Letterhead of THE LAW SOCIETY

From the President of the Law Society

Mrs Percy Ma
Clerk to Panel
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Hong Kong Special Region of the People's Republic of China
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Ref: MN/jb/Mis/01

4th January 2001

Dear Mrs Ma

LegCo Panel on Administration of Justice and Legal Services

Process of appointment of judges

Thank you very much for your letter of 13th December with enclosures. I note that your Panel would appreciate any observations from the Law Society of England and Wales by mid February. In view of our own close interest in the openness and transparency of judicial appointments I am sure that we would wish to comment. Indeed I note that your Chairman is Hon Margaret Ng whom I was very pleased to meet on her recent visit to London when I was able to supply her with a copy of our most recent publication "Broadening the Bench". For your convenience I enclose an additional copy.

I am extremely grateful for your initiative in making contact seeking our views and will write to you again before your consultation deadline.

Please convey my regards to Margaret Ng.

Yours

Michael Napier
President

CC: Russell Wallman
Jonathan Goldsmith
Vicki Chapman
Ben Rigby

Enc.

BROADENING THE BENCH

Law Society proposals for reforming the way judges are appointed

THE LAW SOCIETY

Law Society
October 2000

1. Summary

1.1. The current system for the appointment of judges was intended to meet the needs of a very different society. In recent years the judiciary and both branches of the legal profession have grown dramatically. The task has changed from one of choosing 100 judges from a Bar of 1,500 to over 3,000 judges from a profession of over 85,000.

1.2. Judges perform a vital role, making decisions which profoundly affect the lives of citizens. The judiciary should reflect not only the greater diversity within the profession but also reflect as far as possible the society within which it operates.

1.3. Yet, as the statistics graphically illustrate, solicitors, women and people from ethnic minorities remain largely excluded from the ranks of the higher judiciary. Women and people from ethnic minorities remain under-represented throughout the judiciary, despite the fact that over the past ten years their participation in both branches of the profession has increased.

1.4. Judges are being thrust ever more into the political limelight with the increase in the use of judicial review to check administrative decisions, highly publicised miscarriages of justice, and politically charged cases such as Pinochet. With the implementation of the Human Rights Act, judges' decisions will take on even greater constitutional importance.

1.5. The need to maintain the reality of judicial impartiality, independence and public confidence in it is crucial. For this to be done and seen to be done the selection, appointment and promotion of judges should be independent of the executive.

1.6. Although in recent years some significant improvements have been made in the appointment process, the system remains in essence the same. Improvements round the margins have not tackled the core of the problem.

1.7. It is time to stop tinkering round the edges of an outdated system which can no longer deliver a judiciary appropriate to the needs of the society it serves. The Law Society believes there is a need for a radical overhaul along the following lines to establish arrangements which comply with the best practice in modern appointments systems:

- The creation of a Judicial Appointments Commission, fully independent of the executive, which would adopt open and transparent selection procedures.
- An end to informal consultation, which gives undue weight to the opinion of the serving judiciary and in which anecdote and personal bias, are inevitable.
- A broadening of the pool from which potential candidates for judicial appointment can be drawn, to include all qualified solicitors and barristers, whether in private practice or employed in commerce, industry or elsewhere.

1.8. An independent Judicial Appointments Commission should specifically consider:

- Developing much more flexible points of entry, and encouraging greater movement between the different branches of the judiciary.

- Shortening the length of the appointments process, which presents a particular problem for solicitors. A long drawn out process will act as a strong disincentive to solicitors considering applying for judicial appointment.
- Ensuring greater flexibility in the way part-time sittings are organised in order to better accommodate the working practices of solicitors.

2. Background

2.1. The present judicial appointment system was designed at a time when the Lord Chancellor appointed a small number of judges from a very limited pool of barristers, most of whom were probably known to him personally. A JUSTICE report on *The Judiciary in England and Wales* published in 1992, made the point:

> 'Fifty years ago, with a Bar of some 1,500, no more than 40 judges in the supreme court and some 60 in the county court, the Lord Chancellor was personally involved in choosing judges, as he was personally involved in choosing QCs'.[1]

2.2. Since then the size of the serving judiciary has grown dramatically, as have both branches of the profession. There are now 154 judges in the High Court and above, and over 3,000 Circuit Judges, Recorders[2] and District Judges and Deputy District Judges. In addition there are also over 1,000 full and part time chairs of employment and social security appeal tribunals.

2.3. The Bar itself has grown by a factor of more than seven since that time. The number of solicitors with practising certificates rose from just over 22,000 in 1967 to nearly 80,000 now. Almost 1,000 solicitors now hold rights of audience in the Higher Courts. The number of women solicitors has also increased significantly. In 1987 women accounted for less than a fifth of all solicitors. They now make up a third of the profession with practising certificates. People from ethnic minorities now account for 5.5 per cent of practising certificate holders.[3]

2.4. Yet the Lord Chancellor, in his role as a member of the executive, remains responsible for appointing or advising on the appointment of all full-time judicial posts in England and Wales. The stresses of maintaining a system which would remain recognisable to the Lord Chancellor of 50 years ago are becoming too great.

2.5. The need for an appointments process which commands public confidence was recognised by Labour in opposition. A paper to the Party's 1995 conference said:

> 'The system for selecting and training those who preside as judges in civil and criminal cases must command public confidence. Winning this confidence is crucial to giving the public a real sense that justice is accessible through the courts...The current system is widely perceived as being defective in several respects. We seek to remedy this by the creation of a Judicial Appointments and Training Commission.'[4]

2.6. In July 1997, shortly after the general election, the new Lord Chancellor, Lord Irvine, confirmed that the government would consult later that year on the merits of a

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1 *The Judiciary in England and Wales* JUSTICE 1992

2 The Lord Chancellor announced on 12 April 2000 that in the light of the decision in *Starrs & Chalmers v Procurator Fiscal* all serving Assistant Recorders are to be appointed Recorders

3 *Trends in the Solicitor' Profession, annual statistical report 1999*, RPPU, Law Society 2000

4 *Access to Justice: Labour's proposals for reforming the civil justice system* Conference 1995

Judicial Appointments Commission and whether one should be established.[5] However, following informal consultation by officials[6] the Lord Chancellor announced in October 1997 that formal consultation would not, after all, go ahead.[7] At the same time he announced a number of measures designed to improve the operation of the judicial appointments system. These included the ending the system of appointment to the High Court bench on invitation only, more flexibility in part time sittings, and the inclusion of both judges and lay members in shortlisting judicial candidates. In the light of these changes and the 'other substantial priorities' facing his department, the Lord Chancellor decided not to proceed with work on a possible Commission.

2.7. Since then the Lord Chancellor has, from time to time, indicated that he might be willing to consult on the setting up of a Commission. In March 1999, in a written answer he said that he had 'not ruled out the possibility of proceeding with a consultation on the issue relating to the possible creation of a Judicial Appointments Commission. No decision has yet been taken'.[8]

2.8. However, no consultation was forthcoming. Against a background of unprecedented criticism of the appointments system, the Lord Chancellor announced on 27 July 1999 that he had appointed Sir Leonard Peach to report on the operation of the appointments procedure. Sir Leonard reported in December 1999, making a number of recommendations for improvements to the existing judicial appointments system (see section 5 below).

2.9. On the same day that the Lord Chancellor announced the Peach inquiry, Scottish First Minister, Donald Dewar, announced that there would be a full consultation on the arrangements for judicial appointments in Scotland. He said:

> 'The Scottish Executive is keen to see a more open and inclusive appointments process and a broader base from which candidates for both the Supreme Court and the Shrieval Bench are drawn'.[9]

2.10. On 27 March 2000 Scottish Justice Minister, Jim Wallace, announced that he was bringing forward proposals from the Executive to establish an Independent Judicial Appointments Commission.[10]

2.11. The Review of the Criminal Justice System in Northern Ireland,[11] published in March 2000, has also recommended the setting up of an independent Judicial Appointments Commission, which would have responsibility for organising and overseeing the judicial appointments process and for recommending appointments. The report was published by the Review Group set up under the Good Friday Agreement, which provided for a wide-ranging review of criminal justice. The Group, which began its work in June 1998, consulted widely. The final report notes

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5 *Hansard* [HL] 23 June 1997, col WA145

6 See *Hansard* [HC] 4 March 1998 col 679, and 20 April 1988 col 405

7 *Hansard* [HL] 15 October 1997, col WA193

8 *Hansard* [HL] 31 March 1999 col WA69

9 Scottish Executive press release, 27 July 1999

10 Scottish Executive press release, 27 March 2000

11 Review of the Criminal Justice System in Northern Ireland, TSO March 2000, Chapter 6, para 6.102

that during the consultation 'one of the strongest messages to come across was a desire for transparency in judicial appointments'. A guide to the report published at the same time notes: 'An effective, independent and impartial judiciary is crucial to the well-being of any society...The community must have confidence that judges are not subject to influence from the Government, politicians or other interest groups carrying out their functions'.

3. The present system

The current judiciary

3.1. Despite the improvements made in the appointments process - including more open advertising, job descriptions and notes for applicants - fundamental problems still remain. This is reflected in the statistics that reveal the extent to which the judiciary remains the preserve of white male barristers. Solicitors, women and people from ethnic minorities are largely excluded from the ranks of the higher judiciary. Women and people from ethnic minorities remain under-represented throughout the judiciary, despite the fact that over the past ten years their participation in both branches of the profession has increased.

3.2. Of the 154 permanent judiciary[12] of High Court rank or above, none is from ethnic minorities, only one is a former solicitor and only 11 are women.[13] Of the 547 Circuit Judges, only 74 are former solicitors, 39 are women (seven per cent) and only six (1.1 per cent), are from ethnic minorities. Of the 1,352 Recorders, only 35 (2.6 per cent) are from ethnic minorities, and 164 (12 per cent) are women and 153 former solicitors.

3.3. Between coming into office in May 1997 and November 1999 the Lord Chancellor made four appointments to the House of Lords, 11 to the Court of Appeal and 19 to the High Court Bench. Of these, three have been women (one to the Court of Appeal), and none has been a solicitor or person from an ethnic minority background. Of the 71 appointments to the Circuit Bench, 12 have been women, one from an ethnic minority background and only four have been solicitors.[14]

3.4. In the 1998/99 round of recruitment, all seven judges appointed to the High Court were white male QCs. Of the 15 Circuit Judges appointed to fill known vacancies, one was a solicitor, two were women and one was from an ethnic minority, while of the 136 Assistant Recorders appointed, 10 were solicitors, 22 were women and 6 were from an ethnic minority.[15]

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12 As at 1 June 2000. Figures issued by the Judicial Group, Lord Chancellor's Department

13 The appointment of a second solicitor to the High Court bench, Dr Lawrence Collins, was announced in February 2000 but he will not take up his appointment until October 2000. The announcement on 14 July that Dame Mary Arden is to be promoted means that from October 2000 there will be two women in the Court of Appeal.

14 *Hansard* [HC] 29 November 1999 col WA62

15 *Judicial Appointments annual report* 1998/99 Cm 4449

3.5. In a remarkable claim regarding the proportion of women he had appointed Circuit Judges, the Lord Chancellor said that he regarded this as 'excellent, a high percentage, a higher percentage than the relevant proportion of women at the Bar [emphasis added] ... it is also evident that there is no discrimination in the system.'[16] Addressing the issue of the appointment of ethnic minority lawyers as judges, the Lord Chancellor said that appointments needed to be seen in the context of the composition of the profession from which judges are drawn. He went on, 'In May 1999 only 4 per cent of barristers [emphasis added] with over 20 years experience were of ethnic minority origin, that is, were within the relevant pool from which appointments are made'[17]

3.6. However, in relation to both barristers and solicitors, recent research undertaken for the Lord Chancellor's Department shows that 'women under-apply as a proportion of their numbers in the potential applicant pool' (19 years call/qualification) for Assistant Recorderships. Women solicitors also under apply for the post of Deputy District Judge. In addition, applicants from ethnic minority backgrounds are less successful in relation to both Assistant Recorder and Deputy District Judge posts in relation to their numbers in the profession. The report notes that 'these figures suggest that there is scope for increasing the proportion of both women and minority lawyer applicants for Silk and judicial office in the light of their representation within the legal profession and their success rates as applicants.'[18]

3.7. One of the reasons why barristers continue to dominate the higher ranks of the judiciary may be the continued reliance on informal approaches. Although appointments to the High Court bench are advertised, the Lord Chancellor reserves the right to make informal approaches. Of the seven QCs appointed to the High Court bench in 1998/99, four had applied to be considered for appointment and three were invited to accept appointment.

3.8. The senior judiciary also continues to be dominated by people educated at public school and Oxford or Cambridge University. A number of surveys have been conducted over the years looking at the educational background if judges.[19] In 1975 Hugo Young analysed the educational background of 31 appointees to the High Court during the previous five years. The result, published in the *Sunday Times*, showed that 68 per cent had attended public school and 74 per cent attended Oxford or Cambridge. A Labour Research survey conducted in 1987 and repeated in 1994 showed an increase in the percentage of High Court judges attending public school and Oxbridge. In 1987, 62 per cent of High Court judges attended public school, compared with 80 per cent in 1994, and 78 per cent graduated from Oxbridge in 1987, compared with 80 per cent in 1994.

Pool of potential applicants

3.9. One of the difficulties in ensuring that the judiciary reflects both the steadily improving diversity of the legal profession and the social, gender, racial and cultural

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16 *Woman's Hour* BBC Radio 4. See *Legal Action*, February 1999

17 Speech to launch the Judicial Studies Board's Equal Treatment Benchbook, 28 September 1999

18 *Factors affecting the decision to apply for Silk and judicial office*, Kate Malleson and Fareda Banda, Lord Chancellor's Department, June 2000

19 See *The Politics of the Judiciary* JAG Griffith, fifth edition, 1997, Fontana Press

diversity of society at large, is that the pool from which potential applicants can be chosen remains small.

3.10. Qualification for appointment to the High Court bench is either 10 years High Court qualification or to have been a Circuit Judge for at least 2 years. This means that barristers can move straight from practice to the High Court bench. Solicitors on the other hand, except for the handful with higher rights of audience, can only be appointed after serving as Circuit Judges. Many solicitors who would be suitable for the High Court bench but who do not wish to serve as Circuit Judges are therefore effectively excluded from appointment. It is impossible to justify this restriction. Solicitors and barristers qualified for 10 years or more should be equally eligible to apply.

3.11. Lawyers serving in the Government Legal Service and the Crown Prosecution Service are excluded from appointment. The Crown Prosecution Service employs around 2,000 lawyers in England and Wales. Of those with a practising certificate, 48 per cent are women. Excluding this group ignores a substantial pool of talent from which to draw. The Lord Chancellor has indicated that he is considering lifting the ban on the appointment of lawyers serving in the Government Legal Service and the Crown Prosecution Service, following a recommendation to this effect in the Glidewell report.[20]

3.12. It is also particularly difficult for lawyers in local government and commerce and industry to achieve appointment. This is partly because they are much less likely to be involved in advocacy, and therefore less likely to come to the attention of those who form part of the consultation process. It is also because the requirement that some judges sit in blocks of weeks makes it very difficult for them to obtain the necessary leave from their employers. This means that many thousands of barristers and solicitors, many of whom are women or from ethnic minorities, are effectively excluded from consideration for judicial appointments. Proportionately more women are employed in commerce and industry and local government. Women make up 44 per cent of solicitors in the employed sector compared with only 33 per cent in private practice. Over 3,000 solicitors with a practising certificate are employed in local government, half of whom are women. Solicitors from ethnic minorities are particularly likely to be employed in local government, advice services and charities.[21]

3.13. The need to widen the pool of applicants was recognised by Labour in opposition. The paper put to the Party's 1995 conference said 'we are committed to the development of a more rational training and career structure for the judiciary, together with a more open and objective selection process that can better identify and harness judicial talent from sources other than the bar, including solicitors and academics'.[22]

3.14. It is essential that applicants for judicial appointment should be drawn from the widest possible pool, including all qualified solicitors and barristers, whether in

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20 Lord Chancellor's Response to the report of the Joint Working Party on Equal Opportunities in Judicial Appointment and Silk.

21 See note 3 above

22 See note 4 above

private practice or employed in government service or in trade unions, working as in-house lawyers in industry or commerce, or working as academics.

3.15. In addition, there should be much more flexible points of entry. The upper age limit which is normally applied for the appointment of Recorders (53) is inappropriate. It appears to arise from the belief that barristers appointed will wish to have the opportunity to earn at least 15 years pension. However, many solicitors will already have adequate pension provision. The upper age limit is likely to have the effect of cutting out a number of very able solicitors who, after years in practice, would like to consider a change in direction with an appointment to the bench. It should be possible, for example, for a senior partner in a large commercial firm to consider moving in her mid or late-50s to an appointment as a Recorder.

3.16. There should also be greater movement between the different branches of the judiciary. Although it is technically possible for practitioners serving in a range of other judicial appointments to move to the Circuit Bench, this rarely happens in practice. In the 1998/99 round of appointments only one of the 15 Circuit Judges approved for immediate appointment and only one of the 19 placed on the reserve list held another full-time judicial post.[23] Yet individuals appointed below the level of Circuit Judge (of which the vast majority are solicitors) will themselves be of high calibre, will have been selected according to very similar criteria to those applying for Circuit Bench, and will be exercising a range of judicial functions regularly.

4. The appointments process

4.1. There have been improvements in the procedure for appointments in recent years. The first booklet explaining the procedure for judicial appointments was published in 1986 under the auspices of Lord Hailsham. The current edition, published in March 1999, represents a considerable improvement in both presentation and content from that pioneering document. Lord Irvine, in his foreword, notes the greater emphasis placed on open competition in recent years and the development of open selection procedures. He states:

> 'I am committed to creating an open, effective and accessible system where everyone who is eligible for appointment and who wants appointment shall have a fair chance to secure appointment.'[24]

4.2. There is no doubt that Lord Irvine, along with his predecessors Lord Mackay and Lord Hailsham, has made significant improvements in terms of greater transparency in the appointments process.

4.3. Most recently, the current Lord Chancellor has encouraged the development of better equal opportunities policies and arranged for lay members to be involved in the appointments procedures. He has also extended the policy of open advertisement to

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23 See note 15 above

24 *Judicial Appointments* Lord Chancellor's Department, March 1999

include High Court appointments, although he still reserves the right to offer High Court appointments to those who have not applied.

4.4. While all of these improvements are welcome they fail to go far enough to modernise the system in a way which is satisfactory for current needs. The changes represent an attempt to adapt an appointments process designed to meet the needs of a very different society to modern requirements. But the system continues to lack transparency, and is insufficiently open and objective. It continues to draw on too narrow a range of backgrounds and experience. What is needed is a radically new appointments system, specifically designed to meet the needs of a modern, multiracial and multicultural society.

4.5. Recent research undertaken for the Lord Chancellor's Department[25] notes that while many applicants and potential applicants of 15-22 years qualification/call expressed some positive comments, the most notable feature was 'the high level of criticism of the appointments process', and the 'significant degree of dissatisfaction'. Respondents expressed a number of concerns:

> 'In particular, the lack of openness, the continuing role of patronage, the dominance of an elite group of chambers and the need to be 'known' in order to be appointed were identified as weaknesses in the processes and a deterrent to applications from under-represented groups.'

Informal consultation

4.6. A particular feature of the current judicial appointments procedure that has seriously disadvantaged solicitors, women, and ethnic minority lawyers from being candidates for higher appointments is the use of informal consultation with the professional community.

4.7. This is at the heart of the current mechanism for judicial appointments. In the current edition of the Judicial Appointments booklet, informal consultation is described as follows:

> 'It is a central feature of the appointments system that views and opinion about the qualities and work of applicants and part-time office-holders are collected from a wide range of judges, senior practitioners from both branches of the profession and others, as appropriate, by officials from the Judicial Group on behalf of the Lord Chancellor. These comments are mainly collected in writing and sometimes at face-to-face meetings.
>
> The aim is to collect comments systematically, and with regard to the criteria for appointment, from serving members of the judiciary and senior members of both branches of the profession who have knowledge of individuals and their work over a number of years and who are thus in a position to assess their suitability for appointment.'

[25] See note 18 above

4.8. The need to be assured of the propriety and competence of a potential judge is clear. The question is whether this can be fairly done, and fairly seen to be done, by use of this procedure. Although informal consultation may often be a feature of high level appointments, it will certainly not be a 'central' feature.

4.9. This system of consultation will inevitably favour those applicants who are noticed and well known through the network at the Bar Council, the Law Society and the Inns of Courts. Women and ethnic minority barristers and solicitors are generally under-represented in the activities of their governing bodies.

4.10. There is also a clear perception that most successful applicants are drawn from a small group of chambers, both in London and elsewhere. This was illustrated in recent research for the Lord Chancellor's Department, in which the researchers noted a 'recurring theme that a determining factor in an applicant's chances of success is the chambers which he or she comes from.' Comments from those interviewed included '...in the Midlands its been traditionally based around 6 or 7 sets of chambers and the judges have been drawn only from those chambers'; and 'Certainly in Bristol we feel that there are two sets of chambers that have provided nearly all the judges in Bristol and the other chambers don't really get a look in'.[26]

4.11. The system of informal consultation also favours those who are advocates in the higher courts, and therefore tends to favour barristers who do a considerable amount of advocacy. Solicitors suffer from low visibility in court, and relying primarily on consultation to determine suitability for appointment puts solicitors at a distinct disadvantage. Judges may be well placed to comment on candidates' performances as advocates, but they are not well able to test other skills or qualities, nor to assess those who do not appear before them as advocates. These other skills, such as case management, are recognised as being increasingly important (see section 6 below).

4.12. Although notes on the guidance and selection criteria are issued by the Lord Chancellor's Department, the system remains largely unstructured, and comments are likely to be subjective and arbitrary. The great expansion of the legal profession and the increasing number of solicitors seeking judicial appointment means that many of the applicants are unknown to traditional consultees. Unfairness is inevitable with such an approach, placing as it does a heavy reliance on the view of the judiciary in relation to individuals who may not appear regularly as advocates.

4.13. The process of informal consultation is widely seen as discriminatory, particularly by ethnic minority and women lawyers. A comment on the appointments process from one senior ethnic minority barrister was 'They could start by dropping the secret soundings which is really a licence to discriminate and perpetuate a judiciary which is perceived as being not only pro white and male but which also has a built in bias against minorities, women, solicitors and anyone who is perceived as not being a 'safe pair of hands'.'[27]

4.14. Many solicitors in particular may well not be commented on in the informal sounding process. It would clearly be unfair if an applicant were denied an interview if, on the basis of other information to hand, they otherwise appeared to meet the

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[26] See above

[27] See above

criteria. However, this could lead to a situation where someone with no comments from the informal consultation process was appointed where another applicant who only received one insufficiently enthusiastic comment was denied an interview.

4.15. One of the recommendations in the report by Sir Leonard Peach was that candidates should be requested to name three to six consultees who could provide information on the candidates' suitability (see para 5.8 below). However, it remains unclear what weight these comments would be given as against comments obtained from the informal process.

4.16. This system of informal consultation is an inefficient and inherently discriminatory method of identifying the best candidates from what is now a much wider and diverse pool of talent. A modern Britain, in the era of the Human Rights Act, deserves a modern judicial selection and appointments system, fair to eligible applicants whatever their gender, ethnic origin, or professional background. Reliance on informal consultation has no place in such a system.

Part-time service

4.17. Additional problems can be caused for potential solicitor applicants by the requirement of part-time service, which is normally a pre-requisite of appointment to the full-time office. Part-time service plays a valuable practical training role, particularly for appointees who have had less experience of a court, but the present obligation for many years of service, a week or two at a time, usually four to ten weeks a year fits considerably better into the work pattern of barristers than solicitors. Unlike barristers, who practise as self-employed individuals, almost all solicitors seeking judicial appointment have professional and financial obligations to their partners that cannot be disregarded.

4.18. The length of the appointments process presents a particular problem for solicitors. Solicitors (who will generally be partners by this stage in their careers) will often be discouraged from indicating that they have an interest in judicial appointment because of the uncertainty this creates over their future within the partnership. Once solicitors have put their partners on notice that they are interested in becoming a judge, it is important that they are able to proceed swiftly to a decision about appointment, to minimise the period of disruption for partners, the firm and its employees. A long drawn out process will act as a strong disincentive to solicitors considering applying for judicial appointment.

4.19. The announcement by the Lord Chancellor that, in the light of the decision in *Starrs & Chalmers v Procurator Fiscal*,[28] he would make part-time appointments for a period of not less than 5 years is welcome. Equally welcome is the decision that where appointments are renewable this will normally be done automatically, with removal from office only on limited and specified grounds.

4.20. However, there should be more flexibility in how the part-time sittings are organised in order to accommodate better the working practices of solicitors. In particular the Lord Chancellor should adopt the recommendation of the Joint Working Party on

[28] Appeal Court, High Court of Justiciary, 11 November 1999.

Equal Opportunities, which was convened by the Lord Chancellor's Department to consider means of increasing the number of women, black and Asian lawyers applying for judicial appointments. It recommended that the option of carrying out part-time sitting in a more concentrated way should be made generally available, and not restricted only to those returning to the profession following a career break.[29] We welcome the Lord Chancellor's commitment to give this further consideration.

5. Inquiry by Sir Leonard Peach

5.1. The issue of public appointments generally and the procedures by which they are made has been a matter of public concern. Following the work of Lord Nolan, the government generally has sought to implement more transparent procedures designed precisely to eliminate the type of subjectivity which is likely to be engendered by a secret element in the appointments process.

5.2. Increasingly, the procedures of the Lord Chancellor in relation to the appointment of the judiciary looked old fashioned and out of step with procedures which have been developed elsewhere.

5.3. The appointment in July 1999 of Sir Leonard Peach, a former Commissioner for Public Appointments, to undertake an inquiry into the 'Operation of the Appointments Procedures in relation to all judicial appointments and Queen's Counsel', was against a background of legal challenges in relation to non-judicial appointments.

5.4. The then Attorney General, John Morris, subsequently conceded that a system of appointing barristers to act for Government in civil proceedings was flawed and unacceptable. The admission came as part of a settlement in proceedings brought by a barrister, Jo Hayes, for sex discrimination. Ms Hayes claimed that the appointment of Philip Sales as first Junior Treasury Counsel in December 1997 did not give her a fair chance of applying for the job. Mr Morris agreed to donate £5,000 to charity as part of the settlement.[30]

5.5. The terms of reference for Sir Leonard's inquiry were strictly limited. He was to look only at how appointments were made, rather than by whom. This effectively ruled out any consideration of whether a Judicial Appointments Commission (or indeed any other system) would be a better way of making appointments, rather than the current system where appointments are made by or on the advice of the Lord Chancellor.

5.6. The inquiry was further limited by the fact that it was made clear that the Lord Chancellor would 'continue to involve serving members of the judiciary and senior members of the legal profession in the assessment of candidates and Civil Servants will still support him in his responsibilities for making appointments'.[31] This further

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29 Report of the Joint Working Party on Equal Opportunities in Judicial Appointments and Silk, September 1999

30 *Times* 12 June 1999

31 Lord Chancellor's Department, press release, 27 July 1999

limitation ruled out any consideration of whether informal consultation should be abolished.

5.7. Given the restrictions placed on the inquiry, Sir Leonard's recommendations were inevitably limited to trying to tinker with the system. Although the Lord Chancellor made it clear that the question of informal consultation could not be directly addressed, the Peach report does make some recommendations which were aimed at ameliorating some of the worst effects of the scheme. The report identified a lack of confidence in the system overall, and in particular in the process of consultation and the dominance of the serving judiciary as consultees.

> 'The consultation process requires visibility which is not available to all candidates and for its operation to be acceptable there needs to be confidence in the relevance of the information being provided and that its basis is on evidence not hearsay. Where the consultation process does not provide sufficient information about an applicant then such information must be obtained from other sources.'[32]

5.8. The report also recommends that all applicants should set out their own views on their suitability for appointment against criteria outlined in the guidance. Candidates should be requested to name not less than three, and not more than six, consultees who would automatically be contacted to provide information. The information would be requested on a form specifically geared to the criteria for the appointments.

5.9. Many of the recommendations in the Peach report mirrored those made by the Joint Working Party, which reported in September 1999.[33] It had suggested that aptitude tests should be available to potential applicants to self-test their own suitability for appointment. The working party also recommended the adoption of assessment centres.

5.10. The Peach report also recommends the establishment of an assessment centre 'as a prime element in the selection process for those seeking the first step on the judicial ladder.' This could include interviews, group exercises and discussion, and tests and presentations. There is also a proposal that psychometric and competency tests currently available on the market should be used to aid in the evaluation and measurement of judicial skills and qualities. We welcome the Lord Chancellor's reported comments that 'work would commence shortly on a pilot scheme for an assessment centre'.[34]

5.11. The Peach report also proposes the appointment of a Commissioner for Judicial Appointments. This is not a recommendation for an independent Judicial Appointments Commission, consideration of which was specifically excluded from the inquiry (see para 5.5 above), but for a Commissioner who, together with Deputy Commissioners, would provide an Ombudsman style complaint facility for disappointed candidates and dissatisfied organisations. It would also provide an ongoing audit on a sample basis of current procedures, and make recommendations

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32 *An Independent Scrutiny of the Appointments Process of Judges and Queen's Counsel in England and Wales* Sir Leonard Peach, December 1999, page 3

33 Report of the Joint Working Party on Equal Opportunities in Judicial Appointments and Silk, September 1999

34 *Gazette* 21 September 2000.

to the Lord Chancellor on improvements in the process. The proposal is intended to provide some independent oversight of the current system, but it would not alter the appointments procedure itself and appointments would continue to be made by or on the recommendation of the Lord Chancellor. The Lord Chancellor has announced that he is to appoint the First Commissioner later this year.[35]

5.12. The First Commissioner (who may not be a judge) will be assisted by approximately ten part-time Commissioners, of whom not more than a third will have a legal background. The remaining members will be lay people, and should include a number with specialised knowledge of the selection process.

5.13. Many of the recommendations in Sir Leonard's report are very welcome and should be used as the basis for a more thorough and fundamental reform. The recommendations should be incorporated into modern and transparent judicial appointment procedure, which can objectively test and evaluate candidates' skills and qualities.

6. Changing Role of the Judiciary

Constitutional reform

6.1. Over the last two decades judges have become increasingly involved in a range of socially and politically sensitive issues, through the increase in judicial review of administrative decisions and greater involvement in non-judicial commissions and inquiries. Cases involving highly publicised miscarriages of justice, the supervision of the activities of the security services and politically-charged cases such as Pinochet have thrust judges ever more into the limelight.

6.2. This increasingly sensitive role will be taken a step further through the programme of devolution and the introduction of the Human Rights Act. Judges will find themselves acting as a constitutional court. The Judicial Committee of the Privy Council will have to determine the validity of Acts of Parliament passed by the Scottish legislature. Once the Human Rights Act comes into force the decisions of judges will take on greater constitutional importance, and it is inevitable that their social and political background will come under greater public scrutiny. As the Lord Chancellor has noted, the expansion of judicial review has 'led to the courts coming to be regarded as a central part of a broader constitutional mechanism securing responsible government'. He went on:

> 'The Human Rights Act will form a catalyst that will further fuel the ongoing development of the constitutional function of British courts. It will concentrate attention, more than ever before, on the judiciary's role as the guardian of individuals' rights...New and demanding questions will arise for the courts as they begin to interpret a written catalogue of human rights. They will have to

[35] *Hansard*, [HC] 23 May 2000, col WA457

> resolve hard cases concerning the precise scope of citizens' rights under the Convention and the rigour with which rights infractions must be justified.'[36]

6.3. The Lord Chancellor said in the foreword to the 1998/99 Judicial Appointments annual report:

> 'The independence and integrity of the judiciary, and of the judicial appointments process itself, are essential elements within our constitution...It is essential in the public interest that the judicial appointments system should continue to provide a high quality judiciary of both moral and intellectual distinction. It is also essential that there is public confidence in the judicial appointments system as a process for selecting the best candidates for judicial office, on their merits, irrespective of extraneous factors. Public confidence in the appointments process is not only desirable in its own right, but also helps to sustain the authority of the judiciary in carrying out its important constitutional functions.'[37]

6.4. As the Lord Chancellor has noted, the need to maintain judicial impartiality and independence is crucial. For this to be done and - most importantly for public confidence in the system - to be seen to be done, the selection, appointment and promotion of judges should be independent of the executive, carried out by a fully autonomous commission operating an open, accountable and rigorous selection and promotion procedure. In this way even the appearance of any influence by the executive would be avoided.

Modernisation of the justice system

6.5. In addition, the skills and abilities required by today's judges need to be seen in the context of a number of initiatives in recent years to modernise the justice system. This process of reform includes the Royal Commission on Criminal Justice in 1993, the Civil Justice Review which reported in 1988 and Lord Woolf's Access to Justice reports on the civil justice system in 1995 and 1996. Reform and modernisation is continuing. The issue of judicial appointments and the administration of civil justice are integrally linked as the role of the judges changes to incorporate more case management.

6.6. Lord Woolf saw the development of judicial case management as crucial to the changes necessary to the civil justice system. He describes case management as including 'identifying the issues in the cases; summarily disposing of some issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence'.[38] These judicial functions will mean that judges will need additional case management expertise.

6.7. The Lord Chancellor has acknowledged that those are the skills which many solicitors would possess, given their experience of managing large and complex cases. He has also recognised that the traditional emphasis on advocacy skills is no

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36 Paul Sieghart memorial lecture, 20 April 1999

37 See note 15 above

38 *Access to Justice final report* HMSO July 1996

longer appropriate. In a speech in April 1998 to the Women Lawyer Conference, he said 'you do not have to be a first rate advocate to be a good judge'.[39]

6.8. In welcoming the publication of the Peach Report, the Lord Chancellor said:

> 'The best advocates do not necessarily make the best judges. Today's judges need to be able to meet the demands of managing cases and to have the personal skills needed to run a court, as well as being first class lawyers...the skills and experience needed to be a judge may perfectly well be shown by a successful litigation solicitor as by a leading advocate'.

6.9. In the post-Woolf era it would seem likely that when it comes to case management solicitors, particularly those used to handling a heavy litigation workload, may more readily have the required skills than barristers.

7. A Judicial Appointments Commission

7.1. As already noted, in recent years there have been significant improvements to the system for judicial appointments. However, solicitors remain significantly underrepresented in High Court appointments, as do women and people from ethnic minorities. The judiciary remains overwhelmingly white and male.

7.2. Judges perform a vital role making decisions which profoundly affect the lives of citizens. Yet recent research by Professor Hazel Genn showed that confidence in the system is at an all time low. There is a lack of confidence in the fairness of hearings, with the belief that the courts serve the interests of the wealthy. The research showed that only a bare minimum of those questioned believed that if they took a problem to court they would get a fair hearing, and a lower proportion of women had confidence in the system than men. Professor Genn suggests that 'women's relatively low confidence may be a reflection of the domination of the courts by males'.[40]

7.3. There is also evidence that the public confidence in the independence of the judiciary from the executive has fallen. 'Gallup polls carried out in 1969 and 1985 showed an increase in the proportion of people who thought that the judiciary was influenced by the Government from 19 per cent to 43 per cent. This development, if indicative of a continuing trend, has worrying implications for judicial independence since loss of public confidence in its freedom from government may leave the judiciary more exposed to threats to its independence because there is less to lose by being seen to attack the judges.'[41]

7.4. The judiciary should reflect the greater diversity within the professions and also reflect as far as possible the society in which it operates. This approach was endorsed by Sir Patrick Mayhew when, as Attorney General, he said during the passage of the Courts and Legal Services Bill:

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39 25 April 1998

40 *Paths to Justice* Hazel Genn, page 229. Hart Publishing, 1999

41 *The New Judiciary*, Kate Malleson, page 72. Ashgate, 1999.

> 'It is extremely important for the judiciary to be representative and the Lord Chancellor has taken substantial steps to see that numerically and in other ways the judiciary becomes more representative of the community.'

7.5. This is important not only for potential applicants but also for those, both civil litigants and criminal defendants who appear before the judiciary and whose cases are judged by them. As Professor Genn comments in *Paths to Justice*, 'The courts have a crucial role in maintaining social order, in providing for the peaceful resolution of disputes and in protecting citizens from arbitrary power. Public confidence in the judicial system is also fundamental to the legitimacy that enables the courts to rely on voluntary compliance with promulgated decisions.'

7.6. Whilst ensuring that quality is maintained, there must be a major drive for a judiciary that reflects all members of society. A Judicial Appointments Commission would be able to guarantee independence, objectivity and transparency in the appointment and promotion of judges.

7.7. Recent research has shown that applicants and potential applicants for judicial appointment would largely support the introduction of a Judicial Appointments Commission.[42] The idea was seen as a way of 'opening up the system and reducing the need to be 'known'.'

Independence

7.8. One of the essential elements of a Judicial Appointments Commission would be its independence from the executive. It is becoming increasingly important to distance the responsibility for the appointment of judges from ministerial control. The Lord Chancellor's recent decision to make the tenure of part-time judges more secure demonstrates his awareness of this issue. The Commission should be a creature of statute, operating at arms length from the Government, reporting on its activities through an annual report.

7.9. The Joint Working Party on Equal Opportunities, which made a number of recommendations for improvement of the current appointments system, concluded:

> 'It could be argued that full implementation of many of the recommendations in this report would go some way to reducing the need for such a Commission - particularly as far as transparency and objectivity are concerned. However, a Judicial Appointments Commission would also be independent of the Government, and could attract a variety of experience and skills in its members...rather than being reliant on the ultimate choice of one, unelected politician.'[43]

7.10. It will be crucial that the composition of the Commission enables it to command the confidence of both the legal profession and the public at large. Membership should be drawn from four groups, none of which should be in a dominant position:

- Serving members of the judiciary;

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42 See note 18 above

43 See note 29 above

- Legal academics and members of the legal profession;
- Lay persons with particular expertise in recruitment and training methods at a senior level;
- Lay persons representing the community as a whole.

7.11. Members should be appointed by the Lord Chancellor following a rigorous and open selection procedure, and should serve for a fixed term. The Commission should have its own budget and an independent secretariat, either on secondment or independently appointed to permanent posts.

Recruitment and selection

7.12. The Commission should be responsible for the recruitment, selection and promotion of candidates from the widest possible pool. Eligibility for consideration for judicial appointment should be extended to all qualified barristers and solicitors (see section 3 above).

7.13. The Commission should develop open, accountable and transparent recruitment procedures. In particular it should ensure that the procedures do not directly or indirectly discriminate against women or ethnic minority candidates, and should examine ways in which applications from such candidates could be encouraged.

7.14. The Commission should keep under review the procedures by which candidates are selected, and should establish criteria for appointment which build on the work already done in improving the selection procedure. In particular, appointments should be advertised and job descriptions and person specifications should be developed, setting out the skills, knowledge and experience required for the post. Candidates should be asked to apply on a standard form matching their skills to the criteria listed in the person specification. The proposals set out in the Peach Report for assessment centres and psychometric and competency tests should also form part of the selection process.

7.15. The current criteria set out in the Guidance for Applicants are a major step forward in terms of having published criteria detailing the knowledge, skills and experience required for a post. However, the criteria need to be re-examined and kept under review to ensure that they do not have the effect of indirectly discriminating against particular groups, and to ensure that the right balance is struck between different requirements.

7.16. The current criteria for judicial appointments continue to give implicit over-recognition to advocacy experience and under recognition of the management skills now required by increasingly sophisticated methods of case management. The list of skills should be extended to recognise the management experience and competence now required from the judiciary at every level.

7.17. The Joint Working Party[44] made a number of recommendations which have now been adopted. These included a recommendation that court management skills should be included specifically within the list of criteria in addition to the ability to write and

[44] See above

extemporise lucidly. It also recommended that 'fairness' might be renamed 'impartiality' and that 'open-mindedness' should also be included. The Working Party's recommendation that 'conscientiousness and diligence' might replace 'commitment to public service' would also seem to be desirable.

7.18. As the Peach report recommended, candidates will now be asked to provide their own referees, who can be asked to provide information specifically geared to the criteria for the appointment. The current system of informal consultation should no longer play a part in the recruitment process.

Developing a clearer career path

7.19. The Commission should have specific responsibility for career development. It should work closely with the Judicial Studies Board to develop training and education programmes designed to encourage promotion within the judiciary.

7.20. Appointment as a Recorder is still seen as the main point of entry to the higher ranks of the judiciary for the majority of practitioners. Although it is possible for practitioners serving in a range of other judicial appointments to be appointed to the Circuit Bench there is no defined career path. Tribunal chairs, Social Security Commissioners, Coroners, Supreme Court Masters, District judges and Stipendiary Magistrates are amongst those eligible for appointment, but in practice it is rare for any of these posts to act as stepping stones to the Circuit Bench. Movement between different levels of judges should be much more common.

7.21. The Commission should encourage promotion within the judicial system. This would stimulate recruitment to less senior appointments.

7.22. Encouraging more appointment to the Circuit Bench from those holding other full time judicial posts should also facilitate the promotion of women and people from ethnic minorities. For example, 13.3 per cent of full-time employment tribunal chairs are women, compared with seven per cent of Circuit Judges and 12 per cent of Recorders. Of the six full-time chairs appointed in 1998/99, three were solicitors, one was a woman and two were people from ethnic minorities. The percentage of full-time employment tribunal chairs who are from an ethnic minority is 4.6 per cent compared with 1.1 per cent of Circuit Judges and 2.6 per cent of Recorders.

8. Conclusion

8.1. If judges are to command greater public confidence, they should reflect not only the greater diversity within the profession but also, as far as possible, reflect the diversity of the society within which they operate.

8.2. The system of informal consultation, which allows senior judges to play a decisive role in the appointment and promotion of judges, has no place in a modern, open and transparent appointments system.

8.3. As judges are increasingly exposed to public scrutiny, the need for society to have absolute confidence in their integrity, independence and impartiality will intensify. It is time for the creation of a Judicial Appointments Commission, independent of the executive, which can operate open and transparent selection and recruitment procedures. Such a system could command public confidence and bring the appointment and promotion of judges up-to-date to meet the needs of a modern, multiracial and multicultural society.