AHRB Research Centre for Law, Gender and Sexuality

RESPONSE TO THE DCA'S CONSULTATION PAPER: 'INCREASING DIVERSITY IN THE JUDICIARY'

January 2005

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SUMMARY

This consultation marks an important step forward in the reform of the United Kingdom's justice system. It is extremely encouraging that within a year of Brenda Hale's appointment to the House of Lords being announced, the Department for Constitutional Affairs has undertaken such a wide-ranging investigation into the promotion of judicial diversity. We congratulate the DCA on the thoroughness of the review and the considered nature of your proposals for reform, and we urge you to make the best of this opportunity to set new international standards in the way that we appoint and promote our judiciary.

Here is a summary of our main recommendations:

Improving Information and Communication Strategies

1. We recommend targeting lawyers earlier in their careers, targeting undergraduates particularly at the new universities, reviewing the Court of Appeal and House of Lords judicial assistant schemes to make them available to graduates, and extending the work-shadowing scheme to students.

Becoming a judge

2. **We strongly recommend changing the current statutory requirements.** It should not be necessary that judges acquire rights of audience in order to gain judicial appointment. We also consider that the requirement of being in post for a certain length of time prior to promotion to certain levels should be discontinued.

3. We do not consider that the fee-paid sitting requirement is a factor that inhibits judicial diversity.

4. We suggest a number of ways to encourage non-practising lawyers to consider a judicial career, including supporting schemes such as the Association of Women Solicitors' 'returners' course, and establishing a body specifically for non-practising lawyers.

The appointments process

5. We recommend extending the assessment centre approach to full-time appointments.

6. We recommend that the DCA does not use agencies to undertake any sort of search function.

7. **We strongly recommend the immediate discontinuation of automatic consultation** in favour of what you have termed 'nominated consultation.'

Judicial working practices

8. We recommend targeting disabled lawyers earlier, and throughout their careers, promoting the judicial assistant and work shadowing schemes to disabled lawyers and students, and addressing mental health stigma amongst judges.

9. We support the introduction of flexible sitting arrangements and career breaks, and we recommend the introduction of child care/dependent provision.

10. We consider that the preclusion of return to practice acts as a significant deterrent to those who might otherwise consider judicial office.

The role of the legal profession

11. The cost of qualification and culture in the legal profession (particularly at the Bar) presents a considerable obstacle to students from less privileged socio-economic backgrounds. **Both the law profession and the DCA should have responsibility for investigating and promoting alternative routes to qualification, such as the ILEX route and part-time law degrees.** These routes should ***not*** be perceived as 'second best' to a 'norm' of obtaining a full-time law degree from a Russell Group university followed by a training contract or pupillage in the City.

Monitoring judicial diversity in the future

12. We recommend that the DCA begin collecting data on sexual orientation, religion/belief and wider education/social background.

13. We suggest that the DCA establish an equal opportunities steering or review group, which would report to the Senior Steering Group.

RESPONSE TO CONSULTATION

We have responded to the questions as they are numbered in the chapters of the consultation paper; that is under the following headings:

chapter	*content*
2	Improving information and communication strategies
3	Becoming a judge
4	The appointments process
5	Judicial working practices
6	The role of the legal profession
7	Monitoring judicial diversity in the future.

1. Do you consider that this consultation paper reflects an adequate understanding of the issues and asks the appropriate questions?

1.1 Yes. This consultation paper represents a thorough and thought-provoking investigation of the issues.

2. Are there any other views or comments relevant to increasing judicial diversity that you would like to draw to the DCA's attention? If so, what are they?

2.1 There are two broad issues that we would like to discuss at this stage: the reasons for aiming for judicial diversity, and the cultural changes that are required to render judicial diversity meaningful in practice.

2.2 **Reasons for Judicial Diversity.** Various different arguments have been advanced in justification of judicial diversity. These

include promoting the public's confidence in the judiciary ('public confidence'),[1] reflecting the diversity in our society ('representation' or 'legitimacy'),[2] improving the quality of the decisions through an increased understanding of people's diverse circumstances,[3] and equity – i.e. redressing the unfairness inherent in a narrow group of people controlling the judiciary.[4]

2.3 Our position is that for reasons of equity, more women, 'minority' and disabled judges should be appointed to, and promoted within the judiciary. Taking gender as an example, we should be aiming to see at least half of the 'law lords' as female appointments in the next few years, and this should be reflected throughout the judiciary. However, given the inequalities on lines of gender, ethnicity, disability, sexual orientation, religion and class that currently pervade our society (including the justice system), we should be aiming beyond numbers to achieving a legal and judicial environment that is supportive of minority judges, and which promotes a context-sensitive definition of judicial 'truth.'[5] This requires cultural change within the judiciary and an appropriate interpretation of judicial 'impartiality.'

2.4 **Cultural Change within the Judiciary.** It cannot be assumed that merely by promoting greater numbers of women, ethnic minority and disabled lawyers into the judiciary (and the higher levels of the judiciary), the DCA will secure a fundamental shift in the way that the legal profession interacts with 'minorities', or in the way that 'minority' judges are treated. For example, Professor Margaret Thornton, in her work on women in the Australian legal profession, states that 'numerical proportionality cannot be equated with a radical change in legal knowledge. It may simply mean that we have more lawyers' (Thornton, 1996: 268). She concludes that neither an increase in the numbers of women

[1] See the consultation paper at paragraph 1.2, and Malleson, 2003 at 20.
[2] See Malleson, 2003 at 18 and the consultation paper at paragraph 1.2.
[3] See Kobayashi, 1998 at 203 and Malleson, 2003 at 2.
[4] Ibid at 15.
[5] To this extent, we agree with Professor Kobayashi when she states '..more visible minority appointments should be made for reasons of employment equity; but we should not look to employment equity to solve issues of impartiality' (Kobayashi, 1998, 202).

lawyers nor the passing of time will provide the solution to women's secondary status within the legal profession.

2.5 This being the case, we should be thinking about how to change the culture of the judiciary so that we do not repeat the problems experienced in other jurisdictions when greater numbers of 'minority,' women and disabled judges are appointed. For example, in Canada and the United States, the increased appointment of ethnic minority judges has been accompanied by a disproportionate number of bias challenges against minority and women judges.[6] Furthermore, experience from Australia and Canada indicates that women face considerable problems when they are appointed to judicial office. According to Professor Rosemary Hunter, these problems include:

- excessive scrutiny of their performance;
- an attitude amongst male lawyers that female lawyers who are appointed as judges have 'jumped the queue,' personally depriving them of progress in their own careers;
- the appointment of judges being used as a 'political football,' so that women judges face attack that they have been appointed as the result of political cronyism rather than merit;
- an atmosphere in which it is acceptable for senior male judges to attack senior female judges in public:

Professor Hunter cites two examples. In the Canadian example, Justice McClung used a piece in a national newspaper to make a personal attack on his female colleague Madame Justice L'Heureux-Dubé. The Australian example concerns the speech given by the former Chief Justice of Australia, the Right

[6] As the Honourable Maryka Omatsu points out, following President Carter's affirmative action program in the 1970's aimed at promoting ethnic minority and female judges to the federal bench, a group of cases was heard specifically on the question of whether African-American judges should be permitted to adjudicate on issues of race discrimination (see Omatsu, 1997: 13, and Backhouse, 1998: 179). A similar phenomenon has occurred recently in Canada, with one case concerning a bias application against a Black woman judge resulting in an appeal to the Supreme Court (see below).

Honourable Sir Harry Gibbs, at the opening of the Queensland Supreme Court Library's Rare Books Room in February 2000. During this speech, Sir Gibbs made a number of comments that were overtly derogatory of recent Australian attempts to promote judicial diversity (Hunter, 2004: 12).[7]

and

- an atmosphere in which women judges who attempt to address discrimination within the judiciary are subjected to hostility and personal pressure:

According to Professor Constance Backhouse, when Madame Justice Wilson (a senior Canadian judge) reported the results of a survey amongst Canadian female judges which found that 44 per cent had experienced discrimination including "sarcasm, ill-disguised hostility, sexual harassment, and 'amused tolerance'", male judges responded by forcefully denying that such discrimination could take place, and by vilifying Madame Justice Wilson herself (Backhouse, 2003, cited in Hunter (2004) at 17).

2.6 **What is Judicial 'Truth'?** We alluded above to the disproportionate number of bias applications against 'minority' and female judges in Canada and the United States. These judges are more likely than others to have their judicial credibility called into question, itself a feature of a legal profession that is largely controlled by white, able-bodied men. However, what these bias applications also indicate is the extent to which 'impartiality' has become a contested concept in these jurisdictions. One Canadian example is the case of R v RDS:

The case of R v RDS concerned the acquittal by a Black woman

[7] One such comment ran as follows:
'A more recent heresy is that the bench should be representative and that the sex of the aspirant or perhaps his or her ethnic origin should be a more important consideration than merit. The bench can never be representative, for there are many sections of society which it would be impossible to represent; what is more important, the bench should never be representative, for the duty of a judge is not to represent the views or values of any section of society but to do justice to all' (cited in Hunter, 2004: 12).

judge, Judge Corinne Sparks, of a 15-year-old Black youth on two counts of assault and one count of unlawfully resisting a white police officer.[8] At the trial, Judge Sparks had to assess contradictory evidence from two opposing witnesses, RDS himself, and the police officer, who claimed he had been assaulted by RDS. There were no other witnesses present.

Judge Sparks found RDS to be a credible witness and found that the Crown had not discharged its burden of proving beyond reasonable doubt that RDS had committed the offences. Part of her decision was based on an acknowledgment of the history of police racism in the area; she commented that it was possible that the police officer could have overreacted to the situation. Her decision was appealed eventually to the Canadian Supreme Court on the argument that some of her oral comments gave rise to an apprehension of bias.[9]

The Supreme Court found that there was no reasonable apprehension of bias.[10] The judgment of L'Heureux-Dubé and McLachlin JJ acknowledged that 'judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives' (para 38). They also stated that the reasonable judge will be an informed member of the local community in which the issue arose, and will be cognisant of inequalities, such as systemic race discrimination, that affect the community (paras 47 and 48).

2.7 This case, and the Supreme Court decision, gave rise to a considerable degree of debate on what constitutes judicial 'impartiality.' Professor Kobayashi states in her analysis of the case that '(w)e need widespread recognition that … stories vary not because some are farther from, or closed to, "the truth" than others but because the world "looks different" depending on one's place in it' (Kobayashi, 1998: 210). This does not mean that 'minority' judges should be assumed to produce certain types of

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[8] (1997) 3 SCR 484.

[9] The part of her decision under appeal included the following:

'The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the Court, although police officers have been known to do that in the past. And I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted' ibid at para 53.

[10] See further Bhandar, 1998.

judgements that will always differ from the mainstream decisions.[11] However, female, 'minority' and disabled judges can provide new viewpoints to judicial reasoning based on their own life experiences. **Promoting judicial diversity requires the DCA and the judiciary to build on this in two respects. First, those female, 'minority' and disabled judges who do situate the legal issues within a broader context of wide-ranging social inequalities should be supported. And second, the legal establishment should facilitate greater debate on the definition of judicial 'impartiality' in order to bring the concept into line with contemporary social circumstances and attitudes.**

2.5 **Cultural Change in the Judiciary: Some Routes Forward.** This consultation, and any measures implemented as a result of it, should provide the basis for an ongoing assessment of the relative status in the judiciary of disadvantaged groups. It should not be assumed that parachuting ethnic minority, women and disabled judges into judicial office will be enough to change the judicial culture. Once measures have been put in place to ensure that greater numbers of ethnic minority, women and disabled judges are on the bench (and promoted to higher levels within the judiciary), the DCA should continue to undertake qualitative and quantitative research on judicial diversity, and to act on the results. **We suggest that the DCA commission wide-ranging research into the prevalence of discrimination within the judiciary against women, minority and disabled judges as soon as possible, and that you publicise and act upon your findings.**

2.6 As a further step, the DCA should be prepared to take positive action to support judges once they are in post. Situations in which male colleagues attack their female colleagues in public, for example, should not be allowed to occur. Once in post, the standing and decision-making ability of minority, disabled and female judges should be accorded the same respect as that of the

[11] For the dangers inherent in such assumptions, see Malleson, 2003 and Kobayashi, 1998.

hitherto white, able-bodied male judges, and the DCA should be prepared to uphold this.

2. Improving information and communication strategies

3. Do you agree that DCA should proceed with the proposal for change outlined in paragraph 2.9?

3.1 Yes, we agree that these suggestions provide a good basis from which to start, subject to our comments in response to question 5.

4. Do you support the suggestions made in paragraph 2.10? If so, which measures do you consider would be most effective and why?

4.1 Again, we agree with these suggestions subject to our comments below.

5. Do you have any other suggestions for ways to inform and prepare people for judicial appointment?

5.1 **Target lawyers earlier in their careers.** It is important for lawyers to be targeted earlier on in their careers with the prospect of judicial office. This is a core theme of our overall response. **Given the high attrition rates of qualified female solicitors and barristers, waiting until seven years after qualification runs the risk of targeting a pool of potential judges that has already been divested of female lawyers.** In this way, the DCA should connect any measures to increase the number of female judges with any attempts to reduce the attrition rate of female lawyers. As a preliminary step, we suggest sending information to all lawyers at a point earlier than seven years' call, for example when they are called to the Bar or when they qualify as a solicitor. Reminders and information packs about the possibility of judicial office could be sent out on a regular basis with the Law Society Gazette and Counsel.

5.2 **Target undergraduates at the new universities.** Given the current socio-economic and educational background of the judiciary

as a whole, DCA should aim to target undergraduates at the new universities and mature students on part-time degrees (many of whom are from ethnic minority backgrounds and/or are women). These students may be less likely to perceive that their career path might lead to judicial office. In addition, it is less likely that judges will be alumni of such universities, resulting in fewer informal ties between new universities and the judiciary. To counteract the damaging effects on judicial diversity of such gaps, efforts should be made to send judges to new universities for moot competitions and other informal events where students can meet judges and develop positive views about judicial office.

5.3 **Review the Court of Appeal and House of Lords Judicial Assistant Schemes.** Paying close attention to the numbers of female, ethnic minority and disabled judicial assistants is an important aspect of achieving overall judicial diversity. Furthermore, the judicial assistant schemes provide law graduates with the opportunity to create close links with the judiciary at an early point in their career, which has the benefit of providing a greater number of law graduates with a practical understanding of how judges conduct their case load and reach judgements. This in turn has a positive effect on maintaining links between the judiciary, academia and the wider legal profession.

5.4 The DCA should **consider ways in which the judicial assistant schemes could become more of a viable early-career option for law graduates.** For example, Court of Appeal judicial assistants could be appointed for longer initial terms (we understand that at present, assistants are appointed for terms of 3 months) and salaried, rather than paid by the day (in order to attract applicants from financially less privileged backgrounds). In addition, the requirement for assistants to have completed at least 12 months pupillage or traineeship should be reconsidered due to fact that many excellent candidates may not choose, or succeed in acquiring a training contract or pupillage. Opening up competition to all law graduates would secure a wider range of applicants. Furthermore, given the high quality of the work judicial assistants are required to undertake, consideration should be given to

counting time spent as a judicial assistant towards the requirements for a training contract or pupillage. Finally, the schemes should be publicised widely. It is currently fairly difficult to obtain information on the schemes over the internet unless one is already aware of where to look. Every effort should be made to disseminate information on the schemes wider than London-based lawyers.

The Law Clerk Program of the Supreme Court of Canada offers 27 full time, one-year appointments to candidates holding a Bachelor of Law from a recognized university. In certain jurisdictions within Canada, service as a law clerk counts towards, or is taken to fulfil, the requirements for articling.

Completing a law clerkship at the Supreme Court is viewed within Canada as an excellent gateway into academia or into legal practice for promising graduates. The Supreme Court encourages applications from women, members of a visible minority group, aboriginal people and persons with a disability.

5.5 **Expand the work-shadowing scheme to students.** One way of increasing diversity in the judiciary is to increase the catchment of the work-shadowing scheme so that more people can have experience of judicial work earlier in their careers. Having the opportunity to shadow a judge will encourage students to consider and plan for judicial office, and will also give them a greater degree of understanding about judges' daily work lives. Restricting the scheme to qualified solicitors and barristers excludes all those who, for reasons of finance, family commitments or career stage, have not yet completed the CPE and/or LPC or BVC and who otherwise may never do so.

6. Do you agree that the DCA should consider how to target lawyers early on in their career to raise awareness about becoming a judge?

6.1 Yes. Please see our response to question 5 above.

7. Do you consider that the measures suggested in paragraph 2.11 would help to raise awareness?

7.1 Yes, we consider that all of these suggestions would help to raise awareness, subject to our comments in response to question 5.

8. Do you have any other suggestions for raising awareness about the judiciary among young and potential lawyers, if considered to be worthwhile?

8.1 Please see our response to question 5 above.

3. Becoming a judge

9. Do you consider that the current statutory requirements provide the right starting point for identifying suitable candidates for judicial appointment, and if so why?

9.1 We do not consider that the current statutory requirements provide the most equitable way of identifying suitable candidates for judicial appointment. Please see our response to question 12 below.

We have no comment on question 10.

11. Alternatively, do you consider there to be an argument for changing the statutory requirements?

11.1 Yes. We consider there are overwhelming arguments in favour of changing both the requirement that candidates should have obtained rights of audience, and the requirement that candidates should have completed a certain period at a particular level in order to progress.

11.2 **Rights of audience.** As you point out at paragraph 3.2, the requirement to have obtained rights of audience excludes from judicial office all academics and researchers who have not qualified as solicitors or barristers. There are many such people who have considerable in-depth knowledge of the law, and who would make excellent judges. Many law academics work full time analysing and

evaluating legal doctrine, performing a quasi-judicial role. They are also likely to take a more detached, non-adversarial approach to judicial decision-making than barristers. At present, the requirements for qualifying as a solicitor or barrister are onerous (and expensive) for those not intending to practise. For our suggestions on how this statutory requirement could be altered, please see our response to question 12 below.

11.3 **Time requirements.** The various requirements to have completed a certain number of years service at a particular level (for example, for appointment to the House of Lords, two years in one of the superior courts or 15 years in practice) indirectly discriminate against female, ethnic minority and disabled candidates. The discrimination inheres in the fact that proportionately fewer of such candidates will be able to demonstrate the requisite service due to high attrition rates and slow career progression in all three groups (which is itself the result of inflexibilities within the legal profession).

> '..the criteria for appointment to the senior judiciary in so far as they relate to **previous experience in the higher courts**, are plainly discriminatory. The discriminatory impact is very significant indeed – as is evidenced from the absence of any Black higher court judges and disproportionately low number of women' (Monaghan, 2004, emphasis in the original).

11.4 Furthermore, in and of itself, seniority based on time spent at a certain grade is an outmoded criterion for selection. Length of service is not included within the Generic Competences Framework at Annex D because existing for a certain period of time at a particular level is not, strictly speaking, a skill.

12. If so, what should be the standard which lawyers must meet before being eligible for judicial office?

12.1 **Rights of audience qualifications.** We suggest that the requirement to obtain rights of audience be discontinued in favour of candidates being asked to demonstrate the relevant skills for

appointment to judicial office. Annex D provides an excellent, and wide-ranging summary of the competences that should be demonstrated by any applicant for judicial office.

12.2 **Time requirements.** We recommend that the time requirements be discontinued. If enough care is taken with the selection criteria (again, as we have stated, Annex D looks very promising in this respect), then there will be no need to indicate a minimum period in office. Those with the requisite skills can be promoted to the appropriate posts upon demonstration of the relevant skills, which can only have a positive effect on the quality of the judiciary at all levels.

12.3 **Different skills for different jobs.** A more fundamental point attaches to the types of judicial decision making that happen in different courts. In the magistrates' courts, for example, decision-making is mainly concerned with the evaluation of evidence, whereas the higher courts are more concerned with doctrinal legal analysis. This means that the skills required in each arena will vary. As part of a more widespread recognition of these differences, the DCA should consider altering the competences framework in order to provide guidance on the skills that should be encouraged in each sphere. See further our paragraph 13.3.

13. Do you consider that the fee-paid sitting requirement is a factor which inhibits judicial diversity? If so, why?

13.1 We do not consider that the fee-paid sitting requirement is a factor that inhibits judicial diversity. Fee-paid sitting allows lawyers and academics to gain valuable experience of sitting as a judge prior to applying for full time office. This gives candidates the chance to acquire better knowledge of court procedure (if they have previously been academics), or of new jurisdictions.

13.2 We understand that at present, it is not always possible for candidates to gain fee-paid experience in areas in which they already have some expertise. We believe that a greater diversity of

candidates would be attracted if they knew they could begin their fee-paid work in a legal area of their choice.

13.3 **Further reform.** Fee-paid sitting provides an important, and flexible entry point into the judiciary. We consider that you could use it as a starting point to bring about more extensive reform of the judicial and court structure. For example, the vast majority of criminal cases go no further than the magistrates' courts, which are staffed by lay and stipendiary magistrates. At present, it is not considered desirable for lay magistrates to have legal expertise. However, **given the importance of the magistrates courts within legal system, the DCA might consider the lay magistrate route as an ideal entry point for legal graduates, academics and lawyers beginning their judicial careers.** This need not lead to fewer lay magistrates being drawn from the non-legally trained population as a whole. Rather, the point is that the lay magistrates route could provide a very useful preliminary tier into judicial practice for those with the relevant skills.

We have no comment on question 14.

15. Is it justifiable that solicitors firms are able to prohibit employees from sitting as fee-paid judges?

15.1 No, we do not believe it is justifiable for solicitors firms to prohibit employees from sitting as fee-paid judges. However, the DCA should take some measure of responsibility for the financial issues arising from fee-paid sitting. The fee paid to judges in these circumstances is unlikely to reimburse firms for the loss of practitioner revenue. The DCA should acknowledge to such firms that they are providing assistance of a public nature by allowing practitioners to sit as fee-paid judges.

16. Do you consider that a more diverse range of people would be encouraged to apply for judicial office if the fee-paid service requirement was relaxed, made optional or abandoned? Why?

16.1 No. The fee-paid service requirement provides a diverse range of people with the opportunity to test their aptitude for judicial service prior to applying for full-time office. The DCA should work with the system as it is now and take steps to encourage and support a more diverse range of people at this stage of their judicial career.

We have no response to question 17.

18. Do you consider that the legal professional bodies, the Department and/or the judiciary could do more to help people who are not in practice to pursue judicial appointment?

18.1 Yes. Please see our response to question 19 below.

19. If so, what additional help should be available and from whom?

19.1 These are our suggestions for helping people who are not in practice to pursue judicial appointment:

- **Remove the requirement for candidates to have obtained rights of audience** (see our paragraph 12.1 above);

- If you do not already do so, **make it possible to obtain a position as a fee-paid judge directly, without having been in practice,** upon demonstration of the relevant skills and knowledge;

- **Establish a body specifically for non-practising lawyers** (including academics and researchers). One major aim of this organisation would be to act as a focal point for those who are considering moving directly into a judicial career. To this extent, it could provide mentoring schemes for ethnic minority, disabled, and female non-practitioner candidates, and it could offer advice on practical training and updates on legal developments. However, the body could also showcase the expertise of those who are not currently in practise (for example, researchers might have considerable knowledge of comparative law), and develop active links with other

professional bodies, in order to bridge the divide between practice and academia, for example;

- If you do not already do so, **establish or support schemes such as the Association of Women Solicitors' 'Returners' Course**, which is aimed at women solicitors who have been out of practice for five to ten years. The DCA could provide financial support for the expansion of such courses, which are reported to be very successful. In conjunction with the AWS, you could offer bursaries for those who are on a low income (the current cost is £690). You could also ask the AWS for time within the programme to explain to women returners the routes available to judicial office;

- In conjunction with the Law Society, **keep a record of all those who do not renew their practising certificates for one or more years and target these people with information both on routes back into practise and on routes into judicial office.** For example, many women might not be aware that the Law Society offers reduced fees on the practising certificate where they have been on maternity leave in the previous year, where they have received less than £20,000 gross income in the previous year, and where they return to work part way through a practising year.

20. Would the availability of a wider range of support options encourage a more diverse range of applicants? If so, who would benefit and why?

20.1 Yes. Without such support options, non-practising ethnic minority, female and disabled lawyers will continue to perceive the judiciary as monocultural, and their chances of a judicial career as slight. If there exist well-structured and well-publicised support measures, those who are more likely to leave (or not enter) practice due to the current diversity problems in the legal profession will not be lost to the judiciary. In this way, support measures will benefit women, ethnic minority and disabled lawyers.

We have no response to questions 21 – 22.

23. Do you think that the idea of a formal scheme to assist those who have stopped practising for a time is a good idea in principle?

23.1 Yes.

24. What specific problems do you think it would address?

24.1 Please see our response to question 20.

We have no response to questions 25 – 30.

4. The appointments process

31. Do you consider that the assessment centre approach should be extended to full-time appointments?

31.1 Yes, we think that the assessment centre approach should be extended to full-time appointments. You state in the consultation paper that this approach is acknowledged to be "more transparent, fairer and encouraging of applications from a more diverse background than the interview-only approach" (consultation paper, paragraph 4.4). We agree; the combination of role play, written exercise, technical paper and competency based interview is best placed to find the right candidates for each judicial post, and to reassure applicants and the public that appointments are being made on the basis of the competencies and not on the basis of traditional networks.

31.2 If this is the case for part-time appointments, then it is just as important for full-time appointments to benefit from the same process. Transparency should subsist within the selection procedures for all levels of judicial post, especially full-time office, and assessment centres are the best way of achieving such an objective. Furthermore, given that slightly different skills will be required for different types of judicial office, assessment centres tailored to each level will provide the ideal opportunity to reassess

whether each individual has the skills and competencies to progress from one type of work to another.

31.3 **We do not agree with the suggestion in the consultation paper that one can draw a distinction between the part-time and full-time appointments processes on the basis of established track record and appraisals (paragraph 4.5).** Appraisals, whether conducted by peers or by people in senior levels, run the risk of unwittingly bolstering existing stereotyped assumptions within individuals and organisations. Furthermore, they only provide a snapshot of one point in an applicant's career, running the risk that problems due to an applicant's personal responsibilities (for example, family commitments for women), or interpersonal difficulties at work could unduly affect an applicant's chances of promotion. Assessment centres have the potential to provide a more rounded picture of an applicant's competencies. Nevertheless, we accept that appraisals can be useful as one of a range of different types of assessment. We therefore suggest that if they are to be used for the selection of candidates to full-time office, they should be used as one element of the assessment centres' selection process.

32. Do you consider that the appointments process would be enhanced if selection/search agencies were used to support the Department in securing and processing applications? Would this be likely to identify and attract a wide range of high calibre candidates?

32.1 **We recommend that the DCA does not use agencies to undertake any sort of search function.** Furthermore, any function undertaken by selection agencies short of searching should be carefully monitored for consistency and equality of opportunity.

32.2 Despite subsequent selection procedures, searching for candidates risks endorsing the perception (if not the practice) that those applicants who are invited to apply have the greatest chance of success. Furthermore, search agencies may rely on their own networks in order to identify and approach potential candidates,

thereby compromising the independence and transparency of the selection procedure.

33. Do you consider that these proposals represent an improvement on the current approach? If so, how?

33.1 Please see our response to questions 35-38.

34. If not, how do you consider that the process could otherwise be improved?

34.1 Please see our response to questions 35-38.

35. Does there remain a case for automatic consultation? In what circumstances?

35.1 **Automatic consultation should have no place in the judicial selection procedure, and it should be discontinued as soon as possible.** Automatic consultation is highly likely to lead to indirect discrimination against ethnic minority, female and disabled candidates.[12] Due to the current profile of the judiciary, the overwhelming majority of consultees are likely to be white, male, non-disabled and from a very limited socio-economic background. Candidates who are not known to such consultees – who do not move in the same social circles, did not attend the same schools and universities, and who are not members of the relevant clubs – experience a disadvantage from the outset in such processes. Added to that is the tendency for members of the judiciary to prefer those who 'embody' their own ideals. As Anne Morris puts it:

[12] See, for example, Monaghan, 2004.

'Not all those who discriminate do so consciously. The white middle class males who still predominate in boardrooms, committee rooms and courts may instinctively and unconsciously prefer and select those who 'embody' what they consider to be the 'requirements' for the job. It need not be as obvious as the old school tie or a shared University education, or even connections of friendship or family. It may simply be that people are more comfortable with the kind of reflection they see in the mirror. That is precisely one of the reasons for having legislation like the Sex Discrimination Act, the Race Relations Act and the Disability Discrimination Act which challenge these attitudes and encourage selection processes which are open and transparent' (Morris, 2003: 53).[13]

35.2 The aim of all the judicial selection procedures should be to counteract the instinctive and unconscious preferences of the judiciary for people who mirror their own background. This leads to Morris's next point: transparency. The aim of current anti-discrimination legislation is to promote transparency so that applicants can understand what has happened during the selection procedure, and challenge it if necessary. Automatic consultations disempower candidates who have reason to be concerned about their chances of selection under the current system. In this sense, enabling candidates to nominate six referees of their own choice, to be consulted at length when the candidate is at a later stage of the selection process, is more transparent and more equitable than automatic consultation.

'If real confidence in the appointments process is to be maintained it must be fair and wholly transparent. It must depend upon objective criteria first established by determining the requirements of the job and then fairly applied by a panel trained in good equal opportunities practice. A process dependent upon the decision of one person informed by secret soundings does not meet those requirements' (Monaghan, 2004).

[13] Margaret Thornton cites the example of a law school lecturer who made fun of a female judge, calling her a 'dumpy little woman.' In this way, Thornton states, the judge's female body was invoked to undermine her rationality (Thornton, 1996: 209).

35.3 However, if automatic consultation were not to be abolished, then we would suggest that it be rendered more diverse and more accountable by considered selection of consultees. It is not only judges and members of the Bar who are qualified to comment on judicial appointments, and the DCA should consider consulting outside the legal profession. For example, academics and community groups in the relevant legal fields are likely to be able to provide useful feedback on judicial candidates. If automatic consultation were to be conducted in this way, then the DCA should ensure a wide cross-section of consultees from diverse social, political and professional backgrounds, and any feedback obtained in this manner should be made available to the public and to the candidate concerned.

The Law Council of Australia has recommended that the Attorney-General of each jurisdiction establish a Judicial Appointments Protocol, which provides that the Attorney General should consult with the 'peak national women's association,' amongst other organisations prior to the appointment of a candidate (Law Council of Australia (2002): para 7).[14]

36. If you disagree that consultation should continue to be part of the appointments process, in what other ways could DCA establish a candidate's track record and previous, proven experience?

36.1 Please see paragraph 35.1 above: our opinion is that the provision of a list of consultees by each candidate (what you have termed 'nominated consultation'), or at least a combination of automatic and nominated consultation, are more transparent and equitable options than automatic consultation alone.

37.Do you consider that consultation assessments should be used in making decisions at sift or at interview?

37.1 Assessments solely on the basis of automatic consultations should not be used at all. However, in the case of nominated

[14] For a useful assessment of an earlier version of this policy, see Hamilton, 2001.

consultations, we consider that each candidate should have the opportunity to complete the majority of the selection procedure before the panel addresses the nominated consultees. That is to say, assessments should not be used at sift, but at interview or later.

38. Should the use of consultation assessments be further restricted; for example, only to establish whether there is a reason not to appoint someone who has been identified by the process as meeting the required standards?

38.1 There may be situations in which nominated assessments provide useful positive information on a particular candidate, and we would not want to rule out this possibility. We reiterate that there should be no role for automatic consultations, and especially not to find out whether there is a reason not to appoint a particular candidate.

We have no comments on questions 39 – 45.

5. Judicial working practices

46. With regard to publicity for events and the appointments process generally, in what other ways do you consider that DCA should raise awareness about the system among disabled lawyers?

46.1 Echoing the points we made in paragraphs 5.1 – 5.3, we would recommend the following measures:

46.2 **Target disabled lawyers earlier, and throughout their careers.** Disabilities affect different people in different ways. Some lawyers may have been disabled from birth, and some may develop a disability later in life. Depending on the onset and type of disability, and the attitude of their employers, disabled lawyers may find it difficult to carry on with their career and may consider changing profession or retiring. It is important that the DCA recognise that, as with women lawyers, the pool of disabled lawyers may already have been reduced by the time they reach the current seven-year mark after qualification due to inflexibilities with

the legal profession. For this reason, the DCA should target currently disabled lawyers earlier in their careers, ideally from higher education onwards. Steps should also be taken, however, to publicise the DCA's disability policy to all lawyers, so that they are aware of facilities and adjustments in the event that they do develop a disability later on in their career.

46.3 **Promote the Court of Appeal and House of Lords Judicial Assistant Schemes to disabled lawyers and students.** By working as judicial assistants, disabled lawyers and students can gain the knowledge and experience they need to make a decision about whether they want to pursue judicial office.

46.4 In a similar manner, the DCA should **target disabled lawyers for the work-shadowing scheme.** The DCA can prove to disabled lawyers via the work-shadowing scheme that it has the knowledge and the commitment to adjust its practices and facilities appropriately if they were to consider judicial office.

46.5 **Going further than facilities.** Many people are affected by non-overtly physical disabilities (such as epilepsy), or mental health conditions (for example, diagnoses of bi-polar disorder or schizophrenia). For these people, reasonable adjustment may not mean appropriate facilities, but flexible working arrangements. The DCA should make clear what adjustments are available to judicial staff experiencing such conditions, giving examples.

46.6 **Addressing mental health stigma.** In particular, the DCA should recognise, and address, the stigma surrounding mental health diagnoses. It is unrealistic to assume that none of the lawyers and academics applying for judicial office, and none of the judges currently in office, have experienced mental health problems or have a diagnosis. If it has not already done so,[15] the DCA should draw up and publish a policy on mental health and judicial staff, focussing specifically on the adjustments that can be made for those experiencing mental health problems.

[15] Our search of the DCA web site has revealed no such policy to date.

47. Do you consider that it would be helpful to establish a single point of contact for disabled applicants and judges to deal with a wider range of enquiries as well as the appointments process?

47.1 We agree that this would be a useful idea, subject to provision being made for the sheer diversity of disabilities.

48. Is there anything else that you consider the Department (or the legal professions) should be doing to encourage and assist disabled lawyers who wish to seek judicial appointment and disabled judges?

48.1 Please see our response to question 47.

We have no response to question 49.

50. Do you support the introduction of any of the options listed in the paragraph above? If so, which ones and why?

50.1 We support both of the suggestions listed at your paragraph 5.15.

50.2 **Flexible sitting arrangements.** Such arrangements should, if implemented in the correct manner, enable any judges with personal responsibilities, or disabilities requiring time away from work at particular points to continue with their careers in a normal way.

50.3 **Formal scheme for applying for career breaks.** This should enable those judges who wish to have time away for family or other reasons to do so without such breaks having an adverse impact on their judicial career. It also has the benefit of encouraging those judges who might otherwise leave the judiciary for good after a break in work to return.

51.Do you foresee any difficulties with implementing any of the options? If so, which ones and why?

51.1 We consider that there may be problems with both measures if they are implemented in such a way as they are seen as

"concessions" to female and disabled staff and not relevant to the whole of the judiciary. In particular, part time and flexible working arrangements within the legal profession have tended to mark those working in this way (typically women) as lacking the commitment required by law firms for promotion (see generally Sommerlad and Sanderson, 1998). The aim of considering such measures should be to reconcieve the way that judges work in order to bring an end to indirectly discriminatory working practices within the judiciary.

51.2 In this way, flexible working arrangements, and part time sitting, should not be seen as an exception, available only to women, to the norm of Monday to Friday working. Instead, all judges should be able to benefit from a greater degree of flexibility, possibly including sitting a total number of hours per year.

52. Do you consider that an increased range of flexible working options would encourage a more diverse range of applicants for appointment? If so, who would benefit and why?

52.1 We consider that an increased range of flexible working options would encourage a more diverse range of applicants, including more women, any applicants with family commitments of any sort (including younger men with young families and older women with responsibility for elders, for example), and any applicants who might need time away from work due to medical conditions.

We have no comment on question 53.

54. Are there any other flexible working arrangements which you would like DCA to consider?

54.1 Please see our response to question 51 above.

55. If you are a lawyer, would the availability of any of these flexible working options encourage you to apply for judicial office? If so, which ones and why?

55.1 The lawyers in our working group would be encouraged to consider applying for judicial office if working flexible hours were the norm, and if it were possible to take a career break (for family reasons, or for furthering one's career outside the judiciary by visiting judges abroad, for example) without this adversely affecting one's chances of promotion.

56. Are there any other flexible working arrangements which you would like DCA to consider?

56.1 **Child care/dependent provision.** We consider that the DCA should implement a policy of child-care/dependent support for those judges, alongside other court staff, who need it (including fathers and those caring for elders or other dependents). This support could include any or all of the following measures:

- granting an allowance to judges in order to assist with the costs of care;

- establishing an emergency child-care scheme for situations when child-care falls through. This need not be a dedicated nursery, but could take the form of an allocated number of days per year when a judge can use a nominated nursery for her/his child;

- establishing area crèches near to the courts and tribunals where there is sufficient demand.

57. Do you consider that the preclusion of return to practice acts as a significant deterrent to those who might otherwise consider a judicial career? If so, why?

57.1 The preclusion of return to practice acts as a significant deterrent to ethnic minority, female, and disabled lawyers. With higher numbers of all three groups bunched in the lower ranks of the judiciary, these lawyers and academics are required to give up potentially rewarding careers in legal practice or in academia for a judicial career that might not allow them to reach their full

potential. Increasing the career mobility of women and minority judges may ameliorate this problem in the long term, but in the short term lawyers and academics are more likely to consider applying for judicial office if they know they can return to their previous careers if they need to.

57.2 If it were to be the case that high numbers of women and minority judges were found to be leaving the judiciary to return to practice, this at least would be an indicator to the DCA of the need to address retention. As it is, the DCA now needs to be thinking about how to attract more minority, disabled and women judges from the outset.

We have no comments on questions 58 – 68.

6. The role of the legal profession

69. Do you agree that the problems described above act to deter people from entering the legal profession, and/or cause them to leave it?

69.1 Yes. Please see our responses to question 70 below.

70. If so, how do you consider the problem should be tackled and by whom?

70.1 Given the breadth of this topic, we will focus on one or two core points:

70.2 **Developing and maintaining Diversity:** In the Law Society's Statement on the Training Framework Review (June 2004), there is reference to the possible development of 'new and alternative routes to qualification.' This might be useful in contributing to greater diversity in the applicant pool for judicial appointments. However, the profession and the DCA would still need to work on maintaining the diversity of the applicant pool, given the problems that have already been identified in respect of the retention of women (for example, see your paragraph 6.1).

70.3 In particular, **the Bar has some considerable way to go in demonstrating to students that it provides equality of access.** The expense of qualification and the perceived culture at the Bar do serve to dissuade students from pursuing this particular route. Indeed, **the cost of qualification in both branches of the profession is a major obstacle for many students.** It impacts on diversity within the legal profession on the basis of students' socio-economic background. And this is often compounded by other possible sites of disadvantage, such as university attended, ethnicity, connection to the legal profession etc.

70.4 **Alternative routes to qualification.** ILEX does provide a viable alternative route to qualification, and many legal executives do hold positions of responsibility within law firms. However, **many ILEX executives also continue to report experiences of being made to feel like second-class citizens in the workplace.** Furthermore, ILEX is still far from parity with the Law Society and the Bar Council, with the government inconsistent, at best, as to whether there are two or three branches of the legal profession.

70.5 Another important route is via a part-time LLB degree course. Such courses are overwhelmingly located in the new universities. Your paragraph 6.15 details many of the problems associated with this route – problems mainly to do with the profession's misguided perception that these degrees are not as rigorous as other degrees. **The DCA should try to bypass current recruiting problems associated with new universities and part-time degrees by fostering direct links with these institutions and supporting the profession to engage in fairer selection procedures.** In addition, you should specifically consider the position of part-time degree students with respect to vacation placements, which are themselves an important route into the profession. Many part-time students find it hard to engage with these placements due to work or caring commitments.

70.6 As with all new or alternative routes to appointment (and indeed flexible working practices), care must be taken by the DCA to ensure that ILEX and part-time degree routes are regarded, and

promoted, as equally valid to the existing routes. There must be an emphasis on meeting the criteria regardless of the route to appointment or working practices adopted in post.

We have no response to questions 71 - 75.

7. Monitoring judicial diversity in the future

76. Do you agree that it would be helpful to do more work to understand fully the demographics of the legal profession?

76.1 Yes.

77. If so, are there any specific issues which you consider should be covered as part of this work?

77.1 We welcome the DCA's commitment to address the issues of sexual orientation, religion/belief and wider educational/social background. We urge the DCA to begin this process as soon as possible. The new Commission on Equality and Human Rights will have responsibility for sexual orientation and religion/belief, and will be established by the end of 2006. In the light of this development, the DCA should be consulting on measures to increase judicial diversity in sexual orientation and religion/belief by the end of 2005.

77.2 **Sexual orientation data.** It is important for data to be collected on sexual orientation. For example, if it has not already done so, the DCA should also conduct qualitative research on whether there are perceived barriers to judicial office relating to sexual orientation and perceived sexual identity, and the extent to which sexual orientation discrimination may affect lawyers' and academics' progression through their careers.

77.3 However, in order to do so, the DCA has to build up the appropriate level of trust with lesbian, gay and bisexual lawyers and academics. You can do this by working now towards developing links and consulting with student LGBT societies, professional and academic

LGBT associations, and LGBT lobbying groups, and by overtly expressing a commitment to sexual diversity within your careers literature and on your website.

78. How best can stakeholders be involved in the continuing improvement process?

78.1 **We suggest that the DCA establish an equal opportunities steering or review group, which would report to the Senior Steering Group.** The equal opportunities group would comprise of external members with appropriate expertise drawn from academia, the legal profession, and the voluntary/NGO sector. In particular, given the obvious importance of judicial diversity to the areas covered by the Commission for Equality and Human Rights, the group should contain one CEHR representative at least.

78.2 The group would have ongoing responsibility for commissioning and reviewing quantitative and qualitative research on diversity within the legal profession and the judiciary. Where necessary, it would have the power to suggest changes in selection processes, working patterns and other relevant areas of judicial practice.

78.3 Furthermore, in its capacity of promoting equality, diversity, human rights and good relations between the communities, **the CEHR can and should use its investigatory and enforcement powers to ensure that the DCA continues to make progress in promoting judicial diversity.** The DCA should make a commitment to productive collaboration with the CEHR in this area.

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FURTHER INFORMATION

Method of Consultation

This response is the result of collaboration between Centre members across the three participating institutions in the UK, and with the assistance of members of our International Advisory Board. Members were invited to attend, or send comments to a co-ordinating meeting in December 2004. As a result of that meeting, a draft response was produced and circulated to Centre members for further feedback prior to preparation of the final document.

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