

LETTERHEAD OF THE LAW SOCIETY

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From the President of the Law Society

Mrs Percy Ma
Clerk to Panel
Legislative Council
Hong Kong Special Region of the People's Republic of China
Legislative Council Building
8 Jackson Road, Central Hong Kong

13 February 2001

Dear Mrs Ma

RE: LegCo Panel on Administration of Justice and Legal Services

I write further to my letter of 4th January with comments on the paper prepared by Mr Cheung Wai-lam on *The Process of Appointment of Judges in the UK*.

Method of Appointment

The Lord Chancellor has, I believe, a more significant role in the appointment of judges than the paper implies. It is correct that the most senior appointments, Lords of Appeals in Ordinary, Heads of Divisions and Lord Justices of Appeal are appointed by the Queen on the recommendation of the Prime Minister, but the Prime Minister will, in practice, generally act on advice from the Lord Chancellor. It is the Lord Chancellor who, before advising the Prime Minister, consults senior members of the judiciary, and it is his department which is the centre for the collection of information. The extent to which different Prime Ministers accept the advice of the Lord Chancellor will of course vary.

The bulk of judicial appointments are made by or on the advice of the Lord Chancellor. High Court judges, Circuit judges and Recorders are appointed by the Queen on the recommendation of the Lord Chancellor. District judges are appointed directly by the Lord Chancellor.

Both the Prime Minister and the Lord Chancellor are of course members of the executive. The role of the executive in the appointment of judges has been a matter of some controversy. As you will be aware, the Law Society has for many years argued for the establishment of a Judicial Appointments Commission. One of the main arguments for the creation of a fully independent Commission is to ensure that appointments are, and are seen to be, independent of the executive.

Consultation

The paper rightly notes that an important feature of the process of judicial appointment is consultations. This is described in the Lord Chancellor's Department's judicial appointments booklet as a 'central feature of the appointments system'. This has been subject to extensive criticism, and is widely thought to seriously disadvantage solicitors, women, and ethnic minority lawyers. I would refer you to some research carried out for the Lord Chancellor's Department: *Factors Affecting the Decision to Apply for Silk and Judicial Office* by Kate Malleson and Fareda Banda, published by the LCD in June 2000. I enclose a copy.

The system of consultation is widely regarded as favouring those who are advocates in the higher courts, and therefore tends to favour barristers who do most such advocacy. I would also recommend the report of the Joint Working Party on 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. The Joint Working Party recommended that the system of consultation should be scrapped. They said 'taking up straightforward references can be a necessary part of the process: but wide 'scatter-gun' consultation is entirely nugatory and serves simply to perpetuate a discredited process, representing an unjustifiable cost to public funds'.

The Lord Chancellor has made some significant changes to the consultation process in the light of recommendations contained in the Joint Working Party's report and the report of Sir Leonard Peach, including redesigning the consultation form to ensure that the comments invited are allied to the requirements of the posts and not general. The Lord Chancellor has also accepted the recommendation of the Peach report that all applicants should be asked to name between three and six consultees familiar with their work, who are then contacted and asked to provide opinions based on the stipulated requirements of the post.

Role of the Legislature

Both the Lord Chancellor and the Prime Minister are involved in the appointment of judges. The Lord Chancellor, like the Prime Minister, is a member of the executive and also head of the judiciary.

Commission for Judicial Appointments

As the report notes, Sir Leonard Peach was appointed by the Lord Chancellor to conduct a scrutiny of the appointment process for judges and Queen's Counsel in England and Wales. The terms of reference for Sir Leonard's enquiry were strictly limited. He was to look only at how appointments were made, rather than by whom. The enquiry 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'. The Peach report recommended the appointment of a Commissioner for judicial appointments. The Commissioner, together with Deputy Commissioners, would provide an ombudsman style complaint facility for disappointed candidates and dissatisfied organisations. It would provide an on-going audit on a sample basis of current procedures, and make recommendations to the Lord Chancellor on improvements in the process. This proposal was intended to provide some independent oversight of the current system, but would not alter the appointments procedure itself.

The Lord Chancellor's Department is currently in the process of appointing the first Commissioner, and we expect an announcement to be made sometime in March.

Recently, in giving evidence to the Home Affairs Select Committee (23rd January 2001) the Lord Chancellor once again confirmed that he has not ruled out the possibility of consulting on a Judicial Appointments Commission. He also confirmed that later this year there will be a pilot, probably at Deputy District Judge level, to test out feasibility of an assessment centre, assessing aptitude for judicial appointments.

I hope these comments are of some assistance to you. If you would like any further information please do not hesitate to contact me, or our Director of Policy Development, Russell Wallman.

Yours

Michael Napier
President

Letterhead of Lord Chancellor's Department

RESEARCH PROGRAMME

**FACTORS AFFECTING THE DECISION TO
APPLY FOR SILK AND JUDICIAL OFFICE**

**Kate Malleson
London School of Economics
and
Fareda Banda
School of Oriental and African Studies**

**Research
Series**

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FOR SILK AND JUDICIAL OFFICE**

Kate Malleson and Fareda Banda

The Lord Chancellor's Department Research Secretariat was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.

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DISCLAIMER

Whilst the research paper was produced with the financial support and general assistance of the Lord Chancellor's Department, the views expressed within are those of the report's authors and do not necessarily reflect the opinions of the Lord Chancellor nor any of his officials.

AUTHORS

Dr. Kate Malleson is a lecturer in Law at the London School of Economics. She is the author of *The New Judiciary* (1999, Ashgate Press) and has written widely on the subject of the judicial appointments process. In 1997 she completed a comparative review of the use of judicial appointments commissions in the US and Canada for the Lord Chancellor's Department (Research Paper no. 6, 1997).

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SUMMARY

- This research identifies those factors which influence the decisions of women lawyers and lawyers from minority ethnic groups when considering whether to apply for Silk or Judicial Office.
- Data was gathered on the views, attitudes and experiences of applicants and potential applicants using questionnaires and in-depth semi-structured interviews. Respondents were drawn from amongst senior lawyers from a wide range of backgrounds and practices from different parts of the country. The respondents included those who had applied for Silk and judicial office as well as those who had not. The responses were analysed on the basis of the respondents' gender and ethnic origin and according to whether they were barristers or solicitors.
- The data revealed a clear consensus throughout the different groups of respondents in support of the need for the appointments processes to be based on openness, objectivity and selection on merit rather than patronage. There was general support amongst respondents for the changes introduced by the Lord Chancellor's Department in recent years to promote these goals, such as advertising, interviews, feedback for unsuccessful candidates and the encouragement of under-represented groups to apply. However, the extent to which respondents believed that these changes had gone far enough, differed between the groups. Dissatisfaction with the processes was greater amongst solicitors than barristers; female respondents than male respondents; respondents from minority ethnic backgrounds than white respondents and amongst those whose applications were unsuccessful than those who were successful. Concerns were expressed about the working arrangements of the legal profession as well as the appointments processes themselves. The following factors were most commonly cited as responsible for deterring lawyers from under-represented groups from applying:

- The extent to which being in a top-ranking chambers affects barristers' chances of appointment.
- The effects of indirect racial discrimination on the capacity of minority barristers to build up a successful practice.
- The continuing need to be 'known' in order to be appointed, and the role of social networking in the consultation process.
- The disadvantage faced by solicitors in the consultation process.
- The difficulties faced by solicitors in completing the requirements of part-time sitting.
- The difficulties faced by women lawyers with children in balancing work and domestic responsibilities.

The most commonly proposed changes put forward by respondents included:

- Greater openness and objectivity.
- More active encouragement of qualified lawyers from under-represented groups to apply.
- Reform of the consultation process.
- The establishment of a judicial appointments commission.
- More flexible working arrangements and a change of culture both in the legal profession and in the judiciary

1. INTRODUCTION

This research seeks to identify those factors which affect the decisions of barristers and solicitors when considering applying for Silk and judicial office in order to determine if there are particular factors which encourage or hinder applications from women and lawyers from minority ethnic groups¹. The research draws on data from questionnaires and in-depth interviews in order to identify the views, attitudes, opinions and motivations of different groups of applicants and potential applicants.

Background

Figures for 1999 show that women lawyers and lawyers from minority ethnic groups make up 11 per cent and 1.7 per cent of the judiciary respectively. Moreover, their representation in the senior judiciary is significantly lower. There are no minority ethnic judges above the Circuit bench and only 7 women in the High Court, 2 in the Court of Appeal and none amongst the Law Lords.²

In recent years, these figures have attracted increasing public and official attention. In the 1990s a number of reforms to the judicial appointments process were introduced by Lord Mackay when Lord Chancellor which were intended to open up the system and encourage applications from a wider range of lawyers. The changes introduced included advertising judicial vacancies, the use of interviews, the publication of job descriptions and selection criteria and greater flexibility in arrangements for part-time sitting. These changes have been promoted and extended by Lord Irvine since taking office in 1997.³ In 1996, the Home Affairs Select Committee scrutinised the judicial appointments process, taking evidence from a wide variety of interested groups and individuals. A recurring theme throughout these submissions was a concern about the

¹ Only solicitors with rights of audience to the Higher Courts are eligible to apply for Silk.

² Lord Chancellor's Department, *Judicial Appointments Annual Report 1998-1999*, HMSO: London, p.74.

³ *Ibid*, chapter 2.

lack of diversity in the make-up of the judiciary and the relatively slow rate of progress being made by lawyers from under-represented groups.⁴ In 1999 the Home Affairs Select Committee again reviewed this issue, taking evidence from the Lord Chancellor, Lord Irvine, about the prospect for future change.⁵ In December 1999 Sir Leonard Peach produced a report on Silk and judicial office commissioned earlier in the year by Lord Irvine.⁶ The report's terms of reference covered a review of 'the existence of safeguards in the procedures against discrimination on the grounds of race or gender'. The report recommended a number of changes including consideration of more concentrated blocks of part-time sitting, the use of permanent part-time judicial posts and the use of a wider range of assessment methods for candidates for judicial office to supplement the consultations process. His recommendations also took account of the findings of a joint working party report on equal opportunities in judicial appointments and Silk produced in 1999.⁷

The growing public concern about the unrepresentative background of the judiciary in recent years is partly a reflection of the general increasing awareness of race and gender issues in all areas of public life. But there are other factors, particular to the judiciary, which have drawn attention to the make-up of the judges. The ten-fold increase in the size of the judiciary since the 1970s from just under 300 judges to over 3000 has increased the extent of their involvement in people's lives in quantitative terms. Equally, there has been a qualitative change in the function of the judiciary as a result of the expansion of role of the senior judges in scrutinising government action through judicial review. The effects of devolution and the passing of the Human Rights Act 1998 are likely to increase significantly the involvement of the higher judiciary in controversial political and social issues. The result will be more media

⁴ Home Affairs Committee, *Judicial Appointments procedures*, Session 1995-1996, HMSO: London.

⁵ Home Affairs Committee, *The Work of the Lord Chancellor's Department*. Minutes of Evidence for 2nd November 1999.

⁶ Sir Leonard Peach, (1999) *An Independent Scrutiny of the Appointments Processes of Judges and Queen's Counsel in England and Wales*, Lord Chancellor's Department, London.

⁷ The working party included the Bar, the Law Society, minority lawyers groups and women lawyers groups. See the Peach report, *ibid.*, p.30.

attention focussed on the decisions of the judges and even greater public interest in the make-up of the judiciary.⁸

⁸ See K. Maleson, (1999) *The New Judiciary*, Ashgate Press, Chapter 5.

2. CAUSES OF UNDER-REPRESENTATION

The judiciary in England and Wales is appointed from amongst senior lawyers. Successive Lord Chancellor's have therefore stressed that their choice of appointees is limited by the pool of candidates willing and qualified to serve.⁹ The current judiciary can therefore be described as a reflection of those who entered the legal profession approximately fifteen to thirty years ago, amongst whom women and minority ethnic groups were a small minority. In 1975, for example, women made up 10 per cent of those called to the bar, compared to 43 per cent in 1998, with a comparable rise for women solicitors who now form a majority of those joining the profession with 52 per cent of new admissions being women.¹⁰

The figures for minority lawyers are less reliable since it is only relatively recently that statistics on ethnic origin have been collected by the professional bodies. The first survey of the ethnic origin of young barristers was carried out in 1989 when 12 per cent of new pupils described themselves as being from an ethnic minority. However, this figure should be treated with caution as the completion rates of these self report forms is very variable. Despite efforts to improve data gathering, more recent statistics are still incomplete and are not yet regarded by the Bar Council as reliable. Similar problems exist in relation to the figures for solicitors. Amongst those qualifying in 1999, 13 per cent described themselves as being from an ethnic minority group. This compares with 10.1 per cent in 1989 which is the first year that figures were collected by the Law Society. These figures are, however, considered by the Law Society to be overestimates because of the fact that approximately one sixth of respondents did not complete the forms in 1999.

Despite these statistical difficulties, there is widespread agreement that the proportion of women and minority ethnic lawyers joining the legal profession has risen very considerably in the last twenty years. As a result, many observers have argued that it is just a matter of time before women and minority lawyers 'trickle-up' and are

⁹ See evidence of Lord Irvine before the Home Affairs Select Committee, note 4 above.

appointed QCs and judges in far greater numbers. Others, however, have questioned whether the process of change is an automatic one and have identified barriers within the legal profession, the judiciary and the appointments process which limit the opportunity of qualified women and minority lawyers to take Silk and be appointed to judicial office.¹¹ Evidence before the Home Affairs Select Committee in 1996 from solicitors, women lawyers groups and minority lawyers groups highlighted difficulties faced by lawyers from non-traditional backgrounds in obtaining pupillage, tenancies, training contracts or partnerships in successful chambers or solicitors firms.

These groups also argued that the consultation process, in which the views of judges and senior lawyers are sought about the suitability of individual candidates unfairly disadvantaged those lawyers outside an 'inner elite' and led to a system of self-perpetuation. Some who gave evidence argued that the problem lay partly with the attitudes of the lawyers themselves. In particular, it was suggested that women lacked confidence in their abilities which inhibited them from applying for Silk and judicial office. The then Permanent Secretary of the Lord Chancellor's Department, Sir Thomas Legg, suggested that women might be 'diffident' in applying for judicial posts.¹² More recently, the Lord Chancellor, Lord Irvine, has similarly attributed low application rates to women undervaluing their talents. In November 1998, he told the Association of Women Lawyers that the lack of confidence which women had in themselves was 'robbing' him of good candidates: 'There will never be more women judges unless more women lawyers put themselves forward for appointment'.¹³

¹⁰ Law Society Fact Sheet Number 2, 1999, *Women in the Profession*, Law Society, London.

¹¹ See, for example, JUSTICE, 1996. *The Judiciary in England and Wales*. JUSTICE, London; MacRae, Susan. 1996. *Women at the Top: Progress after Five Years*. The Hansard Society, London; McGlynn, Clare. 1998. *The Woman Lawyer: Making the Difference*, Butterworths, London; TMS Consultants, 1992. *Without Prejudice? Sex Equality at the Bar and in the Judiciary*, TMS, London; Sommerlad, Hilary. and Peter Sanderson. 1998. *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status*, Ashgate, Aldershot.

¹² Note 3 above, para 83.

¹³ Speech to the Association of Women Barristers, 11 February 1998.

3. APPLICATION RATES AND SUCCESS RATES

In the light of these differences of opinion about the causes of under-representation of women and minority lawyers in the judiciary, a starting point for the research is to identify the extent to which lawyers from these groups do, in fact, under-apply for Silk and judicial office in comparison with white, male lawyers and the comparative rates of success of those who do apply. The average years post qualification/call of applicants for Silk, Assistant Recorder and Deputy District Judge are 22, 19 and 16 respectively.¹⁴ In 1999, the Lord Chancellor's Department published the first detailed breakdown of the application and success rates of Silk and judicial office.¹⁵ Combining these figures with a breakdown of the proportion of different groups in the legal profession, the following tables set out the application rates of male, female and minority lawyers as a percentage of those groups for Silk, Assistant Recorder and Deputy District Judge.

Application and success rates of applicants for Silk by gender and ethnic origin 1999

	Percentage of practising bar 22 years call	Percentage of applicants	Percentage of applicants appointed
Women	19 (45)	9 (46)	17 (10)
Men	81 (196)	91 (465)	83 (50)
Minority lawyers	3 (8)	3.5 (27)	7 (4)

Numbers are shown in brackets.

Figures-show barristers only. Although solicitors with rights of audience in the Higher Courts are eligible for Silk, numbers of applications are still too small to be statistically significant.

Application and success rates of applicants for Assistant Recorder by gender and ethnic origin 1999

	Percentage of practising bar 19 years call	Percentage of practising solicitors 19 years post qualification	Percentage of applicants	Percentage of applicants appointed
Women	22 (55)	21 (433)	17 (139)	16 (22)
Men	78 (189)	79 (1616)	83 (661)	84 (114)
Minority lawyers	5 (13)	1.3 (27)	5.5 (44)	4 (6)

Figures for practising barristers provided by the Council of the Bar, figures for practising solicitors provided by the Law Society and figures for applicants provided by the Lord Chancellor's Department.

¹⁴ Figures provided by the Lord Chancellor's Department.

¹⁵ Lord Chancellor's Department, *Judicial Appointments Annual Report 1998-1999*, HMSO: London, annex F.

Application and success rates of applicants for Deputy District Judge by gender and ethnic origin 1999

	Percentage of practising bar 16 years call	Percentage of practising solicitors 16 years post qualification	Percentage of applicants	Percentage of applicants appointed
Women	25 (65)	30 (508)	24 (110)	32 (32)
Men	75 (193)	70 (1200)	76 (340)	68 (68)
Minority lawyers	9 (23)	2.4 (41)	3 (13)	1 (1)

Gender

These figures indicate that women under-apply as a proportion of their numbers in the potential applicant pool amongst both barristers and solicitors for Silk and Assistant Recorder. In relation to the post of Deputy District Judge the proportion of applicants is under-represented when measured against the proportion of women solicitors and almost equally matched when measured against the proportion of women barristers. Women have a higher success rate than men in relation to Silk and District Judge but almost the same rate in relation to Assistant Recorder. These figures are broadly consistent with those available for earlier years.

Ethnic origin

The figures for minority ethnic applicants suggest a difference between the application and success rates of barristers and solicitors. Minority ethnic barristers slightly over-apply in proportion to their numbers in relation to Silk and Assistant Recorder and under-apply in relation to their numbers at the Bar in relation to the post of District Judge. In contrast, solicitors from minority ethnic backgrounds overapply for Assistant Recorder and District Judge in relation to their numbers.¹⁶ Applicants from minority ethnic backgrounds are more successful in achieving Silk in proportion to their numbers applying, but less successful in relation to Assistant Recorder and Deputy District Judge. However, the total numbers of applicants are so small that these figures should be treated with caution. Moreover, the fact that such statistics have only just started to be collated with regard to ethnic origin limits the extent to which it is possible to say whether or not these patterns are continuing ones.

¹⁶ Figures for solicitor applicants for Silk are too small to draw any statistical conclusions, being only 8 applicants in total and one appointment in 1999.

Despite these statistical limitations, 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 rate as applicants.

4. METHODOLOGY

Questionnaires

A total of 320 questionnaires were sent out to barristers and solicitors of 15-22 years call/qualification. Six different versions of the questionnaire were constructed, with certain questions in each version adapted for the different groups of respondents. Drafts of the questionnaires were drawn up and amended in the light of comments from the Lord Chancellor's Department and the Bar Council. The aim of the sampling was to ensure that the respondents represented a wide range of lawyers from different backgrounds undertaking a variety of work in different geographical areas. Table 1, appendix 1-details the numbers sent to each group. The samples were drawn from the following groups:

- minority ethnic female barristers
- minority ethnic male barristers
- white female barristers
- white male barristers
- white female solicitors
- white male solicitors

Construction of samples

It was originally intended to include minority ethnic female solicitors and minority ethnic male solicitors. However, it was not possible to construct samples of these groups since the Law Society was of the view that to provide a list of senior minority ethnic solicitors from their data base would breach the provisions of the Data Protection Act. The minority ethnic lawyers associations were also unable to identify eligible respondents, either for reasons of confidentiality or because their membership lists did not include sufficient numbers of senior lawyers. The option of constructing a sample by selecting those with non-Anglo Saxon names from Waterlows annual list of solicitors firms was rejected as being likely to produce a small and unacceptably unrepresentative sample.

The samples of the remaining six groups were constructed as follows:

Minority ethnic female and male barristers

These were supplied by the Bar Council drawn from its data base of barristers in independent practice. All practising barristers of 15-22 years call who had identified themselves as being from an minority ethnic group were included in the sample, a total of 36 and 64 individuals respectively (see table 1, appendix 1).

White female and male barristers

These were drawn up from Hazell's Guide 1999. The sampling frame included chambers both from London and around England and Wales, undertaking a variety of different work in order to ensure that the sample covered a wide range of practitioners. From these chambers individual barristers of 15-22 years call were chosen at random.

White female and male solicitors

These were drawn from Waterlow's 1999 list of solicitors firms. As with the samples of barristers, the sampling frame included firms both from London and around England and Wales, undertaking a variety of different work and ranging in size of practice from sole practitioners to large commercial firms. From these firms individual solicitors of 15-22 years post qualification were chosen at random.

Response rate

A total of 136 questionnaires were returned; an overall response rate of 42 per cent (see table 1, appendix 1). It was highest for white, female barristers and solicitors (51 per cent) and lowest for minority ethnic, female barristers (22 per cent). The low response rate for minority ethnic, female barristers inevitably limited the analysis of data for this group.

Interviews

Respondents were asked to indicate their willingness to be contacted for interview in their responses to the questionnaires. A total of 52 interviews were carried out with respondents from a cross section of the different groups as set out in table 1.

5. FINDINGS AND ANALYSIS

Application and success rates for judicial office

The extent of the respondents' involvement with the judicial appointments process differed widely both within and between the six respondent groups. 70 per cent of barrister respondents and 24% of solicitor respondents had applied for judicial office - a total of 75 respondents. (see table 2). Of the 85 respondents who had not applied or had been unsuccessful in their applications, 52 indicated that they would or might (re)apply in the future. Overall, therefore, 69% of the respondents had been candidates for judicial office or considered that they might be so in the future. Of the 75 respondents who had applied, 68% were successful or awaiting the outcome of an application. Of the 42 who had been appointed, 37 had been successful on their first application. In view of the fact that the average success rate for the 1998/9 competitions for judicial office was 17%, these respondents would appear to be disproportionately successful compared with applicants as a whole. It is possible that this difference may be the result of a greater willingness on the part of successful applicants to respond, though the discrepancy may be at least partially explained by the fact that some successful respondents may not have entered the dates of previous unsuccessful applications.

Applications and success rates for Silk

As with judicial office the extent of the respondents' involvement with the Silk appointments process differed widely. The main difference between the two being that less than half the numbers who had applied for judicial office had applied for Silk and all the applicants were barristers (see table 4). In total, 37 barrister respondents had applied for Silk. Of these, 26 were successful, 15 of whom were successful on their first application. As with applications for judicial office the respondents who had applied for Silk would appear to be disproportionately successful compared with applicants as a whole, since the average success rate for the 1989/99 annual competition for Silk was 15%. Again, it is possible that this difference may be the result of a greater willingness on the part of successful applicants to respond, though the discrepancy may be at least partially explained by the fact that some successful

respondents may not have entered the dates of previous unsuccessful applications. Of the 114 respondents who had not applied or had been unsuccessful in their applications, 53 indicated that they would or might (re)apply in the future.

Breakdown of responses according to respondent group

Respondents in each of the six categories were asked about their reasons for applying, or not, for judicial office and Silk and what could be done to encourage applications from candidates in their ethnic and gender group (white, male barristers were asked what could be done to encourage applications from well-qualified candidates). The breakdown of responses is set out in tables 6-11, appendix 2. The answers given on the questionnaire were explored in more depth in the interviews.

Minority ethnic male barristers (n.23)

Amongst the eight respondents who had not applied for judicial office, the reasons given were divided between personal and career factors, such as the needs of their practices, and lack of confidence in the appointments process. Amongst the 15 who had applied for judicial office, the most common reason given for applying was a belief that they were able and well-qualified and that they matched the selection criteria. Nine of the 15 respondents who had applied had done so either to test the Lord Chancellor's Department's commitment to change or because of a desire to improve the composition of the bench.

In response to the question of what could be done to increase applications from barristers from minority ethnic backgrounds, three felt that nothing more needed to be done. One respondent summarised this view in interview:

'I'm not sure anything much can be done because so much has been done already. I'm not sure there is anyone out there from an minority ethnic who could really say that applications are not welcomed. They are advertised, there are speeches by the Lord Chancellor which certainly say that applications are welcomed.'

At the other end of the spectrum, there was a body of support amongst the interviewees for structural change through a judicial appointments commission. Most respondents stressed the need for a diverse membership:

'I think it should be a cross section of members. Certainly there should be some judicial element to it. There should be judges, a member from the Race Relations Board, members from the Crown Court Users Committee, members of the Bar - it should be wide.'

'It's the composition which is important. If the system is going to be replaced by an interviewing panel and just change the name to a commission you've done nothing productive really.'

In between these two extremes, there was support for a variety of detailed changes. The appointment of more minority ethnic candidates, greater openness and objectivity, less reliance on consultations and the need for better communication and active recruitment policies by the Lord Chancellor's Department were the most commonly proposed changes:

'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 anybody who is perceived as not being a "safe pair of hands".'

Although most respondents were supportive of the initiatives undertaken by the Lord Chancellor's Department to encourage more minority lawyers to apply, a number of respondents expressed the view that they failed to address the real problems which concern discrimination in the legal profession, usually indirect:

'Its not enough for the Lord Chancellor's Department to say "don't be shy, apply". It can't be taken to be a serious statement. It seems to imply that members of the ethnic minorities are shy people. When they have to put up with what they have to put up with day in and day out living in this country I don't believe they can be called shy! So that's not the reason ...My real concern is, is there an equal or flat playing field? And there isn't.'

'In some places out of London where there are smaller populations of blacks and Asians, although you can't prove it, I think there is a subtler racism, not direct discrimination. I have a good working relationship with solicitors in this area'

because I am always doing the jobs that the white barristers turn down. So why don't they offer me work instead of first waiting for a white barrister to turn it down?'

'Clearly there are first tier chambers, second tier chambers and third tier chambers and they have more minority ethnic members further down the scale...its racial discrimination, its part of the system...ethnic minorities have a difficult time getting into more established traditional sets. The one starting function is where they went to university, clearly the bar is traditional, it helps to have a public school background, Oxford background. So a limited number of minority ethnic people have a public school, Oxford background.'

Three respondents in interview also included the government in the category of those exercising indirect discrimination for failing to initiate active measures to ensure that minority lawyers were regularly instructed by the Crown Prosecution Service and government departments:

'The CPS made a commitment to the Bar Council that they would ensure that 5 per cent of their work went the minority ethnic barristers...Never happened. The difference between empty statements and practice.'

The dominance of a small group of chambers was a common concern both in London and elsewhere:

'...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 the sounding are going to those chambers and so you are in direct competition with their pals from their chambers - so who are they going to support?'

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. On thing the Lord Chancellor's Department could do is start spreading the message that it doesn't matter which chambers you belong to. I've heard clerks from one establishment set saying "in our set we only apply once". That just shows that there is something wrong with the system. How can you have that confidence? The privilege should be gotten rid of. No privilege for belonging to a certain set of chambers.'

'There are certain limited sets of chambers where Treasury Counsel and Silk come from. Now I cannot believe that all the talent is just there. There has got to be something else and maybe its just connections and influence, which is quite wrong. Its wrong for the wider public because their talent is lost and its wrong for the justice system because one should be making appointments on merits and on nothing else.'

Other respondents described the problems faced by those in 'ghetto' chambers:

'You know its like an old fashioned class or caste system, it really is. I happen to be in the top class chambers and therefore the work that I get is fine. But if I were in one of the lower chambers which didn't have the sort of calibre or reputation that these chambers enjoy I just wouldn't get some of the quality work'.

'It's a vicious circle. Black and Asian barristers don't get the work because they are considered to be incompetent and because they don't get the work they are considered to be incompetent.'

'If I had started off in a ghetto sort of chambers, I would not be where I am today. Those sort of chambers lack the proper infrastructure such as the quality of clerking, the library facilities and the kind of people you can go to for advice. You just don't have the right connections there. Its highly unlikely you would meet a High Court judge or circuit judge in a social setting whereas you will in other high-flying chambers'.

The common theme running through these responses was the existence of a number of different points in a career at the Bar at which discrimination can play a part. These included social and educational background, legal training, obtaining pupillage, obtaining tenancy and obtaining work from solicitors. Although all interviewees mentioned some form of barrier, some stressed that they were not insurmountable:

'I personally feel that if you are good enough the chambers and your own background don't matter - you'll get what you want. I know that it is a generally perceived view that the chambers you are in is important but I started in very mediocre chambers and worked my way up'.

A recurrent theme expressed in interview was the need to be 'known' by the right people in order to be successful in the consultations process:

'Its still very much who you know, not what you know. Not how good their practices are, not necessarily how experienced they are, not necessarily how good even their legal skills are.'

The importance of social contacts in affecting an applicant's chances of success in relation to Silk and judicial appointment was stressed by a number of respondents, with differences of opinion about how minority ethnic barristers should respond to this issue:

'On the application form it indicated that the leader of the Circuit, certain local senior judges and certain Bar Associations are sounded out as to their views, I

assume, relating to my application. If that had been done they would have got very little feedback indeed because I do not socialise a great deal, if at all, as a barrister. I don't go to Bar messes, I don't go to annual dinners, I don't go to the pub, I don't go drinking, I haven't been to the same schools, or the same university as most of them. So I believe that when they were asked the question "what are your views about Mr [X's] application" the response from most of them would have been "well, who's Mr [X]?"

'If I socialised and I went to the Bar mess and I went to the big dinners and I drank and I did all the other things they do, it might be different. But I don't.'

'You've got to know how to play the game right. Black people have got to know how to make use of certain social occasions...Its all about networking and black people have got to learn to play this right. Where are the opportunities if not in the social clubs?'

One respondent who had been appointed to judicial office highlighted the difficulties faced by those applicants whose work takes them to a variety of courts so that they are less visible to the consultee judges:

'...there was a long period when I was involved in arbitration and therefore was not getting that regular exposure in the commercial courts as a junior so that the judges who had a run in the court then saw less of me and when they got promoted to the Court of Appeal and saw my name they didn't know me. I don't know whether that is right but it is the feeling that I had that in other fields if you don't have the advantage of appearing in a court in which you are known but you are from a court or circuit from a different part of the country then there is going to be something of a lottery as to whether you come before judges who are on the list of those who are consulted or who take an interest in the process and respond with their comments'.

Another interviewee expressed his concern about the continued lack of openness in the system:

'...it still seems to be a bit of a mystery as to how they do the consulting. Although they tell you in the booklet that "what we will do is circulate your name and presiding judges will be asked to comment". But I don't know who has responded and so when they say there hasn't been much response you feel like saying "well why don't you speak to so and so and so and so and they will tell you about that case". But you can't do that.'

While there was universal support for the use of advertisements and an open applications process, a number of respondents expressed the view that it was

important that minority lawyers were also asked to apply, as one interviewee explained:

'Under the old system not enough people from an ethnic background were appointed and under the new system not enough people from an ethnic background are appointed. It shows that neither system may be the right system. Maybe there should be a bit of mix and match, saying, "well look, this person has not applied but I have seen him and she/he is good and lets get them to apply".'

'...coming for the ethnic minorities as I do we are up against it all the time and it makes you that much more determined to make a success of it...so we've made it against the odds. They should recognise those qualities and encourage people and push them through. The best example for youngsters is to see people like me in positions of authority. I mean, if you are travelling around the country you are a walking advert for the system. So that is the area they have got to look at and really push people through. They should actually come looking for people rather than saying "well, we have sent these leaflets out and the initiative is for you".'

Most respondents who discussed the system of obtaining feedback from the Lord Chancellor's Department after rejection spoke positively about the process, and those who had used it had found it helpful. However, This group of respondents also expressed more scepticism about the feedback system than any of the others. One respondent, for example, explained that there was also a fear that seeking such information might affect an applicant's future prospects:

'From some of the barristers I know I understand that there are secret files kept on us and so we are frightened that a note will be put on your file saying "keeps ringing up every year to find out why he didn't get the job" ...and you may not get called to interview ever again.'

Another interviewee confirmed that he had not sought feedback because: 'I didn't want to spoil my chances in any way for the future'. Those who had been interviewed for judicial appointment were generally supportive of the process as hard but fair:

'...it wasn't an easy interview. It wasn't an unpleasant interview. They were difficult questions and if you weren't prepared for them and you didn't give the right answers you wouldn't be appointed. That's the impression I got.'

Overall, the replies indicate a group of applicants who feel they are well qualified for the judiciary and want to contribute to the legal system, particularly in terms of promoting diversity, but who do not necessarily see judicial office as a natural career step which is open to them.

In relation to Silk, the most common reason given for not applying was that their practices did not justify it and/or that it would reduce their earnings. The three respondents who had applied did so because their practices were ready and it was a natural career progression. Two respondents expressed the view that nothing needed to be done to increase applications from barristers from minority ethnic backgrounds and that the system worked well. The remaining respondents proposed a wide variety of changes, many similar to those suggested for reforming the judicial appointments process, such as greater openness and objectivity in the selection process and specifically inviting candidates from minority ethnic backgrounds to apply. In general, the Silk appointment process appeared to be viewed significantly less favourably than the judicial appointment process. One respondent who had been appointed to judicial office explained his decision not to apply for Silk:

'I don't know what the criteria are for Silk. The criteria for judicial appointment are clear. They are very well set out. Maybe there is a document somewhere that I haven't seen but it seems to me that it depends on who you know, what committee you sit on rather than anything else. There doesn't seem to be a system of interview in the same way. It seems to be on general reputation and I think that is very unreliable'.

While most of criticism was directed at the appointments system, some respondents identified failings in the legal profession, such as the poor quality of work which lawyers from minority ethnic backgrounds are given. In contrast to the women respondents, there was greater support for some form of positive action to improve the representation of minority ethnic lawyers in the profession and the bench, as summed up in the following comment in interview:

'Some years ago it was mooted that, for example, 5 per cent of all members of chambers in any given set should be from the ethnic minorities. Anthony Scrivener came up with that when he was chairman of the Bar in about 1993. At that time I was, in fairness, against that because I didn't think it was a merit based system. But

actually thinking about it, I now think that he had a great deal of foresight and was right because he knew that was the only way to change the system'.

This difference between women and minority respondents is a general reflection of the higher levels of disillusionment with the system which emerge from the responses in this category and a perception that while women are making some progress, minority lawyers are still largely side-lined.

Minority ethnic female barristers (n.8)

The low response rate from this group resulted in only a limited amount of data from which to analyse the views of the respondents. Although it is only possible to speculate about the reason for the low response rate, it may, in itself, be informative. It is possible that minority ethnic female barristers perceive themselves as particularly marginalised from the appointments systems and therefore felt no impetus to engage with research in this area.

Most of the responses which were received were in general terms similar to those made by their male counterparts although the most critical comments came from this group with an apparently higher level of pessimism about the prospects for change. One respondent, for example, described the Lord Chancellor's Department reforms as 'a complete white-wash. New Labour appeal.'

Of the eight replies received, six had applied for judicial office and two had applied for Silk. The main reasons given for applying for both were similar to those of minority ethnic male barrister - that they felt themselves to be able and well-qualified and had something to contribute and that their practices warranted it. The six who had not applied for Silk had not done so because they viewed themselves as being too junior or lacking the necessary practices. Similar criticisms were expressed in interview about the problems of obtaining sufficient quality work, the need to be 'known' and the importance of being in certain chambers:

'If you are in the right chambers it does count. You have the support of the powers that be'.

'It all comes down to the chambers you are from honestly. I can't pretend I don't know that.'

The need for openness was a strong theme in the replies:

'The only way I can see [for improving the system] is an open appointments system...when you go to the Lord Chancellor's Department they say they show you the file but they don't let you read it, they read you what's in it. A lot of people who have been there say they believe what is said to go on is not what goes on really. If the system was open, it would make people feel more comfortable applying.'

White female barristers (n.38)

The demands of practice was the dominant reason cited by the thirteen white female barrister respondents for not applying for judicial office. Lack of confidence in their chances of being taken seriously was the second most common reason. Lack of interest in judicial office were cited by three respondents. Like their male, white counterparts, the most common factors in their decision to apply for judicial office were that it was a natural step in their career; that they had an interest in judicial work and a wish to contribute to the legal system. Six had applied because they were invited to by the Lord Chancellor's Department or had been encouraged to apply by the Lord Chancellor's Department or judges.

A strong theme running through the replies was the problem of balancing work with the needs of their families. Three respondents cited family responsibilities as a reason for not applying for judicial office while three who had applied cited the compatibility of judicial work with family responsibilities as one of their reasons for applying. Factors such as the need to travel on circuit as a High Court judge were mentioned as barriers:

'Although I travel a lot with my work I am in control of that somehow. I wouldn't be in control if I had the Lord Chancellor's Department telling me that for six months of the year I had to be out of London. That to me would be a disadvantage of being a High Court judge and that's one of the reasons I wouldn't want to do it to be honest. If I didn't have a family I think maybe I would feel differently but I don't think it is very compatible with family life.'

The responses included 13 proposals for increasing the numbers of women barristers applying for judicial office, including family friendly policies such as flexible holidays, flexible sitting schedules, local sittings and consideration for career breaks. These were also advocated as a way of encouraging a better quality of male applicant:

'If they did that, they would find not only more women applying but they might also find more family orientated men applyingrather than people who wouldn't be too bothered if they didn't see much of their family. I think men as well as women don't like the child problem and if you have a young family it can be quite tough. If they want to encourage younger applicants, that's one way of doing it'.

In addition to these changes, 13 argued for greater openness and information about the judicial appointments process. In interview one respondent summarised the process as: 'a closed culture dominated by an inner circle'. In interview, there was wide-ranging support for the creation of a Judicial Appointments Commission:

'There should be a commission separate from the Lord Chancellor's Department and it should have a lay element and it should be done on a proper selection basis like people get selected for employment elsewhere.'

Five expressed the view that there was sexism and discrimination in the system of appointment and the profession which needed to be eliminated. There was general expression of support for the changes which had already been introduced such as advertising of jobs and the production of information by the Lord Chancellor's Department about the process. Those who mentioned the interview process expressed mixed views; some were in favour of using interviews more extensively, some against.

Five respondents argued that there was a need to invite women to apply and to encourage women generally to come forward (see Table 8). Two interviewees summarised the recurring concern about the need to encourage applications without promoting tokenism:

'I remember a couple of years ago receiving this notice about encouraging more women to apply. its very difficult to persuade women that you're not looking for tokens...because nobody wants to be a token. So its actually about coming up with a

system where there is a genuine cultural change where you feel that there are objective criteria and you are being taken on your merits'.

In interview, many respondents noted that there was a tendency for male applicants to consider that women were at an advantage in the system both for judicial office and Silk:

'The difficulty is there just because there are so many applicants for so few places as Assistant Recorder. There is inevitably going to be a degree of bitterness and blame - "so and so has got it, she's a woman, why didn't I get it?" I think it's school boy stuff. I think it shouldn't really be taken seriously.'

'I have actually had people say "Have you applied for Silk because these days any woman at the Bar who applies for Silk should be able to expect to get it' and other people say "Have you ever applied for Silk? If you get it, that's wonderful, but can you really live with the fact that you will have been appointed because you are a woman?"'

'...there is usually more publicity given to the appointment of female Silks than there is to male Silks which creates the image that you are only there to be the Lord Chancellor's token woman and I think that is such a negative feature.'

Five suggested that the requirement that Assistant Recorders sit in criminal cases should be removed. In interview, a number of respondents specifically highlighted this as a deterrent to applying and sometimes linked this to the question of confidence:

'Men seem to be more willing to jump in. They always think they can do everything. Women, I think, tend to be less confident. I am not suggesting that I am less able than them but I don't think that civil practitioners are particularly well suited to the work and it is something wrong with our system'.

Some pointed to barriers in the legal profession such as the way in which clerks' allocated work in chambers and the tendency for women to be directed into particular areas of work such as family law.

While most respondents argued that there was a need for change to the system, six expressed the view that nothing needed to be done to encourage female applicants, stressing that the decision to apply was a purely personal one, as summarised by one interviewee:

'I don't accept the thesis that hundreds of women would apply for judicial office or Silk if only they were encouraged. There is nothing to stop those who want to apply from applying. There is no need to think that women need special help.'

Others, however expressed the view that women were more likely than men to lack confidence in their abilities:

'Men and women approach things differently. Men look down a list of criteria and say "yes, that's me". But women are more circumspect. Women need more encouragement than men do. You don't see yourself as having the qualities...Women want to be sure before they apply whereas men will take a punt'.

This lack of confidence was sometimes attributed to a lack of role models:

'I would have thought that the more women there are appointed the more women are likely to apply because they will see the role models and they may think that it is not a hopeless sexist institution'.

In common with barristers from minority ethnic backgrounds, five respondents expressed criticisms of the consultation process. The self-perpetuating nature of soundings was mentioned:

'...it just reinforces the current model of the judge because it is almost human nature to approve of people who resemble oneself. It is insufficiently objective and insufficiently open minded and prefers people of the same mould. PLU - people like us.'

A recurring theme in such criticisms was the need for networking and being 'known' in order to be appointed:

'I think that, to a large extent, it still matters who you know and who you bother to spend time cultivating. If you are interested in your profession just as your profession and you don't want to spend lots of time socialising with people or running round in meetings for different associations, I think it is harder to advance...the reality is that all of these judges come from certain chambers and to a greater or lesser extent maintain ties with people in chambers. And to that extent its not simply about appearing before them - life is much easier if you also come across those judges socially.'

'It goes to how they select - by sending lists to the great and the good. If you don't happen to know anyone in those circles it works against you. Your name doesn't get any ticks because noone knows you. You put yourself in the circle if you are in the

right chambers. The thing is that getting into the right chambers starts as far back as pupillage. You only have to look at who gets in - if you are the child of a judge or one of the senior lawyers or a judge writes to the chambers at the same time as you are applying. It still goes on, however much they say otherwise. So if you don't go to Oxford or Cambridge, if you are not in the right chambers, the whole thing perpetuates itself in the later stages of your career'.

'I am sure that there is a certain amount of politics and people get involved in the Bar Council and all that sort of thing to promote themselves and show that they are "jolly good chaps". But if you are busy trying to do a practice and sort out your family you haven't got time for the garden parties and the politics. Really the family ought to come first before the garden parties and the politics'.

Some women also expressed the view that gender was less important than being an insider:

'...its not a problem with being a woman, its more to do with being establishment - the fact that you can network and are the sort of person who fits the establishment picture'.

'If you look at the very senior ladies in the law they all come from great families in the law. We need a few that are not like that. I'm not saying they are not good at their job but it just helps to promote this little circle of jobs for the establishment.'

The importance of networking was related to the effect of expansion in reducing the likelihood of appearing before a judge who will be consulted about your abilities:

'You do your best when you appear before the judges but for any individual judge who is going to be able to assess you, you're lucky if he has seen you once. I Often hear from members of the Bar, not just from women, that the judges who have to assess whether or not they are qualified for Silk or judicial office don't know who they are.'

In common with many of the other groups, a number of respondents criticised the assumption underpinning the current system that good advocates make good judges:

'One thing I feel very, very strongly about, and is possibly a good reason to create a [judicial appointments] commission in which its not just judges who select, is that the best barristers do not necessarily make the best judges because the field is completely different. What makes a good judge is having good judgment, having a feel for people and their problems and being able to be user-friendly and barristers aren't like that - that's not what makes a good barrister. I've seen time and again barristers who are very successful get appointed... and people are relying on them to understand their needs and judge the case fairly and they can't because they don't have the skills.'

'I am not sure that success at the Bar should be rewarded by High Court appointment. Surely you need to have some brains but it doesn't seem to me that the big earners and the leaders in their field necessarily make the best judges.'

Some respondents also suggested that the possible range of career paths into the judiciary should be opened up by placing more value on posts other than Assistant Recorder:

'I was very put off applying to do tribunal work at one of the dos where I said "what about doing this" to a male official and he said "yes, if you are a second rate practitioner" or something like that... Clearly being an Assistant Recorder carries a lot of status and so on but these other posts do not.'

The most common reason given for not applying for Silk was that their practices did not justify it or that they were too junior. In three cases the effect of maternity leave on their seniority was specifically cited as a factor. As in relation to judicial office, the issue of confidence was raised in interview:

'...if you ask women in this chambers who are Silk quality why they don't apply they tell you that they don't think they are good enough'.

'If we keep apologising for the fact that we are women then we are never going to change anything. Women are generally self-apologetic in thinking that if they don't get it, then they must not be good enough'.

The most common reasons given for applying for Silk were that their practices were ready, that they had too much work and that it was a natural career progression. Three had been advised or encouraged to apply and two considered that the Lord Chancellor's Department was looking for people like them.

White male barristers (n.25)

Of the six respondents in this category who had not applied for judicial office, only one was deterred by an aspect of the appointments process in that he had not seen the relevant advertisements. One respondent summed up the reasons why many senior, successful barristers no longer aspired to the High Court bench:

'The pay is lousy, the perks aren't worth having. Duty carries you so far, but not all that far and we've all got young families and lives to carry on with and we don't want to be sent to Truro for two months'.

Of the remaining nineteen who had applied, the most common reason given was personal ambition and the view that applying for judicial office was a natural career move. Eleven respondents also referred to a wish to contribute to the legal system and an interest in the work of a judge. In response to the question of what could be done to encourage more well-qualified candidates to apply for Silk and judicial office, most respondents cited the need for more openness and information and more direct encouragement to apply. In interview respondents elaborated on the problems of the tendency to recruit from particular chambers:

'If you are in more fashionable chambers you have got more chance of appointment in my view...You look at chambers like this one - big chambers... in some of the big chambers the appointments follow - you look down the list, one after the other after the other. Its probably even more so in London.'

The importance of informal connections were also noted by another respondent:

'It is astonishing sometimes to look through legal catalogues and Bar lists and see how many sons of judges there are. You know the nepotism - its quite incredible really and its obviously what's been going on over the years.'

'I think the trouble with the system in the past was that a great many appointments to Silk were made because someone was in the right chambers or had the right contacts. The new system [of open applications] won't completely eradicate that but it gives people a fairer crack at the whip'.

When asked about the proposal for creating a Judicial Appointments Commission there was general support for the idea, contingent on its membership:

'I would be in favour of an appointments commission, as long as the right people were appointed. If it would be part of the process to make it more public and less mysterious, then it should be encouraged'.

However there was also scepticism about its ability to change the system:

'Under the present system it's the Lord Chancellor's chums who get the leg up, in the other system it would simply be the Chairman of the Judicial Appointment Commission's chums.'

Five respondents also suggested the need for better pay and working conditions. Two respondents suggested reforming the consultations process and two respondents expressed concern that system positively discriminated against white males.

Despite these criticisms, white, male barristers were broadly accepting of the current process:

'I'm a little bit sceptical about the Lord Chancellor's Department initiatives. I can't help thinking that behind the scenes the thing is working in exactly the same way as it always has...I am not an opponent of the system in the sense that in an essentially self-regulating profession like the Bar and the Bench the best way of choosing the best candidate is probably a system not far from the present system.'

Generally, there was a tendency to be more sympathetic than the other respondent groups to the need for confidentiality in the system:

'If you really want to know what people think and to get them to express their views, then those views should be kept confidential otherwise you would be restricted in saying what you really think. But I think it should be kept to a bare minimum, the confidentiality aspect.'

There was also more confidence in the ability of the informal Bar networks to identify and weed out inappropriate candidates:

'The fact is that if somebody, let us say, has got racist or fascist views it is inconceivable that that isn't going to become known at the Bar - he's not going to keep it to himself. We all know each other terribly well and the judges know us terribly well...everybody gossips like crazy of course and everybody knows everybody else's weak points so its very transparent within the system.'

A number of respondents also emphasised the extent to which the consultation process had improved:

'I think in the past consultations has been a little narrow and have been dependent on a few views here and there. But I think that the wider the consultation will gain more recognition for the practitioners in the smaller chambers.'

Most respondents were supportive of the fact that unsuccessful candidates could obtain feedback on why they were not appointed. Two respondent suggested that this development should be taken further and that all unsuccessful candidates for Silk and judicial office should automatically get a written summary of the reasons for not appointing them:

'It would help in two ways. It makes the decision more open and remove suspicion and it also enables them to make career choices sensibly. If it's "we're very interested but we think that he is not in the first group and therefore he should be deferred", that's one thing. But if it's "we are concerned about some of his attitudes", that's another.'

'I think that if you are paying to apply you should actually get a report. There is no reason why you couldn't get one sheet of paper saying "you did not get Silk this year because..."'.

Reasons given for not applying for Silk were principally based on the nature of the respondents' practices, that they were too junior and/or because taking Silk would reduce their earnings. Those who had applied gave similar reasons as for judicial office - personal ambition, a natural career move and a wish to develop their practices.

Eight respondents expressed the view that nothing needed to be done to encourage well-qualified candidates to apply for Silk. The suggestions given for change included the provision of more information, greater openness and more feedback comments to unsuccessful candidates. In common with their answers about application for judicial office, white male barristers were the least dissatisfied with the system for applying for Silk of all the groups:

'I'm the wrong person to ask about the difficulties in applying for Silk. I mean in these chambers usually everyone gets Silk usually the first time of asking and everyone becomes made a judge. It is a sort of "golden road".'

As with responses in relation to judicial office there was a greater emphasis on the improvements in recent years. The following interviewee, although commenting that the new system 'still leaves a lot to be desired' highlighted the benefits of the reforms:

'The new process is fairer than the system that operated when I applied and got it...The competition is such that now you have to name referees who will support your application...now you can find out the reason for your non-appointment whereas before year after year people applied and didn't get it and didn't know why. It might have been because some Lord Justice had seen you when you were drunk at some function and that might count against you.'

Some respondents expressed support for the system whilst also recognising its potential for unequal treatment:

'I can see somebody maybe out of London, maybe from an minority ethnic thinking well who the hell do I get with an appropriate sounding handle [to act as a referee]? I think that in one sense the system does self-perpetuate and create a slightly oligarchic thing. On the other hand can you imagine a system such as Silk which didn't involve the provision of referees? Its difficult.'

White female solicitors (n.24)

The principal reasons given by respondents in this group (eighteen respondents) for not applying for judicial office were that their practices required time, that they did not have sufficient litigation experience, that they had no interest in judicial office or did not consider it an option for solicitors. A number of respondents elaborated on the problems which solicitors have combining judicial office with practice:

'Obviously if you are at the Bar you can't pick and choose but you can take down your workload to allow for a judicial appointments and that's your decision because you have your own practice. But when you are in a partnership it really has to be a partnership and so you know you can't decide that you are going to go off and spend 14 weeks to do judicial work and continue with the partnership. So its not an individual person's decision.'

Some respondents expressed the view that there was a hierarchy of candidates in the judicial appointments process which disadvantaged female solicitors:

'It probably goes male members of the Bar top, women members of the Bar, male solicitors, women solicitors - that's probably the pecking order.'

As with female barristers, a number of respondents mentioned the lack of confidence of women lawyers. One interviewee commented:

'...it is a peculiar trait of women that they are incredibly modest about their abilities, this is a sweeping sexist generalisation, but I have to say that the first time one of the Silks mentioned to me the possibility of applying for judicial office I said 'you must be joking!'. And I think that's the reaction of a lot of women. If you speak to women who have got a very successful practice at the junior Bar and say 'have you applied for Silk?' They say, 'No, not my cup of tea, I'm not good enough'.

In common with female barristers, family commitments were a recurring theme. Three respondents had not applied for judicial office for this reason. Suggestions for increasing number of applications for judicial office from female solicitors were similar to those of women barristers. In particular, the need for greater openness and more information. The current perception was summarised in interview:

'I think there is still the perception that applications disappear into a black hole and the manner in which soundings are taken is quite chauvinistic, old-boy network in its approach'.

'I think it's a sort of fear of the unknown in terms of people not knowing how the process works - what soundings are taken from whom. And the fear that you have put a foot wrong somewhere in the past and that's been noted somewhere and that's going to blight you forever. I think that if there was more openness in the process and the procedures then that would be extremely helpful.'

In interview a number of respondents supported the idea of a Judicial Appointments Commission made up of lawyers and lay people:

'I would include actual court users as well as court administrators. It shouldn't just be the judiciary and the Lord Chancellor's Department. People from very different backgrounds. Even people like Clare Rayner! People that come with a different perspective because the legal side is easy to test, you have either been a good practitioner or you haven't. But those aren't the only skills that should count.'

One interviewee already appointed to the bench stressed the continuing lack of knowledge about the process amongst solicitors:

'I'm amazed at how many people will come up to me at specialist employment law conference and ask how [the judicial appointments process] works and they will be senior people in the field and they've got no clue.'

Other respondents, particularly those with little litigation experience expressed a lack of knowledge about the system:

'I haven't seen anything about judicial appointments in the Law Society Gazette. I certainly wouldn't say it was pushed...So information would be useful. Encouragement would be useful.'

Others stressed the need to overcome cultural barriers:

'I really don't think it is part of a solicitor's culture so that would have to be overcome and a few seminars and encouraging solicitors to apply is not going to overcome that. But I think there are a lot of very, very able solicitors and those solicitors are applying for rights of audience and are much more in the culture of looking at and applying for judicial office.'

In response to these concerns, a common suggestion amongst respondents was for active recruitment policies on the part of the Lord Chancellor's Department and removing the need for Assistant Recorder to sit in criminal cases. The limited scope for specialisation was summarised by a family lawyer who perceived a tendency for the appointments process to appoint generalised litigators:

'I don't have a problem with the litigation - I have done it all my life. But I don't specialise in it any more. If they are appointing Deputy District Judges and 40% of the work load is family then they should be looking to appoint 40% of the people with family experience. But they are only asking questions in interview about all the other work ...which means that there is going to be a bias towards good litigators. Now some of the litigators do some family work but on the whole they are not going in the way that family lawyers are going and the way that Lord Chancellor's Department is pushing family lawyers to go.'

One respondent felt that the lack of specialisation affected the quality of the bench:

'...whilst on the whole the judges are very intellectually sharp and able to pick things up very quickly, you still have to do quite a lot of explaining to them if they have spent many years at the Bar doing one sort of work and they end up hearing a case about a different sort of work...I don't think that's in the interests of justice nor does it inspire confidence if the judge doesn't understand or even if he understands eventually, that it has taken an awful long time to explain it to him or her.'

Another respondent emphasised that women were more deterred by the need to undertake a wide range of judicial work than men because: 'Men seem to think they are specialists in everything'. One respondent, however, was more positive about her experience in undertaking judicial work in areas in which she did not specialise in practice:

'I put it down to fear. I have done family law for years and it quite surprised me how much I enjoyed doing all those things I had not done since university - contracts, consumer law. And the training is superb. I can't speak too highly of the training.'

Those who had applied gave similar reasons for applying to their male counterparts, drawing out both personal career plans and satisfaction in being involved in public service. One respondent summarised this feeling:

'I am well known and I enjoy doing something that I am an expert at and I have achieved that out of my career. But when I do judicial work it does feel more worthy, it feels like I am making a contribution. I enjoy doing it and intellectually I find it much more difficult.'

In common with male solicitors, none of the respondents had applied for Silk. The most frequently cited reasons for not applying were ineligibility and/or lack of advocacy experience. Four had never considered applying and five indicated that they considered solicitors ineligible for Silk. One respondent in interview when asked whether she has considered applying for Silk answered: 'Does that mean I can apply for Silk? I thought you had to be a barrister to become Silk, don't you?'

Other respondents tended to question the continuing need for Silk:

'I use Silks, and I don't actually see the point of Silks. I use them because I deal in that level of work and I need somebody very senior...It possibly influences the court and the other side if you've got a QC. But their seniority ought to speak for itself. I don't really see the point of it...I think its an irrelevance from the past.'

The 3 respondents who answered the question on what could be done to encourage more female solicitors to apply for Silk suggested that greater openness and more information was needed.

White male solicitors (n.18)

In common with female solicitor respondents, the main reasons given (by 14 respondents) for deciding not to apply for judicial office were lack of litigation experience, the fact that it was not a real option for solicitors and the needs of their practice. The senior bench, in particular was viewed as unattainable. One interviewee described the High Court bench as 'a closed shop to the bar'. In interview, respondents elaborated on the theme of openness, emphasising the need to widen the consultation process for solicitors and stressing the advantage that informal networking gave barristers in their contacts with judges:

'To ask judges what they think of candidates, they're far more likely to have been dining with the members of the bar on the list, had them in chambers, possibly had them as pupils, worked with them on cases when they were senior counsel before they were appointed. They're far less likely to know the solicitors on the list, and that's the way the system works'.

The need to be connected with those in power, and to avoid being known as a champion of the powerless was highlighted by one interviewee:

'Being connected with power is always the best thing to be, being disconnected is better than being connected with the powerless or the persecuted'.

In addition, and in contrast to the female solicitor respondents, three respondents stated that loss of earning was a relevant factor and four suggested that increasing judges' pay would encourage more applications from solicitors. One interviewee linked the need for a career progression from the lower to higher ranks with the potential pay-cut which solicitors often take on being appointed to the bench:

'If you're going to be asked to go backwards you have to have the possibility of going forwards again. It mustn't be seen as a cul-de-sac'.

The other common suggestions for change were similar to those put forward by female solicitors - that there should be more openness and information, more encouragement to apply and more specialisation in judicial work. The traditional prioritisation on those with strong advocacy skills was criticised by a number of respondents. One solicitor summed up these views:

'I sit as a judge...and I know that the process is very different from the process of being an advocate...being a very good advocate doesn't necessarily equate with being a good judge and there is no way of knowing whether someone is going to make that transition there or not...I think there is a lot of merit in people sitting part-time and it is one of the ways to deal with this. And there should be more training for part-time people.'

The four respondents who had applied for judicial office gave similar reasons as those given by barristers - as a career progression, out of interest in judicial work and to contribute something to the legal system.

None of the white, male solicitor respondents had applied for Silk. In common with women solicitors, the most common reasons given were lack of advocacy experience and the fact that it was inapplicable for solicitors. One interviewee dismissed the idea of solicitor Silks out of hand:

'I regard the ability to apply for Silk as absolute nonsense and as a sop really to try and keep the system going'.

Another described it as: 'a magic circle for the top echelons of the Bar'. Proposals for encouraging more solicitor applicants were similar to those given for judicial office - more information and encouragement.

6. DIFFERENCES RELATING TO GENDER, ETHNICITY AND PROFESSIONAL BACKGROUND

A number of differences can be identified between male and female respondents, both solicitors and barristers. On a detailed reading of the verbatim responses to the questionnaires twenty-seven women respondents referred to the problems of reconciling the needs of work and family in contrast to only one male respondent. This difference also emerged in the respondents' suggestions for change. The need for flexibility, for example in the timing of sittings and holidays in order to accommodate family responsibilities was almost exclusively proposed by female respondents. In contrast, the need for improvements in judicial pay as a way of attracting good candidates was suggested by male respondents only.

Female respondents also appeared to consider themselves less senior and to have less confidence in their prospects of success. From the questionnaires and interview data taken together almost all the responses which expressed a fear of failure were from women barristers while five female respondents suggested that women were more reticent about putting themselves forward for judicial office. The greater confidence of the male respondents appeared to be reflected in their different use of language. Seven of the male respondents cited 'ambition' as a reason for applying for judicial office or Silk in contrast to female respondents who were more likely to refer to 'career development/progression' as a reason for applying.

Differences also arose between white respondents and respondents from minority ethnic backgrounds. The latter were most critical of the appointments systems and more commonly stressed the need for change. Some of these concerns highlighted the presence of overt racial discrimination but more commonly the criticisms related to the indirectly discriminatory effects of the role of the consultation process and the advantages enjoyed by white lawyers who tended to be better connected. The extent to which ethnicity was an important factor in the decision-making of most of the respondents from minority ethnic groups was highlighted by the high proportion of respondents who cited the wish to test the policies of the Lord Chancellor's

Department or to improve the composition of the bench as a reason for applying for judicial office and Silk. Despite the generally negative view that minority ethnic respondents had of their prospects of success, 12 of those who had applied for judicial office did so because they believed that they were well-qualified and matched the selection criteria. This suggests that the respondents from minority ethnic backgrounds who had applied felt confident in their abilities but lacked confidence in the appointments system.

The most marked differences between the groups were the responses of solicitors and barristers. Amongst barrister respondents, both male and female, there was a widespread impression that judicial office was a natural career step. In contrast, the responses from solicitors suggested that they did not generally consider themselves qualified for office. Despite the fact that solicitors make up approximately half of judicial office holders, the responses indicate that there is a strong perception amongst solicitors that judicial office is still essentially intended for barristers with strong advocacy practices. The fact that the barrister respondents commonly cited a desire to 'contribute' or 'put something back' as a reason for applying for judicial office suggests that they have a greater sense of indebtedness or connection to the court system than the solicitor respondents. These differences between barristers and solicitors in relation to judicial office were accentuated in the answers to questions about Silk which showed that very few solicitor respondents regarded applying for Silk as a viable option for solicitors.

7. OVERVIEW AND CONCLUSION

The variety of responses both within and between the different groups suggest that there is a wide range of different factors which affect the decision-making process of applicants and potential applicants. Some of the reasons given as to whether or not to apply for Silk and judicial office were based on personal or professional factors which were unrelated to the appointments processes. For example, concerns about the way in which Clerks allocate work in chambers. Other factors related solely to the appointments process, such as the perceived effects of greater openness and active encouragement. A third category of factors was not directly related to the appointments processes but was strongly linked to them. In particular, the recurring theme that a determining factor in an applicant's chances of success is the chambers which she or he comes from. While this is a factor outside the control of the Lord Chancellor's Department the nature of the consultations process was identified by many respondents as being responsible for perpetuating this problem by disadvantaging those who come from chambers which do not include judges and QCs and so are outside the informal networking system through which consultees come to know about applicants.

While there were a wide range of issues raised in the responses, some distinct patterns and themes can be identified. In general, many respondents expressed the view that the quality of judges appointed was often high and had improved in recent years. There was widespread approval for the changes which have been introduced in recent years designed to increase openness such as advertising of vacancies and the production of job descriptions and selection criteria. In particular, the opportunity for feed-back after rejection was generally very highly praised as being useful and fair by many who had sought it. There was a mixed response to the use of interviews. Some felt they were a positive development, for example, one respondent, despite not having been appointed described the interview it as 'very fair, very thorough and quite demanding'. Others felt that they were superficial or irrelevant. A common response amongst those who had attended them was how stressful they found them, in the

words of one barrister interviewee: 'I found the interview surprisingly nerve-racking because I am not used to being interviewed and I think a lot of people felt the same'.

Although many of the respondents expressed some positive comments, the most notable feature of the responses taken overall is the high level of criticism of the appointments processes. The nature and extent of the concerns raised by the respondents indicate a significant degree of dissatisfaction with both applications processes amongst applicants and potential applicants. This dissatisfaction was greater amongst solicitors than barristers; female respondents than male respondents; respondents from minority ethnic backgrounds than white respondents and amongst those whose applications were unsuccessful than those who were successful. But despite these differences a number of common concerns were expressed by respondents in all these categories. 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.

The need for the active encouragement of good candidates and the adoption of processes which are, and can be seen to be, more open and objective were most commonly proposed as ways of improving the accessibility and fairness of the processes. The popularity of the idea of active recruitment policies as a means of encouraging applications from candidates in under-represented groups is an interesting one in the light of the Lord Chancellor's Department's policy decision to replace most of the previous system of 'invitation only' appointments by one of advertisements and open invitation. The findings suggest that there is support amongst applicants and potential applicants for a dual system in which appointment is made by open competition but that invited applications are used as a means of targeting well-qualified candidates from under-represented groups.

There was a general expression of support for the introduction of some form of judicial appointments commission across the groups. Although relatively few respondents raised the issue of a commission in the questionnaires, when asked what

they thought of the proposal in interview almost all approved of the idea. The reasons given for doing so were that a commission would provide a means of opening up the system and reducing the importance of the need to be 'known'. Those who supported it commonly expressed the view that its success or failure was dependent its membership. Most respondents favoured a broad range of members including judges, lawyers, lay people and civil servants though the exact membership proposals differed quite widely amongst respondents.

APPENDIX 1

QUESTIONNAIRES AND INTERVIEWS

Table 1. questionnaires sent and received and interviews conducted

	Number of questionnaires sent	Number of Questionnaires Received	Response rate %	Number of interviews conducted
Minority ethnic female barristers	36	8	22	2
Minority ethnic male barristers	64	23	36	13
white female barristers	75	38	51	13
white male barristers	48	25	50	8
white female solicitors	47	24	51	10
white male solicitors	50	18	37	6
Total	320	136	42	52

APPENDIX 2

BREAKDOWN OF QUESTIONNAIRE DATA

Table 2. Numbers of applications for judicial office and outcomes (percentages in brackets)

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male Barristers	White female solicitors	White male solicitors	Total n. %
not applied	2	8	13	6	18	14	61 (45)
Applied	6	15	25	19	6	4	75 (55)
Successful	2	7	16	11	3	4	43 (57)
Unsuccessful	4	4	6	7	3	0	24 (32)
Awaiting Outcome	0	4	3	1	0	0	8 (11)

Table 3. Intentions regarding (re)application for judicial office of respondents who had not applied or were unsuccessful*

	minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	Total
will (re)apply	3	10	9	7	7	3	39
will not (re)apply	3	4	7	2	11	8	35
Undecided	0	0	4	3	3	3	13

*totals do not necessarily match the figures in table 2 as some who had not applied or were unsuccessful did not indicate their future intentions.

Table 4. Numbers of applications for Silk and outcome

	minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	white male solicitors	Total
not applied	6	20	17	14	24	18	99
Applied	2	3	21	11	0	0	37
Successful	0	1	15	10	0	0	26
Unsuccessful	2	2	6	1	0	0	11

Table 5. Intentions regarding (re)application for Silk of respondents who had not applied or were unsuccessful*

	minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	white male solicitors	Total
will (re)apply	4	14	6	9	1	0	34
will not (re)apply	2	6	7	2	16	12	43
Undecided	0	1	7	4	2	5	19

*totals do not necessarily match the figures in table 2 as some who had not applied or were unsuccessful did not indicate their future intentions.

Table 6. Reasons given for not applying for judicial office

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	Total
No. of respondents	2	8	13	6	18	14	61
no interest in judicial office		2	3	2	6	2	15
practice requires time		2	5	1	5	2	14
not considered it/not a viable option for solicitors					6	4	10
Insufficient litigation experience					3	6	9
unlikely to be taken seriously	1	2	5				8
Family responsibilities			3		3		6
loss of earnings					1	3	4
not sufficiently well-connected		1	1		2		4
too junior	1	1	1		1		4
dislike judicial culture			1		1	1	3
haven't seen relevant advertisements				1	2		3
Requirement to sit on criminal cases			2				2

Table 7. Reasons given for applying for judicial office

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	Total
No. of respondents	6	15	25	19	6	4	75
Career progression / ambition / step to full time appointment	2	4	12	14	2	1	35
to make a contribution / put something back	1	4	6	6	1	2	20
matched the criteria / well qualified / had ability	4	8	2	4	2		20
interest in judicial work		3	4	5		2	14
improve composition of bench	1	6	1				8
invited to apply	1		4	2		1	8
Encouraged to apply by LCD / judges / colleagues	2	3	2	1			8
change career focus			2	3	2		7
to gain experience in specialist area			2	1	2		5
Compatibility with family responsibilities			3				3
a challenge		1	1	1			3
test the system / lcd commitment to diversification		3					3

Table 8. Proposals for encouraging more applicants from each respondent group to apply for judicial office*

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	total
more openness/objectivity	2	10	13	5	9	9	48
appoint more candidates from under-represented group	3	5	6			2	16
reform consultation process	2	6	5	2			15
invite individuals to apply	1	3	5		5		14
remove requirement to do crime			5	2	2	2	11
nothing needed		3	6	1			10
more encouragement to apply from LCD/profession/judiciary	2	2		3		4	11
more flexible holidays/sittings			8	1			9
change of attitude of LCD/profession/judiciary			6		2		8
increase pay				3		4	7
give reasons for rejection		3		3			6
reform the legal profession		4					4
more consideration for career breaks/maternity leave			4				4
better working conditions				4			4
permanent part-time contracts					2		2

* This table reports answers from 48 respondents. Many respondents made more than one proposal.

Table 9. Reasons given for not applying for Silk

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	total
No. of respondents	6	20	17	14	24	18	99
too junior	3	4	8	4	1		20
practice/ability doesn't justify it	1	7	7	2			17
would reduce workload/earnings	1	3	2	4		1	11
Inapplicable for solicitors					5	5	10
don't earn enough	1	2	4	2			9
do little advocacy					4	4	8
wouldn't be appointed		1	1	1	2	1	6
never considered it					4		4
not part of the consultation network		3					3
only those from London city firms get appointed			1			2	3
no interest		2				1	3
more advocacy would put strain on family	1		1	1			3
criteria not clear enough to know if I would be appointed		2					2

Table 10. Reasons given for applying for Silk

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	total
No. of respondents	2	3	21	10	37
practice ready	1	2	8	2	13
career progression		1	7	3	11
to develop practice			2	4	6
to limit caseload		1	4	4	9
advised/encouraged to do so			3	1	3
wanted the challenge			2	1	3
had ability			2		2
thought Lord Chancellor wanted to appoint women			2		2

Table 11. Proposals for encouraging more applicants from each respondent group to apply for Silk

	Minority ethnic female barristers	minority ethnic male barristers	white female barristers	white male barristers	white female solicitors	White male solicitors	Total
more openness/objectivity/clearer criteria	3	5	6	3	3	4	24
nothing needed		2	6	8		1	17
more encouragement to apply from LCD/profession/judiciary		3	1	4		3	11
appoint more candidates from respondent group	1	3	5				9
reform consultations process		2	4	2			8
invite individuals to apply	2	2	4				8
Reform the legal profession		2	5				7
Change of attitude in LCD/profession/Judiciary		1	2				3
Create more Silks		2		1			3

**FACTORS AFFECTING THE DECISION TO APPLY
FOR SILK AND JUDICIAL OFFICE**

Based on data from questionnaires and in-depth interviews, this research identifies factors which influence the decisions of women lawyers and lawyers from minority ethnic groups when considering whether to apply for Silk or Judicial Office. The findings show that despite general support for recent reforms introduced by the Lord Chancellor's Department, there remains widespread dissatisfaction with the continuing effects of indirect discrimination and patronage in the legal profession and that there is a perception that there is a need to be 'known' through informal networking in order to succeed in the consultation process.

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