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Select Committee on the Constitution

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Judicial Appointments

Report

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References in footnotes to the Report are as follows:

Q refers to a question in oral evidence;

Witness names without a question reference refer to written evidence.

EXECUTIVE SUMMARY

The process by which judges are appointed is of significant constitutional importance. The current model of recommendations for appointments being made by an independent commission was established by the Constitutional Reform Act 2005 (CRA). Six years later, a broad consensus appears to have been reached that this model is the right one. But this has not prevented ongoing discussion of the details of how the model works. As the Constitution Committee, we decided that this was an appropriate time to review the constitutional framework of the judicial appointments process.

We support the current appointments model and believe that no fundamental changes should be made. We therefore conclude that:

- The independent Judicial Appointments Commission (JAC) should continue to be primarily responsible for appointments to the courts and tribunals of England and Wales. The Lord Chancellor should have no power to determine the JAC's membership or to issue directions as to how it should act; this would be damaging both to its independence and to the perception of its independence.
- The Lord Chancellor should continue to have a limited role in the appointment of senior members of the judiciary; he should be properly consulted and retain his right of veto in relation to the most senior appointments. He must also retain responsibility, and be accountable to Parliament, for the overall appointments process. But he should not be permitted to select candidates from a shortlist, nor should he sit on selection panels. Such changes would risk politicising the appointments process and would undermine the independence of the judiciary.
- Parliamentarians should not hold pre- or post-appointment hearings of judicial candidates, nor should they sit on selection panels. Political considerations would undoubtedly inform both the selection of parliamentarians to sit on the relevant committees or panels and the choice of questions to be asked.
- Merit must continue to remain the sole criterion for appointment. However, we do not consider merit to be a narrow concept based solely on intellectual capacity or high quality advocacy. We refute any notion that those from under-represented groups make less worthy candidates or that a more diverse judiciary would undermine the quality of our judges.

However, there are a number of more limited changes which we recommend to the appointments process. In order to enhance support for an independent, open and transparent appointments process, we recommend that:

- UK Supreme Court selection commissions should be increased in size, with greater lay representation.
- The President and Deputy President of the Supreme Court should not sit on the selection commissions formed to choose their successors.
- The Lord Chancellor's power to reject or request reconsideration of nominations from the JAC for appointments below the level of the High Court should be transferred to the Lord Chief Justice.
- In principle, the JAC should be responsible for the appointment of deputy High Court judges.

- There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions.
- A formal appraisal system for the judiciary should be introduced.
- The retirement age for Court of Appeal and Supreme Court Justices should be raised to 75.

In order to increase public trust and confidence in the judiciary, there is a need to increase judicial diversity. We do not consider that sufficient steps have yet been taken. Accordingly, we recommend that:

- The recommendations of the Advisory Panel on Judicial Diversity should be implemented more rapidly.
- Appointments panels must include lay persons who can bring a different perspective to the assessment of candidates' abilities. Lay membership of selection panels is also the key to avoiding the problem of self-replication within the judiciary.
- All selection panels should themselves be gender and, wherever possible, ethnically diverse.
- All those involved in the appointments process must be required to undertake diversity training.
- The duty on the JAC, contained in s 64 of the CRA, to encourage diversity in the range of persons available for selection for appointments should be extended to the Lord Chancellor and the Lord Chief Justice.
- The "tipping provision" contained in s 159 of the Equality Act 2010 should be used as part of the appointments process.
- If there has been no significant increase in the numbers of women and BAME judicial appointments in five years' time, the Government should consider setting non-mandatory targets for the JAC to follow.
- There needs to be an increased commitment to flexible working and the taking of career breaks within the judiciary. The Senior Courts Act 1981 should be amended to allow part-time appointments to be made at High Court level and above.
- There needs to be a greater commitment on the part of the Government, the judiciary and the legal professions to encourage applications for judicial posts from lawyers other than barristers. Being a good barrister is not necessarily the same thing as being a good judge.

These recommendations constitute necessary first steps towards improving the diversity of the judiciary. We hope that they will prove sufficient, but goodwill and leadership will be required to bring about significant change. We regret that, to date, there has not been sufficient commitment to removing barriers to applications from under-represented groups.

The conclusions and recommendations which we reach in this report are based on our affirmation of the principles which we believe should continue to underpin the judicial appointments process: judicial independence, appointment on merit, accountability and the promotion of diversity. The achievement of the correct balance between these principles is vital in maintaining public confidence in the judiciary and the legal system as a whole.

Judicial Appointments

CHAPTER 1: INTRODUCTION

The background to this inquiry

1. The process by which judges are appointed is of significant constitutional importance. The United Kingdom has a long and respected tradition of judicial independence. Once appointed to a full time salaried position, judges may not be removed other than in exceptional circumstances.¹ The principle that judges decide particular cases in a manner consistent with the law and without being subject to interference by Parliament or the executive is not in doubt and we reaffirm it.
2. The framework for the judicial appointments process for the courts and tribunals of England and Wales, as well as for the UK Supreme Court,² was established by the Constitutional Reform Act 2005 (CRA). For England and Wales, the CRA established an independent Judicial Appointments Commission (JAC) with responsibility for recommending a single candidate for each vacancy that arises. The 15 commissioners consist of lay people, members of the legal professions and judges from all levels of the judiciary.³ For the most senior appointments, selection is by special panels that include judges who are not members of the JAC. The CRA removed the traditional power of the Lord Chancellor to make selections substantially in consultation with the serving judiciary and others, but did not remove the Lord Chancellor's role completely. In relation to each vacancy, the Lord Chancellor may accept the JAC's selection, require the JAC to reconsider its selection, or reject it.⁴ On only four occasions does it appear that the Lord Chancellor has done other than accept the JAC's recommendation.⁵ All appointments must be made "solely on merit".⁶ The JAC has a duty "to have regard to the need to encourage diversity in the range of persons available for selection for appointments."⁷

¹ Judges of the High Court and above hold office during good behaviour, subject to a power of removal by Her Majesty on an Address presented to Her by both Houses of Parliament (Senior Courts Act 1981, section 11(3)). Judges below this level also hold office during good behaviour, but are subject to removal for misbehaviour by the Lord Chancellor with the concurrence of the Lord Chief Justice (see, for example, County Courts Act 1984, section 11 (5)).

² We refer in this report to the "judicial appointments process" as a shorthand for the different processes by which judges at all levels of the courts and tribunals are appointed. We recognise, in particular, that the process of appointment of Justices of the Supreme Court differs from that of the courts of England and Wales. The appointment of lay magistrates is also subject to a separate process which we have not considered as part of this inquiry.

³ The Chair of the JAC must always be a lay member. Of the other 14 commissioners: five must be judicial members; two must be professional members (one barrister and one solicitor); five must be lay members; one must be a tribunal member; and one must be a lay justice member. 12 commissioners, including the Chair, are appointed through open competition with the other three selected by the Judges' Council. "The commissioners are appointed in their own right and are not representatives of the professions that they may come from. It is this diverse make up of the Commission which means that each member is able to bring knowledge, expertise and above all independence of mind." Source: JAC website <http://jac.judiciary.gov.uk/about-jac/157.htm>.

⁴ See Box 1, Chapter Two, for more details.

⁵ Q 348 (Lord Justice Toulson, JAC).

⁶ Constitutional Reform Act 2005, section 63.

⁷ Constitutional Reform Act 2005, section 64.

3. The CRA also established the Supreme Court as a body separate from the legislature.⁸ When a vacancy on the Supreme Court arises, a five-person selection commission is formed, chaired by the President of the Court. The other members are the Deputy President and one member appointed by each of the JAC, the Scottish Judicial Appointments Board and the Northern Ireland Judicial Appointments Commission. The CRA requires that at least one of the members is a lay person. The selection commission recommends a single name for each vacancy to the Lord Chancellor, who has a similar range of options as in relation to appointments to the courts and tribunals of England and Wales. The CRA imposes consultation duties on the selection commissions and the Lord Chancellor. Appointments must be made “on merit”.⁹ However, the selection commission must also “ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”¹⁰
4. Parliament has no role in the appointment process for particular posts, though the Lord Chancellor is accountable to Parliament for his decisions and for the operation of the appointments process as a whole. The CRA therefore introduced the concept that the judicial appointments process should, subject to the residual powers of the Lord Chancellor, have a high degree of independence from the executive and confirmed that the legislature has no direct role.
5. Six years after the passing of the CRA, a broad consensus appears to have been reached that, in general terms, the model of recommendations for appointments being made by an independent commission is the right one. But this has not prevented ongoing discussion of the details of how the model works. As the Constitution Committee, we decided that this was an appropriate time to review the constitutional framework of the judicial appointments process. That we have heard from over 30 witnesses and have received over 60 pieces of written evidence demonstrates the level of interest in this issue. Our witnesses held strongly contrasting views on issues such as the appropriate role for parliamentarians, the degree to which the Lord Chancellor should be involved in judicial appointments and the steps needed to improve judicial diversity. We have sought to take account of all these views in reaching a fair and balanced view of the process and in making our recommendations.

The scope of our inquiry

6. This report examines two questions:
 - who should be responsible for the appointment of judges in England and Wales and Justices of the Supreme Court? and
 - what should the substantive criteria governing those appointments be?
7. Under the first of these headings, our report examines the respective roles of the executive, Parliament, the independent appointment commissions and

⁸ The predecessor of the Supreme Court was the Appellate Committee of the House of Lords and, as such, it was embedded within the structures of Parliament with the Law Lords automatically being made members of the House. In practice the Law Lords operated independently.

⁹ Constitutional Reform Act 2005, section 27(5).

¹⁰ Constitutional Reform Act 2005, section 27(8).

the judiciary. No single one of these four institutions should dominate the process; nor should their roles necessarily be equal.

8. Under the second heading, our main concern has been the question of diversity and how this relates to the principle of appointment on merit. Our witnesses were agreed that the judiciary needs to become more diverse, but also that there is no single straightforward way to achieve this.¹¹ It is important to set out why we believe that a lack of diversity is constitutionally significant and to consider what changes should be made to assist in creating a more diverse judiciary whilst maintaining the primacy of the merit principle.
9. We have examined these questions from a broad constitutional perspective. We have not undertaken full post-legislative scrutiny of the CRA, nor does this report consider the detailed operation of the judicial appointments process. We do not underestimate the significance of the administrative aspects of the appointments process (for example, how sifts are conducted, the length and cost of the process and so forth), but we believe that the operational efficiency and effectiveness of the appointments process is for others to consider.
10. At the constitutional level we agreed to leave aside for the present time questions arising from the devolution settlements. Scotland has its own legal system and appointments process, the oversight of which is a devolved matter, and it is not appropriate for a committee of the UK Parliament to examine that process. Similarly, Northern Ireland has its own appointments commission and there are distinct issues, particularly with regard to community background, which we have not considered in detail. In relation to appointments to the UK Supreme Court, questions relating to the appointment of Scottish and Northern Irish Justices¹² were relevant to our inquiry. However, there is currently political debate about further devolution to Scotland (and a possible referendum on Scottish independence).¹³ We also note that the Welsh Assembly has only recently acquired primary law-making powers,¹⁴ and that its Constitutional and Legislative Affairs Committee is carrying out a consultation on the establishment of a separate Welsh legal jurisdiction distinct from England.¹⁵ In recognition of these developments, we do not consider that this is the best time for us to examine issues relating to the devolved administrations and the Supreme Court. We may return to these matters at a later time.

Taking our recommendations forward

11. In November 2011, the Government published a consultation paper entitled *Appointments and Diversity: A Judiciary for the 21st Century*. The consultation

¹¹ Q 39 (Professor Cheryl Thomas), Q 364 (Christopher Stephens, JAC), Q 367 (Professor Dame Hazel Genn, JAC), Q 379 (Lord McNally).

¹² In this context, we note that the appointment of Lord Reed to the Supreme Court was announced on 11 December 2011: http://www.supremecourt.gov.uk/docs/pr_1113.pdf. Prior to his appointment, Lord Reed was a Senator of the College of Justice in Scotland.

¹³ See Scotland's Constitutional Future, Cm 8203, January 2012 and *Your Scotland, Your Referendum*, Scottish Government, January 2012.

¹⁴ Government of Wales Act, section 105; Written Statement by the First Minister and Deputy First Minister of the Welsh Assembly Government, 4 March 2011. See also the written evidence by the Welsh Government.

¹⁵ <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=2594&Opt=0>

covers many of the issues examined in this report and we welcome the Government's commitment to consulting on, and hopefully delivering, necessary changes to the CRA. The consultation period ended on 13 February 2012, but the Government have stated that they "intend to carefully consider the Committee's findings alongside responses to this consultation."¹⁶ This report is not limited to the questions raised in the consultation paper; nor do we propose a response to every question raised in the consultation. Appendix 3 summarises our responses to the individual consultation questions.

12. The consultation paper proposes that a number of specific provisions in the CRA should be moved into secondary legislation in order to enable future changes to be made more easily and to increase flexibility.¹⁷ The consultation stresses that any such secondary legislation would be subject to an affirmative resolution of both Houses, whilst the Minister of State for Justice, Lord McNally, gave us an assurance that the Government would not seek the use of Henry VIII powers in this context.¹⁸ With these assurances, and noting the comment of Baroness Prashar, the first Chair of the JAC, that the CRA "is an interesting mixture of high principle and low level bureaucracy"¹⁹ **we agree that the detailed provisions of the CRA should be included in secondary legislation. We emphasise that:**
 - (a) **Henry VIII clauses should not be sought;**
 - (b) **provisions of particular constitutional importance should continue to remain in primary legislation where they will continue to be subject to full parliamentary scrutiny. Upon introduction of a bill, the Government should publish draft secondary legislation; and**
 - (c) **the Lord Chief Justice and, where relevant, the President of the Supreme Court should be consulted before secondary legislation is laid before Parliament.**
13. **We recommend this report to the House for debate.**

¹⁶ *Appointments and Diversity: A Judiciary for the 21st Century*, Ministry of Justice, Consultation Paper CP19/2011, November 2011, para 24. See also Q 399 (Lord McNally).

¹⁷ *Ibid*, para 26.

¹⁸ This Committee has consistently been opposed to the use of Henry VIII clauses. See, for example, 6th Report (2010–2011): *Public Bodies Bill* (HL Paper 51).

¹⁹ "Translating Aspirations into Reality: Establishing the Judicial Appointments Commission", in J Jowell et al, *Judicial Appointments: Balancing independence, Accountability and Legitimacy*, JAC, 2010, p 45.

CHAPTER 2: THE CONSTITUTIONAL FRAMEWORK

Constitutional principles

14. The principle of judicial independence, without which the rule of law is impossible, is recognised as an essential feature of constitutional democracies around the world. Many of our witnesses stressed the primary importance of judicial independence,²⁰ and none dissented. There was widespread agreement that the appointments process must be designed in such a way as to reinforce judicial independence.²¹ Judges in the United Kingdom should not be appointed through political patronage.
15. It is important not only that the judiciary act independently, but that they are seen to do so. This principle also extends to the appointments process. Lord Justice Toulson, Vice-Chairman of the JAC, noted that prior to the enactment of the CRA “there was widespread public concern that judges were being appointed through cronyism and secret soundings. Nothing, really, could disabuse the public of that.”²² The establishment of the JAC was intended to put an end to such concerns. By operating in an open and transparent manner—for example, by advertising vacancies, specifying the criteria for appointment and publishing diversity statistics—the existence of an independent appointments commission is aimed at helping to ensure that no suspicion of political patronage remains.
16. As well as upholding independence and being open and transparent, the judicial appointments process must be effective. Assessment of professional competence must be central to the selection of judges in order to ensure the efficient delivery of justice. The CRA uses the term “merit” to refer to these criteria, which have been set out in some detail by the JAC.²³ We received different views as to how merit ought to be understood and applied in judicial selection. Given the importance of the merit principle, it is important that there is clarity over its basic meaning. We return to this in Chapter 3.
17. Another principle relevant to judicial appointments is diversity. At one level this means that the process must be fair and non-discriminatory: by that we mean that it must continue to result in the appointment of high quality judges, but without the imposition of barriers against talented legal practitioners from any section of society. However, the issue of diversity goes further than this: we received evidence, with which we concur, arguing that diverse courts are better equipped to carry out the role of adjudicating than courts that are not diverse and that the public will have greater trust and confidence in a more diverse judiciary. As we argue in Chapter 3, the primacy of the merit principle is not inconsistent with the appointment of a diverse judiciary which is more reflective of the society which it serves.
18. The principle of accountability is also important. Judicial independence does not require that no-one be held accountable for the operation of the

²⁰ See in particular Q 40 (Lord Kerr), Q 41 (Lord Justice Etherton), Q 79 (Lord Justice Goldring), Q 376 (Lord Chancellor), written evidence by Jack Straw MP and by Baroness Prashar.

²¹ See for example, Q 2 (Professor Alan Paterson), Q 40 (Lord Kerr), written evidence by Association of HM District Judges.

²² Q 340.

²³ See Box 2, Chapter Three.

appointments process or perhaps even, in exceptional cases, for individual appointments. Later in this Chapter we consider the practical mechanisms by which the JAC and the Lord Chancellor are held to account. Through annual reports, a detailed website and appearances before parliamentary committees, the JAC provides regular accounts of its work to Parliament, ministers and the public. The Lord Chancellor's role in the appointments process is justified as necessary to secure accountability to Parliament through the usual convention of individual ministerial responsibility. Some of the evidence we received questioned the effectiveness of the current accountability mechanisms, leading to calls for Parliament to have a greater role in the appointments process.

19. None of our witnesses called for the complete replacement of the basic model for judicial appointments which was established by the CRA. We would not like to see that model replaced. But many of our witnesses disagreed about the precise role of the JAC and the Supreme Court selection commissions and about the extent to which Parliament, the executive and the judiciary should also have a role to play. All three branches of the state have a legitimate interest in the quality of justice²⁴ and in the quality of those appointed to act as judges. In the rest of this Chapter, we examine the respective roles of the Lord Chancellor, Parliament, the JAC and the judiciary to determine whether the current balance is right.
20. **The principles which we believe should continue to underpin the judicial appointments process are judicial independence, appointment on merit, accountability and the promotion of diversity. The achievement of the correct balance between these principles is vital in maintaining public confidence in the judiciary and the legal system as a whole.**

The Lord Chancellor

21. Under s 3(6)(a) of the CRA, the Lord Chancellor has a specific statutory duty to defend the independence of the judiciary. This duty underpins his role in the appointments process which is set out in Box 1 below. We examine here the principles governing the Lord Chancellor's involvement in the judicial appointments process.

BOX 1

The Lord Chancellor's power to reject or request reconsideration of nominations

When making nominations for filling judicial vacancies for the courts of England and Wales, the JAC recommends a single candidate to the Lord Chancellor. The Lord Chancellor then has three options: he may accept the recommendation, in which case the candidate's name is put to Her Majesty for appointment; he may reject the nomination if he considers that the candidate is unsuitable for appointment; or he may ask the JAC to reconsider the nomination if he considers that there is either insufficient evidence that the candidate is suitable or evidence that the person is not the best candidate on merit. If the Lord Chancellor rejects a candidate or asks the JAC to reconsider he must provide the JAC with written reasons for the request.

²⁴ Written evidence by Jack Straw MP.

If the Lord Chancellor either rejects or asks the JAC to reconsider its first nomination, the JAC will then propose a second name to the Lord Chancellor. If the first candidate is rejected, that candidate may not be proposed again. If the JAC is asked to reconsider, it may either re-recommend the first candidate, or nominate a new candidate. The Lord Chancellor again has three options: accept the candidate; reject, but only if the candidate was nominated following a reconsideration; or ask for reconsideration, but only if the nomination was made following a rejection.

If the Lord Chancellor rejects or asks for reconsideration during the second round, the JAC must make a third nomination: again, a candidate previously rejected by the Lord Chancellor for this vacancy may not be re-nominated.

On receipt of the third nomination, the Lord Chancellor must either accept the third nomination or accept an earlier nomination which he had asked to be reconsidered and where the candidate had not subsequently been re-nominated. Effectively, at this stage the Lord Chancellor may select any candidate proposed by the JAC during the process, as long as he or she has not rejected that candidate at any stage.

The process for appointments to the Supreme Court is similar to that outlined above; though in the case of such vacancies the Lord Chancellor is also obliged to consult with certain senior judges, as well as the First Ministers of Scotland and Wales and the Northern Ireland Judicial Appointments Commission.

The proper extent of the Lord Chancellor's role

22. As well as creating a new appointments process, the CRA removed the role of the Lord Chancellor as head of the judiciary and as Speaker of the House of Lords.²⁵ The position of Lord Chancellor, which is legally and constitutionally distinct from that of Secretary of State for Justice, is now a more political role than it once was. Although, to date, Lord Chancellors have all been lawyers, there is no longer any requirement for this to be the case. As the current Lord Chancellor, Kenneth Clarke MP, told us:

“I think that we will have a Lord Chancellor who is not a lawyer. The lawyers that we have, including me, will not be as senior and distinguished as they used to be ... A better understanding of my role would be to describe me as Secretary of State for Justice ...”²⁶

23. Lord Woolf, who was Lord Chief Justice at the time leading up to the passing of the CRA, told us that this changing role of the Lord Chancellor was one of the reasons why the Lord Chancellor's role was restricted by the CRA: it would have been inappropriate for a politician to continue to act as Lord Chancellors had done previously.²⁷ Although, in recent history, there has been no political misuse of the role, the risk of this occurring in the future if the Lord Chancellor were to be given increased powers cannot be ignored.²⁸

²⁵ Constitutional Reform Act 2005, section 7, section 18 and Schedule 6. The Lord Chief Justice is now head of the judiciary, as well as being President of the Senior Courts of England and Wales. The Speakership of the House of Lords is now exercised by the Lord Speaker: see *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, 2010, paras 1.39–1.44.

²⁶ Q 382.

²⁷ Q 281.

²⁸ Q 92 (Lord Justice Goldring), Q 92 (Mrs Justice Macur), Q 172 (Lord Judge CJ) and Q 255 (Lady Justice Hallett).

24. Despite this, some of our witnesses argued that the Lord Chancellor should have an increased role, particularly in relation to the appointments process as a whole.²⁹ Others considered that the Lord Chancellor should be removed from the process altogether, except in a purely formal capacity.³⁰ The majority of evidence we received urged caution in dramatically reducing or increasing the Lord Chancellor's role. The JAC's written submission stated that:

"The Lord Chancellor's role is potentially quite extensive, but ... a convention has emerged that the Lord Chancellor's involvement is minimal and the vast majority of the JAC's recommendations are accepted without request for reconsideration or rejection."³¹

25. On this basis, Lord Mance, Justice of the Supreme Court, argued that the Lord Chancellor acted as "a remote long-stop [which] can have some impact, if only indirectly."³² The Lord Chancellor is accountable to Parliament for the appointments process: it is important to maintain the connection between Parliament, the executive and the JAC partly so that "the government cannot entirely wash their hands of what is happening"³³ and partly to enable the Lord Chancellor better to defend the judges from attack by taking responsibility for the system which appointed them.³⁴
26. **We agree that the Lord Chancellor should continue to have a limited role in the appointment of individual members of the judiciary: an increased role would risk politicising the process. However, we consider that the Lord Chancellor must retain responsibility and be accountable to Parliament for the overall appointments process.**

The power to request reconsideration or reject nominations

27. As detailed in Box 1, the Lord Chancellor may accept, reject or request the reconsideration of a nominee put forward by the JAC or a Supreme Court selection commission. The Lord Chancellor is responsible for making the vast majority of judicial appointments.³⁵ The Government's consultation paper states that:

"Last year the Lord Chancellor approved 686 judicial appointments; 400 for the Tribunal Service; 284 for the Courts Service; and 2 for the UK Supreme Court. The Lord Chancellor accepted every recommendation put forward by the Supreme Court and the JAC except for one."³⁶

28. Partly in the light of the establishment of a single head of the courts and tribunals judiciary (the Lord Chief Justice), the Government propose that the Lord Chancellor's role in relation to individual appointments should be

²⁹ Q 94 (Lord Justice Goldring), Q 121 (Jack Straw MP), Q 229 (Baroness Hale).

³⁰ Q 10 (Professor Brice Dickson), written evidence by Equality and Diversity Committee of the Bar Council of England and Wales.

³¹ Para 92.

³² Written evidence, para 24.

³³ Q 285 (Lord Woolf).

³⁴ Q 122 (Lord Falconer).

³⁵ *Appointments and Diversity: A Judiciary for the 21st Century*, Ministry of Justice, Consultation Paper CP19/2011, November 2011, para 36.

³⁶ *Ibid*, para 36.

removed from all posts below either the High Court or the Court of Appeal.³⁷ Responsibility for making all lower level appointments would rest with the Lord Chief Justice. The Government are of the view that the Lord Chancellor should retain his role in relation to more senior appointments since the complete removal of his role “would result in an accountability gap” which “increases with the seniority of the appointment being made, given the Lord Chancellor’s statutory duty to Parliament for the operation of the justice system and the key role the senior judiciary play in that regard.”³⁸

29. In oral evidence, the Lord Chancellor told us that his role:
- “for appointments below the High Court has become largely ceremonial and ritualistic ... I do not know the people. I have no direct contact with the posts concerned and I do not think that anyone in my department is in any better a position than me to second-guess what the Judicial Appointments Commission does. Therefore, I think that we should present a little more of the reality to the outside world ...”³⁹
30. This argument was supported by the previous Lord Chancellor, Jack Straw MP, who described his role in relation to the lower tiers of the judiciary as “ridiculous”.⁴⁰ The Lord Chief Justice, Lord Judge, also stressed that the Lord Chancellor “has no input at all to make other than to be there to look as if he is making an input ... It simply suggests there is political involvement when we have tried to get rid of it.”⁴¹ Another former Lord Chancellor, Lord Mackay, disagreed. He argued that “the elected government and the people—the democracy—have an interest in seeing that the judicial process will be properly run and that the people in it are proper for that job.”⁴²
31. Some witnesses were also concerned that to remove the Lord Chancellor’s role for all those except the senior judiciary would “send a signal that lower-tier appointments are not as important.”⁴³ However, both Lord Justice Carnwath,⁴⁴ the then Senior President of Tribunals,⁴⁵ and the Association of HM District Judges⁴⁶ agreed with the Government’s position that the Lord Chancellor’s role should be limited to the most senior appointments. We do not consider that the proposed change would diminish the importance of individual appointments to the lower level courts.
32. The appointments process needs to be robust and, so far as possible, efficient. The Lord Chief Justice has day to day responsibility for the judiciary of England and Wales: he knows what is required of judicial office at all levels. He is therefore better placed than the Lord Chancellor to make an informed assessment of whether a nominee put forward by the JAC should be appointed. Transferring the Lord Chancellor’s power to request

³⁷ *Ibid*, paras 37–41.

³⁸ *Ibid*, para 38.

³⁹ Q 373.

⁴⁰ Q 131.

⁴¹ Q 171.

⁴² Q 129.

⁴³ Q 308 (Baroness Prashar); see also written evidence by Baroness Prashar and Q 93 (Mrs Justice Macur).

⁴⁴ Written evidence, para 23(a).

⁴⁵ It was announced on 20 December 2011 that Lord Justice Carnwath had been appointed as a new Justice of the Supreme Court. He will be sworn in following the retirement of Lord Brown, probably in the first week of the Easter Term.

⁴⁶ Written evidence.

reconsideration or reject nominations to the Lord Chief Justice would strengthen the appointments system.

33. The senior judiciary are responsible for decisions which have a significant impact on the whole of society: this particularly applies to the appellate courts whose decisions may not, or cannot, be further appealed. The need for proper accountability for appointments is therefore greatest in relation to the appellate courts. However, the significance of this change means that it would be better to restrict this change to appointments below the High Court for the time being.
34. **In order to maintain public confidence in the system, there is a need for the legal framework for appointments to reflect both the extent to which the executive should be involved in individual appointments and the reality of that involvement. We agree that the power to request reconsideration or reject nominations should be transferred from the Lord Chancellor to the Lord Chief Justice in relation to appointments below the High Court. This will promote the independence of the judiciary and increase public confidence in the system. Whether the Lord Chancellor's powers in respect of High Court appointments should be transferred to the Lord Chief Justice should be reviewed in three to five years' time.**
35. We recognise that this change may have resource implications for the Office of the Lord Chief Justice. **The Government should consider whether the Lord Chief Justice will need additional support in order to take on this role.**

Shortlists

36. Some of our witnesses argued that the Lord Chancellor should be able to select from a shortlist of candidates proposed by the JAC, at least in respect of the most senior appointments.⁴⁷ Professor Cheryl Thomas pointed out that the system created by the CRA “is unique in relation to appointments commissions in most other jurisdictions” where the executive normally has the power to select from a shortlist.⁴⁸ The two main arguments given in favour of shortlists were democratic accountability⁴⁹ and diversity.⁵⁰ In relation to the former argument, we have already stated that the Lord Chancellor should primarily be accountable for the overall process.⁵¹ His power to reject individual (senior) appointments enhances this accountability without undermining the independence of the process. As we note above,⁵² his lack of involvement in the appointment of judges to the lower courts and tribunals, means that any democratic accountability in relation to those appointments is illusory. In relation to the diversity argument, we note evidence that unless a Lord Chancellor is committed to the promotion of

⁴⁷ Q 229 (Baroness Hale), written evidence by Sir Thomas Legg, paras 10 and 20, by Professor Alan Paterson, para 15, by the Equal Justices Initiative, para 42, and by Professor Robert Hazell and Professor Kate Maleson.

⁴⁸ Q 20.

⁴⁹ Q 229 (Baroness Hale).

⁵⁰ Written evidence by Equal Justices Initiative, para 42.

⁵¹ See above, para 26.

⁵² Paras 29–30.

diversity, the use of shortlists could have the reverse effect of reducing the diversity of the judiciary.⁵³

37. **The use of shortlists would undermine judicial independence and be contrary to the principle of appointment on merit. The Lord Chancellor should not be offered a shortlist of candidates from which to choose.**

Parliament

38. It is the responsibility of Parliament to establish the statutory framework for the judicial appointments process. Parliament also has an accountability role to play in overseeing the process and reviewing the success or failure of its operation. To what extent should Parliament or parliamentarians be involved in individual appointments? And how best can Parliament hold the Lord Chancellor and the JAC to account for the operation of the process?

Pre- or post-appointment hearings

39. We received evidence arguing that candidates for some senior judicial posts⁵⁴ should be subject to a pre-appointment hearing before a parliamentary committee.⁵⁵ Professor Robert Hazell, Director of the Constitution Unit, University College London, and Professor Kate Maleson, Professor of Law, Queen Mary, University of London, set out the arguments in favour of such hearings as follows:⁵⁶
- hearings act as a check on political patronage, help to ensure that independent and robust candidates are appointed⁵⁷ and add to the appointee's legitimacy;⁵⁸
 - Parliament has the power to scrutinise all acts of the executive—appointments of senior judges are an important exercise of ministerial discretion and should be subject to parliamentary scrutiny which is a useful check against political bias;⁵⁹
 - Parliament nowadays has little contact with the judges: the senior judges are largely unknown to MPs; Supreme Court Justices will be unknown to the Lords now that the law lords have departed—through dialogue, political and judicial actors can better understand the constraints under which the other operates;⁶⁰ and
 - the judges should meet the body vested with the constitutional power to dismiss them.⁶¹

⁵³ Q 22 (Professor Cheryl Thomas).

⁵⁴ In general it was argued that this would include Supreme Court Justices, the Lord Chief Justice, the Master of the Rolls, Heads of Division of the High Court and, possibly, Court of Appeal judges.

⁵⁵ Q 8 and written evidence, para 15 (Professor Alan Paterson), Q 133 (Jack Straw MP), written evidence by Professor Mary Clark, by Sir Thomas Legg, paras 12-14, and by Professor Robert Hazell and Professor Kate Maleson.

⁵⁶ This is a summarised version of the written evidence received.

⁵⁷ See also written evidence by Professor Mary Clark, paras 7 and 8.

⁵⁸ See also written evidence by Sir Thomas Legg, para 12.

⁵⁹ See also written evidence by Professor Mary Clark, para 3.

⁶⁰ See also written evidence by Professor Alan Paterson, para 15, and by Professor Mary Clark, paras 7 and 8.

⁶¹ See also written evidence by Professor Mary Clark, para 4.

40. A number of witnesses focused the case for some form of pre-appointment hearing on the increasingly complex role of the senior judiciary and the legitimate role for Parliament to consider candidates' competing judicial philosophies. Individual decisions made by judges impact on policy and determine the interpretation of legislation enacted by Parliament. Some witnesses argued that in respect of legislation such as the Human Rights Act 1998, and in the development of judicial review, the judiciary has a wide margin in which to develop the law and that Parliament has a legitimate interest in the manner in which this is done. Professor Alan Paterson, Professor of Law at the University of Strathclyde, argued that:
- “We already have committees to ask Supreme Court nominees what they think the role of a Supreme Court justice is in a democracy. I see no reason why the appointments panel could not ask that and I see no reason why a parliamentarian could not ... ask it. Indeed, it could ask about the judge's views on parliamentary sovereignty. We know that there is a split among some judges in their views on this. I do not see why one could not elicit views in general terms on that sort of thing.”⁶²
41. Jack Straw MP, a former Lord Chancellor, stressed the need to address the “lack of mutual confidence between the senior judiciary and this place [Parliament] in respect of the role of the senior judiciary and its broadening authority into areas that are inevitably political”.⁶³ Sir Thomas Legg, former Permanent Secretary in the Lord Chancellor's Department, considered it to be “more and more desirable that our most senior judges should be able to ground their mandate on the authority, not only of the executive, still less of the judges themselves and a few laymen alone, but of Parliament itself.”⁶⁴
42. A number of witnesses on both sides of the argument referred to the system of confirmation hearings in the United States.⁶⁵ However, Professor Cheryl Thomas, Professor of Judicial Studies, University College London, noting the more extensive powers of US judges and their appointment by the President, argued that there were “extremely good reasons for there to be a legislative hearing process for those judges that do not apply to judges in this country.”⁶⁶
43. The weight of our evidence was against pre-appointment hearings for UK judges. Professor Brice Dickson, Professor of International and Comparative Law at Queen's University, Belfast, stressed the ability of Parliament to overturn individual judicial decisions,⁶⁷ whilst Lord Kerr, Justice of the Supreme Court, described such hearings as “the complete antithesis of the preservation of judicial independence”.⁶⁸ The benefits of pre-appointment hearings in respect of senior public appointments are many,⁶⁹ but the relationship between Parliament and the judiciary is a unique one. Parliament is best placed to protect the independence of, for example,

⁶² Q 11 (Professor Alan Paterson); see also QQ 8 and 12 and QQ 47–48 (Lord Justice Etherton).

⁶³ Q133 (Jack Straw MP).

⁶⁴ Written evidence, para 12.

⁶⁵ See, in particular, written evidence by Professor Mary Clark and by Graham Gee for detailed consideration of the possible lessons to be learnt from study of the US system of confirmation hearings.

⁶⁶ Q 15.

⁶⁷ Q 9.

⁶⁸ Q 50.

⁶⁹ Liaison Committee: 1st report (2010–2012): *Select Committees and Public Appointments* (HC Paper 830).

ombudsmen from the executive. Judges must be independent of both the executive and Parliament: it is imperative that they remain one step removed from the political process.

44. Our witnesses also raised more immediate concerns about pre-appointment hearings. It would be difficult to limit the questioning of candidates to matters of general judicial philosophy and approach.⁷⁰ There is a real danger that questions might touch on specific issues that could come before the courts or on candidates' individual political positions. Even if parliamentarians did limit themselves, the answers would either be at a level of such generality as to be effectively meaningless⁷¹ or be sufficiently detailed as to risk politicising the process.⁷² Some witnesses were concerned that hearings would act as a disincentive to many potential candidates.⁷³ There is a further question of what impact criticism of a candidate, explicit or implicit, might have on his or her future public standing.
45. Pre-appointment hearings "would also risk undermining the public's confidence that the senior judiciary is appointed strictly on merit and having regard to integrity and independence."⁷⁴ Roger Smith, Director of JUSTICE, thus described the proposal as "a quagmire into which no one would want to go."⁷⁵
46. **We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions. In the United Kingdom, judges' legitimacy depends on their independent status and appointment on merit, not on any democratic mandate.**
47. One alternative to pre-appointment hearings which we examined was the idea that senior members of the judiciary should appear before a parliamentary committee following their appointment. This would enable a dialogue to take place between those judges and parliamentarians with less risk of politicising the appointment. Our witnesses demonstrated little support for this idea. Baroness Hale, Justice of the Supreme Court, stressed that post-appointment hearings would not improve the accountability of the system.⁷⁶ Lord Judge CJ, noting that most senior judges are not responsible for administrative issues, argued that there was no purpose in parliamentarians simply meeting a Justice of the Supreme Court for the sake of it: "I think the idea of beauty parades is not a good one."⁷⁷
48. **We agree that post-appointment hearings of senior judges would serve no useful purpose. There may be an exception in the case of the**

⁷⁰ Q 58 (Lord Justice Etherton), Q 294 (Lord Carswell).

⁷¹ Q 58 (Lord Kerr), Q 164 (Lord Judge CJ), written evidence by Lord Mance.

⁷² Q 85 (Lord Justice Goldring), Q 196 (Peter Lodder QC, Chairman of the Bar Council), Q 384 (Lord Chancellor), written evidence by Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC, para 16. For an alternative view of the politicisation of US confirmation hearings see written evidence by Graham Gee.

⁷³ Q 50 (Lord Kerr), written evidence by Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC, para 15.

⁷⁴ Written evidence by Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC, para 15.

⁷⁵ Q 197.

⁷⁶ Written evidence, para 7.

⁷⁷ Q 180.

Lord Chief Justice and the President of the Supreme Court who undertake leadership roles for which they can properly be held to account.

Parliamentary participation in selection panels

49. A number of witnesses, including some of those who disagreed with the concept of pre-appointment hearings, proposed that parliamentarians should in future sit as members of selection panels, in particular for the Supreme Court. Lord Justice Etherton and Baroness Hale both argued strongly in favour of this proposal on the grounds that “politicians have the legitimacy of being elected”⁷⁸ and that it would be “a small step towards increasing the democratic accountability of the process”.⁷⁹ Baroness Hale further argued that it would “reduce the potential for ‘cloning’”,⁸⁰ an argument reflected in the evidence of Lord Mance who considered that this could be one way of ensuring that candidates were assessed “from different angles”.⁸¹

50. Lord Phillips, President of the Supreme Court, disagreed with this analysis. He argued:

“Once you start introducing some kind of parliamentary choice of who is appointed, one asks what the criteria are that Parliament is going to be adopting in making the choice. If it is simply to appoint the best person, well, I do not think Parliament is best placed to do that. If it is, alternatively, to have regard to political considerations, I do not myself think that is desirable.”⁸²

This concern was shared by a number of other witnesses, including Lady Justice Hallett⁸³ and Lord Neuberger MR.⁸⁴

51. We accept the concern raised by Baroness Hale and others that selection panels must not simply contain judges who might seek, subconsciously or otherwise, to appoint others in their own image. But we disagree that the involvement of parliamentarians is the means to prevent this. The first question, to which none of our witnesses suggested a convincing answer, is how would these parliamentarians be chosen, and on what basis? Whilst there is no objection to lay persons who happen also to be parliamentarians sitting on panels—indeed, the first Chair of the JAC, Baroness Prashar, is a cross-bench member of this House—and emphasising that there is a strong case for more lay representation on selection panels to increase diversity, we do not see what additional questions a parliamentarian might sensibly ask which could not be asked by a lay person.

52. Parliamentarians, acting in that capacity, should not sit on selection panels for judicial appointments. There is no useful role that parliamentarians could play that could not be played by lay members on selection panels. It would not be possible to choose one or two parliamentarians without recourse to political considerations and in

⁷⁸ Q 53. See also Q 15 (Professor Cheryl Thomas).

⁷⁹ Q 229; see also written evidence by Richard Cornes and Charles Banner QC, paras 14–15.

⁸⁰ Written evidence, para 9; see also written evidence by Equal Justices Initiative, para 42.

⁸¹ Written evidence, paras 18–19; see also Q 229 (Baroness Neuberger).

⁸² Q 172.

⁸³ Q 255.

⁸⁴ Q 256.

so doing it would be difficult to maintain the appearance of an independent judicial appointments process.

Parliamentary oversight of the judicial appointments process

53. The proper role of Parliament is to have oversight of the judicial appointments process rather than to be involved in specific appointments. The Lord Chancellor has ministerial responsibility for the appointments process and is accountable to Parliament for his actions. There is an additional question of the extent to which Parliament should be able to question judges directly on the appointments process and other matters.
54. The Lord Chief Justice, as head of the judiciary of England and Wales, appears annually before this Committee to give evidence on issues of constitutional importance to both Parliament and the judiciary.⁸⁵ He similarly appears on a regular basis before the Justice Committee in the House of Commons.⁸⁶ Lord Judge CJ told us that he was “perfectly happy to come and speak” to us on a regular basis “provided that it does not happen too often and provided that the discussion is, as this one is, structured.”⁸⁷ Lord Woolf, a former Lord Chief Justice, also agreed that such discussions were appropriate.⁸⁸
55. Lord Phillips, the current President of the Supreme Court,⁸⁹ also confirmed that he would be content with an annual appearance before this Committee.⁹⁰ We welcome the fact that a number of judges have provided evidence to this inquiry and other parliamentary inquiries in the past.⁹¹ We recognise that judges, with the particular exception of the Lord Chief Justice,⁹² do not speak for the judiciary as a whole. Lord Justice Toulson has recently raised this as a cause for concern in a note to Lord McNally, Minister of State for Justice:
- “Judges who are called before such committees may have views of their own which do not necessarily represent the views of the judiciary. They may not be particularly well informed and it can be an easy temptation for them to become drawn into political areas.”⁹³
56. **We welcome the willingness of judges, once appointed, to give evidence to parliamentary committees on the judicial appointments process and other matters relating to the administration of justice. We recognise that the majority of judges speak on an individual basis and not on behalf of their fellow judges: indeed, Parliament benefits**

⁸⁵ For the last such session, see Constitution Committee, 9th Report (2010–2012): *Meetings with the Lord Chief Justice and the Lord Chancellor* (HL Paper 89).

⁸⁶ See, for example, Justice Committee, *The Work of the Lord Chief Justice*, uncorrected evidence taken on 26 October 2010: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/uc521/uc521.htm>.

⁸⁷ QQ 180 and 182.

⁸⁸ Q 295.

⁸⁹ Lord Phillips has announced that he will retire in the autumn of 2012: Supreme Court press notice 11 October 2011.

⁹⁰ Q 182.

⁹¹ See, for example, Constitution Committee, 6th Report (2006–07): *Relations between the executive, the judiciary and Parliament* (HL Paper 151).

⁹² The Lord Chief Justice, as Head of the Judiciary for the courts of England and Wales, may speak on their behalf.

⁹³ Published as written evidence.

from the diverse range of views thus offered. We believe that this dialogue is of mutual benefit to both the judiciary and Parliament as it enables both to explore areas of common interest and concern. We encourage its continuation in the future.

The Judicial Appointments Commission

The JAC's relationship with the Lord Chancellor

57. Under the CRA the JAC is established as an independent body: it is not a servant or agent of the Crown and it is not part of the executive. Section 65 of the CRA provides that, with the concurrence of the Lord Chief Justice and subject to an affirmative resolution of both Houses of Parliament, the Lord Chancellor may issue formal guidance to the JAC. The Lord Chancellor's power to issue mandatory directions relates solely to the spending of money. Lord Justice Toulson concluded that, whilst operationally speaking there was a good deal of discussion between the Lord Chancellor and his officials and the JAC, "A very high level of constitutional independence is created for the Commission, which I think is valuable."⁹⁴
58. Both Baroness Hale and Cordella Bart-Stuart, Vice-Chair of the Black Solicitors Network and a serving Immigration Judge, argued that the Lord Chancellor should have the power to issue directions as well as guidance, primarily in pursuance of the aim of increasing diversity.⁹⁵ Baroness Hale based her argument on the ministerial responsibility of the Lord Chancellor for the JAC:
- "The Lord Chancellor is in a leadership position and he is accountable to Parliament. If he says, 'These are the policies that I would like the JAC to pursue,' he can then be questioned in Parliament about whether they are justifiable and can justify them. That seems to be democratically entirely appropriate."⁹⁶
59. Noting that the Lord Chancellor has not so far used his power to issue statutory guidance,⁹⁷ **we do not consider that there is a need for an enhanced power to issue directions to the JAC. Such a power could lead to political interference and undermine the independence of the appointments process.**

The JAC's relationship with Parliament

60. The Chair of the JAC is subject to a pre-appointment hearing by the House of Commons Justice Committee⁹⁸ which has also taken evidence from the outgoing Chair and other commissioners.⁹⁹ As part of this inquiry we received detailed written evidence from the JAC and heard from three

⁹⁴ Q 343.

⁹⁵ Q 230 and Q 276 respectively.

⁹⁶ Q 230.

⁹⁷ Q 343 (Lord Justice Toulson), written evidence by JAC, para 30.

⁹⁸ Justice Committee, 2nd Report (2010–11): *Appointment of the Chair of the Judicial Appointments Commission* (HC Paper 770); see also Liaison Committee, 1st report (2010–2012): *Select Committees and Public Appointments* (HC Paper 830), para 59, which recommended that the post of Chair of the JAC become a joint appointment between the executive and Parliament.

⁹⁹ Justice Committee, *The Work of the Judicial Appointments Commission*, oral evidence taken on 7 September 2010.

commissioners, including the Chair. This level of engagement enables the relevant committees of both Houses to question the JAC on its overall approach to the appointments process.¹⁰⁰ It also enables the JAC to bring its concerns to the attention of Parliament. This could be crucial if, for example, the Lord Chancellor were to propose making serious changes to the structure or funding of the JAC. Such engagement tends to enhance, rather than diminish, the independence of the JAC.¹⁰¹

61. In 2008, the JAC in its response¹⁰² to the Ministry of Justice consultation paper, *The Governance of Britain: Judicial Appointments*,¹⁰³ raised the option of making the JAC a parliamentary body similar to the Electoral Commission. The Electoral Commission is established by statute and appointed by the Queen on an Address by the House of Commons.¹⁰⁴ To ensure independence from government, the Commission's Estimate is presented to Parliament by a Speaker's Committee which also approves the Commission's five-year plan.¹⁰⁵ Treating the JAC in a similar manner would remove the Lord Chancellor's current role in setting the JAC's funding¹⁰⁶ and "increase the independence, and the public perception of the independence, of the JAC."¹⁰⁷
62. Despite the understandable concern about the potential for executive interference in the JAC, the recently appointed Chair of the JAC, Christopher Stephens, did not seek to pursue the option of becoming a parliamentary body: "We are, I think, rather comfortable with our relationship with Parliament."¹⁰⁸
63. **We agree that the current relationship between the JAC and Parliament is appropriate. We welcome continued dialogue between the JAC and this Committee, as well as with the relevant committee(s) in the House of Commons. As the JAC was only established in 2006, it is too early to consider whether making it a parliamentary body would better support its independence. Were a Lord Chancellor to seek in the future to undermine that independence in any way, this option should be revisited.**

Judicial and lay representation on selection panels

64. It is axiomatic that the judiciary must have a role in the appointments process. Currently, a small number sit as members of the JAC, on special selection panels for the most senior judiciary in England and Wales and on the Supreme Court selection commissions. Significant numbers of the judiciary are also involved as consultees or referees.

¹⁰⁰ Q 59 (Lord Kerr, Judge Isobel Plumstead and District Judge Tim Jenkins), Q 94 (Lord Justice Goldring).

¹⁰¹ For the converse argument, see Q 196 (Law Society).

¹⁰² http://www.judicialappointments.gov.uk/static/documents/JAC_Response_to_MoJ_Consultation_Paper_170108.pdf

¹⁰³ *Op. Cit.*

¹⁰⁴ Political Parties, Elections and Referendums Act 2000, sections 1 and 3.

¹⁰⁵ *Erskine May: Parliamentary Practice*, 24th edn, 2011, pp 31–32.

¹⁰⁶ We note that the JAC informed us that they have "so far been able to operate effectively within [the] funding allocations." Written evidence, para 30.

¹⁰⁷ *Ibid.*, para 87.

¹⁰⁸ Q 342.

65. Serving judges best understand the qualities required to fulfil a particular position and are able to provide an informed assessment of an individual's skills and abilities.¹⁰⁹ These factors need to be built into the appointments process, whether through membership of selection panels or through consultation and the provision of references. But the input of the judiciary is one significant factor which risks a candidate being preferred because his or her background, characteristics and manner resemble that of other judges. This could work against attempts to increase diversity.
66. Many of our witnesses argued that having greater lay involvement in the selection process was the most appropriate way of avoiding the problem of self-replication within the judiciary.¹¹⁰ Whilst some queried whether lay members could properly assess candidates for a judicial role,¹¹¹ others stressed that the lay members of the JAC “are very powerful people with strong backgrounds in business, politics or what have you”¹¹² who are “of extremely high calibre and [who bring] different qualities ... and a broader perspective”.¹¹³ We agree with the assessment of Baroness Prashar that:
- “You do not just have a lay member on the panel to increase transparency and to satisfy public perception: they all bring something ... Once you were on the Commission, there was very little distinction between the judicial and the lay members. I know there is a perception out there lay members would be full of deference to judicial members: not at all. The Commission was a very robust body, and it worked extremely well. Lay members add real value, and what I valued most was their independence of mind.”¹¹⁴
67. **For the judiciary to be solely responsible for the appointments process would risk undermining the promotion of diversity and, ultimately, public confidence in the judiciary. Furthermore, the appointments process is enhanced by the involvement of lay persons who can bring a different perspective to the assessment of candidates' abilities. It is therefore important that selection panels include a mixture of judicial and lay representation.**

¹⁰⁹ Q 166 (Lord Phillips), Q 300 (Lord Carswell), and written evidence by Baroness Hale, para 6; but see Q 53 (Lord Justice Etherton).

¹¹⁰ Q 18 (Professor Cheryl Thomas), Q 376 (Lord Chancellor), written evidence by Lord Mance, paras 18–19, and by Equality and Diversity Committee of the Bar Council, para 49.

¹¹¹ Q 302 (Lord Carswell), written evidence by District Judge Anne Arnold, para 18, and by Chancery Bar Association, para 5.

¹¹² Q 54 (Judge Isobel Plumstead).

¹¹³ Q 329 (Baroness Prashar).

¹¹⁴ Q 329; see also Q 369 (Christopher Stephens).

CHAPTER 3: DIVERSITY

68. We take it as a given that no-one should be prevented from becoming a judge merely by reason of their sex, race, religion or other protected characteristic as defined in the Equality Act 2010.¹¹⁵ Freedom from discrimination is a basic principle of fairness and equality which is enshrined in law. The concept of diversity goes much wider than this, however. The judge inhabiting a court room in England and Wales is stereotypically a white male from a narrow social background. Despite concerns raised over the last few decades, the proportion of women judges, black, Asian and minority ethnic (BAME) judges and others from under-represented groups has increased too slowly.¹¹⁶ Many of the causes for this appear to stem from the structures of the legal professions (barristers and solicitors) and the pool of available mid-career legal professionals eligible and interested in putting themselves forward for selection. However, other barriers arise as a result of the appointments process itself or of the structures of the courts and tribunals in which judges work.
69. The slow rate of change is not only a problem for those whose careers are affected; it is a problem for society as a whole. We examine in this Chapter why diversity is important and what changes to the constitutional and legal framework might help to bring about a truly diverse judiciary. Although considerations of judicial diversity tend to focus on women and BAME candidates for judicial appointment, and certain aspects of this report are focused on the particular needs of women, we stress that diversity incorporates a number of different elements including disability, sexual orientation, legal profession and social background. The arguments in favour of a diverse judiciary are even stronger if diversity is approached in its widest sense.

TABLE 1

Progress towards improving diversity—women and BAME judges¹¹⁷

Year	Judges in post	% Women	%BAME
1998	3174	10.3%	1.6%
1999	3312	11.2%	1.7%
2000	3441	12.7%	2.1%
2001	3535	14.1%	1.9%
2002	3545	14.5%	2.0%
2003	3656	14.9%	2.2%
2004	3675	15.8%	2.5%
2005	3794	16.9%	2.9%
2006	3774	18.0%	3.8%
2007	3545	18.7%	3.5%
2008	3820	19.0%	4.1%
2009	3602	19.4%	4.5%
2010	3598	20.6%	4.8%
2011	3694	22.3%	5.1%

¹¹⁵ The eight protected characteristics listed under the Equality Act 2010 are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

¹¹⁶ Table 1 provides some relevant statistics to demonstrate the rate of change within the judiciary as a whole. Since its creation, the JAC has made almost 2,500 selections. Over 35% of these were women and at least 9% were BAME candidates (<http://jac.judiciary.gov.uk/about-jac/167.htm>).

¹¹⁷ Source: *Appointments and Diversity: A Judiciary for the 21st Century*, Ministry of Justice, Consultation Paper CP19/2011, November 2011, p 7. Appendix 4 provides more details of judges in post broken down by gender, ethnicity and profession.

The constitutional significance of a diverse judiciary

70. We do not consider that the concept of merit should be narrowly focused on intellectual rigour.¹¹⁸ Although the simple fact of being a member of an under-represented group will not in itself make someone a more meritorious candidate, our witnesses pointed to “limited empirical evidence that diverse judges can improve the decision-making process.”¹¹⁹ Judging is a complex activity: it is necessary for judges to understand the wide array of concerns and experiences of those appearing before them.¹²⁰ A more diverse judiciary can bring different perspectives to bear on the development of the law and to the concept of justice itself.¹²¹
71. None of our witnesses argued that increasing diversity risks reducing the quality of the current judiciary. However, Lord McNally drew our attention to the comments of “a very senior judge” who asked:
- “whether I could guarantee that in 20 years’ time, under the kind of reforms that the Lord Chancellor would have carried through, we would have greater diversity, and whether the senior judiciary would still have the same intellectual integrity, respect and international reputation that it does today. What he was basically saying was, ‘If we have all these women in there, will all these things fall away?’ I do not believe that they will.”¹²²
72. We consider it our responsibility to refute any notion that those from under-represented groups make less worthy candidates than the stereotypical white male. Indeed, we believe that increasing the pool of talent available will lead to an increased number of meritorious candidates from which to select. As Lord Neuberger MR argued:
- “if ... women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges.”¹²³
73. Justice, fairness and equality are central values in the law which should be reflected in the composition of the judiciary itself.¹²⁴ Judges are independent of Parliament and the executive, but they should not stand apart from the society in which they adjudicate: the public must have confidence in the judges who make the decisions which affect their day to day lives.¹²⁵ This is less likely to be the case “if you have tribunal after tribunal with three members, all of whom are white men, particularly if that does not reflect the applicants coming through.”¹²⁶ People appearing before a court must trust

¹¹⁸ See further below, paras 84–88.

¹¹⁹ Q 26 (Professor Cheryl Thomas).

¹²⁰ See Box 2 below.

¹²¹ For detailed consideration of the evidence for the impact of diversity on judicial decision-making, see JAC, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices*, Cheryl Thomas, November 2005, pp 57–60; see also Hunter, McGlynn and Rackley, *Feminist Judgments: From Theory to Practice*, 2010, Hart Publishing.

¹²² Q 376.

¹²³ Q 251; see also Q 311 (Baroness Prashar).

¹²⁴ Q 216 (Baroness Hale), Q 251 (Lord Neuberger MR).

¹²⁵ Q 23 (Professor Alan Paterson), Q 26 (Professor Cheryl Thomas).

¹²⁶ Q 205 (JUSTICE).

the judges to make decisions based on fairness: levels of trust will be greater if the judiciary itself is seen to have been fairly appointed.¹²⁷ As Lady Justice Arden argued: “People may well have more confidence that their concerns have been taken into account if the judiciary reflects more of a cross-section of society.”¹²⁸

74. **A more diverse judiciary would not undermine the quality of our judges and would increase public trust and confidence in the judiciary.**

Barriers to a more diverse judiciary

75. Traditionally judges came primarily from the Bar, a profession itself dominated by white men from privileged social backgrounds. That few judges from under-represented groups were appointed thirty or forty years ago could be explained largely by reasons which were not specific to the judicial appointments process, such as lack of educational opportunities, discriminatory work practices and formal barriers to entering the legal profession.¹²⁹ We have not attempted to extend our inquiry to such wider historic social issues. But we note that other professions, for example the senior Civil Service,¹³⁰ have made much greater and faster improvements in diversity over the last few decades. We also note that women have been studying law and entering the solicitors profession in equal or greater numbers than men for over twenty years.¹³¹ Yet the so-called trickle-up effect whereby greater diversity amongst young lawyers should lead to a more diverse judiciary¹³² has failed to materialise to any significant degree.¹³³
76. There are four points at which diversity fails to trickle-up. The first is at the junior ranks of the legal profession. There is a significant attrition rate for women in particular which means that many do not reach the level of applying to become a judge. We have not examined the reasons for this in any depth in this report, but **we stress that it is the role of the professions and, in particular, the Bar Council and the Law Society, to ensure that the brightest and the best lawyers from all backgrounds are able**

¹²⁷ Q 205 (JUSTICE), written evidence by Lady Justice Arden, para 13.

¹²⁸ Written evidence, para 4.

¹²⁹ The first women were called to the Bar and admitted as solicitors in 1922.

¹³⁰ In the mid-1990s around 13% of senior civil servants were women, but 2011 this had risen to 35%. There were two grade 1 permanent secretaries in 1993; by March 2012, 9 (23%) of the 39 permanent secretaries across the civil service were women. Statistics taken from the House of Commons Library Standard Note, *Women in public life, the professions and the boardroom*, SN/SG/5170 9 March 2012. See also Q 147 (Jack Straw MP), Q 380 (Lord McNally).

¹³¹ In 1986/87 the number of women passing the solicitors finals exams exceeded the number of men for the first time: Law Society *Annual Statistical Report* 1987, para 0.2. Relevant statistics relating to barristers do not go back further than the mid-1990s: <http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/>. We note that in 2010 44% of those securing tenancy and positions as newly employed barristers were women (56% men) whilst 53% of those called to the Bar were women (47% men): General Council of the Bar of England and Wales, *Bar Barometer: Trends in the Profile of the Bar*, December 2011. For a detailed analysis of diversity in the legal professions, see Legal Services Board, *Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices*.

¹³² This was anticipated as long ago as 1992 when the then Lord Chief Justice, Lord Taylor CJ stated that “The present imbalance between male and female, white and black in the judiciary is obvious ... I have no doubt that the balance will be redressed in the next few years ... Within five years I would expect to see a substantial number of appointments from both these groups.” Richard Dimbleby Lecture, *The Judiciary in the Nineties*, (1992).

¹³³ Q 152 (Lord Falconer).

to progress to a point where appointment to the judiciary becomes possible.

77. The second point is when potential candidates are considering whether to apply. Under the old model of a “tap on the shoulder” from a senior judge, certain types of lawyers (typically barristers known to senior judges through appearances in court) were encouraged into the judiciary whilst others (such as solicitors) would not have been given an opportunity. The more open application system created by the CRA has gone some way to alleviate this. However, under the former system it would have been possible to promote candidates from under-represented groups by suggesting that someone apply who would then be less likely to be rejected. Arguably, this means of encouraging applications has been lost.¹³⁴
78. Under s 64 of the CRA, the JAC is subject to a specific duty to encourage diversity in the range of persons available for selection for appointment. Our witnesses welcomed the way the JAC has approached this duty. As Professor Dame Hazel Genn, a JAC commissioner, explained: “In terms of widening the pool, it is about outreach work; it is about myth busting; it is about improving confidence; and it is about educating people about our processes so that they know what they have to do.”¹³⁵ It should equally be possible for senior members of the judiciary to recognise and promote talent by encouraging applications from under-represented groups. Lord Neuberger MR told us that:
- “going out to encourage women and ethnic minorities ... to apply to become a judge is something that the senior judiciary have a positive obligation to do. We are not doing it enough and I include myself in that criticism.”¹³⁶
79. **We agree that the senior judiciary have an important role to play in encouraging applications from under-represented groups. Whilst individual judges cannot, and should not, determine the outcome of a specific application, senior judges should be sufficiently well-informed about the process to be able to advise candidates and encourage them to apply.**
80. The third point is the applications process itself whilst the fourth constitutes the working terms and conditions of the judiciary. There should be no impediments, structural or otherwise, contained within either the appointments process or the job description that cause lawyers from under-represented groups either not to apply or to fail in their applications despite having the potential to become effective judges. We focus in this Chapter on the reduction of such impediments.
81. In 2010 the Report of the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, was published.¹³⁷ Whilst concluding that there is no “quick fix”,¹³⁸ the Report contained 53 recommendations to improve judicial

¹³⁴ Q 121 (Jack Straw MP), Q 126 (Lord Mackay), Q 245 (Lord Neuberger); see also Q 317 (Baroness Prashar)

¹³⁵ Q 361.

¹³⁶ Q 245.

¹³⁷ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

¹³⁸ *Ibid.*, para 2.

diversity and argued that these had to be implemented as a package.¹³⁹ The Government have committed to implementing all 53 recommendations “and will work together with the Lord Chief Justice, the JAC, the Bar Council, the Law Society and the Institute of Legal Executives” to do so.¹⁴⁰ However, Baroness Neuberger informed us that the Panel believed: “that considerably greater progress could have been made on most of what we said [i.e., implementing the Panel’s recommendations] and that it did not require huge amounts of money, which has been the excuse for why some of it has not happened.”¹⁴¹

82. We examine a small number of the Advisory Panel’s more significant recommendations below, in particular those which relate specifically to the appointments process and which would require legislative change. We have not considered it necessary to go over every one of the Panel’s recommendations: some fall outside the remit of this Committee whilst others require no further reasoning or evidence for their value to be seen. **We support all the recommendations of the Advisory Panel on Judicial Diversity and urge all those responsible to implement the recommendations more rapidly than hitherto. Lack of specific comment in this report on a particular recommendation should not be read as an indication that we regard it as unimportant.**

Appointment on merit

83. It is axiomatic that judges must be appointed on merit. How this is to be applied in practice was the subject of much debate during the course of our inquiry.

The characteristics of merit

84. The concept of merit incorporates a range of different skills and qualities, in addition to the intellectual capacity necessary to become a judge. A number of our witnesses drew attention to the fact that merit is still regarded by many in the legal profession as equating to high quality advocacy;¹⁴² this naturally favours QCs, and it is QCs who are most likely to fit the white male stereotype.¹⁴³ **We consider that it is the capacity to be a good judge, not the capacity to be a good barrister, which is essential to merit. The two may overlap, but not necessarily.** There are a number of lawyers with limited experience of advocacy who would make excellent judges.
85. We note the JAC’s definition of merit which is contained in Box 2 below, in particular the recently amended criterion which requires candidates for judicial posts to have: “An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.” The inclusion of this requirement followed a recommendation of the Advisory Panel¹⁴⁴ and was warmly welcomed by our witnesses, including

¹³⁹ *Ibid.*, para 10.

¹⁴⁰ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 20.

¹⁴¹ Q 217.

¹⁴² Q 152 (Lord Falconer).

¹⁴³ The latest statistics published by the Bar Council for 2009–10 show 11% of QCs as female and 4% as BME.

¹⁴⁴ *Report of the Advisory Panel on Judicial Diversity*, 2010, recommendation 20.

Baroness Neuberger.¹⁴⁵ We likewise welcome the inclusion of this criterion which should help to improve the way in which those appearing before courts and tribunals are dealt with.

BOX 2

The JAC merit criteria

- (1) Intellectual capacity
- High level of expertise in your chosen area or profession
 - Ability quickly to absorb and analyse information
 - Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.
- (2) Personal qualities
- Integrity and independence of mind
 - Sound judgement
 - Decisiveness
 - Objectivity
 - Ability and willingness to learn and develop professionally
 - Ability to work constructively with others.
- (3) An ability to understand and deal fairly
- An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs
 - Commitment to justice, independence, public service and fair treatment
 - Willingness to listen with patience and courtesy.
- (4) Authority and communication skills
- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
 - Ability to inspire respect and confidence
 - Ability to maintain authority when challenged.
- (5) Efficiency
- Ability to work at speed and under pressure
 - Ability to organise time effectively and produce clear reasoned judgments expeditiously (including leadership and managerial skills where appropriate).

86. Determining merit is not a wholly objective exercise; the various criteria will be weighed up differently according to the importance attached to each one by the individual selector.¹⁴⁶ The perception that serving judges appoint in their own image is a persistent one which concerned many of our witnesses.

¹⁴⁵ Q 217.

¹⁴⁶ Q 30 (Professor Alan Paterson).

Lord McNally drew attention to the danger of appointers looking to appoint “chaps like us”¹⁴⁷ whilst Baroness Neuberger stressed the wide-scale nature of this problem:

“we all have an inclination to appoint people who are like us. I certainly found as Chief Executive of the King’s Fund that an astonishingly large number of middle-class, white, rather bossy women were being appointed—I cannot think why that should be.”¹⁴⁸

87. Different means of ensuring that the most meritorious candidates (in that term’s fullest sense) are selected have been identified. The Advisory Panel on Judicial Diversity recommended that all selection panels should be gender and, wherever possible, ethnically diverse.¹⁴⁹ Diversity training for all those involved in the appointments process can help individuals to overcome any tendency to appoint in their own self-image.¹⁵⁰ As we stated above, it is also important for selection panels to include a mixture of lay and judicial representation.¹⁵¹
88. **It is important that all the different elements of the JAC’s merit criteria are properly taken into consideration and applied during the appointments process. In order to ensure that merit is not assessed on a narrow basis, all selection panels should themselves be gender and, wherever possible, ethnically diverse, all those involved in the appointments process must be required to undertake diversity training and lay persons must sit on every selection panel so that the judiciary are not solely responsible for the appointments made.**

Diversity as an aspect of merit

89. The simple fact that an individual is from an under-represented group does not make him or her a more meritorious candidate than someone who is not. Diversity is not, in that simplistic sense, a part of merit. However, a suggestion made by some of our witnesses was that merit and diversity, whilst not identical, are related. Lord Justice Etherton argued that the courts must be sufficiently diverse in their expertise to be able to deal, as a body, with the work that comes before them; a candidate who can “bring to bear on a difficult subject ... some additional qualities” may therefore be considered more meritorious.¹⁵²
90. This understanding of diversity as contributing to the overall effectiveness of a court may be particularly important in relation to appointments to the Supreme Court and Court of Appeal which sit in panels and where different perspectives are brought to bear by those hearing an appeal. Baroness Hale argued that:

“in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity. I am

¹⁴⁷ Q 376.

¹⁴⁸ Q 223.

¹⁴⁹ Recommendations 31, 41 and 43.

¹⁵⁰ Q 242 (Lord Neuberger MR).

¹⁵¹ Para 67.

¹⁵² Q 68.

talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.”¹⁵³

91. Lord Phillips suggested, though did not endorse, the following formula for Supreme Court appointments: “The commission must select that candidate who will best meet the needs of the Court having regard to the judicial qualities required of a Supreme Court Justice and to the current composition of the Court.”¹⁵⁴
92. We note that the requirement to appoint “solely” on merit does not apply in the same way to the Supreme Court. UK Supreme Court selection commissions must “ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”¹⁵⁵ There is therefore a practice that two serving justices will come from Scotland and one from Northern Ireland and, accordingly, a search for the best candidate for a vacancy sometimes focuses on one jurisdiction even though the Court serves the whole of the United Kingdom.¹⁵⁶ In this limited circumstance, based on the vital importance of representation of the different legal systems within the United Kingdom, the concept of merit is nuanced to reflect the needs of the court as well as the capabilities of the individual. This is not, however, comparable to the appointment of an individual from an under-represented group.
93. Lord Phillips described treating diversity as a part of merit as fudging the issue.¹⁵⁷ Lord Carswell further distinguished between the two concepts:
- “to call diversity an element of merit is incorrect in principle, but diversity has an important role to play in two ways. One, you need the skills, knowledge and experience that diverse members of society can contribute; ... The other is the public perception. ... if the public confidence requires an element of people other than the traditional type of person, then you have to look at that. But I do not think you call it merit. ... you might have A, B and C: you cannot call them equal, but they are all very appointable, though they have different qualities, but one fills a need for a particular skill. I did see that happen at one appointment because we had exactly this situation; we appointed A, because A filled a need that we had. So do take it into account, but do not call it merit.”¹⁵⁸
94. **We agree that diversity and merit are distinct concepts.**

The threshold definition of merit

95. Under the CRA, appointments to the courts and tribunals of England and Wales must be made “solely on merit”.¹⁵⁹ One issue which strongly divided our witnesses was that of whether merit should continue to remain the sole

¹⁵³ Q 220; see also Q 216, written evidence by Baroness Hale, para 2, by Sir Thomas Legg, para 17, and by Lord Mance, paras 10–11.

¹⁵⁴ Q 185.

¹⁵⁵ Constitutional Reform Act, section 27(8).

¹⁵⁶ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/12505.htm>, para 165ff.

¹⁵⁷ Q 186.

¹⁵⁸ Q 303.

¹⁵⁹ Constitutional Reform Act 2005, section 63.

criterion for appointments or whether it should be treated as a threshold (or plateau) beyond which considerations of diversity could be taken into account. Professor Cheryl Thomas set out the argument in favour of having a merit threshold:

“What we are usually talking about is a number of individuals who are perfectly qualified and capable ... we are not talking about diversity allowing someone who actually is not capable of doing the job to be chosen because they would somehow create a more diverse judiciary, it is a question of saying that you need to consider a whole range of factors. ... there is a choice to be made. What impact will that choice have on the overall composition of the judiciary as an institution of the state?”¹⁶⁰

Lord Falconer, the Lord Chancellor at the time of the introduction of the CRA, Roger Smith, Director of JUSTICE, and Nwabueze Nwokolo, Chair of the Black Solicitors Network, were all similarly in favour of a merit threshold.¹⁶¹

96. The weight of the evidence we received was, however, against the use of a merit threshold, primarily on the ground that it would undermine the core meaning of the merit principle.¹⁶² The Lord Chancellor was particularly emphatic in his defence of this principle:

“The approach that I take is that one absolutely immovable thing is that we should appoint on merit. That has to be a fixed point because, if you appear before any kind of judicial tribunal, you trust that the person who is handling your case has been appointed as the best-quality applicant when the vacancy arose.”¹⁶³

97. **We believe that merit should continue to remain the sole criterion for appointments. We have a highly acclaimed judiciary in terms of quality. This high quality must not be undermined, whether in fact or perception. Where one individual is the most meritorious, taking into account all the different aspects of merit as defined by the JAC,¹⁶⁴ that candidate must be appointed. We have no doubt that candidates from under-represented groups are equally capable of being appointed on this basis.**

Section 159 of the Equality Act 2010

98. Section 159 of the Equality Act 2010 provides that where a person is choosing between two equally qualified individuals for a recruitment or promotion exercise, the individual with a protected characteristic may be chosen over the individual without that characteristic (in cases where participation in the relevant activity by those with the protected characteristic is disproportionately low). This has become known as the “tipping” or “tie-

¹⁶⁰ Q 30.

¹⁶¹ Q 153, Q 205, Q 262 (respectively).

¹⁶² Q 71 (District Judge Tim Jenkins), Q 86 (Lord Justice Goldring), Q 240 (Lord Neuberger MR), Q 303 (Lord Woolf), written evidence by the Association of HM District Judges, and by the Judicial Executive Board.

¹⁶³ Q 376.

¹⁶⁴ We also note the particular requirements of the Supreme Court in relation to Scotland and Northern Ireland: Constitutional Reform Act 2005, section 27(8).

break” provision. Under s 159(6), the positive action provisions in s 159 cannot be used to do anything that is prohibited by or under another enactment. Section 63(2) of the CRA states that, for judicial appointments, selection must be solely on merit. This effectively prohibits the use of non-merit factors in the making of selections under the CRA, and so s159 does not apply.

99. Both the Advisory Panel and the Government’s consultation paper recommend that where two candidates are essentially indistinguishable, this tipping provision should be applied.¹⁶⁵ None of our witnesses disagreed with this proposal outright, though there was significant disagreement as to its potential impact. Baroness Neuberger, Lord Phillips, Lord Judge CJ and Christopher Stephens were amongst those who doubted whether two candidates are ever truly equal.¹⁶⁶ However, the Lord Chancellor and a number of the senior judiciary¹⁶⁷ considered that the subjective nature of appointments meant that it was not “as rare as people think that you have candidates who are equally qualified”¹⁶⁸ and therefore the use of s 159 could, in some cases, prove critical. At the lower levels of the judiciary, the JAC may be seeking to fill 100 vacancies or more in the same selection exercise.¹⁶⁹ **It seems likely that in large assessment exercises it will not always be possible to rank every candidate in strict order of merit and that a number of candidates may be considered to be of equal merit.**
100. Until the applicability of s 159 is explicitly permitted, it will not be possible to determine how often it could be used. Following a change in the law, it would be necessary for the JAC to maintain proper records of its use and to make available anonymised data showing how often, if at all, it had been applied in individual cases. The publication of such data should be in a form designed to ensure that no individual appointment became known to have been made on the basis of the provision as this could undermine the position of the individual concerned.
101. **We agree that s 159 of the Equality Act 2010 should be used as part of the judicial appointments process. Though we cannot be certain how often it would be used, its application could be the deciding factor in the appointment of a number of candidates from under-represented groups. Moreover, permitting its use would send out a strong signal that diversity in judicial appointments is important, without undermining the merit principle.**

Quotas, targets and benchmarking

102. “Quotas” refers to the requirement to appoint individuals to the judiciary according to certain proportions: for example that 50% of all new

¹⁶⁵ *Report of the Advisory Panel on Judiciary Diversity, op. cit.*, recommendation 21; *Appointments and Diversity: A Judiciary for the 21st Century, op. cit.*, para 89.

¹⁶⁶ Q 224, Q 183, Q 184, Q 364 (respectively). See also Q 96 (Mrs Justice Macur), Q 206 (Bar Council), written evidence by Lord Carswell, para 5.7, and by Baroness Prashar.

¹⁶⁷ Q 377 (Lord Chancellor), Q 98 (Lord Justice Goldring), Q 240, (Lady Justice Hallett), Q 240 (Lord Neuberger MR)

¹⁶⁸ Q 240 (Lady Justice Hallett).

¹⁶⁹ See, for example, the selection exercise for fee-paid members (medically qualified) of the First-Tier Tribunal, Social Entitlement Chamber in which 169 appointments were made out of 247 eligible applications. 12% of those recommended for appointment were classed as BME and 36% female: http://jac.judiciary.gov.uk/static/documents/official_stats_oct_to_march_2011_final.pdf.

appointments should be female. We received no evidence calling for the use of mandatory quotas in the appointments process.¹⁷⁰ Quotas were described as “insulting”¹⁷¹ and “patronising”¹⁷²; they would send out the message that candidates had only been appointed because of their sex, race etc.;¹⁷³ they would dilute the quality of the judiciary¹⁷⁴ and undermine the merit principle.¹⁷⁵ **We see no case for the introduction of quotas.**

103. Our witnesses were, however, divided on the use of targets. By this we mean the setting of goals towards which the JAC would aim (for example that 30% of the full-time judiciary should be female¹⁷⁶ by 2020). Unlike quotas, targets would not be mandatory: appointments would continue to be made on merit. The main argument for targets is that they would focus the mind:¹⁷⁷ “there would be much more of an imperative to work harder at widening that pool and making sure that you are going into the non-traditional places and seeking out the best candidates.”¹⁷⁸ In addition, it was argued that targets would “be an indication of clear and determined political commitment to a more diverse judiciary”¹⁷⁹ and would assist in the creation of “a critical mass” of women judges, encouraging other women to apply and ensuring that women judges were taken seriously as individuals.¹⁸⁰ Those in favour of targets included those representing under-represented groups, notably the Association of Women Solicitors¹⁸¹ and the UK Association of Women Judges¹⁸² (who were both against the use of quotas).
104. The arguments raised against the use of targets were largely similar to those against the use of quotas.¹⁸³ Lord Judge CJ was concerned that, “however you create the formula, you [could] end up with what in truth is a quota system.”¹⁸⁴ Some witnesses also argued that although change would not happen overnight, steps were being taken which would “start moving the logjam”.¹⁸⁵ Targets were therefore viewed as both unnecessary and potentially damaging to the merit principle.
105. We note that the Advisory Panel on Judicial Diversity was against the use of targets¹⁸⁶ and that the Government are also currently opposed to their use. However, the Lord Chancellor accepted that they should be tried next if the Government’s proposals for reform do not work well.¹⁸⁷ We share the

¹⁷⁰ Though see Q 267 (Cordella Bart-Stuart) and written evidence by UK Association of Women Judges.

¹⁷¹ Q 188 (Lord Judge CJ).

¹⁷² Q 252 (Lady Justice Hallett).

¹⁷³ Q 266 (Association of Women Solicitors), Q 333 (Baroness Prashar).

¹⁷⁴ Q 264 (Cordella Bart-Stuart), Q 265 (Association of Women Barristers).

¹⁷⁵ Q 360 (Christopher Stephens), written evidence by Law Society.

¹⁷⁶ Figure suggested in written evidence by UK Association of Women Judges, para 16.

¹⁷⁷ Q 266 (Association of Women Solicitors).

¹⁷⁸ Q 264 (Cordella Bart-Stuart).

¹⁷⁹ Written evidence by Erika Rackley.

¹⁸⁰ Written evidence by UK Association of Women Judges, para 16.

¹⁸¹ Q 266 and written evidence.

¹⁸² Written evidence, para 16.

¹⁸³ Q 267 (Black Solicitors Network), Q 360 (JAC), written evidence by the JAC 39, para 52.

¹⁸⁴ Q 188.

¹⁸⁵ Q 379 (Lord McNally); see also Q 119 (Lord Justice Goldring).

¹⁸⁶ *Report of the Advisory Panel on Judiciary Diversity, op. cit.*, recommendation 5.

¹⁸⁷ Q 379.

widespread impatience to see early progress made on improving diversity. **We agree that it would not be appropriate to set targets at the present time. However, we believe that this should be kept under review. If there has been no significant increase in the numbers of women and BAME judicial appointments in five years' time, the Government should consider setting non-mandatory targets for the JAC to follow.**

106. Lord McNally stressed that:

“something better than targets is good baseline figures that would give us a proper idea of the direction of travel. Targets are meaningless if the relevant statistics are not sound, valid and up to date. One of the things that we are trying to do at all levels of appointment is to make sure that we have the baseline statistics that allow us to make judgments about whether the policy declarations on greater diversity are matched by the facts.”

107. There is clearly a need for better and more meaningful statistics to be published, against which progress can be measured. We received evidence that the data which is currently available is inadequate, for example failing to distinguish between salaried and fee-paid appointments.¹⁸⁸ The failure to make this data available obscures failures to improve judicial diversity, whilst a lack of clear evidence of improvements having been made can discourage further applications from under-represented groups. The Advisory Panel called for better capturing and handling of judicial data to set a baseline against which future progress can be measured.¹⁸⁹ The JAC described this as benchmarking:

“looking at the proportion of people who apply to us as compared with those who would be eligible. Among those who apply, we look at progression rates to see, for example, whether women are progressing through our selection processes at the same rate as men, on the assumption that there will be a similar proportion of talented women among those who apply, as compared with men.”¹⁹⁰

108. Benchmarking will not succeed unless the proportions of under-represented groups working in the legal professions are published in an equally accessible format. This is the responsibility of the Bar Council, the Law Society and the Chartered Institute of Legal Executives (ILEX). Plenty of statistics are currently available, but not always in a form which assists in determining how under-represented groups perform in the appointments process. **The Government, the JAC and the legal professions must work together to ensure that data is collated and made openly available in such a way as to make the progression of under-represented groups through the appointments process as transparent as possible.**

Leadership and the promotion of diversity

109. As noted above,¹⁹¹ the JAC is required by s 64 of the CRA to encourage diversity in the range of persons available for selection for appointment. Whilst it is undoubtedly important for the JAC to seek more applications for

¹⁸⁸ Written evidence by Erika Rackley, paras 24–26, and by Equal Justices Initiative, para 11.

¹⁸⁹ *Report of the Advisory Panel on Judiciary Diversity, op. cit.*, recommendations 6 and 7.

¹⁹⁰ Q 360 (Professor Dame Hazel Genn).

¹⁹¹ Para 78.

under-represented groups, this duty should not be the preserve of the JAC alone. Improvements in diversity will not come about without decisive and persistent leadership:

“a real political commitment to widening the judicial recruitment pool and seeking out talented candidates from non-traditional backgrounds can lead to greater diversity in a relatively short space of time, without any adverse impact on the quality of the judiciary. Conversely, without such a commitment, meaningful change rarely occurs.”¹⁹²

110. Leadership must come from both the Lord Chancellor who is responsible to Parliament for the appointments process and the Lord Chief Justice as head of the judiciary.¹⁹³ Both individuals, along with the JAC, can make it clear to all those involved in the appointments process, whether as applicants or selectors, that improving diversity is taken seriously as an aim within government and the judiciary. The message that all those who meet the merit criterion are capable of becoming judges is one which should not be left to the JAC alone to make. Although a statutory duty is not necessary for this leadership to be given, it will help to ensure that all Lord Chancellors and Lord Chief Justices properly recognise and fulfil their roles in this regard.
111. **The duty contained in s 64 of the CRA should be extended to the Lord Chancellor and the Lord Chief Justice.**

Flexible working

112. One significant reason why certain professions have become much more diverse in recent years, particularly with respect to increased numbers of women,¹⁹⁴ is the increased use of flexible working.¹⁹⁵ This may constitute part-time work (reduced hours or days), the ability to work non-standard hours or the right to adjust working patterns from time to time as needed. Flexible working can benefit everyone, but is especially valuable to those with caring responsibilities who are disproportionately female.
113. Part-time fee-paid judicial work is the usual first step towards obtaining a salaried full-time position;¹⁹⁶ however, this tends to entail working from time to time as required, rather than working to a set number of reduced hours. At present, part-time salaried working is possible at all levels of the judiciary up to, but not including, the High Court. Our witnesses did not consider that, in practice, opportunities for flexible working were always widely

¹⁹² Written evidence by Equal Justices Initiative, para 29.

¹⁹³ Q 157 (Lord Falconer), Q 229 (Baroness Neuberger), QQ 315 and 332 (Baroness Prashar), written evidence by Equal Justices Initiative, para 53, and by Lady Justice Arden, para 22.

¹⁹⁴ See above, para 75 and Q 147 (Jack Straw MP), Q 380 (Lord McNally).

¹⁹⁵ The right to request flexible working is to be found in the Employment Rights Act 1996, section 80F (as inserted by the Employment Act 2002, section 47(1),(2)).

¹⁹⁶ The JAC’s website specifies that: “The Lord Chancellor requires that candidates applying for salaried judicial posts should normally be expected to have previous judicial experience. Provision will be made for exceptional cases where candidates have demonstrated the necessary skills in some other significant way. The JAC recognises that experience as a judicial office holder can provide a valuable insight into judicial life and help candidates for salaried posts decide whether a full time appointment is likely to suit them. This is particularly useful as by convention salaried judges do not return to practice. The JAC therefore regards fee paid experience as a desirable, but not essential, criterion for salaried judicial office and this is consistent with the Lord Chancellor’s policy.” <http://jac.judiciary.gov.uk/application-process/7.htm>

available.¹⁹⁷ The Chairman of the JAC reflected the views of many witnesses when he told us that: “This is the first profession that I have touched in my working life where there is not easy access to flexible working arrangements for senior positions. Having salaried part-time working in the High Court would be transformational.”¹⁹⁸

114. The widespread support for the principle of flexible working has been met with some resistance within the judiciary.¹⁹⁹ Lord McNally informed us that: “I hear judges say, ‘Ah, but you can’t have flexible judges, as that would totally disrupt the processes of the court.’”²⁰⁰ Lord Woolf and Lord Carswell, former Law Lords, both cautioned that part-time working would be difficult to accommodate within the senior judiciary: if some judges are unable to undertake prolonged trials that causes difficulties for the rest.²⁰¹ We were, however, reassured by the Lord Chief Justice that:

“we should be able to organise the sitting patterns for female High Court judges or male High Court judges who have caring responsibilities, so that during, for example, half term they can be at home ... I think those sorts of very small changes, if we can broadcast it sufficiently to the women of quality, will help.”²⁰²

115. The Senior Courts Act 1981 currently places limits on the number of individuals able to serve as High Court and Court of Appeal judges at any given time (whether those individuals work full- or part-time).²⁰³ This provision in effect prevents the making of part-time appointments since to do so would result in a reduced number of full-time equivalent judges overall. The Government’s consultation paper asked whether the Act should be amended in order to enable some appointments to be made on a part-time basis.²⁰⁴ This proposal is reflected in the recommendation of the Advisory Panel that “It should be assumed that all posts are capable of being delivered through some form of flexible working arrangement, with exceptions needing to be justified.”²⁰⁵
116. A related recommendation made by some of our witnesses was that the taking of career breaks, especially for those with young children, should be better accommodated both within the legal professions and the judiciary.²⁰⁶ There are no structural barriers to prevent this, nor were any of our witnesses opposed to it in principle, but it requires a degree of commitment and understanding on the part of all those involved in both appointments and deployment.

¹⁹⁷ Q 260 (Association of Women Solicitors), Q 315 (Baroness Prashar), Q 361 (Dame Professor Hazel Genn), Q364 (Christopher Stephens), Q 380 (Lord McNally), written evidence by Equality and Diversity Committee of the Bar Council, para 12.

¹⁹⁸ Q 364.

¹⁹⁹ Though not universally, see for example Q 68 (Lord Kerr), Q 189 (Lord Judge CJ).

²⁰⁰ Q 380.

²⁰¹ Q 296 (Lord Carswell), Q 297 (Lord Woolf); see also Q 144 (Lord Mackay).

²⁰² Q 189.

²⁰³ Under section 2(1) of the Act the Court of Appeal consists of ex-officio judges and not more than 38 ordinary judges; under section 4(1) the High Court consists of six named senior positions and not more than 108 puisne judges.

²⁰⁴ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 84, question 13.

²⁰⁵ Recommendation 51.

²⁰⁶ Q 296, JAP 60 (Lord Carswell), Q 297 (Lord Woolf), Q 380 (Lord McNally).

117. **We agree that the Senior Courts Act 1981 should be amended to remove the limits on the number of individuals able to serve as High Court and Court of Appeal judges at any given time, to enable some appointments to be made on a part-time basis. We regard this as the minimum change necessary. For the number of women within the judiciary to increase significantly, there needs to be a commitment to flexible working and the taking of career breaks which we believe is currently lacking. This applies to both the judiciary and the legal professions. It is the responsibility of all those with a role in deployment and the appointments process to demonstrate that commitment.**

Increasing the pool of potential candidates

118. As we noted earlier, judges have traditionally come from the senior Bar which is itself lacking in diversity. The solicitors' profession is more diverse at all levels,²⁰⁷ and the Chartered Institute of Legal Executives (ILEX) even more so.²⁰⁸ Employed lawyers, are also much more diverse.²⁰⁹ Whilst the Bar must take its own steps towards increasing diversity amongst its members,²¹⁰ if more judicial appointments were to be made from amongst these other groups, it is highly likely that the judiciary would become more diverse as a result. Lord Falconer stressed that:

“We have been incredibly timid about going to government lawyers, prosecution lawyers, in-house counsel, academics, people who work in law centres—there is a whole group of places you could reach. We tell these people that they can apply, but you are never going to convince people that they will be appointed unless you start making appointments from this diverse group. By and large, most people would assume that they would not get through the process, and they are right.”²¹¹

119. **The JAC, the Lord Chancellor and the Lord Chief Justice must encourage applications from lawyers other than barristers. There should be no sense that not having been a member of the Bar makes an individual unworthy of appointment or less meritorious.** There are, however, specific barriers to appointment which exist within the solicitors' profession (legal executives face similar barriers²¹²) and the Government Legal Service which we consider need to be properly addressed.

Solicitors

120. In their written submission, the JAC informed us that:

²⁰⁷ See the Annual Statistical Reports published annually by the Law Society:

<http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends/statisticalreport.law>
and the Bar Barometer published by the Bar Council:

http://cms.barcouncil.org.uk/assets/documents/120105%20Bar%20Barometer_05.01.12_web.pdf.

²⁰⁸ Written evidence by ILEX stated that 74% of students are women and 24% from BAME groups; see also Q 401 (Lord McNally).

²⁰⁹ At the employed Bar, which represents just under 20% of the barristers' profession, 46.4% are women and 12.1% are BME. This compares to 32% women and 9.6% BME at the self-employed Bar: *Bar Barometer: Trends in the Profile of the Bar*, 2011.

²¹⁰ Written evidence by the Association of Women Barristers.

²¹¹ Q 157.

²¹² Written evidence by ILEX.

“There has been little difference in the proportion of solicitors applying for most roles over the past ten years—there have been small increases but no dramatic leap forward. For some judicial roles—for example Circuit judge—the number of solicitors applying and being appointed has decreased.”²¹³

121. There are a number of reasons why solicitors are failing to be appointed as judges in large numbers. Reasons include that for a highly paid City solicitor to become a fee-paid judge would most likely entail a significant drop in salary, that it would require time away from practice at the peak of an individual’s career and that some solicitors will not necessarily have considered a judicial career as a major ambition.²¹⁴ Whilst these factors no doubt apply in many cases, they will not be universal. Moreover, these reasons, the first in particular, apply equally to senior barristers who still become judges in proportionately much greater numbers. There are clearly other influential factors involved.
122. Some of these factors are outside the control of solicitors. The Law Society drew our attention to the difficulty of ensuring that part-time judicial commitments were kept, given the uncertainties of practice.²¹⁵ Lord Collins, the only solicitor to date to have reached the Supreme Court, stressed that the prospect of a Circuit Bench appointment was unattractive to many solicitors and that the best talent amongst solicitors should be given the opportunity to work as deputy High Court judges with a view to appointment as High Court judges.²¹⁶ Lord Justice Toulson informed us that the selection process could lead to candidates being informed that they were to be appointed in the next two years, but with no certainty that they would be—this “produces a kind of planning blight” for firms.²¹⁷ These impediments should be removed.
123. However, the major reason for the low numbers of solicitor candidates is the attitude of the law firms themselves. To become a part-time fee-paid recorder, for example, requires a commitment of just four weeks per year; but this is often not accommodated within solicitors firms. Reflecting the views of a large number of witnesses, Baroness Prashar told us that: “It was very difficult to get solicitors to apply, because if they applied they were seen by their firms to be disloyal ... That remained a problem, and still remains a problem: changing attitudes.”²¹⁸ Baroness Neuberger, Baroness Prashar and members of the judiciary described their efforts to engage with the Magic Circle firms without success.²¹⁹ In the words of Lady Justice Hallett:

“The trouble is that a number of my friends who are top solicitors will talk the talk but not all of them will walk the walk. They will say the right things. The Judicial Appointments Commission will hold a roadshow and everyone will come out with warm words ... saying that

²¹³ Para 50.

²¹⁴ Written evidence by Law Society of England and Wales.

²¹⁵ *Ibid.*

²¹⁶ Written evidence, paras 7–10; see also Q 254 (Lady Justice Hallett).

²¹⁷ Q 368.

²¹⁸ Q 314.

²¹⁹ Q 218 (Baroness Neuberger), Q 314 (Baroness Prashar), Q 250 (Lord Neuberger MR), Q 254 (Lady Justice Hallett).

we should encourage our solicitors. However, I am afraid that not all of them do that when they get back to their offices.”²²⁰

124. We heard from the President of the Law Society who stressed the Law Society’s encouragement of, and support for, solicitors who wished to apply.²²¹ However, when questioned, he was uncertain as to whether the Law Society even had a published policy on judicial appointments²²² (it does not²²³) and he stressed that “The Law Society cannot, as it were, instruct people”.²²⁴
125. **We are not convinced that either the Law Society or the partners of most of the large firms are sufficiently committed to the encouragement of solicitors applying to become judges. The promotion of judicial diversity will be greatly enhanced if solicitors are able to take time off to hold part-time fee-paid judicial posts whilst continuing to practise. We consider it essential in the public interest that this change be made. This will require a significant cultural change within firms and the solicitors’ profession as a whole.**

Government lawyers and prosecutors

126. The Government Legal Service (GLS) and Crown Prosecution Service (CPS) contain a proportionately higher number of those from under-represented groups than much of the rest of the legal profession.²²⁵ The appointment of more government lawyers and prosecutors to the bench would be one practical way of improving the diversity of the judiciary.²²⁶
127. Government lawyers are currently eligible to sit as deputy district judges in magistrates’ courts, as civil recorders, and as fee-paid tribunal judges, except in matters which involve their own department.²²⁷ This formal ability to apply to be a fee-paid lawyer is limited by the fact that government lawyers are usually most experienced and skilled in the area(s) of law with which their own department deals. CPS lawyers are eligible for recorder or deputy district judge posts but “the opportunities to sit on criminal cases will be limited, as most prosecutions are brought by the CPS”.²²⁸ CPS lawyers therefore find themselves excluded from competing in appointment exercises due to lack of suitable work. If someone is unable to obtain experience as a

²²⁰ Q 254.

²²¹ Q 208, Q 215, written evidence.

²²² Q 208.

²²³ Written evidence.

²²⁴ Q 207.

²²⁵ In the Treasury Solicitor’s Department, over 50% of senior civil servants are women, and 15% of those at senior civil service pay band 1 are BME: Treasury Solicitor’s Annual Report 2010-11. In the CPS, women form 75.9% of Crown Prosecutors, 63.9% of Senior Crown Prosecutors, 49.7% of Crown Advocates and 21.6% of Senior or Principal Crown Advocates. For those CPS lawyers for whom ethnicity data are held, BME lawyers form 21.7% of Crown Prosecutors, 18.3% of Senior Crown Prosecutors, 14.4% of Crown Advocates and 8.1% of Senior or Principal Crown Advocates. Source: *CPS Workforce Diversity data 2010-11*.

²²⁶ Q 150; see also Q 280 (Cordella Bart-Stuart).

²²⁷ *Improving Judicial Diversity: Progress towards delivery of the ‘Report of the Advisory Panel on Judicial Diversity’*, May 2011, p 31: <http://www.justice.gov.uk/downloads/publications/moj/2011/judicial-diversity-report-2010.pdf>

²²⁸ Judicial Appointments Commission, *Conflict of interest* <http://jac.judiciary.gov.uk/about-jac/145.htm>

fee-paid judge, they are much less likely to be appointed to a full-time salaried position.²²⁹

128. As well as the disadvantages faced by government lawyers and prosecutors in seeking judicial appointment, there is a wider problem for society if talented individuals are discouraged from applying to work in these sectors because of a concern that they would not then be able to apply to join the bench at a later stage in their careers. It is in the public interest that the GLS and CPS continue to recruit highly capable lawyers and that such lawyers do not work solely in the private sector.
129. Whilst it remains necessary to avoid conflicts of interest, structural impediments to the appointment of government lawyers and prosecutors should be removed. For example, there is an argument in relation to these candidates in favour of relaxing the requirement to have acted as a fee-paid judge and for the JAC to find alternative means of testing their abilities. The provision of mentoring and shadowing opportunities for prospective candidates would be of particular value here. The GLS and CPS must take all possible steps to enable prospective candidates to obtain judicial experience in areas of law where no conflict of interest arises. These solutions may require fuller assessments, but are worthy of serious consideration.
130. In addition, we note the issue raised by Jack Straw MP who told us that:
- “There is ... an issue about how they [prosecution lawyers] can be part-time recorders, and there was quite a debate, not least between myself and the senior judiciary, about the difference between somebody who is at the referral Bar and does nothing but prosecution work, who can be a recorder in that area and sit on criminal cases, and someone who is a senior prosecutor, who is a High Court advocate, who does nothing but prosecution work and at the moment cannot. I never got a satisfactory answer to that.”²³⁰
131. Jonathan Sumption QC,²³¹ while a member of the JAC, argued that “the blanket exclusion of CPS prosecutors from sitting as criminal Recorders is too absolute and is, frankly, totally unjustifiable.”²³² He suggested that CPS lawyers could sit as part-time judges away from the geographic area in which they work as prosecutors. This idea should be examined.
132. **Those who work for the Government Legal Service and Crown Prosecution Service must not be prevented from becoming judges because of their status as government lawyers. The Government and the JAC must act to overcome any undue impediments to their appointment as both fee-paid and full-time judges. This is important both from the perspective of ensuring equal access to judicial appointment and because it would promote the diversity of the judiciary. Furthermore, it is in the public interest that high quality candidates are not discouraged from applying to join the GLS or CPS because of a potential lack of career progression to the judiciary.**

²²⁹ See above, fn 196.

²³⁰ Q 150; see also Q 280 (Cordella Bart-Stuart).

²³¹ Now Lord Sumption, Justice of the Supreme Court.

²³² Justice Committee, *The Work of the Judicial Appointments Commission*, oral evidence taken on 7 September 2010, Q 38.

The tribunals judiciary

133. We examine in detail in Chapter 7 the need to remove barriers to transfers of judges from one post to another, in particular from the First-tier Tribunal to the courts. This is part of a wider consideration of the career structure within the judiciary and broad questions of eligibility for appointment to certain posts. However, noting in particular that the tribunals judiciary is significantly more diverse at present than the courts judiciary,²³³ we draw attention here to the benefits which a more flexible career structure would have upon the diversity of the judiciary as a whole.

Conclusion

134. **The recommendations in this Chapter are based on our understanding of merit as a broad concept relating to the many different skills and experiences which different individuals can bring to bear on the work of the judiciary. We highlight here those changes which would have a practical effect upon the diversity of the judiciary: application of s 159 of the Equality Act 2010; extension of the duty contained in s 64 of the CRA to the Lord Chancellor and the Lord Chief Justice; increased use of flexible working within the judiciary; making it easier for solicitors to apply; and greater opportunities for government lawyers to apply.**
135. **These recommendations, along with those of the Advisory Panel, constitute necessary first steps towards improving the diversity of the judiciary. We hope that they will prove sufficient, but goodwill and leadership will be required to bring about significant change.**

²³³ Written evidence by Lord Justice Carnwath, Senior President of Tribunals, para 10.

CHAPTER 4: APPOINTMENT OF THE LORD CHIEF JUSTICE AND THE PRESIDENT OF THE SUPREME COURT

136. Of all judicial appointments, two stand out as being of particular importance: those of the Lord Chief Justice and the President of the Supreme Court. The former is the head of the judiciary in England and Wales, whilst the latter leads the most senior Court in the United Kingdom. As well as having the qualities required of a senior judge, candidates for these positions must possess high level leadership and administrative skills and be able to work closely with the Lord Chancellor. We therefore consider that their appointments require special attention.

The role of the Lord Chancellor

137. The Government's consultation paper asks whether the Lord Chancellor should sit on selection panels for the positions of Lord Chief Justice and President of the Supreme Court.²³⁴ If these changes were made, the Lord Chancellor would lose his right of veto in relation to these appointments. The argument made by the Government in support of these proposals focuses on "the importance" of each role and the "level and nature of engagement" between each of these individuals and the executive.²³⁵ The Government do not believe that this proposal would undermine judicial independence since the Lord Chancellor would be only one member of a selection panel consisting of five or more members.²³⁶
138. Several witnesses underlined the need for a close working relationship between the Lord Chancellor and, in particular, the Lord Chief Justice.²³⁷ It was also noted that these appointments "involve strong administrative and executive skills"²³⁸ which the Lord Chancellor may be well-placed to assess. However, we consider that there are others better placed to assess such skills, notably the Chair of the JAC who should have experience of leadership and administration in other contexts as well as a thorough understanding of the needs of the judiciary in this regard.²³⁹ The Lord Chancellor should be properly consulted before an appointment is made to either of these positions, and there may be a need to strengthen the current consultation process.²⁴⁰ It is also important that he retain the right to reject a candidate whom he considers does not possess the necessary leadership and administrative skills. But the very fact of the close working relationship between the Lord Chancellor and these two senior judges creates an increased risk that the Lord Chancellor, if he were to sit on the selection panels, might exercise a political (with a small "p") rather than a wholly impartial judgment.

²³⁴ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, questions 7 and 9.

²³⁵ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, paras 64 (Lord Chief Justice) and 71 (President of the Supreme Court).

²³⁶ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 65.

²³⁷ Q 291 (Lord Carswell), Q 291 (Lord Woolf), Q 384 (Lord Chancellor).

²³⁸ Q 129 (Jack Straw MP).

²³⁹ For details of the post and person specification see Justice Committee, 2nd Report (2010–2011): *Appointment of the Chair of the Judicial Appointments Commission* (HC Paper 770), para 9 and Appendices C and D.

²⁴⁰ Q 345 (Christopher Stephens).

139. **The Lord Chancellor should not sit on selection panels for the appointment of either the Lord Chief Justice or the President of the Supreme Court. He should be properly consulted before the start of each selection process and retain his right of veto. Any closer involvement risks politicising the process and would undermine the independence of the judiciary.**

The appointment of the Lord Chief Justice

140. The selection panel for the appointment of the Lord Chief Justice is currently chaired by the most senior English and Welsh Justice of the UK Supreme Court. The Government's consultation recommends that this role be taken instead by the Chair of the JAC on the grounds that a Supreme Court Justice may "have limited experience of the responsibilities or leadership skills required for the role."²⁴¹ The Lord Chancellor argued that "it is difficult to find anyone more obviously objective and in touch with the system [than the Chair of the JAC] to chair it."²⁴² We did not receive any evidence to the contrary.
141. **We agree that the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice.**²⁴³

The President and Deputy President of the Supreme Court

142. One anomaly in the appointments system established by the CRA which has been universally criticised by our witnesses is that the CRA requires the President and Deputy President of the Supreme Court to sit on (and, in the case of the President, to chair) the selection commissions which appoint their successors. It is contrary to well-recognised principles of appointment for an individual to select his or her successor²⁴⁴ and this requirement undermines attempts to promote an independent appointments process under which judges are not solely responsible for the appointment of other judges. The requirement was variously described by senior members of the judiciary as "inappropriate"²⁴⁵, "undesirable"²⁴⁶ and "indefensible."²⁴⁷ The current President, Lord Phillips, wished to remove the requirement, as did the Judicial Executive Board, the Advisory Panel on Judicial Diversity and the Government.²⁴⁸
143. **We agree that the CRA should be amended to remove the requirement that the President and Deputy President of the Supreme Court should sit on the selection commissions formed to choose their successors.**

²⁴¹ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 66.

²⁴² Q 386.

²⁴³ For consideration of who should chair selection commissions for the President of the Supreme Court, see below, paras 148–150.

²⁴⁴ See, for example, written evidence by JAC, para 67.

²⁴⁵ Q 179 (Lord Judge CJ).

²⁴⁶ Written evidence by Lord Mance, para 22.

²⁴⁷ Q 257 (Lord Neuberger MR).

²⁴⁸ Q 177, written evidence by Judicial Executive Board, para 14, *Report of the Advisory Panel on Judicial Diversity*, *op. cit.*, recommendation 41 and Q 385 and *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 72, respectively

CHAPTER 5: SUPREME COURT SELECTION COMMISSIONS

The overall composition of selection commissions

144. UK Supreme Court selection commissions currently consist of five members: the President, the Deputy President and a member from each of the JAC, the Judicial Appointments Board for Scotland, and the Northern Ireland JAC, at least one of whom must be a lay person.²⁴⁹ A selection commission is chaired by the President and the commission submits a report with its final selection to the Lord Chancellor. The Government's consultation paper proposes that only one serving Justice of the Supreme Court should sit on these commissions, with the second Justice being replaced with a judge from Scotland, Northern Ireland or England and Wales.²⁵⁰ This limited proposed change, which follows a recommendation of the Advisory Panel on Judicial Diversity,²⁵¹ "is intended to reduce the risk that there is a perception that the selection process results in the appointment of a candidate that 'fits in' rather than whether they best meet the merit criteria."²⁵²
145. We accept the concern of the Advisory Panel that a commission of five members, two of whom are serving Justices, gives rise to criticism that the Court is appointing in its own image. However, we consider that there should be a wider review of Supreme Court selection commissions than what is currently proposed by the Government. Such a review needs to proceed by reference to constitutional principles. The principle of judicial independence, as we have already stated, militates against politicians being members of the selection commissions. The principle of appointment on merit in our view necessitates the presence of some senior members of the judiciary on selection commissions. The principle of accountability justifies the retention by the Lord Chancellor of his right either to reject candidates or to ask the commission to reconsider its choice. The need to promote diversity requires commissions to include lay people and to be sufficiently large to enable members to have between them a range of different backgrounds and experiences to bring to bear on the task of selecting a judge.
146. Our witnesses identified a number of concerns with the current composition of the commissions, notably in relation to their size and the proportion of judicial to lay members. These concerns are based on the argument, with which we agree,²⁵³ that the judiciary should not be solely responsible for appointing themselves. The commissions may, at present, contain up to four judicial members out of five:²⁵⁴ there is a strong case for an increased lay presence.²⁵⁵ We also welcome the recommendation of the Advisory Panel that the commissions should be gender and, wherever possible, ethnically balanced.²⁵⁶ In terms of lay membership, we received evidence in favour of

²⁴⁹ Constitutional Reform Act 2005, Schedule 8.

²⁵⁰ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, question 6.

²⁵¹ Recommendation 43.

²⁵² *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 60.

²⁵³ See para 67 above.

²⁵⁴ See HC Deb 2 February 2011 col 797W for information concerning the membership of recent selection commissions.

²⁵⁵ QQ 16 and 19 (Professor Cheryl Thomas), Q 346 (Professor Dame Hazel Genn), written evidence by Lord Mance, paras 18–19.

²⁵⁶ Recommendation 43.

individuals with no legal experience who could evaluate the candidates “from different angles”,²⁵⁷ and in favour of legal practitioners and academic lawyers who would be able to assess the candidates’ earlier judgments.²⁵⁸

147. Having considered all the suggestions and arguments, and recognising that further consultation may be required on the detail of our proposal, **we consider that selection commissions for the UK Supreme Court should consist of a lay chair and six other members. An odd number of members would avoid any need for a casting vote (which gives more weight to the views of one individual). A body of seven is the optimum size to balance the need to promote diversity with the need for efficient and effective decision-making.**

Chairing the selection commissions

148. The first detailed consideration is who should chair the selection commissions. At present this is done by the President whose views would, in any case, no doubt carry great weight with the rest of the panel. Chairing an appointments panel requires particular skills which the President may not necessarily possess. The Chair of the JAC does possess these skills and, as a lay person, would assist in preventing the perception of the court appointing in its own image. The Chair is also independent of the executive and Parliament. The Government have proposed that a non-judicial member of the JAC, the Judicial Appointments Board for Scotland or the Northern Ireland JAC, as someone who “commands the confidence of the judiciary, the executive and the public”,²⁵⁹ should chair selection commissions for the President of the Supreme Court.²⁶⁰ The arguments in favour of a lay chair who commands widespread confidence are just as applicable to all Supreme Court selection commissions.
149. The Supreme Court is a UK body and whoever chairs the commissions must act accordingly. The Chair of the JAC has experience of the courts and tribunals of England and Wales only, but it needs to be borne in mind that only a minority of appointments to the Supreme Court will involve consideration of the requirements of the Court to have expertise in Scots or Northern Irish law. The President of the Supreme Court, who currently chairs the commissions, may well have a background in the English and Welsh legal system, but this has not been suggested as a reason to replace him or her as chair. The Chair of the JAC, if chairing a selection commission, should be capable of considering the needs of the Court as a whole without special experience of the Scottish or Northern Ireland legal systems, just as members from the Judicial Appointments Board for Scotland and the Northern Ireland JAC are expected to take part in decision-making about the selection of judges from England and Wales. Designating the Chair of the JAC as chair of every selection commission would also have the virtue of providing consistency in leadership across several different selection exercises, which in our view is likely to be helpful in upholding the principles of appointment on merit and the promotion of diversity.

²⁵⁷ Written evidence by Lord Mance, para 18; see also Q 16 (Professor Cheryl Thomas).

²⁵⁸ Q 16 (Professor Alan Paterson), Q 19 (Professor Cheryl Thomas), Q 302 (Lord Woolf).

²⁵⁹ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 74.

²⁶⁰ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 75.

150. **We consider that the lay Chair of the JAC should chair all selection commissions for UK Supreme Court appointments.**

Judicial representation on the selection commissions

151. Most appointments to the Supreme Court are likely to continue to be drawn from the ranks of existing judges and judges are best placed to make the fine-grained assessments of the quality of judgment writing from a field of exceptional candidates. **In our view, there should be three senior judges on each selection commission in order to ensure that the selection process has due regard to proven judicial merit.**
152. Our witnesses supported there being at least one serving Justice of the Supreme Court on each commission as they best understand the needs of the court and the skills and abilities required to serve.²⁶¹ However, serving Justices would be influential and we are concerned that having only one Justice could lead to that individual having too much influence by reason of being seen as representing the institutional voice of the Court. Nor do we accept the argument that all serving Justices have the same view of what is required or who should be appointed. Replacing a Justice of the Supreme Court with a senior judge from a different court would not necessarily avoid the perception of a small group of individuals appointing in their own self image. The way to avoid excessive influence is to ensure that the judicial members constitute less than half the members of a selection commission. **Two of the judges should be Justices of the Supreme Court.**
153. There are two main ways of defining who the Justices should be. One method is according to seniority. Where the selection is to fill a vacancy of the President or Deputy President of the Court, the CRA could state that two most senior ordinary Justices of the Court who have not applied for the posts should be the members. **Where the selection commission is for an ordinary Justice of the Court we do not see any constitutional objection to the President and Deputy President being the members. An alternative method would be for the CRA to provide that a selection commission should include two members of the Supreme Court and leave it to the Court to decide which two members should serve on the commission. We can see advantages and disadvantages in both methods. If our proposal is accepted, the Government should consult members of the Supreme Court before introducing legislation to amend the CRA.**
154. Defining the identity of the third judicial member of selection commissions is not straightforward. One suggestion made by our witnesses was that the Lord Chief Justice, as a senior member of the judiciary with relevant knowledge and experience, should sit on the commissions (if not a candidate).²⁶² The Lord Chief Justice is head of by far the largest of the three UK jurisdictions and the Supreme Court's caseload is dominated by appeals from the courts of England and Wales. Specifying the Lord Chief Justice as a member of selection commissions also has the virtue of simplicity, which is important in helping public understanding of the appointments process.

²⁶¹ Q 53 (Lord Kerr), QQ 166 and 178 (Lord Phillips), Q 300 (Lord Carswell).

²⁶² Q 14 (Professor Cheryl Thomas), Q 179 (Lord Judge CJ).

155. An alternative to designating the Lord Chief Justice as the third judicial member of selection commissions would be to have a more flexible arrangement, enabling the Lord President (the head of the judiciary in Scotland) or the Lord Chief Justice of Northern Ireland (the head of the judiciary in that jurisdiction) sometimes to serve on selection commissions in place of the Lord Chief Justice. The CRA requires selection commissions to “ensure that between them the judges [of the Supreme Court] will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”²⁶³ If, as at present, a member from the Scottish Judicial Appointments Board and the Northern Ireland JAC are always to be on selection commissions, this is, we believe, sufficient to ensure knowledge about those jurisdictions is brought to bear on the work of the selection commission. The senior judiciary in Scotland and Northern Ireland are required to be consulted both by the selection commission and at a later stage by the Lord Chancellor, so they participate in this way in the appointments process even if not members of the selection commission. Moreover, if instead of the seniority principle, there is a more flexible method of defining which of the Justices of the Supreme Court serves on a selection commission, it would be possible for one of those judges to bring expertise in Scots or Northern Irish law to the selection commission. **We accept the idea that the Lord Chief Justice of England and Wales should be the third member of the selection commission.**
156. An added practical complication in relation to the third judicial member arises from the fact that the holders of the offices of Lord Chief Justice of England and Wales, the Lord President and the Lord Chief Justice of Northern Ireland are each likely, at some point, themselves to be prime candidates for appointment to the Supreme Court. Where this is so, the CRA would need to specify that another senior judge who is not in the competition serves on the selection commission.

Lay representation on the selection commissions

157. **The three remaining places on a selection commission ought, as at present, to be occupied by a member from each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland JAC, nominated by the Lord Chancellor. To ensure that judges do not dominate the appointments process, no judicial members of the appointments commissions ought to be eligible for nomination to a Supreme Court selection commission. The CRA currently requires that at least one of the three “must be non-legally qualified”: we recommend keeping this rule to ensure that there is a minimum of two lay people (including the chair) on every selection commission. We see no constitutional objection to a member of a territorial appointments body who is a legal practitioner being a member of a selection commission.**

²⁶³ Constitutional Reform Act 2005, section 27(8).

CHAPTER 6: THE JUDICIAL APPOINTMENTS COMMISSION

The size and composition of the JAC

158. The Government have recommended that the number of JAC commissioners be reduced from 14 (apart from the Chair) to 8. This “combined with a more efficient use of Commissioner time, could reduce running costs by up to £50,000 per year.”²⁶⁴ In order to accommodate the reduced numbers, the Government further suggest that “it seems desirable to loosen the rigid criteria which currently prescribe who can be a Commissioner.”²⁶⁵ The Government thus “propose that the Lord Chancellor, when making recommendations for appointment, must ensure that between them the Commissioners will have—
- knowledge and experience of holding judicial office;
 - knowledge and experience of practice in a legal profession;
 - other knowledge and experience which the Lord Chancellor considers suitable.”²⁶⁶
159. The JAC, along with the former Chair, Baroness Prashar, was opposed to these proposals, other than perhaps having a small reduction in the number of commissioners. In terms of the cost, the JAC argued that the proposals would save only a limited sum of money, at best, and that they would not speed up the process.²⁶⁷ The Chair, Christopher Stephens, pointed out that it is not necessary for all the commissioners to be present to make an appointment and that the average number since his appointment has been nine. He did “not believe ... that the number of commissioners has slowed the appointments process by a single day”.²⁶⁸
160. Professor Dame Hazel Genn, a JAC commissioner, argued that it is necessary “to maintain the balance between the judicial members and the lay members, which ... is a real strength of the Commission.”²⁶⁹ The need for “different perspectives” brought by the “extremely high calibre” lay members was also emphasised by Baroness Prashar²⁷⁰ and Judge Isobel Plumstead.²⁷¹ In addition, both the Black Solicitors Network²⁷² and the Association of Women Solicitors²⁷³ pointed to the need for diversity amongst the commissioners themselves; the appointment of a diverse Commission will be more likely with a greater number of commissioners incorporating a significant lay membership. Lord Justice Toulson, the Vice-Chairman of the Commission, drew our attention to the recent appointment of 11 new commissioners, arguing that this was not therefore the best time to decide what the number of commissioners should be.²⁷⁴

²⁶⁴ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 94.

²⁶⁵ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 99.

²⁶⁶ *Ibid.*

²⁶⁷ Q 306 (Baroness Prashar); Q 369 (Christopher Stephens); written evidence by JAC, para 76.

²⁶⁸ Q 369.

²⁶⁹ Q 370.

²⁷⁰ Q 329.

²⁷¹ Q 54.

²⁷² Q 263.

²⁷³ Written evidence.

²⁷⁴ Q 371.

161. In terms of who should be appointed, Lord Justice Carnwath argued that there was insufficient tribunal representation²⁷⁵ whilst Baroness Prashar noted that the Commission had not taken over the selection of magistrates (as had formerly been proposed), therefore there was no need for a magistrate member.²⁷⁶ There is a need for a reconsideration of the composition of the JAC, but this should be done openly and following consultation. Any need for increased flexibility in determining the precise composition of the JAC can be met by placing the details into secondary legislation which would avoid executive interference and allow Parliament to express a view whilst still enabling changes to be made more frequently.
162. **We stress that the JAC is an independent body. The Lord Chancellor should have no discretion to determine the membership; this would be damaging both to the independence of the JAC and to the perception of its independence.**
163. **We believe that there should not be significantly fewer commissioners than at present and that the number should be prescribed in primary legislation. The composition of the JAC must consist of a balance of lay and judicial members. In order to increase flexibility in making changes to the precise composition of the JAC, it would be appropriate for the composition to be set out in secondary legislation, subject to affirmative resolutions of both Houses of Parliament.**

The remit of the JAC

The appointment of deputy High Court judges

164. An issue which concerned a number of our witnesses was that of the appointment of deputy High Court judges. Under the CRA, the appointment of full-time judges has become transparent, open and independent: the appointment of deputy High Court judges remains a constitutional anomaly in this regard. Under s 9 of the Senior Courts Act 1981 circuit judges and recorders may be authorised or appointed to act as a deputy High Court judge.²⁷⁷ The Lord Chief Justice stated that:
- “Such authorisations enable Circuit judges and Recorders with relevant expertise to hear cases which would otherwise require a High Court judge, of which there are a limited number. Contrary to some misunderstanding, this is not an appointment to judicial office at all. It is simply part of a system which will enable those who are already appointed to be deployed to the best advantage.”²⁷⁸
165. The authorisation or appointment of deputy High Court judges was left out of the CRA because, as Lord Falconer, the then Lord Chancellor, explained: “the Lord Chief Justice at the time, Lord Woolf, with whom I agreed, said that flexibility was needed ... I was happy to be persuaded by that.”²⁷⁹

²⁷⁵ Written evidence, para 4; see also written evidence by Sehba Haroon Storey, para 4.2.

²⁷⁶ Q 307.

²⁷⁷ See *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, paras 42–46, for details of the process.

²⁷⁸ Written evidence.

²⁷⁹ Q 159; see also Q 282 (Lord Woolf).

166. None of our witnesses argued against the need for flexibility in the deployment of deputy High Court judges, but a number expressed serious concern about the complete lack of transparency in the process of authorisation or appointment.²⁸⁰ In particular, there is no publicly available list of those authorised or appointed and no available data by which to measure diversity.²⁸¹ Baroness Prashar described the issue as “a running sore” during her time as Chair of the JAC, whilst Lord McNally argued that the process “seems to be one of the last bits that still exist on the old tap-on-the shoulder basis. I have my suspicions that some of the old ways produce old results.”²⁸² A number of leading barristers argued that the process “is difficult to justify and may undermine efforts to promote a fairer and more transparent system of appointment and could, without reasonable care, militate against efforts to secure a more diverse judiciary.”²⁸³
167. Despite the Lord Chief Justice’s view that this is primarily a question of deployment, Christopher Stephens and others stressed the importance of these positions for career development: “looking back over the five and a half years of [the JAC’s] existence, we have made 54 appointments to the High Court and over 80% of them were deputy High Court judges ... These are the pivotal entry-level positions.”²⁸⁴ Baroness Prashar also argued that the authorisations and appointments “are of real significance to the administration of justice”.²⁸⁵
168. The JAC and the Lord Chief Justice have recently agreed a protocol requiring the Lord Chief Justice or his deputy to seek the concurrence of the JAC and to consult the Lord Chancellor before making an authorisation under s 9(1).²⁸⁶ Authorisation exercises will be advertised to all those eligible and expressions of interest made with reference to the agreed qualities and abilities required of a deputy High Court judge. The JAC’s role will be to determine whether the proposed authorisations are a product of a fair and open process, rather than to concur with individual decisions. It will remain the sole responsibility of the head of division (to whom the Lord Chief Justice has delegated authority) to make the authorisation.
169. **We agree that there needs to be flexibility in the deployment of judges. However, authorisation or appointment to act as a deputy High Court judge is an important step towards permanent appointment to the High Court and a significant aspect of the administration of justice. Such authorisations and appointments should therefore be conducted openly and transparently, in line with best appointment practices; in principle they should be a part of the independent appointments process conducted by the JAC. We consider that it would be helpful to see how the new protocol operates in practice as there is no need for an unduly elaborate system, but this**

²⁸⁰ Q 315 (Baroness Prashar), Q 401 (Lord McNally), written evidence by Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC, para 5, and by Equal Justices Initiative, para 17; see also Q 160 (Lord Falconer).

²⁸¹ Written evidence by Equal Justices Initiative, para 18 and by UK Association of Women Judges, para 7.

²⁸² Q 401.

²⁸³ Written evidence by Professor Aileen McColgan, Karon Monaghan QC and Rabinder Singh QC, para 5.

²⁸⁴ Q 352; see also Q 354 (Professor Dame Hazel Genn), Q 354 (Lord Justice Toulson), written evidence by Equal Justices Initiative and *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 48.

²⁸⁵ Written evidence.

²⁸⁶ Written evidence by Lord Judge CJ, Q 353 (Christopher Stephens).

should be reviewed in three years' time. Meanwhile, a list of those currently authorised or appointed to act as deputy High Court judges should be published, and those authorised or appointed under the new protocol should be monitored for diversity with the resulting data being made publicly available.

The appointment of non-legally qualified tribunal members

170. The Government have proposed that the CRA could be amended so that, with the agreement of the Lord Chancellor, the Lord Chief Justice and the JAC, selection exercises for non-legal judicial office holders could be moved out of the JAC's remit, where it is appropriate to do so.²⁸⁷ Lord Justice Carnwath argued that: "There is no advantage in involving the JAC, whose processes including statutory consultation provisions are designed for appointing judges, and which lacks expertise in relation to the different skills required for non-legal appointments."²⁸⁸ Conversely, the JAC argued that it should be responsible for the appointment of non-legally qualified tribunal members "because they form a college or decision-making panel and they have a serious judicial role. We think that we are the statutory body that knows how to identify judicial skills, even if it is in lay people."²⁸⁹
171. The Administrative Justice and Tribunals Council noted:
- "the inconsistency of arrangements for tribunal appointments ... We do not necessarily suggest that all appointments to tribunals must be made by the JAC, but we think that there should be some mechanism for ensuring that all arrangements meet consistent standards ... with this consistency extending to the appointment of non-legal members."²⁹⁰
172. **We believe that the JAC should in principle remain responsible for the appointment of non-legally qualified tribunal members: such persons will be judges and should be appointed on that basis. If, with the agreement of the Lord Chancellor, the Lord Chief Justice and the JAC, particular selection exercises are transferred elsewhere, appointments must continue to be made according to standards determined by the JAC.**

²⁸⁷ *Appointments and Diversity: A Judiciary for the 21st Century*, *op. cit.*, para 32.

²⁸⁸ Written evidence, para 23(c); see also written evidence by Alison McKenna, para 5.1, and by James Kidd.

²⁸⁹ Q 355 (Christopher Stephens).

²⁹⁰ Written evidence, paras 5–6.

CHAPTER 7: POST-APPOINTMENT ISSUES

173. During the course of our inquiry we examined a number of issues which, although more directly concerned with what happens following an individual's appointment to the judiciary, have an impact on the process of appointments: the possibility (or lack) of deployment and promotion has an effect on determining who is eligible, or may wish to be appointed, to particular roles; a formal appraisal system could form part of the appointments process itself; whilst the age at which judges must retire determines both whether it is feasible to appoint those who have taken longer than others to reach the most senior levels of the judiciary and the frequency by which new posts become available. One good reason for making changes in respect of all these issues is to assist with the promotion of diversity, but we consider that the recommendations which we make in this Chapter would be beneficial for the whole judiciary.

Judicial careers

174. Appointment to the judiciary in the United Kingdom is based on a number of years of prior non-judicial legal experience.²⁹¹ Candidates for appointment to the High Court are often experienced QCs who have established themselves in practice for over twenty years. Most Court of Appeal and Supreme Court judges are promoted from the High Court.²⁹² Appointments to become a circuit judge, recorder, district judge or tribunal judge are often made following ten to 15 years in practice. Our witnesses were concerned that there is limited movement between the different parts of the judiciary, and little prospect of promotion from the lower to the more senior branches. Once appointed to the judiciary, there is generally no established career path for individual judges to follow.
175. Greater opportunities for career development within the judiciary may be distinguished from the more formal concept of a career judiciary, as found in most continental civil law systems. Such systems are characterised by the appointment of graduates to junior positions, generally following tailored education at a judicial training institute, and often without having engaged in legal practice prior to appointment. These junior judges may then be promoted, on the basis of performance, to progressively more senior positions in the judicial hierarchy. This career structure is similar in a number of respects to the progression of career civil servants in the UK. Legal systems with career judiciaries of this nature are also characterised by the attachment of judicial security of tenure to the judicial career itself, rather than to any particular judicial post. This allows for greater flexibility in the transfer of judges between courts at similar levels of seniority.²⁹³
176. Our witnesses did not support the idea of having a career judiciary in the United Kingdom, stressing that judges benefit from having had a number of years in practice as well as from the added maturity which is consequent upon appointment to the judiciary at a later stage.²⁹⁴ Our witnesses were,

²⁹¹ Usually as a lawyer, though those with mainly academic experience may also be appointed.

²⁹² The recent appointment of Jonathan Sumption direct from the Bar was an exception.

²⁹³ N Garoupa and T Ginsburg, *Hybrid Judicial Career Structures: Reputation vs Legal Tradition*, Journal of Legal Analysis 2011.

²⁹⁴ Q 116 (Lord Justice Goldring), Q 210, (Law Society), Q 235 (Baroness Hale), Q 235 (Baroness Neuberger), Q 253 (Lady Justice Hallett), Q 259 (Association of Women Barristers).

however, in favour of judicial careers with greater opportunities for promotion through the ranks and deployment between posts at the same level.²⁹⁵

177. Lord Carswell argued that under the present system, “Most people appointed to the different tiers of the judiciary come in at a level appropriate to their ability and can properly remain in that tier.”²⁹⁶ Similarly, the Bar Council was of the view that someone with a particular specialism would not wish to “occasionally sit in a lower tribunal which is intellectually inferior to what they do in practice and has no relevance to what they do in practice.”²⁹⁷ Both these witnesses, however, agreed with a number of others who pointed out that some lawyers would prefer to enter the judiciary at a lower level with the prospect of promotion.²⁹⁸ This would be particularly attractive to those with caring responsibilities. As the UK Association of Women Judges stated:

“Many very able women downsize their professional careers when they undertake family responsibilities but they retain the ability and potential to become excellent judges. Many would find appointment at district or tribunal level attractive if there were a realistic prospect of promotion in later years.”²⁹⁹

178. Witnesses also drew our attention to the much greater diversity of the tribunals judiciary,³⁰⁰ to the difficulties facing tribunals judges whose experience is not fully taken into account when applying to appointment to the courts judiciary³⁰¹ and to the need for greater use of deployment from the tribunals judiciary to the courts judiciary.³⁰² Lord Justice Carnwath set out the specific barriers to deployment between the courts and the tribunals judiciary which exist under current legislation:³⁰³

“Salaried court judges can sit in tribunals by agreement. However, fee-paid courts judges cannot sit in tribunals, and neither salaried nor fee-paid judges in tribunals can sit in the courts. These restrictions are inefficient and serve as a block on judicial flexibility and career development.”³⁰⁴

179. The Advisory Panel on Judicial Diversity recommended that “There should be a fundamental shift of approach from a focus on individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary.”³⁰⁵ We

²⁹⁵ Q 37 (Professor Alan Paterson), Q 116 (Lord Justice Goldring), Q 158 (Lord Falconer), Q 209 (JUSTICE), Q 210 (Law Society), QQ 216 and 218 (Baroness Hale), Q 254 (Lord Neuberger MR), Q 261 (Cordella Bart-Stuart), Q 323 (Baroness Prashar), Q 401 (Lord McNally), written evidence by Sir Thomas Legg, para 26, by Lord Justice Carnwath, para 9, by UK Association of Women Judges, para 4, by Association of Women Solicitors; see also *Report of the Advisory Panel on Judicial Diversity op. cit.* recommendations 1 and 44.

²⁹⁶ Written evidence.

²⁹⁷ Q 210.

²⁹⁸ *Ibid.*

²⁹⁹ Written evidence, para 4.

³⁰⁰ Written evidence by Lord Justice Carnwath, para 20.

³⁰¹ Q 235 (Baroness Hale).

³⁰² Q 116 (Lord Justice Goldring), Q 216 (Baroness Hale).

³⁰³ See, in particular, Tribunals, Courts and Enforcement Act 2007, section 6.

³⁰⁴ Written evidence, para 20.

³⁰⁵ Recommendation 1.

note that the Taskforce Progress Report of May 2011 stated that: “Work is being undertaken jointly to see whether a common framework of competences, suitable for the selection, training and appraisal can be developed, which will assist in career development.”³⁰⁶

180. **There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions. Internal barriers to career progression and movement should, as a minimum, be removed. There also needs to be a cultural change so that all those involved in appointments and deployment are willing to recognise and promote talented judges and enable them to progress to the senior levels of the judiciary.**

Appraisals

181. Appraisals are an expected part of working life within business, the Civil Service and the professions; the judiciary is an exception. Aside from some limited appraisal schemes which exist for fee-paid judges up to the level of district judge and in tribunals, there is no systematic use of appraisals within the judiciary. The evidence we received was wholly in favour of greater use of appraisals,³⁰⁷ though there were some contrasting views as to whether appraisals should apply to the senior judiciary³⁰⁸ and the use which should be made of such appraisals.³⁰⁹
182. Witnesses pointed to a number of benefits of appraisals systems. First, public confidence in the system of appointments will be strengthened if judges, once appointed, are evaluated: this will ensure that “what they are doing is the right kind of thing and that they are doing it well.”³¹⁰ Secondly, appraisals improve the quality of the judiciary by assessing any weaknesses in performance and enabling judges to develop.³¹¹ Thirdly, appraisals are a way of improving confidence by emphasising an individual’s particular strengths: this can lead to some individuals seeking promotion who may not otherwise have done.³¹² For this latter reason in particular, Baroness Neuberger informed us that the evidence received by the Advisory Panel on Judicial Diversity “from all the women and all the people from ethnically diverse groups ... was clear: they wanted appraisal.”³¹³
183. Our witnesses agreed that an appraisal system should be judge-led: appraisal by an outside body could interfere with the independence of the judiciary.³¹⁴

³⁰⁶ *Op. cit.*, p 11.

³⁰⁷ Q 33 (Professor Alan Paterson), Q 109 (Lord Justice Goldring), Q 110 (Mrs Justice Macur), Q 233 (Baroness Neuberger), Q 233 (Baroness Hale), Q 258 (Lord Neuberger MR), Q 258 (Lady Justice Hallett), Q 261 (Cordella Bart-Stuart), Q 310 (Baroness Prashar), Q 393 (Lord Chancellor), Q 394 (Lord McNally).

³⁰⁸ Q 110 (Mrs Justice Macur), Q 234 (Baroness Neuberger), Q 258 (Lord Neuberger MR), written evidence by Judicial Executive Board, para 6.

³⁰⁹ See below, para 185.

³¹⁰ Q 233 (Baroness Neuberger); see also Q 258 (Lord Neuberger MR)

³¹¹ Q 233 (Baroness Hale), Q 258 (Lord Neuberger MR), Q 318 (Baroness Hale), Q 372 (Christopher Stephens), Q 393 (Lord Chancellor).

³¹² Q 233 (Baroness Neuberger), Q 394 (Lord McNally).

³¹³ Q 233.

³¹⁴ Q 33 (Professor Alan Paterson), Q 109 (Lord Justice Goldring), Q 258 (Lord Neuberger MR), Q 393 (Lord Chancellor), Q 394 (Lord McNally).

Under those formal schemes which do currently exist, judges are generally shadowed for a day with the appraiser sitting down with the appraisee at the end of the day to go through the appraisal criteria. A written report would then be kept on file.³¹⁵ Such schemes are significantly different from the process (necessary as it is) whereby a head of division may speak to a judge whose judgments are regularly being overturned on appeal or who has a record of poor case management.³¹⁶ Appraisals are about identifying strengths as well as weaknesses.

184. Our attention was drawn to pilot projects for recorders which took place a few years ago but which foundered on grounds of cost.³¹⁷ A lack of resources was the main reason cited by many witnesses for there not being any universal system of appraisal.³¹⁸ Appraisers need to be trained and must take time away from their judicial work to conduct the appraisals. This can be expensive, but the cost should be set against the cost of having poorly performing judges given no opportunity to improve³¹⁹ and talented individuals given no encouragement to seek promotion. Improving the, already high, quality of the judiciary is a cost-effective exercise.
185. If a formal system of appraisals were to be adopted across the judiciary, a further question is the use which might be made of the appraisals in terms of appointment to other judicial posts. Our witnesses were divided on this issue. Lady Justice Hallett, a former JAC commissioner, pointed out that her “fellow commissioners were always saying, ‘Why don’t we have the best evidence?’” when making appointments.³²⁰ Cordella Bart-Stuart, an immigration tribunal judge with experience of being appraised, told us that since appraisals are not used in the appointments process “you then wonder ‘What was the point of that?’ because no one is seeing it apart from your head of division.”³²¹ Other witnesses, however, were concerned that placing appraisal reports before an appointments panel would damage the appraisals process itself by making both parties less frank: on this view, appraisals systems are designed to improve job performance, not to assess suitability for promotion.³²² An alternative suggestion made was that appraisal records be made available to those providing references as a source of relevant information.³²³
186. **A formal appraisal system should be introduced: the judiciary should not be exempt from a practice which is used in most other sectors and which has such clear benefits for those being appraised. Furthermore, without an effective appraisals system, the public cannot be assured that the judiciary is of the highest possible quality. Whilst we recognise the resource constraints, the cost of an appraisals**

³¹⁵ Q 278 (Cordella Bart-Stuart), Q 63 (District Judge Tim Jenkins).

³¹⁶ This is detailed at Q 167 (Lord Judge CJ).

³¹⁷ Q 61 (Judge Isobel Plumstead).

³¹⁸ Q 33 (Professor Alan Paterson), Q 61 (Judge Isobel Plumstead), Q 111 (Mrs Justice Macur), Q 111 (Lord Justice Goldring), Q 258 (Lord Neuberger MR), Q 311 (Baroness Prashar), Q 397 (Lord Chancellor), written evidence by Judicial Executive Board, para 6.

³¹⁹ Q 61 (Judge Isobel Plumstead).

³²⁰ Q 258; see also Q 33 (Professor Alan Paterson).

³²¹ Q 278.

³²² Q 258 (Lord Neuberger MR), Q 318 (Baroness Prashar), Q 372 (Christopher Stephens), Q 397 (Lord Chancellor).

³²³ Q 320 (Baroness Prashar), Q 372 (Christopher Stephens).

system pales into insignificance compared with the cost of having poor judges.

187. **As no appraisals system is currently in place, it is difficult to assess whether the use of appraisals records in the appointments process would have a detrimental effect on the appraisal system itself and whether this would outweigh the evidential value of making records available. As a first step, records should be made available to judicial referees. Once appraisals are more firmly established and accepted, the possibility of placing records before appointment panels should be reviewed.**

Retirement age

188. The judicial retirement age has a direct impact on appointments as it affects the frequency by which posts become available and the age at which individuals may be appointed to new posts.
189. Compulsory retirement for judges of the High Court and above was first introduced by the Judicial Pensions Act 1959, which set a retirement age of 75. Prior to this, judges were not compelled to retire at all, and could continue in office for as long as they wished.³²⁴ Other judicial office-holders were subject to a variety of different retirement provisions. Some were subject to a retirement age of 70, others below or above that age. Some office holders had to retire upon the attainment of a particular age; others continued until the completion of the year of service following a particular birthday. For some appointments, particularly in tribunals, there was no statutory retirement age at all.³²⁵
190. A general judicial retirement age of 70 was introduced by the Judicial Pensions and Retirement Act 1993.³²⁶ The rationale behind the change was to introduce consistency to the judicial retirement system.³²⁷ The age of 70 was settled on by the Government of the day following consultations between the Lord Chancellor and senior members of the judiciary.³²⁸ However, this new retirement age only applied to judges first appointed to office after the commencement of the relevant provisions (31 March 1995). As such, any judge first appointed to judicial office prior to 31 March 1995 is not required to retire until reaching 75. A number of serving judges remain subject to this higher retirement age (including ten of the current Justices of the Supreme Court³²⁹). It should be noted that legislation permits certain retired judges to sit judicially on an ad hoc basis after retirement. However, retired judges may not sit ad hoc after reaching the age of 75.³³⁰

³²⁴ The last judge not to be subject to compulsory retirement was Lord Denning MR, who retired in 1982 at the age of 83, having held high judicial office for 38 years.

³²⁵ HL Deb 16 June 1992 col 122.

³²⁶ The current retirement provisions for magistrates are contained in the Courts Act 2003. Magistrates cease to be able to exercise the powers of the office on reaching 70.

³²⁷ HL Deb 16 June 1992 col 122.

³²⁸ *Ibid.*, per Lord Mackay. Lord Taylor of Gosforth CJ observed in the same debate (at col 142) that the judiciary was in favour of the general retirement age of 70

³²⁹ The two serving Justices who are not subject to the higher retirement age are Lord Reed and Lord Sumption, both recently appointed to the Supreme Court.

³³⁰ Lord Collins (retired Justice of the Supreme Court) has sat as a member of the Supreme Court under these provisions, and Sir Stephen Sedley (retired Lord Justice of Appeal) has sat as a member of the Judicial Committee of the Privy Council on the same basis.

191. A set retirement age is undoubtedly a blunt tool by which to assess whether someone is no longer fully capable of performing their job. In the light of new laws preventing age discrimination in other sectors,³³¹ there is a case to be made for having no set retirement age at all.³³² However, the principle of judicial independence necessarily makes it very difficult to force a judge to retire on the grounds of declining capacity to act: who should assess when the time is right for a judge to step down from his or her post? The weight of the evidence we received was in favour of a retirement age of around 70 or 75.³³³ We do not consider that a strong case has been made for any significantly different retirement age to be introduced; but the evidence caused us to examine whether it was appropriate for all judges to retire at 70, or whether some or all judges should be subject to an increased retirement age of 75.
192. Much of the problem of determining the most appropriate age for retirement is a result of the current requirement for a uniform retirement age. Despite the clear need to introduce some consistency across the judiciary which was recognised in 1993, we believe that different considerations apply to the senior appellate courts than to the lower level courts and tribunals.
193. At the lower levels of the judiciary, judges who do not retire until the age of 75 could be said to be blocking career paths for their younger colleagues.³³⁴ If individuals are appointed as, for example, district or circuit judges and stay in their posts for 20 to 30 years, there are fewer opportunities for talented younger, and probably more diverse, lawyers to take their places. This difficulty does not arise to the same extent in cases where individuals are promoted to senior judicial positions (so opening up the entry-level positions which they previously held). This especially applies to appointments to the appellate courts where positions will not be held for such a long time. So, appellate judges are less likely to block career paths than their first instance colleagues.
194. Public perception also distinguishes between appellate and first instance judges: the risk of older judges being viewed as out of touch applies to a greater degree to those having to determine the facts of a case. Appellate judges sit in panels and “have time to check, consult and cogitate” whereas trial judges need a greater degree of “quick and accurate recall”.³³⁵
195. An increased retirement age was viewed by some witnesses as particularly beneficial to those who started on the career ladder later in life, perhaps after taking a career break to have children.³³⁶ This argument again applies more to the senior judiciary: it is simply not possible for some individuals to reach the highest levels of the judiciary, however talented or experienced they might be, because their career paths have taken too long. An increased retirement age would provide someone appointed to the High Court in their

³³¹ Introduced by the Employment Equality (Age) Regulations 2006 which came into effect on 1 October 2006.

³³² Written evidence by Sir Konrad Schiemann, and by Richard Cornes and Charles Banner, para 21.

³³³ Q 277 (Cordella Bart-Stuart), Q 277 (Association of Women Solicitors), Q 299 (Lord Woolf), Q 299 (Lord Carswell), written evidence by the Law Society and by Professor Alan Paterson, para 16.

³³⁴ Q 277 (Association of Women Solicitors), Q 277 (Association of Women Barristers), written evidence by the Law Society.

³³⁵ JAP 04 (Sir Konrad Schiemann).

³³⁶ Q 277 (Cordella Bart-Stuart), Q 277 (Association of Women Barristers).

mid to late 50s with sufficient time to gain the experience necessary to reach, potentially, the Supreme Court.

196. We also consider that there is less value to be gained from appointing someone to the Court of Appeal or Supreme Court who only has a couple of years left to serve. We note that Lord Collins was required to retire from the Supreme Court in May 2011 having served as a member of the final court of appeal for only slightly over two years.³³⁷ The loss of such talent is a strong argument in favour of an increased retirement age for the senior judiciary. It is in the public interest that senior judges of proven judicial quality are retained in the appellate courts where experience and knowledge is at a premium in the development of the law.
197. **We do not agree that there should be a uniform retirement age across the whole of the judiciary. There should be differential retirement ages: of 75 for Court of Appeal judges and Supreme Court Justices and 70 for all other judges. This will ensure the retention to age 75 of judges at the highest level, where proven judicial quality and experience are at a premium in the development of the law. This will also ensure that posts become available at the lower levels whilst leaving time for talented individuals who have not followed a traditional career path to reach the highest levels. Differential retirement ages will thus help to promote diversity and to maintain public confidence in the judiciary as being of the highest quality.**

³³⁷ Lord Collins was appointed as a Lord of Appeal in Ordinary on 21 April 2009, and transferred to the Supreme Court on its creation on 1 October 2009. He reached the mandatory retirement age on 7 May 2011.

CHAPTER 8: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

198. We agree that the detailed provisions of the CRA should be included in secondary legislation. We emphasise that:
- (a) Henry VIII clauses should not be sought;
 - (b) provisions of particular constitutional importance should continue to remain in primary legislation where they will continue to be subject to full parliamentary scrutiny. Upon introduction of a bill, the Government should publish draft secondary legislation; and
 - (c) the Lord Chief Justice and, where relevant, the President of the Supreme Court should be consulted before secondary legislation is laid before Parliament. (Para 12)
199. We recommend this report to the House for debate. (Para 13)

The constitutional framework

200. The principles which we believe should continue to underpin the judicial appointments process are judicial independence, appointment on merit, accountability and the promotion of diversity. The achievement of the correct balance between these principles is vital in maintaining public confidence in the judiciary and the legal system as a whole. (Para 20)
201. We agree that the Lord Chancellor should continue to have a limited role in the appointment of individual members of the judiciary: an increased role would risk politicising the process. However, we consider that the Lord Chancellor must retain responsibility and be accountable to Parliament for the overall appointments process. (Para 26)
202. In order to maintain public confidence in the system, there is a need for the legal framework for appointments to reflect both the extent to which the executive should be involved in individual appointments and the reality of that involvement. We agree that the power to request reconsideration or reject nominations should be transferred from the Lord Chancellor to the Lord Chief Justice in relation to appointments below the High Court. This will promote the independence of the judiciary and increase public confidence in the system. Whether the Lord Chancellor's powers in respect of High Court appointments should be transferred to the Lord Chief Justice should be reviewed in three to five years' time. (Para 34)
203. The Government should consider whether the Lord Chief Justice will need additional support in order to take on this role. (Para 35)
204. The use of shortlists would undermine judicial independence and be contrary to the principle of appointment on merit. The Lord Chancellor should not be offered a shortlist of candidates from which to choose. (Para 37)
205. We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions. In the United Kingdom, judges' legitimacy depends on

their independent status and appointment on merit, not on any democratic mandate. (Para 46)

206. We agree that post-appointment hearings of senior judges would serve no useful purpose. There may be an exception in the case of the Lord Chief Justice and the President of the Supreme Court who undertake leadership roles for which they can properly be held to account. (Para 48)
207. Parliamentarians, acting in that capacity, should not sit on selection panels for judicial appointments. There is no useful role that parliamentarians could play that could not be played by lay members on selection panels. It would not be possible to choose one or two parliamentarians without recourse to political considerations and in so doing it would be difficult to maintain the appearance of an independent judicial appointments process. (Para 52)
208. We welcome the willingness of judges, once appointed, to give evidence to parliamentary committees on the judicial appointments process and other matters relating to the administration of justice. We recognise that the majority of judges speak on an individual basis and not on behalf of their fellow judges: indeed, Parliament benefits from the diverse range of views thus offered. We believe that this dialogue is of mutual benefit to both the judiciary and Parliament as it enables both to explore areas of common interest and concern. We encourage its continuation in the future. (Para 56)
209. We do not consider that there is a need for an enhanced power to issue directions to the JAC. Such a power could lead to political interference and undermine the independence of the appointments process. (Para 59)
210. We agree that the current relationship between the JAC and Parliament is appropriate. We welcome continued dialogue between the JAC and this Committee, as well as with the relevant committee(s) in the House of Commons. As the JAC was only established in 2006, it is too early to consider whether making it a parliamentary body would better support its independence. Were a Lord Chancellor to seek in the future to undermine that independence in any way, this option should be revisited. (Para 63)
211. For the judiciary to be solely responsible for the appointments process would risk undermining the promotion of diversity and, ultimately, public confidence in the judiciary. Furthermore, the appointments process is enhanced by the involvement of lay persons who can bring a different perspective to the assessment of candidates' abilities. It is therefore important that selection panels include a mixture of judicial and lay representation. (Para 67)

Diversity

212. A more diverse judiciary would not undermine the quality of our judges and would increase public trust and confidence in the judiciary. (Para 74)
213. We stress that it is the role of the professions and, in particular, the Bar Council and the Law Society, to ensure that the brightest and the best lawyers from all backgrounds are able to progress to a point where appointment to the judiciary becomes possible. (Para 76)
214. We agree that the senior judiciary have an important role to play in encouraging applications from under-represented groups. Whilst individual judges cannot, and should not, determine the outcome of a specific application, senior judges should be sufficiently well-informed about the process to be able to advise candidates and encourage them to apply. (Para 79)

215. We support all the recommendations of the Advisory Panel on Judicial Diversity and urge all those responsible to implement the recommendations more rapidly than hitherto. Lack of specific comment in this report on a particular recommendation should not be read as an indication that we regard it as unimportant. (Para 82)
216. We consider that it is the capacity to be a good judge, not the capacity to be a good barrister, which is essential to merit. The two may overlap, but not necessarily. (Para 84)
217. It is important that all the different elements of the JAC's merit criteria are properly taken into consideration and applied during the appointments process. In order to ensure that merit is not assessed on a narrow basis, all selection panels should themselves be gender and, wherever possible, ethnically diverse, all those involved in the appointments process must be required to undertake diversity training and lay persons must sit on every selection panel so that the judiciary are not solely responsible for the appointments made. (Para 88)
218. We agree that diversity and merit are distinct concepts. (Para 94)
219. We believe that merit should continue to remain the sole criterion for appointments. We have a highly acclaimed judiciary in terms of quality. This high quality must not be undermined, whether in fact or perception. Where one individual is the most meritorious, taking into account all the different aspects of merit as defined by the JAC,³³⁸ that candidate must be appointed. We have no doubt that candidates from under-represented groups are equally capable of being appointed on this basis. (Para 97)
220. It seems likely that in large assessment exercises it will not always be possible to rank every candidate in strict order of merit and that a number of candidates may be considered to be of equal merit. (Para 99)
221. We agree that s 159 of the Equality Act 2010 should be used as part of the judicial appointments process. Though we cannot be certain how often it would be used, its application could be the deciding factor in the appointment of a number of candidates from under-represented groups. Moreover, permitting its use would send out a strong signal that diversity in judicial appointments is important, without undermining the merit principle. (Para 101)
222. We see no case for the introduction of quotas. (Para 102)
223. We agree that it would not be appropriate to set targets at the present time. However, we believe that this should be kept under review. If there has been no significant increase in the numbers of women and BAME judicial appointments in five years' time, the Government should consider setting non-mandatory targets for the JAC to follow. (Para 105)
224. The Government, the JAC and the legal professions must work together to ensure that data is collated and made openly available in such a way as to make the progression of under-represented groups through the appointments process as transparent as possible. (Para 108)
225. The duty contained in s 64 of the CRA should be extended to the Lord Chancellor and the Lord Chief Justice. (Para 111)

³³⁸ We also note the particular requirements of the Supreme Court in relation to Scotland and Northern Ireland: Constitutional Reform Act 2005, section 27(8).

226. We agree that the Senior Courts Act 1981 should be amended to remove the limits on the number of individuals able to serve as High Court and Court of Appeal judges at any given time, to enable some appointments to be made on a part-time basis. We regard this as the minimum change necessary. For the number of women within the judiciary to increase significantly, there needs to be a commitment to flexible working and the taking of career breaks which we believe is currently lacking. This applies to both the judiciary and the legal professions. It is the responsibility of all those with a role in deployment and the appointments process to demonstrate that commitment. (Para 117)
227. The JAC, the Lord Chancellor and the Lord Chief Justice must encourage applications from lawyers other than barristers. There should be no sense that not having been a member of the Bar makes an individual unworthy of appointment or less meritorious. (Para 119)
228. We are not convinced that either the Law Society or the partners of most of the large firms are sufficiently committed to the encouragement of solicitors applying to become judges. The promotion of judicial diversity will be greatly enhanced if solicitors are able to take time off to hold part-time fee-paid judicial posts whilst continuing to practise. We consider it essential in the public interest that this change be made. This will require a significant cultural change within firms and the solicitors' profession as a whole. (Para 125)
229. Those who work for the Government Legal Service and Crown Prosecution Service must not be prevented from becoming judges because of their status as government lawyers. The Government and the JAC must act to overcome any undue impediments to their appointment as both fee-paid and full-time judges. This is important both from the perspective of ensuring equal access to judicial appointment and because it would promote the diversity of the judiciary. Furthermore, it is in the public interest that high quality candidates are not discouraged from applying to join the GLS or CPS because of a potential lack of career progression to the judiciary. (Para 132)
230. The recommendations which we make on judicial diversity are based on our understanding of merit as a broad concept relating to the many different skills and experiences which different individuals can bring to bear on the work of the judiciary. We highlight here those changes which would have a practical effect upon the diversity of the judiciary: application of s 159 of the Equality Act 2010; extension of the duty contained in s 64 of the CRA to the Lord Chancellor and the Lord Chief Justice; increased use of flexible working within the judiciary; making it easier for solicitors to apply; and greater opportunities for government lawyers to apply. (Para 134)
231. These recommendations, along with those of the Advisory Panel, constitute necessary first steps towards improving the diversity of the judiciary. We hope that they will prove sufficient, but goodwill and leadership will be required to bring about significant change. (Para 135)

Appointment of the Lord Chief Justice and President of the Supreme Court

232. The Lord Chancellor should not sit on selection panels for the appointment of either the Lord Chief Justice or the President of the Supreme Court. He should be properly consulted before the start of each selection process and

retain his right of veto. Any closer involvement risks politicising the process and would undermine the independence of the judiciary. (Para 139)

233. We agree that the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice.³³⁹ (Para 141)
234. We agree that the CRA should be amended to remove the requirement that the President and Deputy President of the Supreme Court should sit on the selection commissions formed to choose their successors. (Para 143)

Supreme Court selection commissions

235. We consider that selection commissions for the UK Supreme Court should consist of a lay chair and six other members. An odd number of members would avoid any need for a casting vote (which gives more weight to the views of one individual). A body of seven is the optimum size to balance the need to promote diversity with the need for efficient and effective decision-making. (Para 147)
236. We consider that the lay Chair of the JAC should chair all selection commissions for UK Supreme Court appointments. (Para 150)
237. In our view, there should be three senior judges on each selection commission in order to ensure that the selection process has due regard to proven judicial merit. (Para 151)
238. Two of the judges should be Justices of the Supreme Court. (Para 152)
239. Where the selection commission is for an ordinary Justice of the Court we do not see any constitutional objection to the President and Deputy President being the members. An alternative method would be for the CRA to provide that a selection commission should include two members of the Supreme Court and leave it to the Court to decide which two members should serve on the commission. We can see advantages and disadvantages in both methods. If our proposal is accepted, the Government should consult members of the Supreme Court before introducing legislation to amend the CRA. (Para 153)
240. We accept the idea that the Lord Chief Justice of England and Wales should be the third member of the selection commission. (Para 155)
241. The three remaining places on a selection commission ought, as at present, to be occupied by a member from each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland JAC, nominated by the Lord Chancellor. To ensure that judges do not dominate the appointments process, no judicial members of the appointments commissions ought to be eligible for nomination to a Supreme Court selection commission. The CRA currently requires that at least one of the three “must be non-legally qualified”: we recommend keeping this rule to ensure that there is a minimum of two lay people (including the chair) on every selection commission. We see no constitutional objection to a member of a territorial appointments body who is a legal practitioner being a member of a selection commission. (Para 157)

³³⁹ For consideration of who should chair selection commissions for the President of the Supreme Court, see below, paras 148–150.

The Judicial Appointments Commission

242. We stress that the JAC is an independent body. The Lord Chancellor should have no discretion to determine the membership; this would be damaging both to the independence of the JAC and to the perception of its independence. (Para 162)
243. We believe that there should not be significantly fewer commissioners than at present and that the number should be prescribed in primary legislation. The composition of the JAC must consist of a balance of lay and judicial members. In order to increase flexibility in making changes to the precise composition of the JAC, it would be appropriate for the composition to be set out in secondary legislation, subject to affirmative resolutions of both Houses of Parliament. (Para 163)
244. We agree that there needs to be flexibility in the deployment of judges. However, authorisation or appointment to act as a deputy High Court judge is an important step towards permanent appointment to the High Court and a significant aspect of the administration of justice. Such authorisations and appointments should therefore be conducted openly and transparently, in line with best appointment practices; in principle they should be a part of the independent appointments process conducted by the JAC. We consider that it would be helpful to see how the new protocol operates in practice as there is no need for an unduly elaborate system, but this should be reviewed in three years' time. Meanwhile, a list of those currently authorised or appointed to act as deputy High Court judges should be published, and those authorised or appointed under the new protocol should be monitored for diversity with the resulting data being made publicly available. (Para 169)
245. We believe that the JAC should in principle remain responsible for the appointment of non-legally qualified tribunal members: such persons will be judges and should be appointed on that basis. If, with the agreement of the Lord Chancellor, the Lord Chief Justice and the JAC, particular selection exercises are transferred elsewhere, appointments must continue to be made according to standards determined by the JAC. (Para 172)

Post-appointment issues

246. There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions. Internal barriers to career progression and movement should, as a minimum, be removed. There also needs to be a cultural change so that all those involved in appointments and deployment are willing to recognise and promote talented judges and enable them to progress to the senior levels of the judiciary. (Para 180)
247. A formal appraisal system should be introduced: the judiciary should not be exempt from a practice which is used in most other sectors and which has such clear benefits for those being appraised. Furthermore, without an effective appraisals system, the public cannot be assured that the judiciary is of the highest possible quality. Whilst we recognise the resource constraints, the cost of an appraisals system pales into insignificance compared with the cost of having poor judges. (Para 186)
248. As no appraisals system is currently in place, it is difficult to assess whether the use of appraisals records in the appointments process would have a detrimental effect on the appraisal system itself and whether this would

outweigh the evidential value of making records available. As a first step, records should be made available to judicial referees. Once appraisals are more firmly established and accepted, the possibility of placing records before appointment panels should be reviewed. (Para 187)

249. We do not agree that there should be a uniform retirement age across the whole of the judiciary. There should be differential retirement ages: of 75 for Court of Appeal judges and Supreme Court Justices and 70 for all other judges. This will ensure the retention to age 75 of judges at the highest level, where proven judicial quality and experience are at a premium in the development of the law. This will also ensure that posts become available at the lower levels whilst leaving time for talented individuals who have not followed a traditional career path to reach the highest levels. Differential retirement ages will thus help to promote diversity and to maintain public confidence in the judiciary as being of the highest quality. (Para 197)

APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee that conducted this inquiry were:

Lord Crickhowell
 Lord Goldsmith
 Lord Hart of Chilton
 Lord Irvine of Lairg
 Baroness Jay of Paddington (Chairman)
 Lord Norton of Louth
 Lord Pannick
 Lord Powell of Bayswater
 Lord Rennard
 Lord Renton of Mount Harry
 Lord Rodgers of Quarry Bank
 Lord Shaw of Northstead

Professor Andrew Le Sueur, Professor of Public Law, Queen Mary, University of London and Director of Studies, Institute of Law, Jersey, acted as Specialist Adviser for this inquiry.

Declaration of Interests

The following interests were declared:

GOLDSMITH, Lord

Partner, Debevoise & Plimpton LLP (international law firm)
Chairman, Board of Trustees, Access to Justice Foundation
President, Bar Pro Bono Unit
Attorney General for England and Wales and Northern Ireland from 2001–2007
Former Chairman of the Bar Council
Crown Court Recorder and authorised to sit as a Deputy High Court Judge

HART OF CHILTON, Lord

Non-practising solicitor.
Former Partner, Herbert Smith.
Former paid special adviser to two successive Lord Chancellors: Lord Irvine and Lord Falconer.
Wife is a practising solicitor and a former recorder.

IRVINE OF LAIRG, Lord

Lord Chancellor from 1997–2003

PANNICK, Lord

Practising member of the Bar
Contributes fortnightly column on legal issues for The Times

A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

APPENDIX 2: LIST OF WITNESSES

Written Evidence

Evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (020 7219 5341).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with * gave both oral evidence and written evidence. Those marked with ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

*	QQ 1–39	Professor Cheryl Thomas
*		Dr Erika Rackley
*		Professor Alan Paterson
**		Professor Brice Dickson
**	QQ 40–77	Rt Hon Lord Kerr of Tonaghmore
**		Rt Hon Lord Justice Etherton
**		Her Honour Judge Plumstead
**		District Judge Tim Jenkins
**	QQ 78–120	Rt Hon Lord Justice Goldring
**		The Hon Mrs Justice Macur DBE
**	QQ 121–161	Rt Hon Lord Mackay of Clashfern
**		Rt Hon Lord Falconer of Thoroton
*		Rt Hon Jack Straw MP
**	QQ 162–192	Rt Hon Lord Phillips of Worth Matravers
*		Rt Hon Lord Judge CJ
*	QQ 193–215	Bar Council of England and Wales
*		Law Society of England and Wales
**		JUSTICE
*	QQ 216–237	Rt Hon Baroness Hale of Richmond
*		Baroness Neuberger
**	QQ 238–258	Rt Hon Lord Neuberger of Abbotsbury MR
**		Rt Hon Lady Justice Hallett
*	QQ 259–280	Black Solicitors Network
*		Association of Women Barristers
*		Association of Women Solicitors
**	QQ 281–304	Rt Hon Lord Woolf
*		Rt Hon Lord Carswell

- * QQ 305–337 Baroness Prashar
- * QQ 338–372 Judicial Appointments Commission
- * QQ 373–401 Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice
- ** Rt Hon Lord McNally

Alphabetical list of all witnesses

- Administrative Justice & Tribunals Council (ajtc)
- Rt Hon Lady Justice Arden DBE
- Anne Arnold, District Judge (Magistrates’ Courts) and Recorder
- Association of Her Majesty’s District Judges
- * Association of Women Barristers (AWB)
- * Association of Women Solicitors (AWS)
- Charles Banner
- * Bar Council of England and Wales
- Bar Council of England and Wales (Equality and Diversity Committee)
- Bar Council of England and Wales (Legal Services Committee)
- Professor Lizzie Barmes, Queen Mary University of London
- Mrs Justice Baron DBE, Family Division Liaison Judge for the South East
- Walter Bealby
- * Black Solicitors Network, Cordella Bart-Stewart, Vice-Chair
- * Black Solicitors Network, Mrs Nwabueze Nwokolo
- Sir John Brigstocke, Judicial Appointments and Conduct Ombudsman
- Rt Hon Sir Robert Carnwath CVO, Senior President of Tribunals
- * Rt Hon Lord Carswell
- Chancery Bar Association
- Chartered Institute of Legal Executives
- Professor Mary L. Clark, American University Washington College of Law
- Commercial Bar Association (COMBAR)
- Richard Cornes
- Council of Appeal Tribunal Judges
- Nicholas Davidson QC
- ** Professor Brice Dickson
- Equal Justices Initiative (EJI)
- ** Rt Hon Lord Justice Etherton
- ** Rt Hon Lord Falconer of Thoroton
- Graham Gee, Lecturer in Law, University of Birmingham
- ** Rt Hon Lord Justice Goldring

- * Rt Hon Baroness Hale of Richmond DBE PC
- ** Rt Hon Lady Justice Hallett
 - Josephine Hayes, Barrister
 - Professor Robert Hazell, Constitution Unit, University College London
 - InterLaw Diversity Forum for Lesbian, Gay, Bisexual and Transgender (“LGBT”) Networks
 - Sundeep Iyer, Department of Government, Harvard University
- ** District Judge Tim Jenkins
 - Nick Jones, Traffic Commissioner for the Welsh Traffic Area and Traffic Commissioner for the West Midland Traffic Area
- * Rt Hon the Lord Judge, Lord Chief Justice of England and Wales
- * Judicial Appointments Commission (JAC)
 - Judicial Executive Board
- ** JUSTICE
- ** Rt Hon Lord Kerr of Tonaghmore
- * Law Society of England and Wales
 - Legal Services Board
 - Sir Thomas Legg KCB QC
- * Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP
- ** Rt Hon Lord Mackay of Clashfern
- ** The Hon Mrs Justice Macur DBE
 - Professor Kate Malleon, Queen Mary University of London
 - Rt Hon Lord Mance
 - Robert Martin, President, Social Entitlement Chamber
 - Professor Aileen McColgan
 - Alison McKenna, Principal Judge, First-Tier Tribunal (CHARITY)
- ** Rt Hon Lord McNally
 - Karon Monaghan QC
- * Baroness Neuberger DBE
- ** Rt Hon Lord Neuberger of Abbotsbury MR
 - Northern Ireland Judicial Appointments Commission (NIJAC)
- * Professor Alan Paterson OBE, Strathclyde University Law School
- ** Rt Hon Lord Phillips of Worth Matravers
- ** Her Honour Judge Plumstead
- * Baroness Prashar
- * Dr Erika Rackley
 - Mark Ryan BA, MA, PGCE, Barrister (non-practising)

Sir Konrad Schiemann

Karamjit Singh CBE, Northern Ireland Judicial Appointments
Ombudsman

Rabinder Singh QC

Society of Asian Lawyers (SAL)

Judge Hugo Storey

Sehba Haroon Storey

* Rt Hon Jack Straw MP

Supporting Higher Court Advocates (SAHCA)

* Professor Cheryl Thomas, University College London (UCL)

Rt Hon Lord Justice Toulson

United Kingdom Association of Women Judges (UKAWJ)

Welsh Government

** Rt Hon Lord Woolf

APPENDIX 3: SUMMARY RESPONSE TO THE GOVERNMENT CONSULTATION

Questions posed by the Government and our response

The consultation paper published by the Ministry of Justice on 21 November 2011, *Appointments and Diversity: a Judiciary for the 21st Century*, asks for responses to 22 specific questions. We have given our response to a number of these questions as part of this report. However, we have not specifically addressed many of the questions posed. Our response to certain questions follows from our conclusions and recommendations on the bigger constitutional questions addressed in this report. For ease of reference, we state here whether we support or oppose (or have no opinion on) the particular proposals raised in the Government's consultation paper.

Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court? (ss 67, 70–76, 79–85, 88–93 CRA)

We support this proposal for appointments below the level of the High Court (para 34).

Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges? (Pt 4, Chapter 2 CRA and s 9 Senior Courts Act 1981)

We support this proposal (para 169).

Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)? (ss 70, 75B, 79 CRA)

We support this proposal (discussed with particular reference to the appointment of the Lord Chief Justice, para 139).

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (ss 71, 75C, 80 CRA)

We support this proposal (paras 82 and 147).

Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (s 71 CRA)

We do not state an opinion on this proposal.

Question 6: Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales? (Schedule 8, pt1 CRA)

In the context of our recommendations for more wider changes to the selection commissions, we are opposed to this proposal. (Chapter 5).

Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto? (ss 71, 73, 74 CRA)

We are opposed to this proposal (para 139).

Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (ss 71 CRA)

We support this proposal (para 141).

Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto? (ss 26, 27, 29, 30, Schedule 8 CRA)

We are opposed to this proposal (para 139).

Question 10: What are your views on the proposed make-up of the selection panel for the appointment of the President of the UK Supreme Court? (ss 26, 27, Schedule 8 CRA)

The selection panel should consist of a lay chair (the Chair of the JAC), two Justices of the Supreme Court, the Lord Chief Justice of England and Wales (if not a candidate), and three lay members (at least one of whom is non-legally qualified) from each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland JAC, nominated by the Lord Chancellor. (Chapter 5).

Question 11: Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court, should be a lay member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission?

We consider that it should always be the lay Chair of the JAC (para 150).

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister? (ss 26, 29 CRA and convention)

We do not state an opinion on this proposal.

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (ss 2, 4 Senior Courts Act 1981)

We support both these proposals (para 117).

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (s 63 CRA)

We support this proposal (para 101).

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

We support this proposal (para 82).

Question 16: How many Judicial Appointments Commissioners should there be? (Schedule 12 CRA)

We believe that there should not be significantly fewer Commissioners than at present and that the number should be prescribed in primary legislation (para 163).

Question 17: Should the membership of the Commission be amended as proposed above? (Schedule 12, pt1 CRA)

We are opposed to this proposal (para 163).

Question 18: Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring a legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (ss 85 CRA)

We partially support this proposal (para 172).

Question 19: Do you agree with the proposed approach to delivering these changes?

We agree, subject to appropriate safeguards (para 12).

Question 20: Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?

We draw attention to a number of such issues and proposals in this report.

Question 21: We welcome your views on the EIA in terms of likely equality impacts. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?

We have no specific views on the details of the EIA.

Question 22: We are particularly interested in understanding more about the barriers faced by people with protected characteristics. Are there any further sources of evidence of equality impact that you are aware of that would help better understand the impacts of the proposals?

We draw the attention of the Government to the evidence received during the course of this inquiry.

APPENDIX 4: 2011 JUDICIAL DIVERSITY STATISTICS—GENDER, ETHNICITY AND PROFESSION

2011 Judicial diversity statistics—gender

Appointment name	Gender			
	Male	Female	% Female	Total in post
Justices of the Supreme Court	10	1	9.1	11
Heads of Division	5	0	0	5
Lords Justices of Appeal	33	4	10.8	37
High Court Judges	91	17	15.7	108
Judge Advocates	7	1	12.5	8
Deputy Judge Advocates	4	1	20	5
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	34	14	29.2	48
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	46	28	37.8	74
Circuit Judges	559	106	15.9	665
Recorders	1,020	201	16.5	1,221
District Judges (County Courts)	331	113	25.5	444
Deputy District Judges (County Courts)	529	259	32.9	788
District Judges (Magistrates' Courts)	99	38	27.7	137
Deputy District Judges (Magistrates' Courts)	102	41	28.7	143
Grand Total	2,870	824	22.3	3,694

Source: *Judicial Database 2011—as at 1 April 2011*

2011 Judicial diversity statistics—ethnicity³⁴⁰

Appointment name	Ethnicity										Total in post
	White	Asian/ Asian British	Black/ Black British	Chinese	Mixed	Any other back- ground	Total BME ³⁴¹	Unknown ³⁴²	%BME		
Justices of the Supreme Court	10	0	0	0	0	0	0	1	0	11	
Heads of Division	4	0	0	0	0	0	0	1	0	5	
Lords Justices of Appeal	25	0	0	0	0	0	0	12	0	37	
High Court Judges	84	0	0	0	1	3	4	20	4.5	108	
Judge Advocates	7	0	0	0	0	0	0	1	0	8	
Deputy Judge Advocates	3	0	0	0	0	0	0	2	0	5	
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	33	1	0	0	0	0	1	14	2.9	48	
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	39	0	1	0	1	1	3	32	7.1	74	
Circuit Judges	583	3	2	0	3	7	15	67	2.5	665	
Recorders	874	22	15	0	14	10	61	286	6.5	1,221	
District Judges (County Courts)	394	10	3	0	4	4	21	29	5.1	444	
Deputy District Judges (County Courts)	595	19	6	1	7	6	39	154	6.2	788	
District Judges (Magistrates' Courts)	99	4	0	0	0	0	4	34	3.9	137	
Deputy District Judges (Magistrates' Courts)	88	3	0	1	2	0	6	49	6.4	143	
Grand Total	2,838	62	27	2	32	31	154	702	5.1	3,694	

Source: *Judicial Database 2011—as at 1 April 2011*

³⁴⁰ The database of the ethnic origin of the judiciary may be incomplete as (a) candidates are asked to provide the information on a voluntary basis and (b) such details have only been collected since October 1991. Further ethnicity data was collected from judiciary in post through a diversity survey undertaken by the Judicial Office in 2007. In May 2009, the Judicial Office began collecting ethnicity data from all new judicial appointees with the help of Ministry of Justice.

³⁴¹ BME stands for Black and Minority Ethnic.

³⁴² Not all judges declare their ethnicity and so the ethnicity figure is calculated as a percentage of those members of the judiciary who have agreed to provide ethnicity data and from whom we have collected this information.

2011 Judicial diversity statistics—profession

Appointment name	Profession					Total in post
	Barrister	Solicitor	Legal Executive	% Non-Barrister		
Justices of the Supreme Court	10	1	0	9.1		11
Heads of Division	5	0	0	0		5
Lords Justices of Appeal	37	0	0	0		37
High Court Judges	107	1	0	0.9		108
Judge Advocates	7	1	0	12.5		8
Deputy Judge Advocates	5	0	0	0		5
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	27	21	0	43.8		48
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	40	34	0	45.9		74
Circuit Judges	582	83	0	12.5		665
Recorders	1,158	63	0	5.2		1,221
District Judges (County Courts)	48	396	0	89.2		444
Deputy District Judges (County Courts)	174	613	1	77.8		788
District Judges (Magistrates' Courts)	48	89	0	65.0		137
Deputy District Judges (Magistrates' Courts)	56	87	0	60.8		143
Grand Total	2,304	1,389	1	37.6		3,694

Source: Judicial Database 2011—as at 1 April 2011