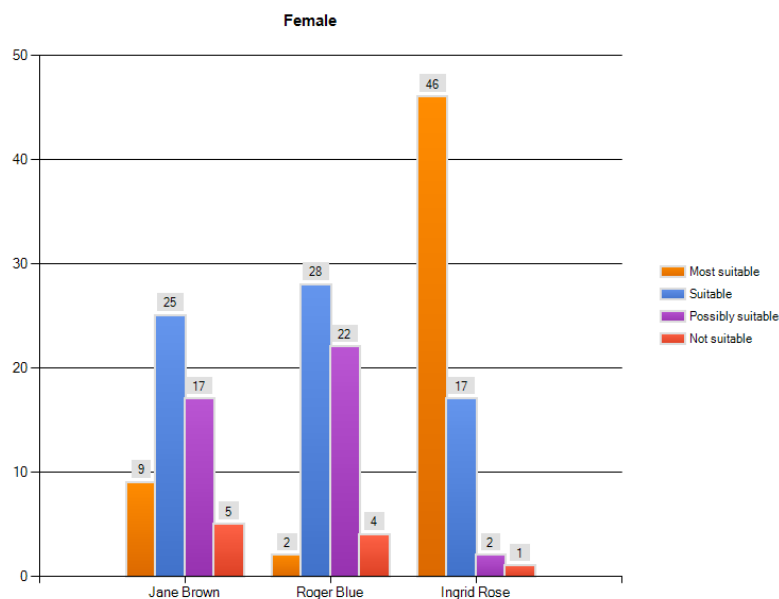


Figure 45 - Who is best for High Court, Female View

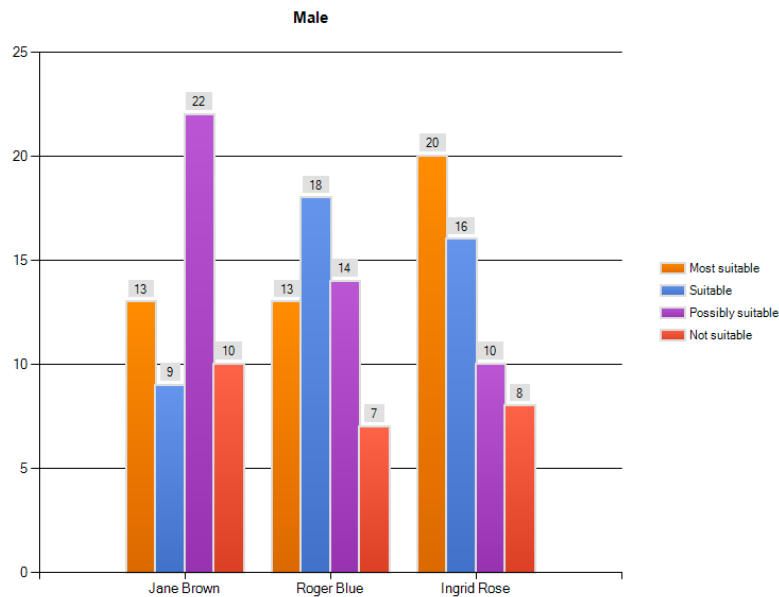


Figure 46 - Who is best for High Court, Male View

However, we cannot say that there were any markedly different responses to merit from male and/or female which mirrored the differences between solicitor and private barrister: e.g. Ingrid was seen as the most meritorious by both male and female.

3.7 The View from those with NIJAC contact

A reasonable number of our respondents (39) had some contact with judicial office or applying for judicial office or were considering applying for judicial office (and we presume they had at least investigated NIJAC and the process. Did this group have a different and/or less sceptical view from the other respondents which experience with the process had given them? The short answer appears to be, 'no': they were as likely or not as those who had had no direct contact with NIJAC to view our imaginary candidates as showing merit but being rewarded/not being rewarded for that merit. For example, diverse responses from those who considered Helen show there is no common perspective. One who thought she had merit but would not be appointed 'in Northern Ireland today' suggested:

"She probably was not a partner when she worked in Derry, so therefore would be unable to say she had managerial skills and this will be held against her despite the fact it was probably due to family reasons. Also she probably was doing a similar workload to a partner but won't be credited with this. She then, like a lot of female solicitors, goes part time for children which also will be held against her both in terms of promotion and sitting on committees. It is unlikely she will have the time to sit on the Law Society panels. None of this I feel should be held against her but it will. She is obviously intelligent in that she was able to teach law and has very useful skills, but I feel this will count for nothing if she is competing against a male who has worked full time for the same length of time and has been either a partner in a firm or has obtained in house promotions which she was unable to apply for or that simply weren't

offered. It will not matter that intellectually she is superior.” *[Female solicitor, part-time judicial office, applied for other judicial office unsuccessfully]*

To a more positive one who thought Helen had merit and could be appointed under the current system:

“Judicial careers should be open to all and I am aware of a number of judges who have similar backgrounds.” *[Male solicitor, part-time judicial office, has applied unsuccessfully, considering applying again]*

We also found more reference to the practicalities of the appointments process from this group. For example, one who didn’t know whether Helen had merit and thought she wouldn’t succeed anyway raised a perceived bias towards those in the public service which had been found in our earlier research:

“It is unlikely that a female applicant who is 36 would be considered to have gained sufficient experience or be selected for judicial office – there is little evidence that anyone who has not followed a “traditional” full time career path and achieved partnership for example would be successful. Partnership is itself a variable dependent on where one has worked and there is less likelihood of a “part time” solicitor having the client base and revenue to be appointed partner especially at the age of 36 years. On a practical basis someone who works part time or follows an atypical career path whether male or female has not acquired the same level and diversity of caseload as someone who has worked full time as they have not transacted as many cases. However this might be addressed by training in the relevant area. In my view however there is an ample supply of qualified people in all of the areas of law who would be ideal for judicial office. Academic knowledge of the law is not the same as practical experience and training would have to be provided to cover this. This raises another issue as to the skills set we are seeking in our judicial system and how experience is evaluated.” *[Female solicitor in government employment, unsuccessfully applied but considering further application]*

Our respondents in this group were either as likely to note their belief that gender was a bar to the High Court as were other groups, or to note that they thought it was not a relevant factor.

3.8 What have we learned from the survey?

The survey methodology appeared to us to work reasonably well and provided us with materials which described the general context of how legal professionals view the notion of merit. In large part – and particularly due, no doubt to the larger number of solicitors who responded to our survey, we found a clear willingness to consider a judiciary which was non-traditional in make-up and which comprised talents which had not previously been viewed as useful qualities in the appointments process. Generally, women respondents were more favourable towards the non-traditional candidate than were the men.

However, the view differs when we look to the responses from the private bar. These had a more traditional view of merit which suggested that court experience was a necessary part of merit assessment. This is a view which has been commonly held – that to really participate in the judicial process one has to understand how advocacy operates and be aware of the subtleties of the process. This view presumes, of course, that the court process will continue as it has in the past – as primarily adversarial and advocate led. This may not be true in the future: the changes in provision of legal aid, for example, are leading to many more litigants in person appearing and it may be that the nature of being a judge and thus the qualities which are required for a senior judicial post may themselves be changing. Our survey did not pick up these elements of change, but it could be said that there are certainly comments suggesting that some (particularly those who are not at the private bar) who would welcome change.

Although there was certainly a call for change, there were also elements of conservatism from all sectors of our respondents: age, for example, was viewed as a problem by many with some candidates being viewed as ‘too young’. It is not clear to us why age should be important – if the skills and ability are there, why should the age of the candidate matter so much? We are not sure whether it was perceived that age represented a necessary quality itself in a judge, or whether it simply reflected the notion that there was a proper career order in the profession which guided who was ‘at the appropriate point’ to move up the hierarchy. The reference to Queen’s Counsel being a requirement for a High Court position is both age and skill related, but perhaps more based upon the former than the latter. ‘Provincialism’ can be viewed as a form of conservatism, too, and we found that when comments by respondents suggested that being part of the Northern Ireland legal community was important, both to understand the system and also to have contacts within the system.

Another element of conservatism we found amongst many of our respondents was the view that one had to be fully committed to the judicial post – that fulfilling family duties; seeking a few disparate judicial roles; not being focused on a judicial career were all viewed as undermining the respondents view of whether a candidate had merit or not. The judge, in this light, is never part of society – always apart and always focused on the needs of the judicial task.

Where respondents saw merit in non-traditional candidates, there was also a considerable amount of scepticism that merit is being rewarded by the current appointments system. The view which very strongly came through is that the most conservative force in judicial applications is the system itself: meritorious candidates, to many of our respondents, were unlikely to be rewarded by the system at present. In particular, this scepticism revolved around the higher levels of the court where many respondents felt that merit continued to be seen as requiring a background as a private barrister and being male. Many of the comments made in the survey pointed to the continuing failure of women to achieve a position on the High Court but they also pointed to the difficulty of moving up the judicial ladder (the kind of progression which is found in European judicial appointments) and that candidates who did well at the lower judicial levels had reduced (if any) chance of moving up the system.

We found that, generally, there were considerable differences in attitude between male and female respondents, particularly in the view of the nature of merit required for the High Court. Women respondents were generally more favourable to non-traditional backgrounds being seen as meritorious as traditional backgrounds. But this does not mean that the split was clearly on gender lines: some women took a more traditional view and some men took a more liberal attitude.

We imagined that those who had had some contact with NIJAC (through having been appointed or gone through the appointments process, for example) would take different views from those who had not, but we did not find that.

Briefly, perhaps what we found from most of our respondents was a willingness to consider change as a possibility within judicial appointments but a feeling that there were forces which were preventing that change. We also found a minority who felt to the contrary that change was being forced upon the system when it would be better if that were not the case.

4 Focus Groups

4.1 Methods and samples

The findings from the scenario based questionnaire were followed up through a series of focus groups and interviews. Initially we thought to explore in more detail the issues elicited by the scenarios but it became apparent rapidly that this was best regarded as a starting point for discussion of the strongly held views that our respondents had about the themes of merit, and formal and informal pathways to appointment.

Focus groups were held with male and female solicitors, and with male and female barristers, as well as with a mixed group of lawyers working in the public and voluntary sectors. The interviewees were of course all volunteers selected from a list provided by a range of key personnel in both NIJAC's Research Steering Group and by some key contacts in the professions. Although our sample numbered no more than 20 we believe we talked to groups that were generally reflective of the wider professions. There was a good range of experience represented in the groups ranging from three years of practice to more than 35 years. We did not talk to other court users, although this might have provided a corrective to the view that sometimes appeared that courts and judges existed for the satisfaction and convenience of practitioners. This would be an interesting direction for future research. Discussions were recorded and transcribed by the researchers but were untaken on the basis that comments would be anonymous and not capable of attribution. While most remarks below are transcribed directly, in one of two instances material has been removed to ensure anonymity.

4.2 Merit

The views elicited from the scenarios were generally confirmed in the focus groups. As regards merit in the context of judicial appointments the view was generally expressed that it involved more than simple technical legal knowledge. As one barrister expressed it, "knowing the law is just the start ... the merit principle needs to be broadly defined to include a wider range of skills, and disentangled from experience in the traditional sense."

Having said this, there was considerable variation expressed as to what *exactly* merit might mean and how it could be evidenced. For some, this was clearly related to the sort of work that an individual might have before appointment. We were told by a barrister that "the better judges in family law or criminal are those who have worked in the area, have a feel for family law or criminal law". Indeed often focus group respondents, particularly from the bar, took the view that a mixed, high-end practice provided the best basis to demonstrate merit. Often criminal law was mentioned as important and so too was judicial review which was thought to provide an opportunity to demonstrate the requisite attributes. There was also a view fairly

frequently found that involvement in high value chancery cases might be indicative of merit. However this linking of merit to particular kinds of work was not universally held. It was suggested that complexity and difficulty could be found in all sorts of areas of law. As one barrister saw it, “anyone dealing with children’s cases, freeing orders ... social security cases are the hardest cases that I read, dealing with really complex law ... chancery cases ... anyone who can do that has the intellectual ability to do the job [of a judge] – provided they are given the training in evidence and so forth”.

If an applicant’s case load were mainly in the High Court with occasional visits to the Court of Appeal or even the Supreme Court or Strasbourg this too was seen as significant. As a barrister pointed out “How else do you demonstrate merit except if you can do the more difficult cases... you have to have demonstrated it”. In part this seems to be because the standard of practice is generally agreed to be higher in the higher courts. As one relatively new QC put it, “You do learn from higher level courts ... everyone gets better, you get better, the questions get harder ... and you learn about how to behave in court”.

This view was however far from universal, and indeed respondents not from the bar, tended to express doubts about the extent to which specific sorts of cases in particular courts demonstrated merit as opposed to some sort of prestige. It was in fact a senior barrister who told us, “It’s about kudos ... often high value cases are straightforward, easy, they can be a penalty kick ... and murder is not the most complex crime ... it is not depth or quality it is about kudos”. This view was supported enthusiastically by a public sector lawyer who expressed the view that “if you can handle ... industrial tribunal cases ... equal value ... indirect discrimination, you can handle anything that is likely to come up in the High Court ... you would be very unlucky in the High Court to come up against anything as complex”. Similarly social welfare law was mentioned as a complex area where skills developed there would be transferable to a senior court appointment, although generally it was not thought to be seen as such.

4.3 Merit and the bar

We found a view that merit is more likely to be seen as existing within a private bar practice. This view was not unique to barristers but also noted in a more critical way by those not at the bar. Indeed a solicitor at partner level expressed the view that “the solicitor’s profession is at the bottom and people want to keep them there”. From the barristers’ perspective, however, it was felt that the high profile of court work brought particular value, and showed merit very clearly. As one moderately senior barrister put it, “our skills are as advocates ... if you have cross-examined witnesses on a day and daily basis this is an appropriate skill for a judge.” Another barrister went further in seeing the importance of advocacy for judicial office saying, “you need to have experience with advocacy so you can see when the wool is being pulled over your eyes”. Indeed generally experience of court work over a sustained period of time and at a reasonably high level was felt, particularly by some barristers, to be the most effective – if not indeed the sole – way of demonstrating merit for judicial office. As we were told, “it is the best test you can have ... you are

immersed in the law, worked in the law ... you don't go outside ... you have got to have some experience of real law." This experience was seen (by some barristers) to be unique to the bar and it meant that identifying merit was relatively straightforward. As one barrister put it simply, "the most successful practitioners are the most successful judges. They have demonstrated that they know the law ... and get on with colleagues ... and if females have got on despite the obstacles [then they too must have merit]."

However it would be inaccurate to see this view of merit as being bar-oriented as universal to barristers. A moderately senior barrister told us, "people with the appropriate skills are being appointed. I have no doubt about that at all, the skills must be appropriate rather than the knowledge ... the competencies can come from wherever ... if you have been a family lawyer, a Queen's Bench lawyer or in a industrial tribunal ... wherever ... the skills are transferrable". Another barrister took the view that "the recent changes have really improved ... the process [and] the last number of appointments has really dealt with this. ... [Now it is] more geared towards identifying legal skills, problem solving rather than showing that you do a particular kind of work".

The more senior bar appeared more willing than the junior bar to find merit beyond their ranks. One senior barrister told us, "There are two examples of judges ... who have come from the solicitor's profession and they are excellent judges". However the same respondent went on to say, "but the bar think that we have a particular set of skills that make us good judges ... our skills are more transferable". This view was expressed more trenchantly by younger barristers with one of our focus group insisting, "There is a difference between a barrister and a solicitor ... they [solicitors] routinely sit behind the junior and senior counsel ... they have all sorts of opinions but they don't have to ask the questions, put themselves on the line". While it may not be entirely clear how this translates into the judicial role, barristers generally did represent their work as closer to that of the judge than other lawyers. As one barrister told us, "the skill of presenting a case is a transferable one ... I do it from a partisan point of view, the judge does it from a non-partisan view. It is the same thing".

Of course there are consequences to such a view and those (particularly non-barristers) who did not share the bar-orientation were fully alive to them. One of these is that a bar-oriented focus on merit meant that other important skills were being overlooked. A solicitor told us,

"some [barristers] are very good at paperwork, at drafting an opinion or the black and white letter of the law but that doesn't necessarily translate to them being good in a court situation, having to weigh up pros and cons, deal with the people in front of you and decide if someone is credible or not".

It was a moderately experienced public sector lawyer who expressed the view that:

"a fairly homogenous group are describing themselves to themselves, and, although you have a fair and transparent appointment process, the way in which a candidate is described will favour someone who has a traditional, mixed private practice ... if you go into any public voluntary or public sector

[body] you find people are doing things that are very different ... and yet you will be exercising very relevant skills”.

Indeed it may be that not all skills relevant for judicial appointment are developed in a private practice at the bar, and that to see it in this way misses other important attributes. As a partner in a firm of solicitors told us:

“a lot of them are good advocates but that doesn’t make them a good judge... a good judge is the opposite, not a spin doctor... that is going back to the old way of working your way up the bar”.

Another public sector lawyer pointed out that:

“the judicial skill set and the private practice skill set are not necessarily exactly the same ... you need things that people from non-traditional backgrounds can bring ... case management, managing staff ... you need people who have these skills”.

It may also have the effect that the process misses those who cannot easily refer to experience of advocacy. As a barrister said to us, “Measuring merit on the basis of great advocacy skills is a mistake ... [you are asked to] ‘Tell us about when you crossed examined a person and they broke down’. But my practice isn’t like that.”

Another barrister pointed that “you can turn it round and point to individuals who have done all that and aren’t very good judges ... just because you have done all that doesn’t mean you will be a good judge. Indeed it was a solicitor who summarized the position saying, “advocacy doesn’t have much to do with being a judge. It can allow you to demonstrate to your colleagues that you have clear thinking but it isn’t too much to do with being a judge”.

4.4 Merit and seniority

We also came across the view that merit was most likely to be found with senior practitioners – those with many more years of experience than the formal requirement for most judicial posts. This view was fairly widely held but seemed particularly prevalent among barristers. Indeed it was a senior barrister who told us:

“we need the very best people who have dealt with high value cases, been to the Court of Appeal, Strasbourg, dealt with difficult and complex cases and only if you have done this are you really good enough to demonstrate the sorts of skills [for the High Court”].

This view, that experience often far in excess of the minimum required is important, reinforced the idea of a “pecking order” for judicial appointment that we discovered in our earlier research. Here again the idea emerged that the bar (mainly) but the legal profession in general would have some idea of who was “worthy” and who should be next on the bench. For example, we were told, “there would have been quite a bit of disapproval if [XX] hadn’t got it... there are appointments that are seen as surprising

because the bar know how those people perform in court but the judicial appointments commission can't". Views of this sort also tied into more general criticisms that "outside" bodies could not be expected to be alive to the pecking order. For example, we heard that "competence based [appointment] works in England and Wales where there are a lot of people ... but we are still a small enough jurisdiction and people know each other and know their reputation". When pressed if the respondent would be happy with a situation where the pecking order (involving this carefully calibrated notion of seniority) were to be followed, we received the reply that "I [would be] not unhappy with it ... I don't feel aggrieved by that if it tallies with my opinion of the applicant. ... We kind of know who is right, you can judge them".

There were of course other views. Many of those we spoke to were willing (at least in theory) to look for merit where it could be found. As one barrister said, "Does experience equate with age? Quantitatively or qualitatively, that is the question? I know people who have done 12 or 13 years of work at the very highest level and others who have been pootering around for 25 years and more and will never do the same level of work". Others agreed with the view that it is the nature and quality of work that which is important, and this is not the same as simple length of service: it may be possible to obtain sufficient experience of work at the appropriate quality in a short period. As we were told, "it is the quality of your work generally and not the quantity and you can get that in seven years".

However it was interesting that several respondents made the point that opportunities now for accelerated experience were diminishing. We were told, "times have changed. When we started the bar there were a lot less people there and we got a lot of experience quickly ... you cannot possibly get the experience now in seven years that I got in seven years ... people seven years out are not that experienced now". This seemed to be accepted – at least by some female practitioners. Another (quite senior) female barrister said, "we haven't had the breadth of experience that some of our male colleagues have had and we are going to be quite a few years behind them". A more junior barrister confirmed this as still being the position saying, "there are too many of us and we can't get the experience in just a few years".

This idea of merit being linked with seniority was not unchallenged in our focus groups. There were several respondents who were aware of the consequences of equating merit with seniority. As one senior practitioner put it, "there are no High Court judges who are work-shy but there is an expectation that you are going to work harder in your sixties than you did even in your twenties – that is unusual". This was felt to narrow the applicant pool to those who maintained an energy and enthusiasm about continuing the long hours, hard work culture that had put them in the position where they may be seen as meritorious. It was also seen as potentially limiting the pool yet further as it was felt by some that such a decision about extending one's active working life may well be one that men would find easier to take than women for a whole host of reasons relating to caring responsibilities and life patterns. It was in fact a senior male barrister who made the point to us that, "if you become a high court judge in your late fifties you are probably thinking about working until you're seventy ... if you are a man would you find it easier to make a decision about working on in a high pressure job until you are seventy".

4.5 Merit as male

Of course this view that merit may most often be associated (at least by some people) with practice at the bar, with a particular sort of caseload and obtainable only with a degree of experience has other consequences too. We heard the view that women were less likely to be able to offer merit of this sort. For example, a female barrister told us that “getting the experience of dealing with juicy high value cases can be an issue for women ... Northern Ireland is still very old fashioned ... a victim of a very small community”. We were told frequently about how difficult it is for women to avoid being channelled into family work. For example a solicitor remarked that “the vast majority of women do family law ... and it’s a very difficult field to break out of”, while a barrister said that “women are pigeon holed at the very beginning and they don’t get the opportunities in those [other] areas”. Our respondents expressed a divergence of view as to whether the necessary experience could be attained in family law as opposed to other sorts of work. As one (male) barrister put it, “criminal law is now extremely complex.... there is not a lot of law in family law ...”.

Many of our respondents took the view that this channelling of women into family law, and the uncertain status of the skill sets there, has the consequence that any merit that may be displayed there is likely to be overlooked in favour of other forms of merit that can be observed more easily in more “mainstream” work. Some of our respondents took the view that this was a consequence of the nature of family work. However other interviewees took the view that there was rather a different skill set, and it was one that was just as valuable in evidencing merit for judicial appointment. For example, a QC who practiced only rarely in the family court reported an experience of seeing a female barrister in action: “I was in court and was blown away by her advocacy skills but judges don’t see her ... I thought it was a lot more difficult ... a very limited number of judges see them... and they are held in private”.

Indeed the view was expressed quite strongly that this pigeon-holing of women combined with the way in which merit is seen may have the effect that it is difficult for women to present themselves as having the same degree of merit. We were told, “if you have criminal experience that is the gold standard ... family law experience is not what is wanted ... and the vast majority of those, barristers and solicitors who practice criminal law are male, and there you are ...”. Indeed our female respondents, as well as some males, were very keen to make the point that generally female merit is something different and does not seem to be transferable. We were told that, “the requirement to succeed is that you must think just like a man, you must act like a man ... be as good as a man”.

Some of our female respondents were anxious to tell us that it is often particularly difficult for women to emulate this male model of merit. There are structural factors which may make it more difficult for women to progress in the same way. These include not only the diversion of women into family law specialisms and sexist briefing patterns at the bar but also some structural factors. There was a view expressed by female respondents, and not generally contradicted by male respondents, that men were better able to pursue the informal networks that can lead to success. For example, we were told:

“men can stay on here [the bar library] and then go home to a cooked dinner, the kids in bed, and go straight into the study... they can hang around here ... do their work in the library .. networking in a an informal way ... they can run into someone in the servery or on the stairs.. and get worked passed on”.

In contrast women talked of the difficulties of managing careers and families. We were told, “most of the women at the bar are juggling not only their practice but also their family life ... and I have watch my male peers at the bar advance far beyond me... they have good wives at home”. It was agreed that a lot more networking goes on among male practitioners, particularly at the bar. A relatively new qualified female barrister told us, “there is a very much a message – any time that you seek advice - that you won’t get on as far as the men... don’t let your expectations get too high .. it’s not what you know, it’s very much the golf and the rugby”. One of the public sector lawyers we talked to maintained that “young male law students are more savvy – not necessarily about being a judge – but about making contacts ... to make a successful career ... which may lead to a judicial career because they have done all the right things”.

There is however a view that this may be changing – albeit at a very slow pace. One of our female respondents referred to, “the diligent 2.1 girls, good girls” who needed to understand that they had to “be something else to survive”. We heard a lot about the feminization of the legal professions at the lower levels but also something about the emergence of a cohort of women lawyers who are more ambitious than their predecessors. It was also thought that the general move to specialism in legal practice may in fact facilitate this development. However even the most enthusiastic heralds of change of this sort recognised this as both a very uncertain and long term process, and as a reaction to the continuing male dominance of the legal profession rather than a more fundamental change in its nature. As one interviewee expressed it, “the women are adopting a male way of succeeding ... but the system, the way of succeeding, needs to be changed”

4.6 Merit policed by judges

The idea of merit being bar-influenced and in large part male is conditioned and reinforced, according to many of our interviewees, by the role that they see the existing judges playing as gatekeepers to judicial appointment. As one barrister respondent told us:

“those on the bench see the skill sets they bring as being the ones that are needed ... it is an advocacy skill set by and large. ... Judges have the view that the profile we [barristers] have represents what a good judge is.”

From the perspective of some barristers this was not a problem. Indeed, it may be seen as good thing – particularly if the view of merit being bar focused is accepted. Another barrister said:

“people who are appointed are like those who are appointing? Is that a bad thing? Who are the best people to judge? The objective is to get the best

person [and] if a judge is able to say, 'well I was in that case and he never did that, he didn't cross examine at all'".

Solicitors in particular often expressed the view that their skills were being overlooked because the judges controlled the idea of merit and viewed it in relation to barristers' skills. A senior solicitor told us:

"You get the example of individuals who are very good in relation to drafting of contracts and then a contract dispute goes before a judge who has no experience whatsoever ... but people with that sort of experience aren't known to judges [although] they would be ideally placed for that sort of work."

Indeed, the role of the judges more generally in reinforcing a hierarchy within the professions was mentioned frequently. It was in fact a barrister who made the comment:

"How the judiciary address solicitors in courts compared to how they address barristers, particularly QCs ... this all helps to perpetuate the hierarchy ... a lot of the bar would feel this ...".

A consequence of this view is that many see the existing judiciary playing an undue role in determining appointments. This is indirect, in terms of validating certain understandings of merit, and even sometimes more direct. It was a solicitor who reflected a fairly common view when saying:

"The High Court still have their black balling, if I can put it like that ... all applicants have to be known to people on the High Court either personally or professionally ... whenever you have that criteria – that discriminatory criteria – that sends out huge signals that we want to keep it to ourselves or pull up the drawbridge when we have the right people on our side".

This view was maintained even when the role and procedures of NIJAC were mentioned. In large part this felt to be a consequence of the consultee role. As is discussed further shortly, there was thought to be an informal career pathway, one element of which involves high visibility to the senior judiciary who are felt to have a determining role. One youngish barrister put it succinctly, "'Not known' ought not to be a barrier ... but it is".

The processes and indeed structures of NIJAC, including the alternative consultee arrangements and the presence of the lay commissions, were treated with varying degrees of scepticism. One respondent asked, "Do all the commissioners carry equal weight? Do the judicial commissioners have more say? Can they say he appeared in front of me last week and he's no good?" Another expressed a more unequivocal view: "NIJAC doesn't work: it is a front, there is still a tap on the shoulder approach".

4.7 The High Court

Although our research was interested in the range of judicial appointments it was fairly clear that the position in the High Court sets the scene for the whole judicial appointments system. When we mentioned to respondents that the balance of men and women was moderately healthy in proportion to the applicant pool in some of the lower courts and tribunals this was sometimes dismissed. As one respondent said, “a lot of people don’t consider that part of NIJAC’s role ... do not consider those to be judicial offices ... lower down the judicial ladder it is easier [but] the High Court sets the scene”. Another solicitor respondent put the situation more directly:

“You just have to look at the High Court. They perpetuate themselves; they just want more of them up there. They don’t want diversity. You only have to go along to a function with High Court judges and they are all there in their dark grey suits ... no women sends out the wrong signals”.

4.8 A Woman in the High Court

Indeed it is the absence of women in the High Court that coloured all our conversations about merit at every level in the judiciary. It would be difficult to exaggerate the significance that is attached to the absence of a woman judge at that level. For example we were told, “the High Court in NI without any female members of the bench is quite astonishing ...”. Unfavourable comparisons were frequently made with the Republic of Ireland with more than one respondent pointing out that Northern Ireland is 31 years behind its neighbour in this regard.

There was however a general recognition that this absence of female High Court judges was an intricate issue which required a complex solution. As a senior barrister put it, “Self-evidently the problem is that there are no women on the High Court bench but if you are just trying to design a process that is going to [appoint a women to the high court] for its own sake, how is this going to be a good process?” Indeed fear of a tokenistic appointment was wide-spread. Some of our respondents saw the problem as far-reaching. We were told

“Until more women advance in the profession, both branches of the profession, you will not see a woman in the High Court ... there is a lack of assistance to women to succeed in the legal profession ... we need something more general and systemic ... it can’t be left to the endeavours of some one individual.”

Indeed there was considerable speculation in our conversations about what sort of individual might be the first to take the role. A female barrister made the observations that:

“The last thing any women wants is to lead the charge ... because we all know what will be said. “You are only there because of your gender” and that would

be a nightmare to work through. We all know it is said of women judges on the bench now”.

When we asked what sort of woman would make the ideal candidate to be the first female High Court judge in Northern Ireland were told:

“someone who is prepared to handle the rejection ... not getting through the first time, and not everyone wants to be the first. Not everybody wants to engage in the cultural change ... it would be a bit discomforting ... a bit isolating”.

This was a fairly common theme, particularly among female respondents who generally expressed a view stressing the challenges of being the first female in this role. Mention was made of, “the considerable chill factor of going into a club of 14 or 15 men”. Another respondent said that, “... the back corridor can be seen as a very special sort of club ... and that club atmosphere might very well put off anyone who is not an iconoclast from applying”. One thought from a female barrister was that “maybe we would need to have two or three appointed at the same time” to overcome the perceived difficulties. However there was a view strongly expressed, particularly among female respondents at the bar, that such a candidate could and would be found. For example, we were told:

“She exists ... The High Court bench is not full of dinosaurs. There are many High Court judges would more than welcome a woman colleague, and would be welcoming and supportive”

This view was not universally held, however. For example, another female respondent made that point that:

“the job is not appealing ... for men and for women. The back corridor is not very appealing, not being able to go and have coffee ... it would be more appealing to women if there was a woman there”.

There was a recognition that of course the role of High Court was not for everyone and not everyone would be suited temperamentally as well as in terms of straightforward merit. As one respondent remarked, “You see how hard people have to work ... it is a good salary but it is hard earned ... [there is a] loss of control”. Another (male) respondent took the view that:

“to be stuck in the back corridor all day every day is a frightening prospect ... but there are people who don’t want to be in the back corridor but do want to sit as judge ... and the opportunity for them to do so should be there but it is not”.

4.9 Judicial Pathways

The research was particularly focused on whether or not there are particular pathways to judicial appointment, either in the formal sense whereby nascent stages

in the emergence of a professional judiciary might be discernable, or more informally in the sense of particular career steps being recognised as important in building towards a judicial career. Drawing upon the information elicited from the scenarios the focus groups sought to explore if respondents believed that there were signs of more or less formal pathways emerging whereby individuals might take particular career steps with a view to eventually taking up a full-time judicial appointment. Equally we were interested to see what the perceptions were about informal career paths whereby either ambitious and informed individuals would take certain career steps in order to ensure their eligibility for future appointment, or, conversely, if particular career trajectories were perceived to ensure recognition of merit.

4.9.1 Formal judicial pathways

We were keen to discern if there is an emerging idea of a formal career path that might lead to appointment at the higher levels. However this was not something that we were able to uncover to any great degree. There was mention of a few individuals who, it was reported, seemed to have taken on judicial office at a relatively junior level but who were thought to have further ambitions but this was not seen as a universally available career option. One informant did entertain the possibility that, “one could apply for the lesser posts and demonstrate competencies that way ... move up from tier to tier.” Indeed it was suggested that this might be a good thing in that it “would allow a wider range people to demonstrate the appropriate competencies ... the part-time roles have the potential to do this too”.

Another senior barrister expressed the view that this would be increasingly important in future: “if you are under 30 years you should be thinking about part-time appointments which would put you on the trail”. However other interviewees wondered if this strategy would necessarily yield results: “if you spent 10 or 15 years doing this would you get to the High Court?” Indeed, several of our respondents took the view that in practice movement from the County Court to the High Court was very difficult indeed.

Having said this there was generally a sense that individuals should have the possibility of developing a judicial career rather than accepting appointment at one level for the remainder of their working life. We were told, “If you shine in one tier you should have the opportunity to move up”. It was thought that this possibility might even encourage good applicants who would otherwise not think of a judicial career. A senior lawyer from the public sector made the point that, “a judicial pathway is the key thing ... I work in a sector where there are some extremely capable women but who have no perception of the possibility of being a judge ... to be a part-time judge”. The creation of this possibility was felt to be an important attraction. Indeed this was seen by some as the best possibility of securing a female appointment in to the High Court. We were told that, “women have taken the route of... coming up through the tiers, from other judicial jobs” and that, “there are a large number of female applicants in the County Court who may well be where the next High Court judge comes [from]”. This was generally thought to be an appropriate proving ground and perhaps of at least equal validity to a career in the bar. As one respondent put it, “merit has to be real merit ... but if someone is a solicitor, a female

in family work west of the Bann ... they need a place to show that they can do the hard work ... it is the County Court that is the place. They can progress from there". Of course there were those who felt that such a progression would be problematic and may well be unattractive. Being a judge in the lower tiers might not necessarily appeal to some: "Sitting in Limavady Court House in what is a broom cupboard with your lunchbox, and that is the extent of their social interaction – maybe people haven't thought this through".

4.9.2 Informal pathways to a judicial career

Although the idea of a formal pathway to a judicial career that might take a judge up the rungs of the career level remains an uncertain although interesting possibility there was very little doubt among our informants about the existence of an informal pathway to judicial preferment. It was widely reported in all the focus groups that there were a number of important attributes and career choices that were likely to have been made in order for a candidate to appear meritorious. These were widely and easily recognised by our informants. For example when we discussed the hypothetical merit of Roger Blue from the scenario we were told that, "if you set that individual [Roger Blue] down in front of 20 lawyers the vast majority would point to him ... he is on Treasury Counsel Panel, he has got to know the right people over the years, he has done all the right things ... he will go up". Another interviewee remarked that, "it is funny how, irrespective of the existence of NIJAC, there are certain truths that are self-evident ... senior crown council will become a judge". Not every interviewee saw this simple progression. For example, when we pressed further on what this informal track might involve we were told "you have access to the right sort of work ... if you're known in the back corridor, if you're Treasury Counsel, if your father was a judge ... ". Thus, other factors seemed to involve having a high profile: we were told, "junior or senior crown council is seen as a stepping stone, Attorney General list is a stepping stone". Another informant characterised a successful candidate as someone who may well have been, "vocal on the bar council or served on it ... very high profile, everyone would have heard of them".

Much of this idea of a career pathway was seen to be about networking and making the correct contacts. Various events including dinners and lectures were thought to be important. It was here that the necessary impressions can be made and the important contacts fostered. However, it was reported to us that this was not as easy for women as for men. As one interviewee put it, "it is all very well for the men to network, to be at the lectures and ask the questions ... if a woman does it she is vilified. A man is seen as ... [someone who] knows what he is about ... But who does she think she is ... yes, seen that way by both men and women". This rather alarming finding was widespread among the female practitioners we spoke to at all levels. A young barrister told us, "I do not like talking to men counsel.... I am worried about that other label that is attached to women barristers ... tarts and sluts who only get on ... ". When another female recalled that, "I was told by [a judge] that women only go to the bar to get husbands", the remark was recognised by all our participants as commonplace.

However beyond the casual sexism which regrettably our focus groups uncovered all too easily there are other structural factors which come into play in relation to this informal career pathway. Progress down the informal career path was seen to provide substantive advantages. As one informant put it, “the person who has played at that level is going to have an advantage ... you have access to the right sort of work” and, crucially, “you know the judges”. This latter element – connections with the senior judiciary – is seen as particularly important, mainly in relation to access to appropriate consultees. It is also thought to be a feature that impacts negatively on women. Women reported themselves to be less likely to network and less willing to ask judges for support. We were told by female practitioners both that, “a lot more networking goes on among the males” and that generally, “boys are more happy with competitions than girls”. A female barrister told us in relation to asking for support from a judge that, “I wouldn’t feel comfortable asking any of the judges and I have been working nine years”. A more junior female barrister said, “I am still happy if they remember my name”. One of our solicitor respondents went even further claiming that, “you can hear them laughing at who is going to apply”. (It is perhaps an interesting aside that when we asked our female interviewees if they would be more comfortable asking a female judge for support the answer was a resounding no.)

It was felt that these informal career pathways are taken at a very early stage. As one young practitioner told us, “It would be naive to say there are no pathways ... if you look into any year group you can see that for some people the path is laid out before them, the connections are there”. The existence of these pathways was thought to be common knowledge: we were told, “Of course that goes on, there is evidence of that. Everybody knows that”. (Indeed selection to the QC panel was mentioned frequently as being subject to a similar process, and here too a belief in informal pathways as significant was widely and firmly held.) While the existence of a pathway to the bench, often taking in appointment as Treasury Counsel or in a high profile case, was widely acknowledged it was not invariably seen as a bad thing. For example, one informant took a broad view of the successful practitioner saying, “you have got a lot of money from the government and now you are going to give something back ... part of your duty ... it is not a reward, it is an obligation”. However mostly the informal career path was not seen as providing the most open and accessible route to judicial office and it was felt to miss talent that may not have chosen or been able to negotiate a way to the glittering prizes. As one informant put it, “NIJAC has been looking for other experiences, outside of work, so that flies in the face of what they are trying to do ... people who are on the inside track know how to fill in the form, know the buzz words... but others don’t”.

There was a feeling reported that relying on judicial insiders reporting on those that are known to them had the effect that experiences outside the informal career pathway were undervalued. As a lawyer from the public and voluntary sector focus group put it, “the assumption is that all your interactions are in a very rarefied world of lawyers but you need to send a signal that there is a life outside the law ... In the voluntary sector you find yourself on quite high level bodies but you can’t use them”.

4.10 NIJAC Processes

While this research project was less focused on NIJAC processes than our earlier one it is significant that some of the issues discussed above are refracted through the various processes that NIJAC uses in its appointment strategy. Some of the comments we heard were based on misinformation about what NIJAC does in fact do. Others were familiar complaints about the paperwork, with complaints that the appointment process is, “more about keeping NIJAC right” and how, “competence based forms are lifted from civil service forms”. There were also well-known complaints (from barristers mainly) about how competence based assessment favoured solicitors and public sector lawyers over barristers. For example we heard that, “if you are a solicitor you will have to have [applied for a post] but most young barristers will not”. Confidentiality too was a recurring theme and the dangers for both barristers and solicitors of being “outed” as an applicant. Previous experiences in recruiting for the High Court were also mentioned more than once as a factor damaging NIJAC’s standing.

However other comments are more revealing. There was some praise for NIJAC’s efforts. One interviewee remarked that, “NIJAC do give a lot of good guidance and if you follow what they say you should be able to get yourself through it ... eventually”. Another took what is perhaps a more philosophical view about how applicants may rationalise their own shortcomings commenting that, “people will revert to the old view that they just didn’t know the right people at the top” but went on to say, more critically, how it was difficult to dispel such a view when a “High Court judge can still blackball you”. Overall there was perhaps a sense of helplessness with regard to what NIJAC can do. As one solicitor remarked, “to what extent have we really changed or do we now have a very open and transparent organisation applying the same old criteria ... you know, let’s have somebody who looks exactly like the last guy? ... And [these] criteria don’t seem to working to deliver a representative judiciary”.

Perhaps most revealing however was the view that NIJAC procedures were neither the problem nor the solution. As one interviewee expressed it, “the procedure, the selection process itself, isn’t the problem ... the problem is the gene pool in the profession itself ... how you get yourself into the position where you are the best candidate ... there isn’t enough diversity in the profession”. This idea of the gene pool was repeated by several informants. We heard how law is, “still effectively a male dominated profession, even for solicitors” and how, “the current procedure with NIJAC is as good as it can be ... but the real issue is the gene pool, advancement within the profession”. It would seem that responsibility for a fully reflective judiciary is not thought to be NIJAC’s alone but extends beyond the current judiciary and into the way in which the professions are organised and operate.

4.11 Practical suggestions for NIJAC

We did try to explore if there were any immediate practical steps that our focus group informants felt should be taken. It was not surprising that no immediate cure-all solutions were proffered. Most of the comments focused on the culture within the

legal professions and saw change coming mainly from there and only very slowly. The structure of the professions, the gene pool of senior applicants and the tightly confined notion of merit all act together to produce a structural configuration that makes change very difficult at anything other than a systemic level.

Seeing the problem as one that involves individuals, and that can be cured by one or two women being brought on within the system as it currently stands is a rather forlorn hope. Nevertheless there were some suggestions for changes at this level. For example one female practitioner commented that, "I think one of the key things is confidence [but] I don't know what NIJAC can do to increase confidence, which is a personal thing". Another suggested that NIJAC might, "offer training for judges so that people can feel confident that in area where they don't have much experience they will be given a chance to develop the transferable skill." We also explored the value of a range of ideas such as having a senior female judge from another jurisdiction on the selection panel, introducing early and continuing mentoring schemes, increasing the influence of the non-legal commissioners, allowing applications from beyond Northern Ireland, introducing a bar library system with the career development that a clerk can bring, and requiring a CPD based scheme of judicial shadowing. Even quotas and a requirement that women be placed on a shortlist of eligible candidates were discussed. All of these measures had both supporters and detractors but none were seen as anything like adequate.

Only one practical step was felt to have the potential to make an immediate and significant impact. This relates to the introduction of more flexible working, including part-time working. Here it was felt that a favourable impact could be made in the relatively short-term. As one respondent put it, "job-share and job-split or part-time – any other walk of life at a senior level would be able to accommodate this ... it is absolutely standard and accepted". While some interviewees were happy to recount the standard arguments against any forms of part-time working the vast majority, including the vast majority of females, were strongly in favour of change here. As one respondent put in opposition to the usual objections, "that is the problem with 'Planet Law'. Let's move away from lawyers to outside where there very senior people, female consultants, who are job-sharing ... female surgeons in the health service." While there were some who talked about the business needs of the court there were many others who felt that the obstacles were not insurmountable. There were suggestions that it should be, "stated in the ad that job split or part time would be welcome – it puts it in mind ... You have got to work it through but that gets you into the process and gets you in the way of thinking". Another informant pointed out that while it is "not a magic bullet ... not every woman is a mother or a carer ... it would help". However this optimism was tinged with a sense that such change would not happen. We were told, "Look at the actual hard statistics ... It's not like everybody is sitting in five day cases all the time, or three month cases ... it's about planning the work and slotting in your resource ... but I get the sense that there is no commitment to even start to look at things differently and unless the door is opened to doing things differently from how it has always been I don't see how things are going to change"

5 Conclusion

Unlike the previous report this one has focused less on the processes of NIJAC and more on some of the systemic issues that face the legal system in its continuing efforts to recruit a judiciary, particularly at the higher levels, that is fully reflective of the changing society in which it operates. What are the changes in society, and in its legal culture, that might impinge on traditional views of merit? It appears to us that there are a number of factors that may be worth considering.

Firstly, there is the changing role and self-perception of solicitors. Solicitors over the past decades have become much more expert in substantive law and less keen to defer to the bar on matters of law – as researchers who investigated the relationship between solicitor and bar in the late 1980s, we are indeed struck by the differences between then and now. Changes to the economy of the legal system have encouraged solicitors to undertake more of the legal work in any case. Certainly, the bar is viewed as much more expert in advocacy, but levels of expertise have grown amongst solicitors who have themselves been able to develop specialisms rather than being the generalists and “back-office” staff that was much more common in the past. It is perhaps arguable that this is part of why ‘merit’ is not now necessarily seen as being linked solely to the bar.

In society at large there has been less deference towards authority. Currently the judiciary are held in high regard (the call for a judge to host an inquiry is almost the first step when a social problem needs investigation) but there are signs from our two research projects that that regard may not continue if it is not based on a view of the judge as democratically legitimate. In the “new Northern Ireland” there may well be an increasing feeling that the judiciary in common with other bodies in the justice system should reflect the composition of the legal profession at large. The absence of women as judges in the most senior positions is the most visible sign that this has not yet been achieved.

The costs of the legal system are having effect. First, as individuals find that justice through the traditional mediation of an advocate becomes impossible (without legal aid) and individuals become litigants in person, the role of the judge changes from being the detached arbiter to one who must ensure a level playing field. Second, that the call for better management of cases to increase speed and reduce costs requires a more pro-active judge. Management may become as important a judicial attribute as any other. We see that the European judiciary offer a very much cheaper access to justice and do not have a history as a successful private barrister – are the two connected?

We also see growing signs that there are changes to who might be a judge. For example, the recent agreement to set up the unitary patent court will see London host judges from other countries, and also judges who are ‘technical’ rather than ‘legal’. This court will certainly be specialist, but as the thin edge of a wedge may herald a view that special problems (family law across European borders, perhaps) needs a specialist judiciary which are less oriented towards finding legal solutions than to finding social solutions in a legal context.

These aspects – and perhaps many others – are elements which set the scene for any developments in the process by which judges are appointed. Although we did not directly raise these with our respondents, it is unimaginable that this broader changing social and professional context does not have an effect upon how individuals think about their own position in the legal order.

Both the survey using the scenarios and the focus group interviews have shown good and less good things about the way in which the system is currently operates. Responsibility for change does not lie with NIJAC alone or the existing judiciary, and the Bar Council and Law Society must consider their role in producing and sustaining the legal culture that gives us the range of judges that society requires. As one of our informants put it, the law does not know just how much it has to change, “there is a meritocracy but it’s their meritocracy... that’s a fact of life”.