



Ministry of  
**JUSTICE**

# **Appointments and Diversity: A Judiciary for the 21st Century Government Response**

Equality Impact Assessment

May 2012



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## Introduction

- 1) These policy proposals concern a number of measures to improve the end-to-end process for selecting and appointing members of the judiciary.
- 2) The current process for judicial appointments was established under the Constitutional Reform Act 2005 (the "CRA"). While the Lord Chancellor continues to make appointments and recommendations for appointment to the Queen, responsibility for the selection of judges was moved to an independent Judicial Appointments Commission (JAC). The JAC began operation on 4 April 2006.
- 3) The Government reviewed the judicial appointments process in 2010. The review found that the JAC is a well-respected body which has brought openness to the process, and recommended that the JAC be retained. The review made recommendations for changes to the process, many of which could, and will, be implemented within the current statutory framework. A number of other recommendations concerned constitutionally significant issues, which would require legislative change to address.
- 4) The Government is committed to increasing the diversity of the judiciary. A judiciary which is visibly more reflective of society will enhance public confidence in the judiciary and in the justice system as a whole. Minister of State for Justice, Lord McNally, has written<sup>1</sup>: "Public confidence will be strengthened by having a judiciary drawn from across our communities. Those who sit in judgment in our courts, from the Supreme Court to the magistracy, should be felt to bring a wider breadth of social experience, as well as knowledge and prudence."
- 5) The findings of the Advisory Panel on Judicial Diversity, published in 2010, included 53 recommendations for action which, if implemented, could accelerate progress towards a more diverse judiciary. In May 2011, the Judicial Diversity Taskforce reported that some progress has been made towards implementing the Panel's recommendations. In some cases, however, statutory barriers exist.
- 6) A MoJ consultation on delivering changes to the process for appointing judicial office holders and measures to increase judicial diversity was published on 21 November 2011 and closed on 13 February 2012. It invited comments on the Governments proposals for amending the statutory and regulatory frameworks for judicial appointments. The aims of the proposals included:

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<sup>1</sup> [www.guardian.co.uk/law/2011/may/09/judiciary-becoming-diverse-slowly](http://www.guardian.co.uk/law/2011/may/09/judiciary-becoming-diverse-slowly)

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- achieving the proper balance between executive, judicial and independent responsibilities;
  - creating a more diverse judiciary that is reflective of society and appointed on merit; and
  - delivering speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer.
- 7) In addition to the above proposals, the following proposals which were not included in the consultation will also be taken forward:
- amend existing legislation relating to the number of UK Supreme Court judges; and
  - allow for more flexible judicial deployment between courts and tribunals.
- 8) This equality impact assessment (EIA) covers a number of proposals that we intend to take forward following this consultation, and should be read alongside the Government response document and the impact assessment (IA).

## **Equality duties**

- 9) Under the Equality Act 2010 section 149, when exercising its functions, Ministers and the Department are under a legal duty to have 'due regard' to the need to:
  - eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
  - advance equality of opportunity between different groups (those who share a protected characteristic and those who do not), and
  - Foster good relations between different groups.
- 10) Paying 'due regard' needs to be considered against the nine "protected characteristics" under the Equality Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment and pregnancy and maternity.
- 11) MoJ has a legal duty to investigate how policy proposals are likely to impact on those with the protected characteristics and where a potential disadvantageous effect is identified how that is either mitigated or justified by reference to the objectives of the policy. MoJ also has a legal duty to advance equality of opportunity in the design and delivery of its policies and practices.

## Summary

- 12) This EIA has been produced in support of the Government Response to the recent consultation and reflects those proposals that are being taken forward following the consultation. These policy proposals concern a number of measures to improve the end-to-end process for selecting and appointing members of the judiciary.
- 13) We have considered the impact of the proposals against the statutory obligations under the Equality Act 2010. Those are outlined below.

### *Advancing equality of opportunity*

- 14) We have put some of these proposals forward with the explicit aim of promoting equality of opportunity for everyone. We therefore view all of these proposals as having a positive or neutral impact on the advancement of equality of opportunity in the appointments and selection process.
- 15) The following proposals are anticipated to explicitly deliver positive outcomes for those with protected characteristics, or to increase the transparency of the process:
  - **Remove barriers to salaried part-time working in the High Court and above (including the UK Supreme Court)** – this change may lead to an increase in applications for High Court office from under-represented groups. The availability of salaried part-time working provides an opportunity to people whose personal circumstances may prevent them from working full-time, particularly those with caring responsibilities, or those who choose not to work full time for any other reason. This measure is more likely to positively affect women since they are usually more likely to work part-time than men.
  - **Enabling the JAC to use positive action provisions ('tipping point')** – enabling the use of Equality Act 2010 'tipping point' principles would retain the fundamental principle that judicial appointments should always be made on merit. However, where two candidates are essentially indistinguishable, then any of the nine protected characteristics could be applied to decide who to select for appointment. The explicit application of the Equality Act positive action provisions to the selection process would be a powerful statement and an enabling tool that could increase the diversity of the judiciary.
  - **Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981** – it is expected that increased JAC involvement in the appointment process for temporary deputy judges of the High Court and in the selection process to make requests to Circuit judges or Recorders to sit in the High Court will improve

candidates' confidence in the process and will increase transparency in these appointments. This may reassure the public that all requests and appointments are made fairly through a transparent selection process. There is a range of research evidence to suggest that the creation of the JAC has been a positive development for equality, and thus increased JAC involvement in the appointments process for deputy Judges of the High Court and requests to sit in the High Court may improve perceptions amongst some protected groups.

- **Composition of selection panels and Lord Chancellor role** – the proposals are to allow for more flexibility by allowing the processes to be determined by secondary legislation and also to make a number of specific changes to the existing processes to ensure the correct balance of roles between the executive, judiciary and independent appointment bodies, including making the Lord Chancellor's role in senior appointments more significant, as it is appropriate for the executive to have an input to provide accountability for the appointments to Parliament and to the public. These proposals have the potential to improve public confidence in the openness and fairness of the process, as they protect the process against accusations that judges select successors based on a likeness to their own image.

*Direct discrimination/Indirect discrimination/Discrimination arising from disability*

- 16) The policy proposals are aimed at improving the opportunities for everyone in the judicial selection and appointment process. We do not, therefore, consider that they will be either directly or indirectly discriminatory as indicated in the analysis.
- 17) Some of the proposed changes are likely to have no equality impact. In some cases, this is because the change is an administrative one which has no potential to affect either the outcome of selection or the diversity of the pool of applicants.
- 18) Our proposal to enable the JAC to apply a positive action provision (similar to the one in section 159 of the Equality Act 2010) when two candidates are essentially indistinguishable on merit is only allowed where it is a proportionate way of addressing under-representation or disadvantage. Positive action provisions mean that it is not unlawful discrimination to take special measures aimed at alleviating disadvantage or under-representation experienced by those with any of the protected characteristics. It is assumed that the circumstances in which these provisions could be used will be rare. This is because there is an assumption that two candidates are rarely assessed as being exactly equal in merit, and because the applications of the 'tipping point' provisions is voluntary. However, in order to mitigate against the possibility of the 'tipping point' provisions being used inappropriately or inaccurately, guidance will be produced in accordance with s.65 of the CRA and issued to support the selection panels in the application of the 'tipping point' provisions.



- 19) Some concern was raised during the consultation that any power introduced into legislation to enable the size of the JAC in the future to be reduced may reduce the diversity of the Commission. However, there is no equality impact associated with the introduction of the enabling power. There will only be impacts where the enabling power is used and will depend on how it is used.

*Duty to make reasonable adjustments*

- 20) These proposals do not affect our existing commitments in this area. The Ministry of Justice (MoJ) is committed to ensuring equality for disabled people (as defined by the Equality Act 2010) who apply for judicial appointment, for new appointees who are disabled, and for serving judicial office holders who become disabled. The MoJ promotes a positive approach to disability and makes reasonable adjustment for disabled applicants for judicial office, and disabled judicial office holders (including magistrates) throughout the courts and tribunals and other organisations across the MoJ.
- 21) The MoJ policy ('Reasonable Adjustments Policy for Disabled Judicial Office Holders') was published in May 2011 and covers all judicial appointments for which the MoJ is either directly or indirectly responsible, including legally qualified, lay or specialist appointments. It describes at a high level, the approach taken at each stage of an office holder's career.

*Harassment and victimisation*

- 22) We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

*Promoting understanding and fostering good relations*

- 23) It is clear that additional work can be done to promote equality of opportunity in this area and the Government is committed to this. The recommendations of the Advisory Panel on Judicial Diversity go beyond the proposals outlined in the consultation and the Judicial Diversity Taskforce continues to monitor and promote progress against the wider recommendations. The Taskforce membership includes the Ministry of Justice, the Judiciary, the JAC, Bar Council, Law Society and Institute of Legal Executives. The Taskforce will be providing an update on progress towards delivery of the recommendations in its second annual report, due for publication in summer 2012.

## Stakeholder consultation and engagement

- 24) The MoJ published a public consultation setting out proposals for changes to the statutory and regulatory frameworks for judicial appointments. The consultation was aimed at members of the judiciary, legal practitioners and their representative organisations, those responsible for aspects of the judicial appointments process, equality and diversity groups and those who have an interest in judicial appointments. It included a draft EIA and specific questions on equality, and was sent to a wide range of equalities stakeholders.
- 25) In total, 96 responses were received. The following table documents the type of person/organisation who responded to the consultation.

Category	Number of Respondents
Judiciary (including representative bodies)	30
Academics	5
Organisations	40
Members of the public	5
Legal Professions (including representative bodies)	14
Others	2

- 26) The details of responses will be set out in the Government's response to the consultation, due to be published in May 2012. Generally though, respondents showed support for the overall framework of judicial appointments as introduced by the CRA, but agreed that there is scope to rebalance some executive, judicial and independent responsibilities. The consultation responses also made clear that there is no single solution to the issue of increasing judicial diversity, and most of the diversity measures that were proposed received strong support. There was also broad agreement that there should be greater flexibility in the number and composition of Commissioners of the JAC, the remit of the JAC, and that detailed procedure should be removed from the face of the CRA and replicated within secondary legislation.

- 27) Although not a formal response to our consultation, we also considered the 2012 report from the House of Lords Constitution Committee<sup>2</sup> following its inquiry into judicial appointments and diversity. The Committee's inquiry addressed similar issues to those considered in our consultation and the report outlined the Committee's views on our proposals, many of which they supported.

*Responses on provisional EIA*

- 28) The MoJ sought views on the equality impacts identified in the screening EIA and on any further ways in which these proposals might impact positively or adversely on people with protected characteristics during the judicial appointments process.
- 29) Of those who responded to the question, "Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?" (13 in total), nobody indicated any negative impact arising from our proposals, save for the proposal around restricting fee-paid service to three terms of five years. Many questioned whether this would in reality deliver a more diverse judiciary as anticipated and some questioned whether it would be discriminatory, specifically in relation to age. For reasons set out in the Government Response this proposal is no longer being pursued at this time.

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<sup>2</sup> House of Lords, Select Committee on the Constitution, 25th Report of Session 2010–12, Judicial Appointments.

## Methodology and Evidence sources

- 30) In addition to the responses to our consultation, we have considered a range of statistical and research evidence. Key sources of evidence include data provided by the Judicial Appointments Commission, Judicial Office and data published by the legal professions.
- 31) The Judicial Appointments Commission collects information on age, gender, ethnicity and disability. In September 2011 the Judicial Appointments Commission started to collect data on religion and belief, and sexual orientation - because of the small number of exercises from which these data are drawn some caution should be used when interpreting the figures presented in this EIA as they may not be representative. These results are drawn from unpublished internal management information. There are gaps in the data relating to marriage and civil partnership, gender reassignment and pregnancy and maternity.
- 32) The Judicial Office<sup>3</sup> collects data on the age, gender and ethnicity of members of the judiciary. There are gaps in the data relating to disability, sexual orientation, religion and belief, marriage and civil partnership, gender reassignment, pregnancy and maternity in relation to members of the Judiciary.
- 33) We have reviewed research and statistical reports relating to the diversity of legal professionals and the judiciary. The research reports reviewed are listed at Annex B.

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<sup>3</sup> [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/)

## Profile of legal professionals and the judiciary

- 34) This section provides statistical evidence on the characteristics of the judiciary and the pool from which appointments to the judiciary are made.
- 35) Research in 2005<sup>4</sup> suggested that diversity in the legal profession was improving but that *'inequalities continue to exist between White males and both women and ethnic minority solicitors in relation to pay, prestige jobs and promotion'*. The legal profession acts as the pool of people from which appointments to the judiciary are made. The diversity of the judiciary is largely dependent on this pool, and thus measures to improve the diversity of this pool are a key driver in improving diversity in the judiciary.
- 36) The statistics on the diversity of the judiciary over the last 14 years suggest that there has been gradual but slow progress in the percentage of women and Black, Asian and Minority Ethnic (BAME) members of the judiciary, but that there are still low levels of representation of ethnic minority groups and women, particularly in the higher courts.
- 37) Sullivan, R (2010) suggests that the diversity of *'the [legal] sector quickly declines with more experienced or senior individuals within the sector'*<sup>5</sup>. This research reports also cites evidence from Malleson and Balda (2000)<sup>6</sup> which proposed that *'the tendency for certain groups to be directed into particular areas of law has been suggested as a possible explanation for the narrowing of the pool from which applicants are selected for silk and judiciary (Malleson and Balda, 2000) and may not be an indicator of choice, just expectation'*<sup>7</sup>.

### Sex

- 38) Table 1 (Annex A) presents the available data maintained by the Bar Council's Record department on the sex of practising barristers in 2010. It shows that in 2010, females accounted for 35 per cent of practising barristers.

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<sup>4</sup> Thomas, C. (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: a Review of Research, Policies and Practices, The Commission for Judicial Appointments

<sup>5</sup> Sullivan, R (2010). Barriers to the legal profession. Legal Services Board.

<sup>6</sup> Malleson, K and Balda, F (2000) Factors affecting the decisions to apply for silk and judicial office. Lord Chancellor's Department.

<sup>7</sup> Sullivan, R (2010). Barriers to the legal profession. Legal Services Board.

- 39) Pike and Robinson (2012)<sup>8</sup> found that the number of women in the profession declines after 12 Years with attrition higher in the self-employed Bar. Among senior barristers with 22 years call or more who have QC status, 13 per cent are women. Blackwell (2011)<sup>9</sup> found that there was a slow rate of increase to QC among female barristers between 1995 and 2011 (6 per cent to 11 per cent). The report concludes that *'At such a rate of increase there would not be parity between number of male and female QCs this century'*.
- 40) Table 2 (Annex A) shows that slightly more women (proportionally) were employed as solicitors in private practice with a practicing certificate in 2010. This shows that, in 2010, 46 per cent of private practice solicitors were female.
- 41) JAC data for exercises (legal positions only) to the end of March 2012 show that 34 per cent of applications for the courts and 41 per cent of applications for tribunals were from females. Thirty per cent of people short-listed for courts positions and 41 per cent short-listed for tribunal positions were female. Of those selected for courts positions, 34 per cent were from women; the equivalent figure for tribunal positions was 43 per cent. (Table 3, Annex A).
- 42) Table 4 (Annex A) shows that 22 per cent of the judiciary in 2011 were female. Within the most senior courts judiciary (High Court and above), 14 per cent were women.
- 43) Work is currently underway to update the judicial database, in order to be able to extract reliable information about the make up of the tribunals' judicial office holders. Initial assessment of the database indicate that women make up around 42 per cent of office holders<sup>10</sup>.

### *Race*

- 44) Figures on the representation of ethnic groups have been presented excluding those where the ethnic group was unknown, and results should be treated with caution.
- 45) Tables 5 and 7 (Annex A) present the ethnic background of barristers and private practice solicitors in 2010. The ethnic background for 12 per cent of barristers and 10 per cent of solicitors was not known, and this means results should be treated with caution. In 2010, 11 per cent of barristers were from a minority ethnic group. Table 5 also shows that BAME

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<sup>8</sup> Pike, G and Robinson, D (2012). Barristers' Working Lives: A Biennial Survey of the Bar 2011. Bar Standards Board

<sup>9</sup> Blackwell (2011). Old Boys' Networks, Family Connections and the English Legal Profession.

<sup>10</sup> [www.judiciary.gov.uk/Resources/JCO/Documents/Reports/spt-annual-report-2012.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/spt-annual-report-2012.pdf)

representation is highest amongst barristers at the employed Bar (15 per cent) and lowest amongst QCs (5 per cent).

- 46) Table 6 (Annex A) presents the ethnicity of barristers at 5 and 15 years Call at the Bar. Ethnicity is unknown for 30 per cent and 8 per cent of barristers at 5 and 15 years Call respectively. This means that results should be treated with caution. Table 6 shows that there is little difference in the BAME breakdown for practising barristers with 5 years call at the Bar (11 per cent) and 15 or more years call at the Bar (10 per cent).
- 47) In 2010, 11 per cent of private practice solicitors who stated their ethnicity (Table 7) were from a minority ethnic group.
- 48) JAC data for exercises (legal positions only) to the end of March 2012 show that 13 per cent of applications for the courts and 18 per cent of applications for tribunals were from BAME groups. Eight per cent of people short-listed for courts positions and 9 per cent short-listed for tribunal positions were from a BAME group, whilst of those selected for courts positions 7 per cent were from a BAME group; the equivalent figure for tribunal positions was 8 per cent. (Table 8, Annex A)
- 49) Table 9 (Annex A) presents the available data on the ethnicity of the judiciary at April 2011. Ethnicity is not known for 19 per cent of the judiciary and so findings should be treated with caution. Table 9 shows that 5 per cent of the judiciary were from a BAME background. Within the most senior courts judiciary (High Court and above) the percentage of BAME is 3 per cent.
- 50) An initial assessment of the Judicial database indicate that those identifying themselves as from a BAME background make up over 10 per cent of the tribunal judicial workforce .

#### *Age*

- 51) Table 10 (Annex A) presents the available data maintained by the Bar Council's Record department on the age of practising barristers in 2010. Age is unknown in 26 per cent of records which means results should be treated with caution. In 2010, the majority of barristers (73 per cent) were aged between 30 and 49.
- 52) Table 11 (Annex A) presents the available data maintained by the Law Society on the age of solicitors holding practising certificates in 2009. It shows that the majority of solicitors (60 per cent) with practising certificates were aged between 31 and 50.
- 53) Table 12 (Annex A) presents the age of applicants in a small number of JAC exercises (legal positions only) from September 2011 to March 2012. 32 per cent of applications for the courts and 38 per cent of

applications for tribunals were from those aged 50 or under (excluding those where this question was not answered)<sup>11</sup>.

### *Disability*

- 54) Table 13 (Annex A) presents the poor health and disability status of practising barristers at the self-employed Bar in 2007. Seven per cent of barristers at the self-employed bar considered themselves to have a disability or suffer from poor health. This is based on a survey of all practising barristers conducted at the end of 2007 by the Bar Council.
- 55) Table 14 (Annex A) presents the disability status of practising barristers completing the 'working lives' survey of the Bar in 2011. Four per cent of practising barristers considered themselves to have a disability defined as a long term health problem that affects day-to-day activities. It is noted that the different definitions of disability between the 2007 and 2011 surveys makes any comparisons, and thus conclusions about change, problematic.
- 56) JAC data for exercises (legal positions only) to the end of March 2012 show that 4 per cent of applications for the courts and 6 per cent of applications for tribunals were from disabled people. Four per cent of people short-listed for courts positions and 5 per cent short-listed for tribunal positions had a disability. Of those selected for courts positions 3 per cent had a disability; the equivalent figure for tribunal positions was 6 per cent. (Table 15, Annex A).

### *Gender reassignment*

- 57) Information is not available on gender reassignment.

### *Marriage and Civil Partnership*

- 58) The 2011 'working lives' survey suggested that two thirds of the Bar were married (65 per cent) or in a civil partnership (2 per cent)<sup>12</sup>.

### *Pregnancy and Maternity*

- 59) Information is not available on pregnancy and maternity.
- 60) However, some data on barristers with dependant children and whether they had ever taken any maternity/paternity leave lasting three months or

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<sup>11</sup> Because of the small number of exercises from which this data is drawn some caution should be used when interpreting these figures. They are drawn from unpublished internal management information.

<sup>12</sup> Pike, G and Robinson, D (2012). Barristers' Working Lives: A Biennial Survey of the Bar 2011. Bar Standards Board



more is available (Pike and Robinson, 2012)<sup>13</sup>. Overall, 13 per cent of all barristers had taken maternity/paternity leave lasting three months or more but gender differences were substantial (33 per cent of women and 2 per cent of men).

#### *Religion or Belief*

- 61) Table 16 (Annex A) presents the religious affiliation of practising barristers completing the 2011 'working lives' survey. Religion was not stated by 11 per cent of barristers surveyed and so findings should be treated with caution. Table 11 shows that, excluding people who did not state their religion, 37 per cent of barristers had no religious affiliation, 54 per cent said they were Christian, 4 per cent Jewish, and 5 per cent other religions.
- 62) Table 17 (Annex A) presents the religion of applicants in a small number of JAC exercises (legal positions only) from September 2011 to March 2012. The religious affiliation of 9 per cent of those applying for courts posts and 14 per cent of those applying for tribunal posts was not known, and so results should be treated with caution. Table 17 shows that 65 per cent of applications for the courts and 53 per cent of applications for tribunals (excluding those who did not state a religion) were from Christians, and 15 per cent were from other religions<sup>14</sup>.

#### *Sexual Orientation*

- 63) Table 18 (Annex A) presents the sexual orientation of practising barristers completing the 2011 'working lives' survey. Sexual orientation was not stated by 12 per cent of barristers surveyed and so findings should be treated with caution. Table 18 shows that 90 per cent of barristers indicated that they were heterosexual, 4 per cent explicitly preferred not to say, and 6 per cent said they were gay or bisexual.
- 64) Table 19 (Annex A) presents the sexual orientation of applicants in a small number of JAC exercises (legal positions only) from September 2011 to March 2012. The sexual orientation of 8 per cent of those applying for courts posts and 12 per cent of those applying for tribunal posts was not known, and so results should be treated with caution. Table 9 shows that, excluding those who did not state their sexual orientation, 6 per cent of applications for the courts and 4 per cent of applications for tribunals said they were gay or bisexual<sup>15</sup>.

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<sup>13</sup> Ibid

<sup>14</sup> Because of the small number of exercises from which this data is drawn some caution should be used when interpreting these figures. These results are drawn from unpublished internal management information.

<sup>15</sup> Ibid.

## Research on judicial diversity

- 65) The available research suggests that the diversity of the judiciary is perceived to be an important influence on public confidence in the criminal justice system. For example, low levels of representation may have a negative impact on public perceptions of the courts among BAME defendants and lawyers<sup>16</sup>.
- 66) More recent evidence from the 2008/09 Witness and Victim Experience Survey of victims whose criminal cases had been through the courts, found few differences in the proportions of victims and witnesses who felt that the Magistrate/Judge was courteous in their treatment by gender and disability. However, responses varied by ethnic group with less of those from the Black ethnic group feeling that the Magistrate/Judge was courteous (86 per cent) than in the White group (93 per cent).
- 67) Similarly, evidence from the 2010/11 Citizenship Survey suggested that BAME respondents were more likely than White respondents to feel they would be treated worse by at least one of the five criminal justice system organisations i.e. the police, the prison service, the courts, the Crown Prosecution Service and the probation service (15 per cent compared to 9 per cent). Organisations that were more likely to be cited as discriminatory by people from ethnic minority backgrounds than by White respondents were: the police (12 per cent compared with 5 per cent), the prison service (8 per cent compared with 2 per cent), the Crown Prosecution Service (6 per cent compared with 5 per cent) and the probation service (5 per cent compared with 2 per cent). The differences between groups for the courts were not significant in 2010/11 and had narrowed since 2001.
- 68) The research reviewed in completing this EIA also suggested a number of barriers to increasing diversity in the judiciary for individuals with particular protected characteristics:
- There is evidence of 'Prestige theory' (women and BAMEs being more likely to occupy less prestigious posts) operating in England and Wales, and of additional barriers relating to education (i.e. improved access for those attending private schools and top universities)<sup>17</sup>.

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<sup>16</sup> Hood, R., Shute, S. & Seemungal, F. (2003). Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment. Department for Constitutional Affairs Research Series No2/03.

<sup>17</sup> Thomas, C. (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices. The Commission for Judicial Appointments.

- Barmes and Malleson (2011)<sup>18</sup> suggested that, over the last 20 years, the legal profession had become more diverse in terms of gender and ethnicity, but women were more likely to practice in family law, BAME groups more likely to undertake legal aid work, and, at the Bar, lower proportions of female and BAME barristers were making it to QC. In addition, Barmes and Malleson (2011) argued that there were factors which act to channel barristers into the judiciary and solicitors out.
- Genn (2008)<sup>19</sup> argued that discussions with recently appointed judges and practitioners suggested the move from appointment by invitation to open competition introduced by the JAC post-2006 process was regarded as a positive development, although there were concerns that '*reluctant stars*' who were picked up by the old approach would now be lost.

69) There is also evidence which suggests there are perceptions of bias in appointments among certain groups, although these are not necessarily borne out by more detailed analysis:

- In the BMRB (2009) study<sup>20</sup>, 72 per cent of those barristers and solicitors responding felt that it was more difficult for certain types of people to apply successfully: a greater proportion of those from BAME groups found to strongly agree with this statement. However, whereas BAME and women respondents saw belonging to these groups as a disadvantage in the application process, White respondents saw belonging to a minority ethnic group and men perceived being female to be positive influences. In spite of these perceptions, however, the number of years of professional experience was the only demographic factor which predicted whether someone rated themselves as being very likely to apply for a judicial office in future.
- In her small-scale study of recently appointed High Court judges and barristers and solicitors, Genn (2008)<sup>21</sup> found that some factors were more frequently mentioned by women to affect application for senior judicial appointment, such as concerns about a predominantly male environment that may be hostile to women; the absence of female role models; their ability to obtain the necessary part-time judicial appointment (to become eligible for the senior judiciary) while at the same time juggling the demands of legal practice and family life. She also suggested that the requirement for High Court judges to routinely sit in courts located in

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<sup>18</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. *The Modern Law Review*, 74(2), pp.245-271

<sup>19</sup> Genn, H. (2008). The attractiveness of senior judicial appointment to highly qualified practitioners: Report to the Judicial Executive Board. Judicial Communications Office.

<sup>20</sup> BMRB (2009). Barriers to Judicial Appointment Research. Judicial Appointments Commission.

<sup>21</sup> Genn, H. (2008). The attractiveness of senior judicial appointment to highly qualified practitioners: Report to the Judicial Executive Board. Judicial Communications Office.

different parts of the country might deter those with caring responsibilities together with associated reductions in pay.<sup>22</sup>

- Moran and Winterfeldt (2011)<sup>23</sup> showed that Lesbian Gay Bisexual and Transgender (LGBT) respondents perceived '*being female*', '*being disabled*' and '*being a solicitor*' as negative influences on judicial career aspirations. They also perceived being lesbian, gay or bisexual and membership of a diversity group as negative influences on application outcome. More than two thirds of respondents indicated that more openly LGBT lawyers would make them more likely to apply for judicial office, and around two thirds also indicated that stronger public commitment to diversity would make them more likely to apply. The authors argued '*A more sexually diverse judicial family will give more LGBT lawyers the confidence to apply for the judiciary and give the wider community greater confidence that the judiciary reflects and effectively serves the whole of society*'.

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<sup>22</sup> Ibid

<sup>23</sup> Moran, L and Winterfeldt, D. K. (2011). Barriers to application for Judicial Appointment Research: Lesbian, Gay, Bisexual and Transgender Experiences. Interlaw Diversity Forum

## **Delivering a proper balance between executive, judicial and independent roles**

### **Transfer decision making role from Lord Chancellor**

#### Aims and outcomes of the policy

- 70) The CRA provided for a greater separation of powers between the executive and judiciary. It implemented substantial changes to the office of Lord Chancellor, bringing the role more squarely into the executive branch and transferring many of its judicial responsibilities to the Lord Chief Justice of England and Wales. The CRA changed the role of the Lord Chancellor so that the office holder was no longer a judge, nor exercised any judicial functions.
- 71) The Lord Chief Justice is now responsible for representing the views of the judiciary of England and Wales to Parliament, the Lord Chancellor and Ministers of the Crown generally. The CRA conferred upon the Lord Chief Justice the office of President of the Courts of England and Wales and Head of the Judiciary of England and Wales. He is also responsible, within the resources made available by the Lord Chancellor, for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales, and for maintaining appropriate arrangements for the deployment of the judiciary of England and Wales and allocating work within courts. The Tribunals, Courts and Enforcement Act 2007 conferred comparable powers on the Senior President of Tribunals.
- 72) In light of legislative changes to the partnership that exists between the Lord Chief Justice and Lord Chancellor we believe that it would be more appropriate for the Lord Chief Justice to decide whether or not to accept a recommendation from the JAC for particular judicial appointments below the High Court and for the Senior President of Tribunals to undertake a similar role for particular appointments to the First-tier Tribunal and Upper Tribunal, as they are better placed to understand the requirements of a particular judicial role.
- 73) Our proposal is therefore to transfer the Lord Chancellor's power to appoint particular courts-based judicial office holders to the Lord Chief Justice and to transfer the Lord Chancellor's power to appoint particular judicial office holders of the First-tier Tribunal and Upper Tribunal to the Senior President of Tribunals. The Lord Chief Justice and Senior President of Tribunals will therefore have a greater role in the selection process; however the Lord Chancellor will remain accountable to Parliament for the appointments process and will continue to be responsible for referring certain judicial appointments for recommendation to HM the Queen.

## Analysis

74) We do not anticipate this proposal to have any impact on equality or diversity. Even though the Lord Chief Justice will be carrying out the role in place of the Lord Chancellor, the role is identical and there will be no change in outcome. We consider it would be more appropriate for the Lord Chief Justice to decide whether or not to accept a recommendation from the JAC for particular judicial appointments below the High Court and for the Senior President of Tribunals to undertake a similar role for particular appointments to the First-tier Tribunal and Upper Tribunal, as they are better placed to understand the requirements of a particular judicial role. Concerns have been raised about the importance of political direction in improving judicial diversity (see, for example, Thomas' 2005 review of the literature<sup>24</sup>). However, we consider the fact that the Lord Chancellor will retain overall accountability for the process provides sufficient accountability.

## **Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981**

### Aims and outcomes of the policy

75) Being requested to sit in the High Court by the Lord Chief Justice and in some cases the Criminal Division of the Court of Appeal (in the case of Circuit Judges) is considered an important stepping stone in being appointed as a puisne judge of the High Court. Under the current system, the JAC plays a limited role in these requests (they concur to a recommendation by the Lord Chief Justice) and they do not have any role at all in relation to a temporary appointment as a deputy judge of the High Court in accordance with section 9(4) of the Senior Courts Act 1981 ("SCA"). Therefore, currently there is not the same degree of openness and transparency for these requests and temporary appointments as there is for other judicial appointments. Considering the importance of section 9 in allowing judges to sit in the High Court and the ramifications for those judges that are able to sit, it is believed that the process would benefit from greater JAC involvement and being more transparent, open and independent.

76) We propose therefore to provide a more meaningful role for the JAC in the exercise of the Lord Chief Justice's power to request judges to sit in the High Court (and Court of Appeal) in accordance with section 9(1) and make temporary appointments as a deputy judge of the High Court in accordance with section 9(4). The JAC will own the selection and recommendation process and will possess the power to determine how each exercise will be run. It is not believed that these exercises will

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<sup>24</sup> Thomas, C. (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices. The Commission for Judicial Appointments.

require the same process as that utilised for an initial judicial appointment because the applicants will already hold a judicial office. We envisage a different process, the details of which will be determined by the JAC as these reforms are implemented. The JAC will however be required to collect and publish data on the diversity of applicants in the same way that they do for all other judicial appointments.

### Analysis

- 77) It is anticipated that increased JAC involvement in the selection process for those judges that are able to sit in the High Court will strengthen candidates' confidence in the process in addition to increasing overall transparency. This will also reassure the public that all authorisations are made fairly by an independent body. We currently envisage a streamlined process but the detail of this process will be determined by the JAC at the implementation stage.
- 78) There is a range of research evidence to suggest that the creation of the JAC has been a positive development for equality, and thus increased JAC involvement in the selection and appointments/request process for judges sitting in the High Court may improve perceptions amongst some protected groups.
- 79) BMRB (2009)<sup>25</sup> found that '*...there has been a positive shift in perceptions of the application process since the JAC took over its administration*'. 75 per cent of those barristers and solicitors taking part felt that setting up an independent body was a positive development. Women were more likely to agree with this statement than men and younger respondents more likely than older respondents. Moran and Winterfeldt (2011)<sup>26</sup> found that support for JAC was higher among their LGBT respondents than among the solicitors and barristers taking part in the BMRB (2009) study.

## **Composition of selection panels and Lord Chancellor role**

### Aims and outcomes of the policy

- 80) In relation to judicial appointments the intention is to make a number of specific changes to the existing processes to ensure the correct balance of roles between the executive, judiciary and independent appointment bodies, including making the Lord Chancellor's role in senior appointments more significant. Though the Lord Chancellor will play a smaller role in appointments below the High Court as a result of the

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<sup>25</sup> BMRB (2009). Barriers to Judicial Appointment Research. Judicial Appointments Commission.

<sup>26</sup> Moran, L and Winterfeldt, D. K. (2011). Barriers to application for Judicial Appointment Research: Lesbian, Gay, Bisexual and Transgender Experiences. Interlaw Diversity Forum

policy changes outlined above, in relation to appointments to the senior judiciary it is appropriate for the executive to have an input to provide accountability for the appointments to Parliament and to the public.

81) It is proposed therefore that:

- the Lord Chancellor will be consulted prior to the selection processes for appointments to the Court of Appeal and above (including Heads of Division);
- the Lord Chancellor will be able to be a member of the selection panel for the appointment of the Lord Chief Justice and the selection commission for the appointment of the President of the Supreme Court;
- the Lord Chief Justice will chair selection panels for Heads of Division;
- in relation to the UK Supreme Court, only one Supreme Court judge will serve on a selection commission (rather than two); and
- the serving President/Deputy President of the Supreme Court will not participate in selecting their own successor.

### Analysis

- 82) These proposals could improve public confidence in the openness and fairness of the process, as they protect the process against accusations that judges select successors based on a likeness to their own image. This could potentially benefit applicants to judicial offices and increase public confidence in the efficiency of the system by providing a more responsive and effective service to court and tribunal users.
- 83) This proposal will not diminish the role of the executive in the appointments process; arguably it will be enhanced. The Lord Chancellor will play a more active role in the appointment of the Lord Chief Justice and President of the UK Supreme Court by sitting on the selection panel, and will be retaining his right to veto in all other appointments.
- 84) Save for the appointment of the Lord Chief Justice for England and Wales and the President of the UK Supreme Court where the Lord Chancellor will be a member of the selection panel, the Lord Chancellor will retain his right of veto for appointments to the High Court and above. Malleon (2012)<sup>27</sup> argued the removal of the Lord Chancellor's right to veto for the upper judiciary was '*likely to undermine efforts to increase diversity in the judiciary*' given evidence which suggests that political drive may be needed for such changes. Others have also emphasised the importance of political leadership in bringing about change in relation

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<sup>27</sup> Malleon, K (2012). Taking the politics out of judicial appointments? UK Constitutional Law Group.



to judicial diversity (see, for example, Thomas' 2005 review of the literature<sup>28</sup>).

- 85) In respect of amending Part 4, Chapter 2 of the CRA (sections 71 and 80) to increase the number of members on selection panels for Lord Justices of Appeal, Lord Chief Justice and Heads of Division from four to five, Thomas (2005)<sup>29</sup> points to international evidence that diverse nominating commissions attract more diverse applicants and select more diverse nominees; and that appointments commissions are one of the main levers for bringing about change in the composition of the judiciary.
- 86) There is an element of concern that changing the composition of selection panels could be perceived as weakening the guarantee of fairness and impartiality provided by the certainty of the current framework, especially in relation to reducing the judicial presence on panels. This could reduce confidence in the process among affected groups such as the legal profession. We believe that the detail of the proposed panel compositions will mitigate any concerns surrounding a loss of impartiality.
- 87) There is a risk that the reduced Supreme Court judicial presence on Supreme Court selection commissions could carry a cost in terms of how the process is perceived among the judiciary. It could be argued that the ability of the judiciary to contribute their knowledge and experience to the selection of a high-quality appointee would be reduced by this change. However, we consider that a single judge of the Supreme Court is sufficient to provide an appropriate level of knowledge and experience to the selection commission. The commission will also include other members of the UK judiciary.

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<sup>28</sup> Thomas, C. (2005). *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices*. The Commission for Judicial Appointments.

<sup>29</sup> *Ibid.*

## **Creating a more diverse judiciary reflective of society and appointment on merit**

### **Remove barriers to salaried part-time working in the High Court and above**

#### Aims and outcomes of the policy

- 88) Part time salaried working is currently only practised by judicial office holders below the High Court. The Senior Courts Act 1981 places an upper limit on the number of puisne judges of the High Court and ordinary judges of the Court of Appeal which can only be changed with Parliamentary approval. The limit for puisne judges of the High Court, which currently stands at 108, and for ordinary judges of the Court of Appeal, which currently stands at 38 is expressed in terms of a headcount, rather than a full-time-equivalent (FTE) figure. This is seen as a barrier to the appointment of High Court judges on anything other than a full-time basis.
- 89) The Advisory Panel on Judicial Diversity considered the lack of support for flexible work patterns in judicial terms and conditions to be a barrier to judicial diversity. This lack of flexibility may deter candidates from applying for a judicial post due to difficulties in trying to balance their personal and professional responsibilities.
- 90) We propose therefore to facilitate flexible part-time salaried working in the High Court and above (including the UK Supreme Court). In relation to the Court of Appeal and High Court, we propose to express the statutory ceiling in the maximum number of puisne judges of the High Court and ordinary judges of the Court of Appeal in FTE terms rather than as a maximum number of judges. Similarly, for the UK Supreme Court, we propose to express the statutory ceiling on the maximum number of 12 judges in FTE terms.

#### Analysis

- 91) The availability of salaried part-time working provides an opportunity to people whose personal circumstances prevent them from working full-time, particularly those with caring responsibilities. This change may lead to an increase in applications for High Court office from under-represented groups, although any increase is expected to be low.
- 92) There is evidence that lack of flexibility may prohibit some, in particular women, from applying for more senior positions. For example, Barmes

and Malleson (2011)<sup>30</sup> point to *'the systematic negative effect of rigid working patterns on the legal careers of females'* at lower stages in the legal profession. Genn (2008)<sup>31</sup> found obstacles to senior judicial appointment cited particularly by women including difficulties obtaining the necessary part-time judicial appointment required to become eligible for the senior judiciary, while also juggling the demands of legal practice and family life. International evidence cited in Thomas (2005) also highlights flexibility and opportunity for part-time working as important in other jurisdictions.

- 93) The House of Lords Constitution Committee<sup>32</sup> heard from a number of witnesses who advocated this change as being one which they believed would have the greatest impact on increasing the diversity of the judiciary. The Committee observed that:

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

- 94) However, some concerns were raised in our consultation that, as everyone was eligible to apply for part-time working (i.e. other than those with caring/family responsibilities and men as well as women), the impact on diversity may be lessened.
- 95) Any increase in the diversity of appointments can create a more representative judiciary and therefore carries the potential benefit of improving public confidence.

## **Enabling the JAC to use positive action provisions**

### Aims and outcomes of the policy

- 96) The Equality Act 2010 allows selecting bodies to take protected characteristics (such as, for example, race or gender) into account where

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<sup>30</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. *The Modern Law Review*, 74(2), pp.245-271

<sup>31</sup> Genn, H. (2008). The attractiveness of senior judicial appointment to highly qualified practitioners: Report to the Judicial Executive Board. Judicial Communications Office.

<sup>32</sup> Paragraph 117, 25th Report of Session 2010–12, Judicial Appointments

two or more candidates are considered to be as qualified as each other for a post (the “tipping point” principle). The application of these provisions to judicial appointments where candidates are of equal merit may help to encourage a more diverse judiciary. However, as section 63(2) of the CRA requires that selection for judicial office must be solely on merit there is at present doubt over whether the tipping point can apply to these selections.

- 97) Our proposal is therefore to amend the CRA to enable the JAC to apply positive action provisions when two candidates are essentially indistinguishable on merit.

### Analysis

- 98) This proposal is supported by legal articles which suggest that more extreme positive actions are needed, and that positive action on appointments may not be enough to impact quickly (e.g. Malleson, 2009; Barmes and Malleson, 2011<sup>33</sup>).

- 99) Some responses to the consultation expressed concern that it would be detrimental for judges from diverse backgrounds if they are seen to have been appointed on the basis of their ethnicity, gender or other protected characteristic, rather than upon their merits. Barmes and Malleson (2011)<sup>34</sup> also noted potential problems with positive action measures relating to protected characteristics.

- 100) However, the House of Lords Constitution Committee<sup>35</sup> made the following observations on the proposal to incorporate the Equality Act 2010 provisions into judicial appointments:

*It seems likely that in large assessment exercises it will not always be possible to rank every candidate in strict order of merit and that a number of candidates may be considered to be of equal merit.*

*We agree that s 159 of the Equality Act 2010 should be used as part of the judicial appointments process. Though we cannot be certain how often it would be used, its application could be the deciding factor in the appointment of a number of candidates from under-represented groups. Moreover, permitting its use would send out a strong signal that*

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<sup>33</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. *The Modern Law Review*, 74(2), pp.245-271

<sup>34</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. *The Modern Law Review*, 74(2), pp.245-271

<sup>35</sup> Paragraphs 99 and 101, 25th Report of Session 2010–12, **Judicial Appointments**

*diversity in judicial appointments is important, without undermining the merit principle.*

- 101) The view may be taken that the JAC's duty to appoint solely on merit conflicts with any use of the positive action provisions provided for in the Equality Act 2010. Appointment on merit is considered a principle of paramount importance to the continuing quality and independence of the judiciary. The implementation of this change could therefore be seen as a threat to the quality of the judiciary. We consider, however, that this can be mitigated by maintaining the primacy of appointment on merit and only utilising the tipping point when candidates are of equal merit.
- 102) However, some concerns have been raised about the merit based approach (for example, Barmes and Malleson 2011<sup>36</sup>, BMRB 2009<sup>37</sup>, and Moran and Winterfeldt 2011<sup>38</sup>). Barmes and Malleson (2011)<sup>39</sup> also note that there are potential problems with positive action measures relating to protected characteristics.
- 103) It is assumed that the circumstances in which these provisions could be used will be rare. This is because there is an assumption that two candidates are rarely assessed by the JAC as being exactly equal in merit, and because the application of the 'tipping point' provisions are voluntary. However, in order to mitigate the likelihood of this scenario materialising, guidance will be produced and issued, in accordance with section 65 CRA that will support the JAC in the application of a 'tipping point' provision.
- 104) Where this policy leads to a candidate with a protected characteristic being appointed instead of a candidate without such a characteristic, then there will be costs and benefits to those individuals. It is also assumed that increased judicial diversity could lead to an increase in public confidence in the judicial system.

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<sup>36</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. The Modern Law Review, 74(2), pp.245-271

<sup>37</sup> BRMB (2009). Barriers to Judicial Appointment Research. Judicial Appointments Commission.

<sup>38</sup> Moran, L and Winterfeldt, D. K. (2011). Barriers to application for Judicial Appointment Research: Lesbian, Gay, Bisexual and Transgender Experiences. Interlaw Diversity Forum

<sup>39</sup> Barmes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. The Modern Law Review, 74(2), pp.245-271

## **Improving the speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer**

105) Moving the selection process to an independent Commission has delivered significant benefits with respect to the perceived openness of the selection process. While the new process has continued to produce high quality appointees, the Ministry of Justice review undertaken in 2010 highlighted a number of concerns and in particular criticised the process as:

- being inflexible and unresponsive to the immediate needs of HMCTS;
- being lengthy and bureaucratic, taking from 4 to 18 months from beginning to end;
- lacking clear accountability and effective governance, and
- providing poor service to applicants.

106) Separate to the consultation, the Ministry of Justice has been working closely with HMCTS, the JAC and Judicial Office on non-legislative changes that will help to reduce the length of time and overall costs associated with identifying a need for a judicial office holder and appointing one. The JAC continues to look for and implement ways to shorten the appointments process without sacrificing the quality of selections made, fairness or transparency.

### **Size and Composition of JAC**

#### Aims and outcomes of the policy

107) The JAC is currently comprised of fifteen commissioners drawn from the judiciary, the legal profession and lay members. The number of commissioners, the detailed requirements relating to the composition of the JAC and the selection of Commissioners are currently contained in primary legislation. This creates an overly rigid structure. For example if, due to reduced workload, it was agreed that the number of commissioners could be reduced this could currently not be taken forward without primary legislation.

108) Our proposal therefore is to amend the CRA to remove the detailed requirements relating to the composition of the JAC and procedures regarding selection of Commissioners, and to introduce an enabling power within primary legislation to allow the composition of the JAC, including the numbers of commissioners, and selection processes to be provided for via secondary legislation subject to certain requirements set out in the Act.

### Analysis

109) There are no equality impacts associated with the introduction of the enabling power. There will only be impacts where the enabling power is used and will depend on how it is used.

110) However, concern was raised during the consultation that a reduction in numbers of Commissioners would potentially reduce the diversity of the Commission itself.

111) Thomas (2005)<sup>40</sup> points to international evidence that diverse nominating commissions attract more diverse applicants and select more diverse nominees; and that appointments commissions are one of the main levers for bringing about change in the composition of the judiciary.

112) The House of Lords Constitution Committee<sup>41</sup> considered this proposal and heard from a number of witnesses on the wider ramifications that might arise:

*We stress that the JAC is an independent body. The Lord Chancellor should have no discretion to determine the membership; this would be damaging both to the independence of the JAC and to the perception of its independence.*

*We believe that there should not be significantly fewer commissioners than at present and that the number should be prescribed in primary legislation. The composition of the JAC must consist of a balance of lay and judicial members. In order to increase flexibility in making changes to the precise composition of the JAC, it would be appropriate for the composition to be set out in secondary legislation, subject to affirmative resolutions of both Houses of Parliament.*

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<sup>40</sup> Thomas, C. (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices. The Commission for Judicial Appointments.

<sup>41</sup> Paragraphs 162 and 163, 25th Report of Session 2010–12, Judicial Appointments

## **Create more flexibility around the JAC's remit**

### Aims and outcomes of the policy

- 113) Schedule 14 to the CRA lists the judicial offices for which the JAC is responsible. This includes some offices for which a legal qualification is not necessary. The application of the JAC's selection processes (developed primarily for selection to judicial offices which require a legal qualification) to selection for specific judicial offices not requiring a legal qualification (such as specialist members of tribunals) is seen by some involved in the appointments process as overly prescriptive and inflexible.
- 114) As the need for judicial office holder's changes, it may not always be possible to accommodate selection exercises for emerging needs into the JAC's programme, which is agreed annually. Exercises to meet emerging requirements may need to be delayed until a slot is available, as the JAC's programme is matched to its budget allocation. This can add to the time taken between the identification and the filling of a vacancy. There is thus a need for this system to be more flexible in responding to demand. By removing selection exercises for offices that do not require a legal qualification from the JAC's remit, the JAC would have more capacity to accommodate emerging requirements.
- 115) We therefore propose to amend the CRA and introduce an enabling power to allow, through secondary legislation, selection for appointment to tribunals-based offices that do not require a legal qualification (for example appointment of hydrologists as fee-paid specialist members of the First-tier Tribunal) to be removed from the remit of the JAC, after discussion with the Lord Chief Justice, JAC and HMCTS. In such circumstances the selection process will be operated by another body, for example HMCTS, in conjunction with the relevant professional regulatory body where there is a clear business need (i.e. General Medical Council for appointments of General Practitioners). Before this power is utilised, all parties (the Lord Chancellor and the Senior President of Tribunals/Lord Chief Justice) must be satisfied that any new system used for non-legal appointments complies with the same selection standards that the JAC applies in its selection exercises.

### Analysis

- 116) We do not have any equalities data on the diversity of non-legal appointments so we are unable to assess whether there are impacts of removing JAC oversight of those cases.



- 117) There are no equality impacts associated with the introduction of the enabling power. There will only be impacts where the enabling power is used and will depend on how it is used.
- 118) Introducing more flexibility would enable the system to respond more rapidly to emerging needs. Reducing delays would increase confidence in the system among key affected groups (including the legal profession and the judiciary). If exercises for non-legal judicial office appointments were transferred out of the JAC, equality would need to be integrated throughout the appointment process, and monitored/evaluated to check on progress on improving diversity for non-legal judicial office posts.

## **Amending existing legislation relating to the number of UK Supreme Court Judges**

### Aims and outcomes of the policy

- 119) Section 23(2) of the CRA provides that the Supreme Court of the United Kingdom consists of 12 judges appointed by Her Majesty. However, having a fixed number of judges makes for an inflexible system, and necessitates, where there are less than 12 judges, drawing upon judges from a supplemental pool made up of representatives from the territorial jurisdictions, even though the full complement of 12 judges are often not needed.
- 120) Our proposal is therefore to amend legislation to remove the requirement for a fixed number of 12 judges, replacing this with a provision for the Court to consist of a maximum number of 12 FTE judges. This would remove the obligation for the Lord Chancellor to fill all vacancies.

### Analysis

- 121) We do not envisage that this will have a differential equality impact because it is designed solely to improve business efficiencies.

## Amending existing legislation to allow for flexible judicial deployment

### Aims and outcomes of the policy

- 122) The ability of judicial office holders to work flexibly across the tribunals and courts is not currently reciprocal. A variety of judicial office holders in the courts can be assigned to sit and hear cases in the First-tier Tribunal and Upper Tribunal by the Senior President of Tribunals (SPT). However, this flexibility is not currently reflected within the tribunals. First-tier Tribunal and Upper Tribunal judges are not authorised to sit in the senior courts (i.e. the Court of Appeal, the High Court or the Crown Court) or the county courts. They are required to go through a specific court-based appointment process to be able to sit in courts.
- 123) Allowing judicial office holders to work flexibly would help to develop the concept of a judicial career and provide greater flexibility in managing judicial resources across courts and tribunals to meet business needs.
- 124) Our proposal is therefore to allow greater flexibility in the deployment of judicial office holders in both the courts and tribunals, by specifying in legislation that tribunal judges can be deployed to certain courts and courts-based judges can be deployed to certain tribunals.

### Analysis

- 125) The policy will provide the opportunity for more efficient use of existing judicial resources. It will allow for the deployment of appropriate office holders in appropriate jurisdictions to meet business needs in courts and tribunals rather than necessitating, as now, tribunal judges to go through a separate JAC selection process to sit in the courts. This will provide greater flexibility in managing judicial resources across courts and tribunals and support business efficiencies. There may also be a reduction in the need for urgent JAC selection exercises, saving JAC time. In turn, a more fluid process could reduce delays in hearing cases, thus providing a better service for court/tribunal users and increasing confidence in the court and tribunals system.
- 126) This could have a positive impact on equality. For example, Thomas (2006)<sup>42</sup> found that, whilst tribunals were the most ethnically diverse and had twice the proportion of women than judges in courts, both groups were less likely to attain prestigious posts. Ethnic minorities were mainly represented, and women best represented, as lay members.

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<sup>42</sup> Thomas, C (2006). Difference in diversity. Tribunals 2006, Spr, 5-6

## Mitigation and justification

127) We have put some of these proposals forward with the explicit aim of promoting equality of opportunity. We therefore view all of these proposals as having a positive or neutral impact on equality of opportunity in the appointments process.

128) The following proposals are anticipated to deliver positive outcomes to those with protected characteristics or increase the transparency of the process:

- facilitating flexible working to the High Court and above (including the UK Supreme Court);
- amending the appointments process to enable the JAC to apply the positive action provisions;
- increasing the role of the JAC in relation to requests made to Circuit judges and Recorders to sit in the High Court and introducing JAC involvement in Deputy High Court Judge appointments; and
- increasing the independent and lay involvement in the selection of the senior judiciary.

129) Although we do not anticipate any of our proposals to have a negative impact on equality, the following proposals have raised some minor concerns:

- introducing a 'tipping point' provision similar to that in section 159 of the Equality Act 2010. The view may be taken that the JAC's duty to appoint solely on merit conflicts with any use of positive action provisions, and that candidates without a protected characteristic are at a disadvantage. However, this provision will only be utilised when two candidates are otherwise indistinguishable on merit and the primacy of appointment on merit will therefore continue to be maintained. Guidance will also be produced and issued to support the selection panels in the application of these 'tipping point' provisions.
- changing the composition of the JAC. Concerns were raised during the consultation that a reduction in the number of Commissioners would reduce the diversity of the Commission itself. However, we are not proposing to reduce the number of Commissioners now, but to make this possible if business needs require it. We do not anticipate that this proposal will carry any adverse equality impacts; and
- moving certain selection exercises from the JAC's remit. If exercises for non-legal judicial offices were transferred from the JAC, diversity for non-legal judicial office posts would need to be monitored.

- 130) It is clear that additional work can be done to promote equality of opportunity in this area and the Government is committed to this.
- 131) Some of the responses to our consultation highlighted the importance of fee-paid work in encouraging judges from diverse backgrounds to take up judicial roles. For example, candidates with caring responsibilities may struggle to balance their responsibilities while holding a salaried appointment. Although we are no longer proposing to limit fee-paid judicial service to three renewable terms of five years. We are proposing to undertake a thorough review of terms and conditions for the fee-paid judiciary as a whole. It will also be important to work with the judiciary to ensure that opportunities for part-time working are promoted and any operational or cultural constraints are addressed.
- 132) Another important consideration is that the degree of diversity within the judiciary is partly dependent upon the range of candidates who apply for judicial office. It is therefore essential to increase the diversity of the eligible pool of candidates to enable a 'trickle up' effect to take place. A number of organisations involved in the appointments process, such as the JAC, Law Society and CILEx, continue to engage in outreach events that encourage solicitors and other legal professionals to apply for judicial office.

## **Monitoring**

- 133) The Ministry of Justice will continue to work together with the Judicial Office of England and Wales and the Judicial Appointments Commission to collect and share diversity data, enabling the development of a baseline against which progress can be measured. As we develop and implement the policies being taken forward following consultation, we will continue to monitor and evaluate 'what works' in improving judicial diversity and strengthening the appointments process. The Ministry of Justice will also work closely with the JAC, Judicial Office and legal professions to ensure where possible that data is collected and published reflecting all of the protected characteristics detailed within the Equality Act 2010.
- 134) Although we do not currently support the introduction of non-mandatory targets or quotas to encourage judicial diversity, we are in agreement with the House of Lords Constitution Committee that the number of BAME and female judicial office holders should be kept under review. The House of Lords Constitution Committee suggest that if no improvement has been made in five years time, then we should consider introducing non-mandatory targets.
- 135) The House of Lords Constitution Committee also recommend that we review in three to five years' time whether the Lord Chancellor's powers in respect of High Court appointments should be transferred to the Lord Chief Justice. Our current proposal is to transfer appointment powers for particular judges below the High Court.

## Annex A – Evidence

**Table 1: Gender: Practising Bar, 2010 (excluding not stated)**

<b>Gender</b>	<b>Numbers</b>	<b>Per cent of practising barristers</b>
Female	5,354	35%
Male	10,033	65%

Source: Sauboorah, 2011

**Table 2: Gender: Solicitors holding practising certificates (PCs), 2010  
England and Wales**

<b>Gender</b>	<b>Numbers</b>	<b>Per cent of solicitors with PCs</b>
Female	53,966	46%
Male	63,896	54%

Source: Law Society, 2012

**Table 3: Gender of applicants, those shortlisted and those selected from JAC exercises since 2006**

	<b>Women Applied</b>	<b>Women Shortlisted</b>	<b>Women Selected</b>
Courts	34%	30%	34%
Tribunals	41%	41%	43%

Source: Judicial Appointments Commission

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**Table 4: Gender of the Judiciary, April 2011**

<b>Appointment name</b>	<b>Male</b>	<b>Female</b>
Justices of the Supreme Court	91%	9%
Heads of Division	100%	0%
Lords Justices of Appeal	89%	11%
High Court Judges	84%	16%
Judge Advocates	88%	13%
Deputy Judge Advocates	80%	20%
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	71%	29%
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	62%	38%
Circuit Judges	84%	16%
Recorders	84%	16%
District Judges (County Courts)	75%	25%
Deputy District Judges (County Courts)	67%	33%
District Judges (Magistrates' Courts)	72%	28%
Deputy District Judges (Magistrates' Courts)	71%	29%
<b>Total</b>	<b>78%</b>	<b>22%</b>

Source: Judicial database 2011

**Table 5: Ethnicity: Self-defined ethnicity of barristers (excluding not stated), 2010  
England and Wales**

<b>Position</b>	<b>Self-defined ethnicity</b>					
	<b>Total</b>	<b>White</b>	<b>Mixed</b>	<b>Asian</b>	<b>Black</b>	<b>Chinese or Other</b>
QC	1,341	95%	1%	2%	1%	1%
Self-employed Bar	11,110	89%	1%	5%	3%	2%
Employed Bar	2,339	85%	2%	7%	5%	2%
<b>Total</b>	<b>14,790</b>	<b>89%</b>	<b>1%</b>	<b>5%</b>	<b>3%</b>	<b>2%</b>

Source: Bar Council  
Published in Statistics on Race and the Criminal Justice System 2010  
Note: Calculated from a total excluding where 12% (n=1,994) did not state their ethnicity

**Table 6: Ethnicity: practising Bar at 5 and 15 years' Call (excluding not stated)**

<b>Ethnicity</b>	<b>Number</b>	<b>5 years' Call at Bar</b>	<b>15 or more years' Call at Bar</b>
White	7,097	89%	90%
BME	293	11%	10%

Source: Sauboorah, 2011  
Note: Calculated from totals excluding where ethnicity is not stated in 30% (n=123) at 5 years' Call and 8% (n=623) at 15 years Call.



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**Table 7: Ethnicity: Law society defined ethnicity of private practice solicitors (excluding not stated), 2010  
England and Wales**

Position in firm	Total	Ethnicity			
		White	Asian	Black	Chinese or Mixed/Other
Partners <sup>1</sup>	28,254	92%	5%	1%	2%
Sole Practitioners	3,526	80%	12%	5%	3%
Associate solicitors	14,773	88%	6%	1%	4%
Assistant solicitors	24,862	86%	9%	2%	3%
Other private practice	7,044	91%	5%	1%	2%
<b>All positions</b>	<b>78,459</b>	<b>89%</b>	<b>7%</b>	<b>2%</b>	<b>3%</b>

**Notes:**

The Law Society uses its own ethnic classification. This has been aggregated as follows:

- White includes: White European; British-English; British; British-Scottish; British-Welsh; British-Other; Irish; Romany Gypsy; Traveller; White Other
- Black includes: Afro-Caribbean; Black Caribbean; African; Black-African; Black-Other.
- Asian includes: Asian-Bangladeshi; Asian-Indian; Asian-Pakistani; Asian.
- Chinese or Mixed/Other includes: Asian-Chinese; Chinese-Other; Chinese; Mixed-Other; White and Asian; White and Black African; White and Black Caribbean.

<sup>1</sup>Partners or partner equivalents

Source: Law Society

Published in Statistics on Race and the Criminal Justice System 2010

Note: Calculated from a total excluding where 10% ( $n=8,289$ ) did not state their ethnicity

**Table 8: Ethnicity of applicants, those shortlisted and those selected from JAC exercises since 2006**

	BME Applied	BME Shortlisted	BME Selected
Courts	13%	8%	7%
Tribunals	18%	9%	8%

Source: Judicial Appointments Commission

**Table 9: Ethnicity: Judiciary, April 2011**

<b>Appointment name</b>	<b>White</b>	<b>BME</b>
Justices of the Supreme Court	100%	0%
Heads of Division	100%	0%
Lords Justices of Appeal	100%	0%
High Court Judges	95%	5%
Judge Advocates	100%	0%
Deputy Judge Advocates	100%	0%
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	97%	3%
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	93%	7%
Circuit Judges	97%	3%
Recorders	93%	7%
District Judges (County Courts)	95%	5%
Deputy District Judges (County Courts)	94%	6%
District Judges (Magistrates' Courts)	96%	4%
Deputy District Judges (Magistrates' Courts)	94%	6%
<b>Total</b>	<b>95%</b>	<b>5%</b>

Source: Judicial database 2011

Note: Calculated from available data excluding where 19% (n=702) of ethnicity information is unknown

**Table 10: Age of practising barristers, 2010 (England and Wales)**

<b>Age range</b>	<b>Number</b>	<b>% all practising barristers</b>
20-29	1,156	10%
30-39	4,241	37%
40-49	4,161	36%
50-59	1,455	13%
60-69	362	3%
70-79	36	0%
80-89	6	0%
<b>Total</b>	<b>11,417</b>	<b>100%</b>

Source: Sauboorah, 2011

Note: Calculated from a total excluding where age was not stated in 26% (n=3,970) of cases

**Table 11: Age of solicitors with practising certificates (PCs), 2009**

Age	Numbers	% solicitors with PCs
30 and under	20,560	18%
31-40	40,477	35%
41-50	28,930	25%
51-60	18,355	16%
61-70	5,829	5%
71 and over	821	1%
All ages	114,972	114,972

Source: Law Society

Note: Calculated from a total excluding where age was unknown for <1% (n=503) of solicitors with PCs

**Table 12: Age of applicants from JAC exercises since September 2011**

Courts / Tribunals	Age Group					Total
	Under 46	46 to 50	51 to 55	56 to 60	61 and over	
Courts	10%	22%	34%	28%	5%	100%
Tribunals	23%	15%	21%	26%	15%	100%

Source: Judicial Appointments Commission

Note: Calculated excluding 1% of court applications (n=1) and 6% of tribunal applications (n=32) did not state age

Because of the small number of exercises from which this data is drawn some caution should be used when interpreting these figures. These results are drawn from unpublished internal management information.

**Table 13: Poor health and disability status of practising barristers at the self-employed Bar, 2007 (England and Wales)**

	Health problem or disability?			
	Numbers	Per cent of self-employed barristers	Valid per cent	Cumulative per cent
Missing <sup>1</sup>	66	2%	2%	2%
Yes	291	7%	7%	9%
No	3,751	91%	91%	100%
Total	4,108	100%	100%	

Source: Price and Laybourne, 2010

<sup>1</sup> This is where a barrister responded to the survey but did not answer a particular question

**Table 14: Disability status of practising barristers, 2011 (England and Wales)**

<b>Status</b>	<b>Per cent of practising barristers</b>
Declared disabled*	4%
Declared not disabled	96%
<i>Base N = 100%</i>	<i>2,685</i>

\*Declared disability means that individual self reported a long term health problem of disability that affects day-to-day activities

Source: Pike and Robinson, 2012

**Table 15: Disability of applicants, those shortlisted and those selected from JAC exercises since 2006**

	<b>Disabled Applied</b>	<b>Disabled Shortlisted</b>	<b>Disabled Selected</b>
Courts	4%	4%	3%
Tribunals	6%	5%	6%

Source: Judicial Appointments Commission

**Table 16: Religion: practising Bar, 2011 (excluding not stated)  
England and Wales**

<b>Religion (excl. not specified)</b>	<b>Per cent of practising barristers</b>
Buddhist	less than 1%
Christian	54%
Hindu	1%
Jewish	4%
Muslim	2%
Sikh	1%
Any other	1%
No religion	37%
<i>Base N = 100%</i>	<i>2627</i>

Source: Pike and Robinson, 2012

Note: Calculated excluding total survey responses that 11% (n=338) did not state their religion

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**Table 17:** Religion of applicants from JAC exercises since September 2011

<b>Courts / Tribunals</b>	<b>Christian</b>	<b>Other</b>	<b>None</b>	<b>Total</b>
Courts	65%	15%	20%	100%
Tribunals	53%	15%	31%	100%

Source: Judicial Appointments Commission

Note: Calculated excluding 9% of court applications (n=16) and 14% of tribunal applications (n=75) did not state religion. Because of the small number of exercises from which this data is drawn some caution should be used when interpreting these figures. These results are drawn from unpublished internal management information.

**Table 18: Sexual orientation: practising Bar, 2011 (excluding not stated)  
England and Wales**

<b>Sexual orientation excl. not specified</b>	<b>Per cent of practising barristers</b>
Heterosexual / Straight	90%
Gay / Lesbian/ Bisexual	6%
Other	less than 1%
Don't know / Refusal	4%
<i>Base N = 100%</i>	<i>2,612</i>

Source: Pike and Robinson, 2012

**Table 19:** Sexual orientation of applicants from JAC exercises since September 2011

<b>Courts / Tribunals</b>	<b>Gay or Bisexual</b>	<b>Heterosexual</b>	<b>Total</b>
Courts	6%	94%	100%
Tribunals	4%	96%	100%

Source: Judicial Appointments Commission

Note: Calculated from total where 8% of court applications (n=14) and 12% of tribunal applications (n=63) did not state sexual orientation. Because of the small number of exercises from which this data is drawn some caution should be used when interpreting these figures. These results are drawn from unpublished internal management information.

## Annex B – List of research evidence

- **Statistics on Race and the Criminal Justice System 2010**  
Biennial report containing key statistics on the representation of Black, Asian and Minority Ethnic groups in the CJS including their representation as practitioners.
- **Statistics on Women and the Criminal Justice System 2009/10**  
Biennial report containing key statistics on the representation of men and women in the CJS including their representation as practitioners.
- **Sauboorah, J (2011). Bar Barometer Trends in the Profile of the Bar. Bar Standards Board**  
Report based on anonymous statistical information held by the Bar Council.
- **Pike, G and Robinson, D (2012). Barristers' Working Lives: A Biennial Survey of the Bar 2011. Bar Standards Board**  
First biennial working lives survey of the Bar, which aims to provide improved demographic data. The survey was sent to a random sample of 8,000, and a 38 per cent response rate was achieved.
- **Hood, R., Shute, S and Seemungal, F (2003). Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment. Department for Constitutional Affairs Research Series No2/03**  
Interviews with 778 ethnic minority and white defendants at the conclusion of criminal proceedings at Crown and Magistrates Courts in 3 urban areas (Manchester, Birmingham and London). Views were also sought from court staff, judges and magistrates with 1,252 people interviewed in total.
- **Witness And Victim Experience Survey (WAVES) 2008/09**  
A survey providing detailed information on the experiences and perceptions of a subset of victims and prosecution witnesses of certain crime types involved in cases which resulted in a criminal charge.

- **2010/11 Citizenship Survey**

Findings on perceptions of organisational discrimination presented in Cohesion Research Statistical Release Number 16.

- **Thomas, C (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices. The Commission for Judicial Appointments.**

A review of the international and UK literature on research, policies and practices including approaches for appointments.

- **BRMB (2009). Barriers to Judicial Appointment Research. Judicial Appointments Commission.**

Findings from a postal self-completion survey of eligible barristers and solicitors. A final response rate of 35% (2,182) was achieved, which means findings may not be representative of all barristers and solicitors.

- **Blackwell (2011). Old Boys' Networks, Family Connections and the English Legal Profession.**

Contrasts the gender, education and family background of respective pools of solicitors and barristers from which future judges are selected using a range of data sources including successive editions of the Law Society annual statistics, the Bar Council Annual Report, and obituaries.

- **Moran, L and Wintfeldt, D. K. (2011). Barriers to application for Judicial Appointment Research: Lesbian, Gay, Bisexual and Transgender Experiences. Interlaw Diversity Forum.**

Findings from a questionnaire completed by a small sample of LGBT lawyers (188). The authors note that some of the samples studied were small and, as a result, some findings need to be treated with caution.

- **Barnes and Malleson (2011). The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity. The Modern Law Review, 74(2), pp.245-271.**

Discussion of defects of measures to promote diversity in the composition of the judiciary in England and Wales.

- **Genn (2008) The attractiveness of senior judicial appointment to highly qualified practitioners: Report to the Judicial Executive Board. Judicial Communications Office.**

Research based on interviews with 6 recently appointed High Court Judges and a snowball sample of 29 highly qualified barristers and solicitors.

- **Thomas, C (2006). Difference in diversity. Tribunals 2006, Spr, 5-6.**

Discussion of statistics relating to diversity within different judicial offices.

- **Malleson, K (2009). Diversity in the Judiciary: The Case for Positive Action. Journal of Law and Society, 36 (3), pp.376-402.**

An article examining differing forms of positive action that may be employed to enhance the diversity of the judiciary.

- **Malleson, K (2012). Taking the politics out of judicial appointments? UK Constitutional Law Group.**

A recent article for the UK Constitutional Law Group, which raises concerns about the removal of veto for the Lord Chancellor in senior appointments.

- **Paterson, A and Paterson, C (2012) Guarding the guardians? towards an independent, accountable and diverse senior judiciary.**

- **Cole, B. et al (2009). Trends in the Solicitors' Profession: Annual statistical report 2009**

The annual statistical report of the Law Society for 2009. It contains statistics available on the solicitors' branch of the legal profession.

- **Price, D and Laybourne, A (2010). Report of the Analysis of Demographic Data collected from the practising Bar in November 2007. The General Council of the Bar**

Report of a survey of all practising barristers conducted at the end of 2007 by the Bar Council in conjunction with the Legal Services Commission by whom it was funded. Sent to all practising barristers in 2007 and achieving a response rate of 35 per cent.



Alternative format versions of this report are available on request from  
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