# Judicial Appointments

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This note provides background to the recent changes to the judicial appointments system in England and Wales, starting with the *Constitutional Reform Act 2005*, which established the Judicial Appointments Commission. Further changes to eligibility for appointment were made under the *Tribunals, Courts and Enforcement Act 2007*, which changed the criteria for appointment to a number of judicial offices.

The *Governance of Britain* Green Paper suggested that there would be additional changes to the system of judicial appointments. In March 2008, the Government published a White Paper and a Draft Bill setting out the proposed amendments.

## Contents

A. Background 2
B. The establishment of the Judicial Appointments Commission 5
C. Eligibility for appointment 6
D. Diversity in the judiciary 6
1. Representation of women and minorities in the legal profession 9
E. The White Paper 11
1. A role for Parliament? 14
F. Annex 1: Diversity statistics 16
G. Annex 2: Parliamentary Materials 18

# A. Background

The judicial appointments system in England and Wales has recently been subject to rapid reform. The foundation for the current system of judicial appointments was suggested in a Department for Constitutional Affairs (DCA) consultation paper entitled *Constitutional Reform: A new way of appointing judges*, which was published in July 2003.[1] The proposals coincided with the Government's attempt to abolish the office of Lord Chancellor. Accordingly, the reforms were considered first by the Constitutional Affairs Select Committee (as it then was), which produced a report, *Judicial appointments and a Supreme Court (final court of appeal)*[2] in February 2004. Subsequently, they were also considered by the House of Lords Select Committee on the Constitutional Reform Bill, which reported in July 2004.[3] A background to the system as it operated prior to the Constitutional Reform Act 2005 can be found in the Library Research Paper entitled *The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments*.[4] The Lords Select Committee on the Constitution has published a detailed report explaining the changes made by the *Constitutional Reform Act 2005*. It specifically considered judicial appointments and judicial discipline and indicated that:

> **Part 4: Judicial Appointments and Discipline**
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> 31. This part of the Act creates a Judicial Appointments Commission to play the key role in making all judicial appointments in future (other than the Supreme Court). By Schedule 12, the Commission will consist of a lay chairman ("lay" means someone who has never held judicial office or been a practising lawyer), together with 14 other members, as follows:
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> • 5 judges (1 from Court of Appeal, 1 from High Court, 1 from either Court of Appeal or High Court, 1 circuit judge, 1 district judge),
> • 2 practising lawyers,
> • 5 lay members,
> • 1 legal tribunal member, and
> • 1 lay magistrate.
>
> Serving civil servants are not eligible to be appointed. The Act will govern the appointment of some of the members—thus the Judges' Council will select the three senior judges on the Commission, and for some appointments to the Commission appointing panels are required. The vice-chairman of the Commission will be the senior judicial member. Appointments are limited in time to not more than 5 years and there is a 10 year maximum limit on membership. The Commission will appoint a

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1 Department for Constitutional Affairs (DCA) Consultation Paper CP 10/03, *Constitutional reform: a new way of appointing judges*

2 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)* First Report Session 2003-4, HC 48-I http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf (last accessed on 1 April 2008)

3 House of Lords Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]* HL 125 I http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf (last accessed 1 April 2008)

4 House of Commons Library, *The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments*, Research Paper 05/06 13 January 2005, pp 47-52, http://www.parliament.uk/commons/lib/research/rp2005/rp05-006.pdf (last accessed 3 April 2008)

chief executive, and may act through committees or by delegation of its staff, except for the selection of judges.

32. Sections 63–97 contain the general rules for the making of judicial appointments. Selection must be solely on merit (Section 63(2)) and no-one may be selected unless the selecting body is satisfied that he is of good character (Section 63(3)). These criteria are not defined in the Act. Subject to these criteria, the Commission "must have regard to the need to encourage diversity in the range of persons available for selection for appointments" (Section 64). Guidance on procedures and on the encouragement of diversity may be issued by the Lord Chancellor, after consultation with the Lord Chief Justice and subject to approval by resolution of each House (Sections 65, 66).

33. Separate rules for appointment apply according to certain levels of judge—namely (a) the selection of the Lord Chief Justice and heads of divisions (Sections 67–75); (b) Court of Appeal judges (Sections 76–84); (c) High Court judges and other holders of judicial office (Sections 85–94). So far as the more senior judges in (a) and (b) are concerned, a selection panel of four persons must be created whenever the Commission is requested by the Lord Chancellor to select a candidate for a specific post. The panel will in the case of the most senior appointments (category (a)) generally consist of a Supreme Court judge, the Lord Chief Justice or his nominee, the Chair of the Judicial Appointments Commission or his nominee, and a lay member of the Commission. Once the panel has selected someone for appointment, the name is transmitted to the Lord Chancellor and the procedure is thereafter similar to that described above for the appointment of Supreme Court judges, as regards the power of the Lord Chancellor to reject a selected name or to require reconsideration. In the case of High Court judges and other holders of judicial office, requests for appointment may relate to more than one appointment. The prescribed process at this level includes provision for the situation in which no candidates of sufficient merit have been identified and also provision for identifying persons that would be suitable for future selection (Sections 93, 94).

34. This part of the Act includes provision for complaints about the appointment process. This will be a statutory version of the present scheme (that exists under the Judicial Appointments Order in Council 2001) by which complaints may be made to the Commissioners for Judicial Appointments. The statutory post will be entitled "Judicial Appointments and Conduct Ombudsman" (Section 62, Schedule 13). The Ombudsman will be appointed by the Queen on the recommendation of the Lord Chancellor, and must never have been a judge or practising lawyer. Former service as a civil servant, an MP, or with the Judicial Appointments Commission must not be such as to make the person inappropriate for the office; and a high level of party political activities may prevent an appointment being made. The appointment must be for a fixed period of not more than 5 years and no person may be the Ombudsman for more than 10 years.

35. Complaints about the appointment process may allege maladministration by the Judicial Appointments Commission or the Lord Chancellor's Department. They may be made only by a person who claims that he was adversely affected in the selection process by the maladministration (Section 99). Complaints made within 28 days after the matter complained of must be investigated by the Commission or the Department, as the case may be. This may lead to a further investigation by the Ombudsman. Other complaints about the appointment process may be made to the Ombudsman at any time. As with other ombudsmen, the main functions of the Ombudsman will be to investigate complaints within his remit, to report on his investigations (to the Lord

Chancellor, the Judicial Appointments Commission and the complainant), and to make recommendations for any further action, including compensation.

36. Hitherto, apart from the provisions that exist for removing a judge from office, there has been no statutory basis for disciplinary procedures involving measures that are less extreme than removal. Chapter 3 of this Part of the Act authorises the creation of a disciplinary scheme applicable to the judiciary at its various levels. Its main provisions may be summarised in this way:

(a) in the case of holders of judicial office (such as circuit judges) whom the Lord Chancellor has power to remove for inability or misbehaviour, the Lord Chancellor's power will be exercisable only after compliance with prescribed procedures (Section 108(1)) (this does not apply to High Court judges and above, who may be removed only by the Queen following an address of each House);

(b) in the case of all holders of judicial office (apart from judges of the new Supreme Court), the Lord Chief Justice will (with the agreement of the Lord Chancellor and after following agreed procedure) be authorised to give to a judge formal advice, or a formal warning or reprimand (and the Lord Chief Justice may also continue to act informally as at present, and may give general advice or warnings to judges) (Section 108(3));

(c) the Lord Chief Justice (with the agreement of the Lord Chancellor) will be able to suspend a person from judicial office who is subject to criminal proceedings, serving a sentence imposed in criminal proceedings, or has under certain circumstances been convicted of an offence (Section 108(4), (5));

(d) the Lord Chief Justice may (with the agreement of the Lord Chancellor) suspend a senior judge from office while he is subject to proceedings for an address for his removal in Parliament (Section 108(6)); he may suspend other holders of judicial office while they are under investigation for an offence (Section 108(7)). The effect of suspension is that the judge who is suspended may not perform any of the functions of his office (Section 108(8)).

37. Hitherto, there has been no prescribed procedure for making complaints about the conduct of judges, although in recent years the Lord Chancellor has in fact received many such complaints and has dealt with these in various ways, and with a varying degree of publicity. The Lord Chancellor has refused to investigate complaints about the decisions made by judges, taking the view that the individual affected will in most cases have a right to appeal against the decision. The absence of a formal complaints procedure is now to be made good by conferring powers on the Judicial Appointments and Conduct Ombudsman relating to discipline and complaints against judges. The initiative to approach the Ombudsman must be taken by an interested party—that is, either a complainant who is not satisfied with the action taken by the Lord Chancellor and/or the Lord Chief Justice, or a judge who has been disciplined and complains of the procedure used in his case. The complainant or the judge may apply to the Ombudsman to review the exercise of the disciplinary function, whether for procedural failure or some other maladministration (Section 110(1)). The Act specifies the circumstances in which the Ombudsman must carry out such a review. The review by the Ombudsman will involve the making of an investigation, the issuing of a report on the investigation, power to make recommendations (including the payment of compensation) and power to set aside a

> disciplinary finding where there has been maladministration that makes it unreliable (Section 111(5)). [5]

In October 2004, the DCA published a further consultation paper entitled *Increasing diversity in the judiciary*. The paper invited views as to whether the current statutory eligibility requirements constituted an obstacle to greater diversity in the judiciary. The issue of diversity in the judiciary is considered further below.

## B. The establishment of the Judicial Appointments Commission

Following the enactment of the *Constitutional Reform Act 2005*, the Judicial Appointments Commission (JAC) was officially launched on 3 April 2006. The Commission is an independent Non Departmental Public Body (a "quango") set up to select judicial office holders. It selects candidates for office on merit, independently of government through fair and open competition. It is expected to encourage a wide range of applicants.

Baroness Usha Prashar CBE (formerly the First Civil Service Commissioner) was appointed Chairman of the JAC in October 2005. In October 2006, the JAC indicated that it had set out its new processes for selecting judges, and a definition of merit by which judicial applicants will be assessed.[6]

The JAC has been the subject of some criticism. In September 2007, Baroness Prashar was reported to have indicated that:

> "[i]f there is any delay, it is not with us […] I think it is important that people understand what is actually happening. Carping criticism of a new body does not help. It is not in the public interest because the credibility of the commission matters and ultimately its credibility will depend on the people we appoint."[7]

In the same article, a spokesman for the Ministry of Justice was said to have stated that it was incorrect to suggest that the Lord Chancellor was holding up the appointment of judges.[8]

Recently, the Lord Chief Justice is said to have complained of a shortage of judges, linking this to the "unduly cumbersome" appointment process and the JAC lacking sufficient staff.[9] Members of the JAC have appeared before the Constitutional Affairs Committee in July 2006 and June 2007.[10]

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5 Select Committee on the Constitution, *Constitutional Reform Act*, 5th Report of Session 2005–06, HL 83: http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/83/83.pdf (last accessed 10 April 2007)

6 http://www.judicialappointments.gov.uk/select/qualities.htm (last accessed on 1 April 2008)

7 *The Times*, "Ministers are blamed for shortage of judges", 10 September 2007

8 *Ibid*

9 *Solicitors Journal*, "Lord Chief Justice calls for a new tribunal to tackle immigration cases", 8 April 2008

10 Constitutional Affairs Committee, *The Operation of the Judicial Appointments Commission*, One off oral evidence session, Tuesday 18 July 2006: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1554/6071801.htm (last accessed 10 April 2008); Constitutional Affairs Committee, *Judicial Appointments Commission*, One off oral evidence session, Wednesday 20 June 2007: http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/uc416-ii/uc41602.htm (last accessed 10 April 2008)

## C. Eligibility for appointment

The eligibility requirements for holding a judicial appointment did not change at the same time as reforms were made to the appointments system. Prior to the passage of the *Tribunals Courts and Enforcement Act 2007*, eligibility for appointment to professional judicial office in England and Wales was dependent upon applicants possessing particular qualifications (within the meaning of the Courts and Legal Services Act 1990) which are based on possession of "rights of audience" for a prescribed number of years.

The precise category of rights of audience required, and the length of time for which they must have been held, varied according to the judicial office concerned. The practical effect of the arrangements was to restrict eligibility for almost all judicial posts to persons who had been qualified as barristers or solicitors in England and Wales for at least seven years (and for many posts, ten years). The 2007 Act made a number of changes to the eligibility requirements, including:

• removing the existing link between eligibility for judicial appointment and possession of advocacy rights;
• providing for the extension of eligibility for some appropriate appointments to holders of legal qualifications other than barristers and solicitors;
• introducing a requirement that a person with a relevant qualification must also have gained legal experience to be eligible for office; and
• reducing the number of years for which it is necessary to have held the relevant qualification and gained legal experience.

The majority of the changes appeared to have been introduced to encourage diversity in the judiciary.

## D. Diversity in the judiciary

As mentioned above, diversity in the judiciary has been an issue of concern for some years. One issue where tensions have arisen is the inter-relationship between appointments on merit and increasing diversity. It is almost universally accepted that appointments to the bench should continue to be made only on the basis of merit, however there have been some disagreements on how exactly merit can be defined.[11]

Sir Thomas Legg, a former Permanent Secretary at the Department for Constitutional Affairs, has argued that:

> Selection on merit can have one of at least two quite separate meanings. One of these meanings is what I have elsewhere called maximal merit. On this approach, there is only one candidate who is fit for appointment, namely the single candidate who is judged to be the best available. This approach leaves no room at the point of

[11] See for example KE Malleson, *The New Judiciary*, Ashgate 1999 and *Rethinking the Merit Principle in Judicial Selection*, Journal of Law and Society Vol 33, No 1, March 2006 and also the evidence of Sir Thomas Legg to the Constitutional Affairs Committee report *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC 48-II 2003-04

> decision for supplementary policies about the social and professional make-up of the judiciary. That is the approach which has been adopted up to now. It is sometimes difficult to apply, but it has represented the underlying, and usually achievable, principle.
>
> The other approach, which I have called minimal merit, is where all candidates who are judged to reach an agreed minimum standard are treated as equally suitable for appointment, and you are then entitled to select among them in accordance with any supplementary policy you happen to have, for example about a need to have more women or ethnic judges. Both of these approaches can genuinely claim to be appointment on merit, but they can lead to very different results. The concern must be that the policy implied by the paper will generate so much pressure to diversify the composition of the judiciary that it will in practice lead to numerous appointments on a basis of minimal merit.[12]

In contrast, Professor Kate Malleson has observed that in circumstances where a comparison was required between candidates who were similarly qualified in a narrow field:

> […] the maximalist approach may be modified to allow for the possibility of the application of a 'tie-break' approach to merit. This arises where two or more candidates are identified as equally qualified and one is from an underrepresented group such as a women; the latter's disadvantaged status then serves as a 'tie-breaker' giving her the advantage.[13]

She has also argued that 'proactive polices' might be used to encourage a more diverse judiciary:

> The development of proactive policies to encourage a more diverse range of candidates into a recruitment or promotion pool is intended to increase the chances that candidates from under-represented groups can compete equally in the selection process, but ultimately they will be measured against all other candidates on the basis of merit. For this reason the application of proactive policies poses no threat to the fairness of the selection system as between individual candidates because they do no more than put unfairly disadvantaged candidates in the same position as advantaged candidates. Nor do they run the risk of undermining the merit principle by reducing the quality of those appointed. Indeed, by encouraging more qualified applicants to come forward and so expanding the recruitment pool, such policies should increase the competition for places and thus the quality of those ultimately appointed.[14]

In evidence to the Constitutional Affairs Committee in 2004, Mr Oba Nsugbe QC suggested that it would be a concern to candidates to think that minority groups could be appointed who were not of sufficient merit. He also suggested that candidates who might be well qualified might not fall within the pool in any event, due to a lack of good quality work – leading to a lack of visibility:

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[12] Sir Thomas Legg QC, *Judicial Reform: Function, Appointment and Structure*, Speech delivered at the Cambridge Centre for Public Law, 17 October 2003 and see also Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, HC 48-I 2003-04, para 149

[13] Kate Malleson, *"Rethinking the Merit Principle in Judicial Selection"*, Journal of Law and Society, Vol 33, No 1, March 2006, pp126-40

[14] *Ibid*

> I am anxious that merit is kept to the forefront […] but where I think the problems lie is where you are taking the merit from, and for me there are issues about encouraging in all four corners of the appointment constituency […] Therefore, for me you have got to get there much earlier, to people coming out of college, coming out of Bar school, coming out of law school. This means workshops, it means lecturing, it means mentoring and it means supporting those people who have got through the system so that they can play an important role in encouraging other people much, much earlier. I was fortunate. I was in a set of Chambers where we had plenty of information and there was a track record of appointments. There were lots of recorders and circuit judges, and Judge Brodrick was from our Chambers, so I got information pretty much after three or four years. I think the other issue […] is the issue of access to work because if you do not get access to the quality work and you are not tested where it really matters, with responsibility, you will not get appointed because you will not be able to point to having been through the mill, so these are all key areas that I think before you get to the issue of how wide is the pool and where is the pool, we have got to get earlier to the difficulties.
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> […]I think targets and encouragement towards targets, yes, but positive discrimination, no, because so far as I am concerned, it would raise question marks about the credibility of an appointment if there was some suggestion that I was appointed just to make up a number.[15]

It has been argued that the current lack of diversity in the judiciary has a damaging effect on public confidence and leads to the loss of potentially talented judges.[16]

In a speech in February 2007, the then Lord Chancellor, Lord Falconer, stated that progress on diversity was being made. In particular, he indicated that:

> We are making progress in terms of gender and ethnic diversity. Year on year the statistics are pointing in the right direction. In 1999 only 24% of judicial appointments to courts and tribunals were women. By September 2005 this had increased to 46%. Positive trends; with the total number of female judges in courts rising from 14-18% in the last 5 years alone. More and more women are applying for and taking up judicial office, and I hope that increasing the profile of women in the judiciary, promoting more flexible working arrangements, and highlighting the new open, transparent selection procedure will encourage more women to consider a career on the bench.
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> A similar picture emerges with those from ethnic minority backgrounds with the percentage of appointments to courts and tribunals increasing from 5% to 17% in that same period. While the percentage of judges in courts from ethnic minority backgrounds has doubled since 2001 to nearly 4% by April last year.[17]

When considering the issue of diversity and under-representation in the judiciary, it has also been suggested that background and class plays a part in disadvantaging candidates. When

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15 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC 48-II, Qq420-424

16 See for example: C. Banner and A. Deane, *Off with their wigs*, 2003, pp129-139

17 Department for Constitutional Affairs, Speech by Lord Chancellor and Secretary of State for Constitutional Affairs Lord Falconer of Thoroton at Wragge and Co (Birmingham), 1 February 2007, available at: http://www.dca.gov.uk/speeches/2007/sp070201.htm (last accessed 10 April 2008)

the issue was considered by the Constitutional Affairs Committee, Ann Cryer MP put to Oba Nsugbe QC, that a woman who had attended a comprehensive school, followed by a former polytechnic might be more disadvantaged than an ethnic minority candidate who had benefited from other 'advantages':

> **Mrs Cryer**: I just wonder what all of you would think if you saw an interview about to take place for a judicial appointment and one candidate was a young woman who had been to a comprehensive school, had a fairly strong Yorkshire accent and had been to a poly or what had been a poly, and the other candidate was a young black man who had been to an independent school, had been to one of the better universities that we keep hearing about and had a fairly sort of middle England, what we would call in Yorkshire, "posh" accent. Who do you think would be discriminated against in that interview and what do you think should be done? Mr Nsugbe, you said that you were not in favour of positive discrimination, so I wonder what you would think about how those two candidates would get on and how they would be dealt with by the appointments people interviewing them and also what could be done perhaps to address the problems that we are talking about by way of positive discrimination?
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> […]
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> **Mr Nsugbe**: I think that you would have certainly to look at the issue of disadvantage. You are suggesting that potentially the woman has been as equally disadvantaged as the black male. The black male is obviously black and that is apparent and the woman has a background which does not readily identify with a number of judges, for example. I think you would have to look at the issue of background, but at the end of the day you would have to test it on merit and you would have to test it by transparent, clear criteria and whichever candidate was the better on the transparent, clear criteria, whether it be in an assessment centre where you have a slightly more objective way, I suspect, of choosing judges or whether it be on the criteria that the panel are supposed to deal with when they are interviewing, I would still stick to the guiding principle which has to be: which one would be the better judge? If it is a draw and you really cannot make your mind up about it, appoint them both. I do not think that that to me would be a problem area and I think certainly I would have in mind the issue of background, but I do have a difficulty, I must confess, as to how we would judge who is the more disadvantaged and I think there would be a pretty difficult problem there.[18]

The current judicial diversity figures can be found at the Annex to this paper, below.

## 1. Representation of women and minorities in the legal profession

One of the issues which restrained the development of a diverse judiciary has previously been the lack of representation of women and ethnic minorities in the legal profession. In terms of representation in the legal profession, in recent years, women (in particular) have made great strides.

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[18] Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC 48-II, Qq433-35

It has been reported that the alleged "stranglehold" of Oxbridge colleges and private schools on the legal profession may be breaking, according to a survey for the Bar Council.[19] It found that 63 per cent of students training for the Bar's one-year vocational course (BVC) had attended state schools and 86 per cent did not study at Oxford or Cambridge. It also found that 53 per cent were women and 39 per cent were from ethnic minorities. That said, the number of institutions offering the BVC has expanded over the past few years and there have been other reports indicating that additional restrictions should be placed on the number of students undertaking the BVC, given the shortage of pupilages and tenancies available at the independent at the Bar.[20]

A DCA report published in November 2005, provided some statistics on numbers in the professions:

> **The Legal Professions**
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> **Gender**
> Some 30% of all barristers are women. In the self-employed Bar the proportion is 29%, in the employed Bar it rises to 44%. The proportion of women is likely to increase, with 48% of those called to the Bar in 2003/04 being female. 40% of all practising solicitors are women. For the last ten years a majority of those admitted as solicitors have been women, with women making up 57% of those admitted in 2003/04. However, of those solicitors with 10 – 19 years experience in private practice, 78.7% of men were partners or sole principals, compared with only 52.1% of women15.
>
> **Ethnicity**
> 9% of barristers come from BME backgrounds, as do 7.9% of solicitors. 17% of new admissions to the roll of solicitors, and 18% of trainee solicitors are from BME backgrounds. The BME proportion of the professions is thus likely to rise over time.[21]

In November 2007, Lord Neuberger of Abbotsbury delivered a report (on behalf of a Bar Council working party) on how entry to the Bar could be improved.[22]

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[19] "Law barriers are 'breaking down'", *The Times*, 17 October 2006, this corresponds favourably to the figures contained in Department for Constitutional Affairs, *Increasing Diversity in the Legal Profession*, November 2005 http://www.dca.gov.uk/legalsys/diversity_in_legal_2col.pdf, in which it was reported that: "Michael Shiner's research suggests that there has been a significant bias towards students from independent schools and Oxbridge universities when allocating places for the Bar Vocational Course (BVC). For example, his 1997 Cohort study noted that the highest percentage of graduates to be offered a place on the BVC came from Oxbridge universities (94% and 97% for CPE students) and the lowest were from 'new' universities (73% and 60% for CPE students)."

[20] See for example, "Raising the Bar", *The Sunday Times*, 15 October 2006 which quotes Stephen Hockman QC, the Chairman of the Bar Council as saying "The academic barriers at the start of the course are not as high as they might be […] Generally, you need an upper second class degree -but not everywhere. The taskforce might suggest bringing in a competence test to select for just 1,000 places on the bar vocational course. So the wastage would be less" and "Students wait and worry as barristers go to war", *Daily Telegraph*, 21 September 2006

[21] See for example Department for Constitutional Affairs, *Increasing Diversity in the Legal Profession*, November 2005 and "Law firms, breaking down the stereotypes", *The Independent*, 17 October 2006

[22] Entry to the Bar Working Party, *Final Report*, November 2007, http://cms.barcouncil.rroom.net/assets/documents/FinalReportNeuberger.pdf

In addition to this focus on diversity at the Bar, efforts have also been made to encourage more solicitors to apply for judicial appointments. In a speech in 2005, Lord Falconer, then Lord Chancellor, indicated that:

> Solicitors are an untapped market. There is a substantial disparity between the number of solicitors who are eligible and those that actually apply. Solicitors that do apply tend to apply for more junior posts. There is an assumption - among some solicitors - that being a judge is not just for 'other people' but more specifically is for 'other barristers'. This is simply wrong. Experience as an advocate is not a necessary requirement for judicial office. Solicitors are a huge untapped pool of talent for the judiciary.[23]

The Times has recently reported that the Law Society, which represents solicitors, has criticised the judicial appointments process. In January 2008, Francis Gibb reported that the Law Society claimed that:

> The creation of the JAC […] was "an opportunity to sweep away the old and bring in the new; an opportunity which we believe has not yet been fully realised". The Government retains "too much influence", both over the staff of the commission itself (82 per cent of whom are on secondment from the Ministry of Justice or Whitehall); over its members, "selected primarily by the Lord Chancellor and the Lord Chief Justice"; and over appointments: the Lord Chancellor is responsible for considering and deciding on selections that the commission makes. […][24]

The same article indicated that the JAC was taking steps to encourage under-represented barristers and solicitors to apply for judicial appointments:

> It has embarked on a strategy with the Bar Council and Law Society to reach a more diverse group of candidates. Research will be undertaken into the pool of candidates and barriers to entry; and roadshows held to promote judicial posts. Five have been held this month (Newcastle, Liverpool, Manchester, Cardiff and Leeds). The challenge is, it insists, "for all of us in the legal and judicial world, not just us". The profession has to do its bit. If people don't apply — or reach senior levels of the profession — they can't be appointed.[25]

## E. The White Paper

On 25 October 2007, the Government produced a consultation document entitled *The Governance of Britain – Judicial Appointments*.[26] The consultation posed a number of questions seeking views on the existing functions of the executive, legislature and judiciary in relation to appointments and considered the scope of transferring functions. The consultation closed on 17 January 2008 and 34 responses were received.[27]

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[23] Lord Falconer of Throton QC, *Increasing judicial diversity: the next steps,* Speech for Commission for Judicial Appointments at Institute of Mechanical Engineers, London, 2 November 2005 http://www.dca.gov.uk/speeches/2005/lc021105.htm (last accessed 25 April 2008)

[24] *The Times* "Judges still have too much influence", 31 January 2008

[25] *Ibid*

[26] For further details see: http://www.justice.gov.uk/publications/cp2507.htm (last accessed 10 April 2008)

[27] *Ibid*

After an analysis of the results of the consultation, the Government concluded, *inter alia*, that:

> 110. The Government has analysed the implications of removing the Lord Chancellor's discretion to reject, or ask for reconsideration of, a selection for judicial appointment from the JAC. In light of the responses received to the consultation, it considers that the complete removal of the Lord Chancellor from the process is likely to result in an accountability gap. This gap increases with the seniority of the appointment being made. The most significant change in risk appears to be around the level of appointments to the High Court. The key considerations which emerge from the analysis are that due to their seniority, there is much more potential for members of the higher judiciary to become involved in cases involving high-profile, complex, sensitive, and contentious issues. They are likely to have to make decisions – often with national implications – which are binding on other courts.
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> 111. There are significantly more appointments made at lower levels of the judiciary. The involvement of the Lord Chancellor in the selection of individuals at these lower levels has greater resource implications for both the Lord Chancellor and his department, and for the JAC than appointments at the highest levels. This has the potential to add cost, and to draw out the process, if only to a small degree.
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> 112. While it should clearly be avoided, the impact of an error in making a single judicial appointment would increase significantly with the seniority of the appointment being made. This is due to the lower number of judges at the higher levels, the gravity of the decisions they take, and the precedents they will set for the lower courts.[28]

In March 2008, the Government published a White Paper and a Draft Bill setting out proposals for further changes to the system of judicial appointments. It indicated that:

> The Way Forward
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> 113. As set out in The Governance of Britain Green Paper, the Government believes that the role of the executive in the appointment of judges should be reduced, that the existing arrangements for these appointments should be streamlined and that those who exercise power should be made more accountable. The Government therefore proposes to make changes to the role of the executive in the appointment of judges. These changes are set out below.
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> 114. Remove the Lord Chancellor from the selection process for judicial appointments below the High Court – The Government proposes the removal of the Lord Chancellor's discretion to reject, or power to ask the JAC to reconsider, a JAC selection for appointment to a judicial office below the High Court. The Lord Chancellor will retain his current discretion to reject a candidate on medical grounds, and his discretion to withdraw entirely (after consulting the Lord Chief Justice), a request to fill a vacancy, if he considers the selection process was unsatisfactory – for example, where there may have been a procedural error or systemic flaw in the appointments process.

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[28] The Governance of Britain: *Constitutional Renewal*, March 2008, Cm 7342-I, http://www.justice.gov.uk/docs/constitutional-renewal-white-paper.pdf (Last accessed 10 April 2008)

115. Remove the Prime Minister entirely from making judicial appointments – The most senior judges (the Law Lords, Lord Chief Justice, Heads of Division, and Court of Appeal judges) are appointed by Her Majesty The Queen on the advice of the Prime Minister. In practice the Prime Minister advises Her Majesty The Queen on a recommendation from the Lord Chancellor, and the Prime Minister's role is essentially a formality.

116. Set out key principles in legislation – The Government proposes the inclusion in legislation of a series of key principles, which represent best practice in making judicial appointments. These principles would help to guide all the bodies involved in the appointment process. They would also provide a basis on which to hold them more accountable.

117. Carry out medical checks at a different stage in the judicial appointments process – There was general consensus amongst respondents that this aspect of the appointment process should be quicker. The Government agrees and proposes to amend the Constitutional Reform Act 2005 (CRA) to transfer responsibility for medical checks from the JAC to the Lord Chancellor.

118. The Lord Chief Justice should no longer be required to consult the Lord Chancellor, or to obtain his concurrence, before deploying, authorising, nominating, or extending the service of judicial office holders – The Lord Chief Justice is currently required to consult the Lord Chancellor, or in some instances, to obtain his concurrence, in relation to a wide range of deployments, authorisations and nominations of individual judicial office holders to particular roles or offices. In addition, he is required to obtain the Lord Chancellor's concurrence in relation to the extension of service of judicial office holders.

119. In the interests of streamlining the process, we asked in the consultation whether this requirement should continue, other than in circumstances where there were financial implications. There was general agreement that it should be removed. Given the responses to consultation, the Government proposes to remove the requirement on the Lord Chief Justice to consult the Lord Chancellor, (or in some cases to obtain his concurrence), when he is exercising specified functions relating to the authorisation, nomination and extension of service of judicial office-holders, other than those where there are financial implications.

120. The Judicial Appointments Commission should be allowed to take the preliminary steps in a selection process before a formal Vacancy Notice is received – The CRA requires the JAC to undertake certain steps having received notification of a vacancy for which a selection is required. Consequently, the JAC only begins the preliminary steps in making a selection after a formal Vacancy Notice has been issued. This can mean avoidable delays in starting selection exercises – for example, when filling a vacancy is likely to lead to a linked series of promotions, for which it would be helpful to prepare quickly.

121. Given the responses to consultation, and the uncertainty which has arisen in previous selection exercises, the Government proposes that it should make clear that preliminary steps can be taken prior to a formal Vacancy Notice being received. The Government is considering whether legislation is required, and, if necessary, will introduce provisions in the Constitutional Renewal Bill on introduction.[29]

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[29] *Ibid*

The relevant proposals in the Draft Bill can be found at **Part 3 Courts and Tribunals** between clauses **19-20** and in a much more detailed schedule (**Schedule 3: Judicial Appointments Etc**). Part 1 of Schedule 3 contains amendments to the *Constitutional Reform Act* which would alter the judicial appointments regime.

## 1. A role for Parliament?

The issue of whether or not Parliament should play a role in the judicial appointments process was considered during the passage of the *Constitutional Reform Act 2005*.

The Constitutional Affairs Committee stated that:

> 82. The Department's Consultation Paper raised the possibility of enhancing the status of the members of the [new Supreme] Court by establishing confirmation hearings before one or other of the Houses of Parliament. This could, it argued, help to ensure that Parliament had confidence in the Judiciary. This was the view of Sir Thomas Legg, former Permanent Secretary in the Lord Chancellor's Department and of Professor Robert Hazell.
>
> 83. The consultation paper dismissed this option, concluding that:
>
> 'The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills. If the intention was to assess their more general approach to issues of public importance, this would be inconsistent with the move to take the Supreme Court out of the potential political arena. One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be the members of the Court would cut right across that objective'.
>
> 85. We agree with the Government's view that confirmation hearings for judges would not be desirable. That does not preclude a parliamentary Committee from seeking formal opportunities—from time to time—to meet Justices of the Supreme Court, including recently appointed ones. This Committee has done so. Following discussions with the Lord Chief Justice, we have been able to hold evidence sessions with members of the judiciary from almost every tier, including the Law Lords and the Lord Chief Justice. We have found these sessions very fruitful and we all believe that they are welcomed by the judiciary.
>
> 86. The views of Judges on the role of the Supreme Court, approaches to broad questions of law, especially constitutional law and human rights and law reform are all matters of legitimate public interest. A constructive dialogue between Parliament and the UK's most senior judiciary need in no way undermine judicial independence. The Supreme Court itself has much to gain from such dialogue, especially if senior members of the judiciary cease to sit as peers in the House of Lords.[30]

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[30] Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, First Report Session 2003-4, HC 48-I: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf (Last accessed on 10 April 2008)

On 23 January 2008 the Prime Minister announced that the Government had written to and would welcome views from the House of Commons Liaison Committee on a list of public appointments that it proposed should be subject to pre-appointment scrutiny by their relevant select committee. Along with a number of other public office holders, this list included any future Chair of the JAC. In its White Paper, the Government indicated that:

> 133. Respondents to the consultation generally acknowledged the useful role played by the legislature in scrutiny of the overall process. However, a substantial majority opposed any role for the legislature in the selection or making of judicial appointments, and in particular to confirmation hearings for individual appointments to judicial posts. While the Government welcomes the continued and valuable scrutiny performed by the various parliamentary select committees, there could be merit in a meeting of the House of Commons Justice Affairs Committee and the House of Lords Constitution Committee to hold the system to account on an annual basis.[31]

[31] The Governance of Britain: *Constitutional Renewal*, March 2008, Cm 7342-I, http://www.justice.gov.uk/docs/constitutional-renewal-white-paper.pdf (Last accessed 10 April 2008)

# F. Annex 1: Diversity statistics

**Annual Diversity Statistics - as at 1st April 2007**

| | | Females | | Ethnic Minority | |
|---|---|---|---|---|---|
| | Total | Number | % of total | Number | % of total |
| Lords of Appeal in Ordinary | 12 | 1 | 8.3% | 0 | 0.0% |
| Heads of Division (excl LC) | 4 | 0 | 0.0% | 0 | 0.0% |
| Lord Justices of Appeal | 37 | 3 | 8.1% | 0 | 0.0% |
| High Court Judges | 108 | 10 | 9.3% | 1 | 0.9% |
| Circuit Judges (inc TCC) | 639 | 73 | 11.4% | 9 | 1.4% |
| Recorders | 1,206 | 182 | 15.1% | 53 | 4.4% |
| District Judges (inc Family Division) | 450 | 101 | 22.4% | 14 | 3.1% |
| Deputy District Judges (inc Family Division) | 780 | 219 | 28.1% | 30 | 3.9% |
| District Judges (MC) | 139 | 33 | 23.7% | 7 | 5.1% |
| Deputy District Judges (MC) | 169 | 42 | 24.9% | 9 | 5.3% |
| **Total** | **3,544** | **664** | **18.7%** | **123** | **3.5%** |

Note: As at 31/8/2000 all Stipendary Magistrates became District Judges (Magistrates' Courts)

Source: Annual Diversity Statistics, Judiciary of England and Wales
http://www.judiciary.gov.uk/keyfacts/statistics/index.htm

**Annual Diversity Statistics - as at 1 April 2008**

| | | Females | | Minority Ethnic | |
|---|---|---|---|---|---|
| | Total | Number | % of total | Number | % of total |
| Lord of Appeal in Ordinary | 12 | 1 | 8.3% | 0 | 0.0% |
| Heads of Division | 5 | 0 | 0.0% | 0 | 0.0% |
| Lord Justice of Appeal | 37 | 3 | 8.1% | 0 | 0.0% |
| High Court Judge | 110 | 16 | 14.5% | 3 | 2.7% |
| Circuit Judge | 653 | 87 | 13.3% | 20 | 3.1% |
| Recorder | 1,305 | 194 | 14.9% | 61 | 4.7% |
| Judge Advocates | 9 | 0 | 0.0% | 0 | 0.0% |
| Deputy Judge Advocates | 12 | 2 | 16.7% | 0 | 0.0% |
| District Judge | 438 | 98 | 22.4% | 20 | 4.6% |
| Deputy District Judge | 773 | 213 | 27.6% | 31 | 4.0% |
| District Judge (Magistrates' Courts) | 136 | 30 | 22.1% | 3 | 2.2% |
| Deputy District Judge (Magistrates' Crt) | 167 | 42 | 25.1% | 12 | 7.2% |
| Masters, Registrars, Costs Judges and DJ (PRFD) | 48 | 11 | 22.9% | 1 | 2.1% |
| Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judge (PRFD) | 115 | 39 | 33.9% | 5 | 4.3% |
| **Total** | **3,820** | **736** | **19.3%** | **156** | **4.1%** |

**Statistics by Gavin Berman, Social and General Statistics Section**

## G. Annex 2: Parliamentary Materials

Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04:
http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf

House of Lords Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill*, July 2004, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

Constitutional Affairs Committee, *Constitutional Reform Bill [Lords]: the Government's proposals*, Third Report of Session 2004–05:
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/275/275i.pdf

Select Committee on the Constitution, *Constitutional Reform Act*, 5th Report of Session 2005–06:
http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/83/83.pdf

Constitutional Affairs Committee, *The Operation of the Judicial Appointments Commission*, One off oral evidence session, Tuesday 18 July 2006:
http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1554/6071801.htm

Constitutional Affairs Committee, *Judicial Appointments Commission*, One off oral evidence session, Wednesday 20 June 2007:
http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/uc416-ii/uc41602.htm