Committee for Justice

Review of Judicial Appointments in Northern Ireland

Together with the Minutes of Proceedings of the Committee relating to the Report, Minutes of Evidence, Written Submissions, Northern Ireland Assembly Research and Information Service Papers and Other Papers

Ordered by the Committee for Justice to be printed 26 April 2012
Report: NIA 38/11-15 (Committee for Justice)

REPORT EMBARGOED UNTIL COMMENCEMENT OF THE DEBATE IN PLENARY

Session 2011/15

First Report

Membership and Powers

Powers

The Committee for Justice is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Standing Order 48.

The Committee has the power to:

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- consider relevant secondary legislation and take the Committee stage of primary legislation;
- call for persons and papers;
- initiate inquires and make reports; and
- consider and advise on any matters brought to the Committee by the Minister of Justice.

Membership

The Committee has eleven members including a Chairperson and Deputy Chairperson and a quorum of five members.

The membership of the Committee during the current mandate has been as follows:

Mr Paul Givan (Chairman)
Mr Raymond McCartney (Deputy Chairman)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott[1]
Mr Séan Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Patsy McGlone[2]
Mr Peter Weir
Mr Jim Wells

1 With effect from 23 April 2012 Mr Tom Elliott replaced Mr Basil McCrea.

2 With effect from 23 April 2012 Mr Patsy McGlone replaced Mr Colum Eastwood.

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Executive Summary

- The Northern Ireland Act 2009 made amendments to the process of judicial appointments and removals as set out in the Judicature (Northern Ireland) Act 1978 and the Justice (Northern Ireland) Act 2002 (as amended by the Justice (Northern Ireland) Act 2004).
- Section 29C of the Northern Ireland Act 1998, as amended by Schedule 6 of the Northern Ireland Act 2009 (the 2009 Act), states that Standing Orders shall require one of the committees established by virtue of section 29 or the committee established by virtue of section 29A of the 1998 Act to review the operation of the amendments made by Schedules 2 – 5 of the Northern Ireland Act 2009.
- Initially the Assembly and Executive Review Committee was to undertake the review however following the devolution of policing and justice it was agreed that the responsibility for the review should pass to the Committee for Justice and Standing Orders were amended accordingly.
- The requirement to report on the review by 30 April 2012 provided restricted time to complete the review and the Committee therefore agreed to undertake a targeted consultation with key stakeholders and to place information on the review on the committee webpage.
- The Committee received eight written submissions and held three oral evidence sessions with the Attorney General for Northern Ireland, the Lord Chief Justice in his capacity as Chairman of the NI Judicial Appointments Commission (NIJAC) with other NIJAC representatives and a representative from the Office of the Lord Chief Justice, and the NI Judicial Appointments Ombudsman.
- Due to the limited time available the Committee's deliberations, which are set out in the section of the report covering consideration of the issues, were confined to a small number of issues including the appointment process for Appeal Judges, the composition of NIJAC, whether judicial appointments are reflective of the community in Northern Ireland and the role of elected representatives.

Committee Conclusion and Recommendation

- Having considered the evidence received and noting that the Department of Justice and NIJAC are of the view that the arrangements created by the 2009 Act, while only in place for a relatively short period of time, appear to be working satisfactorily, the Committee recommends that there should be no changes to the current process for judicial appointments and removals in Northern Ireland at this time.
- Given the statutory requirement to report to the Assembly by 30 April 2012, which restricted the time available to complete this review, and the fact that a number of issues may merit further consideration, the Committee intends to undertake a further review of the Judicial Appointments and Removals processes.

Introduction

Background

1. The Northern Ireland Act 2009 made amendments to the process of judicial appointments and removals as set out in the Judicature (Northern Ireland) Act 1978 and the Justice (Northern Ireland) Act 2002 (as amended by the Justice (Northern Ireland) Act 2004).

2. Section 29C of the Northern Ireland Act 1998, as amended by Schedule 6 of the Northern Ireland Act 2009 (the 2009 Act), states that Standing Orders shall require one of the committees established by virtue of section 29 or the committee established by virtue of section 29A of the 1998 Act to review the operation of the amendments made by Schedules 2 – 5 of the Northern Ireland Act 2009.

3. Initially Standing Order 59 (4A) required that the Assembly and Executive Review Committee should undertake the review of the operation of the amendments made by Schedules 2 – 5 of the Northern Ireland Act 2009. Following the devolution of policing and justice and the establishment of the Committee for Justice discussion took place regarding which committee would be best placed to carry out the review. Agreement was reached that responsibility should pass to the Committee for Justice and the Chairman of the Assembly and Executive Review Committee subsequently wrote to the Committee on Procedures to request that Standing Orders be amended accordingly. A copy of the relevant correspondence is included at Appendix 5 in the report.

4. The Standing Orders of the Assembly were subsequently amended on 28 November 2011 and Standing Order 49 A states:

> "(1) The statutory committee established to advise and assist the Minister of Justice (in this Standing Order referred to as 'the Committee for Justice') shall –
>
> (a) review the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009;
>
> (b) report on its review by 30 April 2012; and
>
> (c) include in its report any recommendations it has for changes to the way in which judicial office holders are appointed and removed."

The Committee's Approach

5. At its meeting on 2 February 2012 the Committee agreed the following terms of reference for the Review of Judicial Appointments:

The Committee for Justice will:

(a) review the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009;

(b) identify any issues in the operation of these amendments;

(c) if applicable, make recommendations for changes to the way in which judicial office holders are appointed and removed; and

(d) report on the review by 30 April 2012.

6. Given the limited time available to complete the review the Committee agreed to undertake a targeted consultation with the following key stakeholders and to place information on the review on the committee webpage:

- The NI Judicial Appointments Commission
- The NI Judicial Appointments Ombudsman
- The Lord Chief Justice
- The Attorney General for Northern Ireland
- The Lord Chancellor
- The First Minister and deputy First Minister
- The Minister of Justice
- The Assembly and Executive Review Committee
- The Committee for the Office of the First Minister and Deputy First Minister
- The Political Parties represented in the Assembly
- The two Independent Members in the Assembly
- The Law Society of Northern Ireland
- The Bar Council

7. The Committee received eight written submissions which are included at Appendix 3 in the report and held three oral evidence sessions with the Attorney General for Northern Ireland, the Lord Chief Justice in his capacity as Chairman of the NI Judicial Appointments Commission (NIJAC) with other NIJAC representatives and a representative from the Office of the Lord Chief Justice, and the NI Judicial Appointments Ombudsman. The Minutes of Evidence (Hansards) of the evidence sessions are included at Appendix 2 of this report. The Minutes of Proceedings relevant to this review are included at Appendix 1.

8. To assist the Committee's consideration of the process of judicial appointments and removals in Northern Ireland a background paper setting out the amendments made by Schedules 2 – 5 of the Northern Ireland Act 2009 was prepared and is included in the report at Appendix 5. The Committee also commissioned research papers on the process of judicial appointments in Northern Ireland, the models of judicial appointment in America and Germany and the process of appointments to the Court of Appeal in England and Wales and how it differs from the process in Northern Ireland. The research papers are included in the report at Appendix 4.

9. While undertaking the review the Committee was cognisant of the on-going House of Lords Constitution Committee Inquiry into the judicial appointments process for the courts and tribunals of England and Wales and Northern Ireland and for the UK Supreme Court and that the Ministry of Justice had just completed a consultation on appointments and diversity relating to the judiciary in England and Wales. The House of Lords Constitution Committee published its Inquiry report on 28 March 2012 and the formal response to the Ministry of Justice consultation should be available in April 2012.

10. Due to the limited time available the Committee's deliberations, which took place on 27 March 2012 and 19 April 2012, were confined to a small number of issues including the appointment process for Appeal Judges, the composition of NIJAC, whether judicial appointments are reflective of the community in Northern Ireland and the role of elected representatives.

11. At the meeting on 26 April 2012 the Committee agreed its report on the Review of Judicial Appointments and ordered that it should be printed.

Summary of Evidence

12. During its Review of Judicial Appointments in Northern Ireland the Committee received 8 written responses and heard oral evidence from the Attorney General for Northern Ireland, the Lord Chief Justice, Sir Declan Morgan, in his capacity as Chairman of the Northern Ireland Judicial Appointments Commission (NIJAC), together with representatives from NIJAC and the Office of the Lord Chief Justice, and the Northern Ireland Judicial Appointments Ombudsman, Mr Karamjit Singh. A copy of the written evidence received is at Appendix 3 and the Minutes of Evidence of the three oral evidence sessions is at Appendix 4.

13. The evidence received focused on the changes made by Schedules 2 to 5 of the Northern Ireland Act 2009[1] (the 2009 Act) and in particular changes made by Schedules 2 and 3. A number of general points were also highlighted regarding the judicial appointments process.

Schedule 2: Substitutes sections 12 to 12C for sections 12 and 12B of the Judicature (Northern Ireland) Act 1978

14. Schedule 2 of the 2009 Act substitutes sections 12 and 12B of the Judicature (Northern Ireland) Act 1978[2] with new sections 12 to 12C. A number of specific points were raised regarding these sections.

Section 12 - Appointment of the Lord Chief Justice and Lords Justice of Appeal

15. Section 12 of the 2009 Act makes provision for the appointment of the Lord Chief Justice and Lords Justice of Appeal by the Queen on the recommendation of the Prime Minister. The Prime Minister must consult the current Lord Chief Justice (or if that office is vacant or the Lord Chief Justice is not available, the senior Lord Justice of Appeal who is available) and NIJAC before making a recommendation.

16. In both his written submission and his oral evidence, the Attorney General highlighted that the appointment of Appeal Judges appeared to have been on a seniority basis rather than through the application of the merit principle and he stated that if the NIJAC system of appointment on merit is considered the most appropriate, there seems to be no clear reason for senior appointments not to be made in accordance with it.

17. The Lord Chief Justice, in his oral evidence as Chairman of NIJAC, offered clarification on this point highlighting that since the 2009 Act there has been a change in the appointment process for Appeal Judges but the new process has not yet been used as no new appointments have been made since the changes came into being. The Lord Chief Justice pointed out that the 2009 Act provides that the Prime Minister has responsibility to make a recommendation for appointment to the Queen and that he must consult with the Lord Chief Justice and NIJAC before making a recommendation. The Lord Chief Justice expressed the view that when the Prime Minister consults NIJAC on the process, given its statutory obligation to pursue all appointments on the basis of merit, it seems inevitable that NIJAC will recommend that the appointment should be on merit and will recommend that there should be a process to ensure that appropriate candidates can participate.

18. In his written submission to the Committee, the Lord Chancellor, the Rt Hon Kenneth Clarke QC MP, drew the Committee's attention to the consultation by the Ministry of Justice on

1 The Northern Ireland Act 2009. http://www.legislation.gov.uk/ukpga/2009/3/contents

2 The Judicature (Northern Ireland) Act 1978. http://www.legislation.gov.uk/ukpga/1978/23/contents

judicial appointments and diversity[3] and highlighted a proposal in the consultation to remove the role of the Prime Minister.

19. The consultation document indicates that historically the Prime Minister has made recommendations to HM Queen for the most senior judicial offices on the advice of the Lord Chancellor. However, now that the Lord Chancellor's role in relation to senior appointments is as a member of the Executive, the consultation puts forward the argument that removing the Prime Minister's role and allowing the Lord Chancellor to make recommendations directly to HM Queen would streamline the process and remove a layer of administration and duplication.

20. The Lord Chancellor indicated that the formal response to the consultation proposals will be available in April 2012.

Section 12C - Removal of Lords Justices of Appeal and also High Court judges

21. Section 12C of the 2009 Act provides for the removal of Lords Justices of Appeal and also High Court judges appointed before section 7 of the 2002 Act[4] (removal from listed judicial offices) came into force. The Queen may remove Lords Justices of Appeal and certain High Court judges following an address of both Houses of Parliament. A motion for an address may be made in the House of Commons only by the Prime Minister and in the House of Lords only by the Lord Chancellor or, if the Lord Chancellor is not a member of that House, only by another Minister of the Crown at the Lord Chancellor's request. No such motion may be made unless a Tribunal convened either by the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman has recommended that the office holder be removed on grounds of misbehaviour and the Lord Chancellor and the Prime Minister have consulted with the Lord Chief Justice or have been advised by the Lord Chief Justice to accept the recommendation. Pursuant to section 7 of the Justice (NI) Act 2002 the power to remove or suspend a person holding a listed judicial office is now exercisable by the Lord Chief Justice.

22. The Attorney General, in his evidence, highlighted that the limitation in this arrangement is that the address in the House of Commons/House of Lords can only be moved by the Prime Minister or Lord Chancellor and it can be made only if there has been a prior determination by a Tribunal whereas, previously, any MP could have introduced a motion praying for removal.

Schedule 3: Amendments to the Justice (Northern Ireland) Act 2002 amending the appointment and removal provisions

23. Paragraphs 3 and 13 to Schedule 3 of the 2009 Act substitute a new Schedule 3 for Schedule 3 of the Justice (Northern Ireland) Act 2002.

24. A number of specific issues were raised regarding this Schedule.

Process for appointment of those listed judicial office holders by the Northern Ireland Judicial Appointments Commission

25. Part 2 of Schedule 3 of the 2009 Act sets out the appointment process for listed judicial office holders appointed by NIJAC.

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3 Appointments and Diversity, 'A Judiciary for the 21st Century', A Public Consultation. Ministry of Justice www.justice.gov.uk/.../judicial-appointments-consultation-1911.pdf

4 The Justice (Northern Ireland) Act 2002. http://www.legislation.gov.uk/ukpga/2002/26/contents

26. The Queen's power to appoint a person to a listed judicial office is exercisable on the recommendation of the Lord Chancellor. NIJAC is responsible for selecting a person for recommendation for appointment and must notify the Lord Chancellor when a person is selected. The Lord Chancellor must, as soon as is reasonably practicable, recommend the selected person for the office. NIJAC select and make recommendations for Crown appointments to the Queen via the Lord Chancellor, up to and including High Court Judges. It is also an appointing body, selecting and appointing persons to non-Crown listed judicial offices.

27. Section 5 and Schedule 3 of the Justice (Northern Ireland) Act 2002 had originally prospectively transferred responsibility from the Lord Chancellor to the First Minister and deputy First Minister, acting jointly, for the appointment of persons and for recommending persons to the Queen for appointment as listed judicial officer holders.

28. Part 1 and Part 2 of the new Schedule 3 no longer include a provision for the Lord Chancellor to ask NIJAC to reconsider their selection. Previously, the Justice (Northern Ireland) Act 2002 provided that when NIJAC made a selection for the Lord Chancellor to consider, he could ask NIJAC to review its choice.

29. Previously, the Justice (Northern Ireland) Act 2002 provided that the power to add or omit listed judicial offices or alter their description was exercisable by the First Minister and deputy First Minister. Section 1 and Schedule 1 of the Justice (Northern Ireland) Act 2004 amended the Justice (Northern Ireland) Act 2002, transferring these functions from the First Minister and deputy First Minister to the Lord Chancellor.

30. A number of issues were raised in the written and oral evidence regarding the NIJAC selection and appointments process.

The Role of the Judiciary in the Appointment of Judges

31. During the oral evidence sessions the issue of whether the higher judiciary was the dominating element in the NIJAC appointment process was discussed.

32. The Attorney General is of the view that even though the higher judiciary does not form a majority of NIJAC, there is no doubt that, de facto, it is the dominating element.

33. In response, the Lord Chief Justice, as Chairman of NIJAC, outlined that NIJAC was designed to ensure that there was a contribution from the judiciary and from the non-legal members appointed by the Office of the First Minister and Deputy First Minister. He pointed out that the judiciary members understand the nature of the posts and what is expected of the postholders and the lay members are extremely experienced in Human Resources. He indicated that a lay member sits on all competitions and makes as important a contribution as other members and emphasised that all members of the Commission have an equal status and contribute equally to the selection process.

34. Ms Laird, a Lay Commissioner with NIJAC, outlined her role and stressed that the contribution of the Lay Commissioner was no less effective than the judicial members. She indicated that personally she never felt unduly influenced in any direction while on the Commission.

35. In his oral evidence the Northern Ireland Judicial Appointments Ombudsman stated that if the perception is that judges are appointing judges, it would seem that the whole assumption behind setting up Judicial Appointments Commissions, whether in Northern Ireland, England and Wales or Scotland, is fundamentally flawed as the assumption, when setting up independent Commissions, is that it is about promoting confidence in the way in which judges are being appointed. The Ombudsman suggested that the challenge for any Judicial Appointments Commissioner must be to be able to put across very clearly what the Commission does and how it discharges its responsibilities in seeking, not only to ensure that appointments are being made on merit, but that they deal with the question of diversity and having a judiciary that is reflective of the community in which it is based.

36. In respect of the lay commissioners and the representatives of the legal profession on NIJAC, the Ombudsman pointed out that the challenge is to harness those different perspectives in a way that ensures an appointments system and processes that enjoy confidence and that those skills should also be used in such a way that people, externally, can see and appreciate that.

37. When asked if he felt that the composition of NIJAC should be reviewed, particularly in relation to the number of judicial members, the Ombudsman indicated that the fundamental question is the relationship between the number of people who come from a legal background, not just judges, and the number who come from a non-legal background. In his view, it is not a question simply of the number who sit around a table, it is a question of how to address perceptions that might exist. NIJAC has got to reflect on that challenge. He also indicated that this issue is not unique to Northern Ireland.

The Role of Elected Representatives

38. The Law Society emphasised the fundamental importance of judicial independence. Its position is that the independence of the judicial appointments process underscores the independence of the judiciary and it is of fundamental importance that there is no interference by any member of the Government or Executive. It would therefore be inappropriate for a member of the Executive or Government to be empowered to require a judicial appointments body to refuse or re-consider a recommendation.

39. However, to ensure confidence in the overall appointments process the Law Society states that it is important that there is some form of political accountability for the independence and integrity of the appointments process including the equality of the process that does not compromise operational decision making on individual appointments.

40. The Bar Council strongly endorses an independent judicial appointments process stating that "Sustaining the integrity of the legal system is of supreme importance and any challenge to the independence of the Judiciary or the Bar will ultimately cause harm".

41. The Department of Justice has also pointed out that an effective justice system is a cornerstone of a democratic society and an independent and impartial judiciary is critical to confidence in the administration of justice. The Department notes that the modified arrangements for appointments under the Northern Ireland Act 2009, which were designed to reinforce judicial independence by limiting Executive involvement and which increased the role of NIJAC, must be seen as a positive development and states that it is important that both appointment and tenure are immune from political or partisan interest, in terms of perception and reality.

42. The Traditional Unionist Voice (TUV) position is that the changes made by the 2009 Act should remain as they are.

43. In his written evidence the Attorney General stated that, on analysis, it may well be that NIJAC is a much less accountable vehicle for appointment than the traditionally politically accountable method. The Attorney General also questioned the transparency of NIJAC, pointing out that it cannot be questioned on the floor of the Assembly regarding appointments.

44. The Attorney General believes that there is a case to explore further ministerial involvement or that of the legislature in judicial appointments and suggests that the Committee for Justice may wish to consider whether it is ultimately healthy in constitutional terms for High Court Judges to be appointed by a Commission dominated by the judiciary as it is at present or whether there should be greater involvement by the Executive and the legislature.

45. He highlighted the views of Sir Thomas Legg QC, in his written evidence to the recent House of Lords Constitution Committee Inquiry into Judicial Appointments[5] when he stated "…. strikes the balance of roles and powers too far towards the judges and too far away from the Executive".

46. When questioned about other possible models the Attorney General highlighted the German model as worthy of scrutiny.

47. In his evidence the Lord Chief Justice highlighted that there has often been some legislative involvement in the appointment of judges and indicated that he had no specific issue with a role for the legislature in the process. He did however question what it would add to a process which is based solely on merit. He also stated that while it might be regarded as unusual for NIJAC to be the appointing body to certain judicial offices as well as having responsibility for selection, as such appointments are more routinely a matter for Ministers, the arrangement appears to have worked perfectly well in practice.

48. The Lord Chief Justice stated that having some legislative involvement is not necessarily contrary to the fundamental principles of judicial independence but all the discussions on this in the UK and elsewhere have not, to his mind, satisfactorily answered the question of what the Executive or the legislature would bring by way of skills to ensure that the process of selection on merit was better achieved.

The selection processes used by NIJAC

49. In its written evidence the Law Society indicated that it would like to see greater acknowledgement in the selection process for skills in drafting legal agreements, the provision of complex legal advice to clients and case/practice management. It stated that it has worked with NIJAC to ensure that the assessment methodologies used in NIJAC competitions take proper account of the expertise and experience of solicitors and to address the view that the judicial appointments process favours the skills and experience of members of the Bar and also disadvantages applicants from a non-public service background.

50. The Bar Council stated that it supports the selection process established by NIJAC. The Bar Council indicated that the recent appointment process for the High Court and County Court demonstrates the work conducted by NIJAC to improve the appointment process in relation to the criteria used, speeding up the process and the confidentiality surrounding it.

51. The Attorney General questioned whether, in relation to the selection process used, the highest score at one or more interviews or exercises is necessarily indicative that the best candidate has been identified. He also expressed the view that it appeared that those who had previous public sector experience were the most comfortable with the NIJAC recruitment method.

52. The Attorney General stated that there needed to be a tailoring of assessment exercises, which may include role play or giving presentations and made the general criticism that a purely competence-based system will not always deliver the best outcome.

53. The Attorney General also raised the question of whether a process could identify several candidates as being worthy of appointment and then have a separate process to identify whether someone has the specific experience that is needed to fill the particular vacancy under consideration.

54. The Lord Chief Justice, in written and oral evidence, outlined the NIJAC appointments process including its use of a generic Judicial Selection Framework which can be tailored to the specific requirements of the judicial office to which an appointment is to be made and how the criteria and the required features for each of the criteria are set. The Lord Chief

5 House of Lords, Select Committee on the Constitution, Judicial Appointments Process, Oral and Written Evidence. http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf

Justice also indicated that appointment processes had included role play, case studies, presentations, shortlisting tests and published work with the intention of using a broad range of tools to assist the selection process.

55. The Northern Ireland Judicial Appointments Ombudsman, in his written submission, indicated that NIJAC should ensure consistency in its approach to competition procedures and appointments.

56. The Ombudsman was also in agreement that there is a perception that judicial appointments are largely the preserve of the Bar.

57. In his oral evidence, the Ombudsman stated that, when selecting on merit, it is about looking at what the criteria and issues are and he indicated that his personal experience on a panel that selects QCs raised, for him, the point that being a very good advocate does not necessarily mean a person will go on to be a very good judge.

Delays in the NIJAC appointment process

58. The Bar Council raised issues about delays in the process in previous selection competitions. Whilst acknowledging that this has been addressed by NIJAC the Bar did highlight that the length of time involved in the confirmation of Crown appointments can have a serious impact on the professional and personal lives of candidates.

59. The Bar Council also highlighted the impact of judicial vacancies on the smooth running of the courts, the current judicial caseloads and the avoidable delay created due to the lack of court time.

60. In response, during his oral evidence, the Lord Chief Justice indicated that the total recruitment time was decreasing.

The Cost of NIJAC

61. In both his written and oral evidence, the Attorney General raised the issue of the cost of the current process for appointing judges and suggested that the process could be handled through the Office of the Lord Chief Justice with the assistance of HR Connect. While moving the responsibility to the Office of the Lord Chief Justice would have some resource implications the Attorney General believed that it could be done much more cheaply as, currently, NIJAC does not run that many competitions in any given year.

62. When this was raised with the Lord Chief Justice, he pointed to the large amount of work carried out by NIJAC to secure a diverse pool of applicants and raised concern that removing NIJAC from the process, while it would not necessarily affect independence, would be a serious departure from the aim of securing the statutory objective of ensuring a diverse and reflective pool of applicants. He also expressed concern that if the selection process fell within his office it could reinforce the false impression that he was in some way in control of appointments with the detrimental effect that might have on public confidence in the judiciary.

63. The Lord Chief Justice also stated out that, unlike HR Connect, NIJAC tailors each competition.

64. The Northern Ireland Judicial Appointments Ombudsman, in his written evidence, indicated that NIJAC must take value for money considerations into account and that the selection process should be proportionate but must have a robust audit trail to promote confidence that appointments are being made on merit and in a considered fashion.

Selection or recommendation for appointment to a listed judicial office must be solely on the basis of merit

65. Schedule 3 also provides that selection of a person to be appointed or recommended for appointment to a listed judicial office must be solely on the basis of merit.

66. All respondents to the review supported the principle of selection on the basis of merit.

67. The Bar Council, in its evidence, emphasised that it is imperative that merit is the sole criteria for appointment.

68. The Department of Justice also indicated that any system for judicial appointments and removals is based on selection on merit, through fair and open competition and from the widest range of eligible candidates.

69. NIJAC has outlined that to ensure the merit principle is adhered to and that the appointments process is open and transparent, it has developed a generic Judicial Selection Framework which can be tailored to the specific requirements of the judicial office to which an appointment is to be made.

70. The Attorney General, while raising some questions regarding a lack of understanding of the definition of merit and the process, is supportive of the principle of identifying the best person for the job.

71. The Ombudsman also highlighted that appointments should be strictly on merit and that NIJAC is required, so far as it is reasonably practicable, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is selecting a person to be appointed, or recommended for appointment.

Judicial appointments are reflective of the community

72. Schedule 3 provides that NIJAC must at all times engage in a programme of action to ensure that, so far as it is reasonably practicable, judicial appointments are reflective of the community in Northern Ireland and that a range of persons reflective of the community are available for consideration by NIJAC when selecting a person or recommending for appointment.

73. The Law Society pointed out that ensuring that the judicial appointments process is open and transparent and takes account of the full range of skills and experiences which make one suitable for judicial office will assist in ensuring a diverse judiciary. It highlighted the findings of the report by the Advisory Panel on Judicial Diversity in England and Wales in 2010[6] and that Baroness Neuberger, the Chairwoman of the Advisory Panel, recently emphasised that encouraging solicitors to apply for judicial appointments is absolutely key to ensuring judicial diversity.

74. The Department of Justice also indicated that the statutory responsibility placed by the 2009 Act on NIJAC to develop a strategy to ensure that persons appointed to listed judicial office and the range of persons available for consideration for selection are reflective of the community in Northern Ireland is to be welcomed.

75. In the view of the Department a judiciary which is visibly reflective of society can only enhance public confidence in the justice system. The Department also noted that research

6 The Report of the Advisory Panel on Judicial Diversity 2010. http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations

commissioned by NIJAC in 2008[7] on barriers and disincentives to applying for judicial office was largely positive about NIJAC's role.

76. NIJAC highlighted that it has developed a judicial equity monitoring database, plus mechanisms for collating and analysing feedback to inform the judicial appointments process and a robust programme of action to ensure that the Northern Ireland judiciary is reflective of society. It has commissioned research on the matter and undertakes specific tailored outreach and general outreach.

77. During his oral evidence the Lord Chief Justice indicated that, in his view, NIJAC has given a reasonably good account of itself in encouraging a reflective applicant pool and a reflective judiciary. Responding to remarks made by Lord Kerr in his evidence to the House of Lords Constitution Committee Inquiry into Judicial Appointments[8] regarding his disappointment that there was a lack of women on the High Court Bench in Northern Ireland, the Lord Chief Justice outlined that NIJAC was aware that more work needs to be done to encourage applications from women for the higher court tiers. He also expressed his disappointment at the current situation and explained that research is currently being conducted to identify the reasons and how to deal with it. He also pointed out that there is work on-going with the professions to look at the issue and that NIJAC recently visited locations in England and Wales that are looking at alternative working arrangements.

78. The Attorney General, referring to the recommendation by Baroness Neuberger in the 2010 Advisory Panel Report on Judicial Diversity in England and Wales[9], suggested that judicial training for those interested in a career in the judiciary could be considered to encourage applications.

79. In his written submission the Lord Chancellor highlighted that the Ministry of Justice consultation[10] was seeking views on whether the principle of salaried part-time working should be extended to the High Court and above.

80. It is the view of the Northern Ireland Judicial Appointments Ombudsman that the judiciary should be reflective of the community and seeing judges appointed from a diverse range of non-traditional backgrounds would be seen as a more open-minded approach.

81. The Ombudsman agreed that there has been a perception that the judiciary is not currently reflective of the community in Northern Ireland in respect of gender and believed that this raised questions in relation to what NIJAC can do to enhance confidence, given its statutory responsibility, and how NIJAC goes about making the wider public aware of what it is trying to do in that area.

82. Addressing the question of whether the lack of women in senior judicial posts was due to a cultural mindset the Ombudsman indicated that questions that needed to be explored included are there issues which limit the current pool, how that pool could be expanded e.g. by looking beyond Northern Ireland, are there factors that hold people back from applying such as working practices and opportunities for part-time appointments and the reasons why people are not successful.

83. The Ombudsman pointed out that, in his experience, there is always a time lag between external expectations and changes occurring and, given that Northern Ireland has a relatively

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7 Research into the barriers and disincentives to judicial office by QUB and NISRA. Northern Ireland Judicial Appointments Commission. http://www.nijac.gov.uk/index/what-we-do/publications/research.htm

8 Lord Justice Etherton, Lord Kerr of Tonaghmore, Her Honour Judge Plumstead and District Judge Tim Jenkins – Oral Evidence to the House of Lords Constiotution Committee. P196 http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf

9 The Report of the Advisory Panel on Judicial Diversity 2010. http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations

10 Appointments and Diversity, 'A Judiciary for the 21st Century', A Public Consultation. Ministry of Justice http://www.justice.gov.uk/downloads/consultations/judicial-appointments-consultation-1911.pdf

small judicial community, the number of opportunities to fill posts are much smaller and any change will probably take longer. He also highlighted that, as an accountability measure, the changes that are expected need to be set out and then the situation monitored.

84. The Ombudsman did not believe this to be an issue only for Northern Ireland and referred to the 2010 Advisory Panel Report[11] as evidence that the Judicial Appointments Commission for England and Wales faced similar challenges in relation, not only to gender, but ethnic background.

Removal of a person from a listed judicial office

85. The new Schedule 3 provides that the power to remove a person from a listed judicial office (or suspend a person from office pending a decision whether to remove him) is exercisable by the Lord Chief Justice upon recommendation by a specially convened tribunal. Previously this power was prospectively provided under the Justice (NI) Act 2002 to the First Minister and deputy First Minister, acting only on the basis of a tribunal recommendation and only on agreement of the Lord Chief Justice. The Lord Chief Justice has discretion not to remove or suspend someone even if a recommendation has been made but must notify the person, the tribunal and, if the tribunal was convened by the Northern Ireland Judicial Appointments Ombudsman, the Ombudsman of the reasons for not removing or suspending the person.

86. The Department of Justice noted that the changes made to the arrangements for removal from judicial office under the 2009 Act have only been exercised on one occasion since the devolution of justice but indicated that the transfer of responsibility for removals to the Lord Chief Justice afforded additional protection for judicial independence. The Department expressed the view that discipline and removal are properly matters for the Lord Chief Justice as Head of the Judiciary and that the requirement to act on recommendation of a removals tribunal and involvement of the NI Judicial Appointments Ombudsman ensures appropriate checks and balances are in place.

87. The Attorney General indicated in his written evidence that there is no reason why there should not be a restoration of the classic constitutional position, that removal of a judge of the Court of Judicature in Northern Ireland should be possible by Her Majesty only following a resolution of both Houses of Parliament.

Maximum number of persons who may hold a listed judicial office

88. Part 3 of Schedule 3 provides that NIJAC must agree, with the Department of Justice, the maximum number of persons who may hold a listed judicial office at any one time. With the agreement of the Department of Justice, NIJAC may revise this determination.

89. The Attorney General, in his oral evidence, when asked about NIJAC's role in this respect, agreed with the suggestion that it seemed quite extraordinary that an independent and unaccountable body such as NIJAC should determine the number of judges and he was of the view that this was a matter for politically accountable judgments.

90. The Lord Chief Justice clarified that the maximum number of judges is informed by the Northern Ireland Courts and Tribunals Service and that any determination NIJAC makes has to be agreed by the Department of Justice which is perfectly proper as the decision also depends on the Department taking the view that money is available.

91. The Department of Justice indicated that its experience of the 2009 Act arrangements for delivery of the functions has been positive so far.

11 The Report of the Advisory Panel on Judicial Diversity 2010. http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations

Other Relevant Issues Raised

92. In addition to the issues specifically relating to the Schedules, the Committee received a number of more general comments about the current Judicial Appointments process.

Sponsoring Department

93. In its written evidence, the TUV proposed that the function of overseeing NIJAC's governance and finance should be passed from the Office of the First Minister and Deputy First Minister to the Department of Justice.

94. During the Attorney General's evidence session this proposal was raised and he agreed with the suggestion that it would not make any real difference in terms of accountability.

95. NIJAC indicated that it has an effective working relationship with its sponsor department in relation to finance and governance, the Office of the First Minister and Deputy First Minister, and the experience of the Department of Justice of the 2009 Act arrangements has been positive thus far.

Tribunals

96. In relation to the Tribunal process the Department of Justice indicated that it is currently considering options for reform of the tribunal system in Northern Ireland, including future arrangements for delivery of functions related to the appointment, removal and terms and conditions of appointment of tribunal members. To help inform the development of proposals the Department recently issued a discussion document seeking views on the current system.

Judicial Appointments Ombudsman – Delivery of Functions

97. The Department of Justice, mindful that only a small number of complaints have been made to the Judicial Appointments Ombudsman since the Office was established (five complaints in five years) and, in light of the Executive Review of Arms-length bodies, is considering possible alternative options for delivery of his functions, including whether it would be appropriate for those functions to be delivered in conjunction with those of another Ombudsman.

98. When asked whether a distinct Judicial Appointments Ombudsman is required, or whether the role could be absorbed into that of a broader Justice Ombudsman, the Ombudsman indicated that it is important that, whatever the mechanism is, it has not only the confidence of the sector that is being investigated but is able to project a sense of confidence to the wider public.

99. The Ombudsman highlighted that soon after his appointment, a comment was made to him that there seemed to have been a lot more concentration and emphasis on policing and prison issues than on the rest of the justice system in Northern Ireland and he expressed the view that if the route of a single Justice Ombudsman was taken it would have to be ensured that he or she gave equal weight to all sections.

100. The Ombudsman also highlighted that the legislation for his role stipulates that he should not be a lawyer nor have sat in a judicial capacity and in his view these are important characteristics.

101. In relation to combining the role with another Ombudsman's role simply because it was another Ombudsman's role, he expressed the view that he was not sure that would be particularly helpful as there is such a wide range of public services. On the other hand, if the role was limited to the justice system, the question is whether that would be sufficient.

Investigation of Complaints in relation to Judicial Office Holders

102. The question of whether the NI Judicial Appointments Ombudsman should have a remit to investigate complaints of conduct against judicial office holders was raised with the Lord Chief Justice who responded that there is a system of complaints in relation to judicial office holders that comes through his office and he is not aware of any sense of public dissatisfaction with the outcome of that process which is managed expeditiously and for virtually no money. He indicated that if there is another process that might achieve better public confidence he would be open to looking at it as long as the factors of affordability and making sure the process will attract public confidence are borne in mind.

103. The Lord Chief Justice confirmed that NIJAC had accepted a recommendation by the Judicial Appointments Ombudsman that the Commission should not make recommendations for appointment in relation to a competition while an individual's complaint about the process is on-going and stated that the Commission has a very positive relationship with the Ombudsman.

104. In his oral evidence the Judicial Appointments Ombudsman outlined that, unlike the Commissioner for Judicial Appointments whose role was prior to his, he is unable to take up thematic complaints, look at wider issues, undertake auditing or take complaints from individuals on behalf of someone else. The legislation clearly sets out that his role is to look at complaints from individuals who have participated in the selection process.

105. When asked if his role could be expanded to deal with complaints of conduct against judicial office holders the Ombudsman indicated that the key question was whether establishing those responsibilities in his office would provide greater confidence in the administration of justice.

Consideration of the Issues

106. Due to the limited time available for the completion of this Review of Judicial Appointments it was not possible to explore the issues in depth and the Committee's deliberations were confined to the issues set out below.

The Role of Elected Representatives

107. One of the issues that was considered during the review was the involvement of Executive Ministers or the Legislature in the Northern Ireland judicial appointments and removals processes.

108. The 2009 Act removed the original intention for the appointment of persons and for recommending persons to the Queen for appointment as listed judicial office holders to be undertaken by the First Minister and deputy First Minister acting jointly. While mindful of the reasons for the current position the Committee notes that the result is that full responsibility now sits with NIJAC and elected representatives play no part in the process.

109. The Committee discussed the question of whether the balance of power in relation to the process for judicial appointments and removals has moved too far towards the judiciary and non-elected bodies and away from politicians. In any further consideration of where power should reside in relation to judicial appointments and to what extent, if any, political representatives should have a role, a distinction should be made between involvement in the selection process and involvement in the appointment process.

Appointment of the Lord Chief Justice and Lords Justice of Appeal

110. Since the 2009 Act there has been a change in the appointment process for Appeal Judges however the new process has not yet been used as no new appointments have been made.

111. One of the criticisms levelled at the previous appointment system is that appointments were based on seniority. The Committee believes that all judicial appointments should be based on merit and is strongly of the view that the merit principle must apply to any appointment process for Appeal Judges or the Lord Chief Justice post. The Committee supports the position of NIJAC, as articulated by its Chairman, the Lord Chief Justice, that, when consulted by the Prime Minister on the appointments process, NIJAC will inevitably recommend that the appointment should be on merit and there should be a process to ensure that appropriate candidates can apply.

Removal of Lords Justices of Appeal and also High Court Judges

112. The Committee notes that a motion for an address can only be made when a tribunal convened either by the Lord Chief Justice or NIJAC has recommended that the officer holder be removed on grounds of misbehaviour and the Lord Chancellor and the Prime Minister have consulted with the Lord Chief Justice or have been advised by the Lord Chief Justice to accept the recommendation.

113. The Committee notes that this is an area where power has shifted from elected representatives.

The Composition of NIJAC

114. The Committee wishes to highlight that there appears to be some perception that NIJAC is dominated by its judicial members. The Committee was struck by the view expressed by the

NI Judicial Appointments Ombudsman that the assumption when setting up an independent commission for the appointment of judges is that it is about promoting confidence in the appointment process. While the Committee notes that the Lord Chief Justice, as Chairman of NIJAC, strenuously refutes that the judicial members have more influence and indicated that all members of the Commission have an equal status and contribute fully to the selection process, it agrees with the Judicial Appointments Ombudsman's assertion that NIJAC should reflect on the challenge of addressing any perceptions that might exist.

Judicial Appointments are reflective of the community

115. The Committee is very concerned that, despite the requirement that NIJAC must engage in a programme of action to ensure that so far as it is reasonably practicable judicial appointments are reflective of the community in Northern Ireland, this has not been achieved in the higher court tiers with regard to female representation.

116. The Committee notes that the current Lord Chief Justice has expressed his disappointment about this situation as has Lord Kerr, the previous Lord Chief Justice, in his evidence to the House of Lords Constitution Committee during its recent Inquiry into Judicial Appointments when he outlined his view of the reasons that were acting as a disincentive for women applying.

117. NIJAC, in its evidence, recognised that this is an issue that needs to be addressed and outlined the work it is taking forward, including research to identify the reasons for the lack of representation and what needs to be done to address it.

118. The Committee is disappointed that no progress appears to have been made to address this long standing issue. While recognising that this problem does not just exist in Northern Ireland the Committee is of the view that NIJAC must take forward the work outlined as a matter of urgency and give appropriate priority to it. The Committee would highlight the suggestions that judicial training may be beneficial for those interested in a career in the judiciary and a commitment to flexible working arrangements as worthy of further consideration.

119. The Committee intends to review what progress is made in this area in the future.

Removal of a person from a listed judicial office

120. The Committee notes that the power to remove a person from a listed judicial office is exercisable by the Lord Chief Justice upon recommendation by a specially convened tribunal but the Lord Chief Justice has discretion not to remove or suspend someone.

121. The Committee notes that this is an area where power has shifted from elected representatives.

Maximum number of persons who may hold a listed judicial office

122. The Committee discussed the nature of the current arrangement in which NIJAC plays a key role in deciding the maximum number of persons who may hold a listed judicial office at any one time.

123. The Committee is of the opinion that the fact that NIJAC has responsibility for determining the compliment of judges is unusual and, noting that NIJAC must agree with the Department of Justice the maximum number, would question were the power actually rests in relation to this matter.

Sponsoring Department

124. The Committee notes that NIJAC indicated it has an effective working relationship with the Office of the First Minister and Deputy First Minister in relation to its finance and governance arrangements and the Department of Justice is also positive regarding the delivery of these functions.

125. Given that the arrangements are working well and the First Minister and deputy First Minister also have responsibility for the appointment of Lay Commissioners to NIJAC the Committee sees no reason to change the oversight functions.

Delivery of the Functions of the Judicial Appointments Ombudsman

126. The Committee is aware that the Department of Justice is currently considering alternative options for the delivery of the functions of the NI Judicial Appointments Ombudsman.

127. The Committee recommends that the Department of Justice takes account of the views expressed by the NI Judicial Appointments Ombudsman during his oral evidence to the Committee when reviewing the options and in particular, if consideration is being given to having one Justice Ombudsman, the current legislative requirements that stipulate that the Judicial Appointments Ombudsman appointee should not be a lawyer nor have sat in a judicial capacity.

128. The Committee will give further consideration to this issue when the Department presents its options and findings.

Investigation of complaints in relation to Judicial Officer Holders

129. The Committee discussed the fact that, under the current arrangements, the NI Judicial Ombudsman does not have the power to investigate complaints in relation to judicial office holders (this sits with the Office of the Lord Chief Justice) and his remit under the legislation is very narrow allowing him to only look at complaints from individuals who have participated in the selection process. He is unable to investigate thematic complaints, look at wider issues or deal with complaints from individuals on behalf of someone else.

130. The Committee noted that compared to Judicial Ombudsmen in other jurisdictions the NI Judicial Appointments Ombudsman's role is relatively narrow. This is an issue the Committee may return to in the future.

131. The Committee welcomes the acceptance by NIJAC of the recommendation by the NI Judicial Appointments Ombudsman that it should implement a policy that no formal part of the appointment process to fill a post will be made unless any outstanding complaints process relating to the same competition has been completed. The Committee believes that, in the interest of fairness, this is the correct approach to adopt.

Conclusion

132. Having considered the evidence received and noting that the Department of Justice and the NI Judicial Appointments Commission are of the view that the arrangements created by the 2009 Act, while only in place for a relatively short period of time, appear to be working satisfactorily, the Committee for Justice recommends that there should be no changes to the current process for judicial appointments and removals in Northern Ireland at this time.

133. Given the statutory requirement to report to the Assembly by 30 April 2012 which restricted the time available to complete this review and the fact that a number of issues may merit further consideration, the Committee intends to undertake a further review of the Judicial Appointments and Removals processes.

Appendix 1

Minutes of Proceedings

Thursday 26 January 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mr Paul Carlisle (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies:

2.03 p.m The meeting commenced in public session.

11. Review of Judicial Appointments in Northern Ireland

Agreed: The Committee agreed to consider the Review of Judicial Appointments in Northern Ireland at its meeting on 2 February 2012.

[EXTRACT]

Thursday 2 February 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Mr Colum Eastwood MLA

2.02 p.m. The meeting commenced in public session.

1. Review of Judicial Appointments in Northern Ireland

The Committee considered draft Terms of Reference for the review of judicial appointments which it is required to complete in accordance with Section 29C of the Northern Ireland Act 1998 as amended by Schedule 6 of the Northern Ireland Act 2009 and Standing Order 49A.

The Committee also considered its approach to carrying out the review and a proposed list of consultees.

Agreed: The Committee agreed the terms of reference for the Review of Judicial Appointments.

Agreed: The Committee agreed that the approach to the review should be a targeted consultation with information placed on the Committee webpage.

Agreed: The Committee agreed a list of key consultees from which written evidence will be requested and the commissioning letter to issue.

Agreed: The Committee agreed that arrangements should be made for oral evidence sessions with the NI Judicial Appointments Commission, the Judicial Appointments Ombudsman, the Lord Chief Justice and the Attorney General for Northern Ireland.

[EXTRACT]

Thursday 23 February 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Colum Eastwood MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)

2.04 p.m. The meeting commenced in public session.

7. Update on the Committee's Review of Judicial Appointments in Northern Ireland

The Committee note the current position in relation to written evidence received for the Review of Judicial Appointments in Northern Ireland and oral evidence sessions scheduled for 1 and 8 March 2012.

[EXTRACT]

Thursday 1 March 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Colum Eastwood MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Ms Jennifer McCann MLA
Mr Jim Wells MLA

2.04 p.m. The meeting commenced in public session.

8. Briefing by the Attorney General for Northern Ireland on the Review of Judicial Appointments in Northern Ireland

The Attorney General for Northern Ireland, Mr John Larkin QC, joined the meeting at 3.24 p.m.

The Attorney General briefly outlined his views on the current arrangements for judicial appointments and removals in Northern Ireland.

A question and answer session followed covering issues including the merit principle and how merit is defined; the competence based process and the need for flexibility; the process for appointments to the Court of Appeal; the merits of exploring the possibility of the Legislature having a role in the appointment process; the transparency, cost and accountability of NIJAC; a proposed model involving the Office of the Lord Chief Justice; and models used in America and Germany.

4.02 p.m. Mr Eastwood left the meeting.

The evidence session was recorded by Hansard.

The Chairman thanked the Attorney General for the briefing and he left the meeting.

Agreed: The Committee agreed to commission a research paper on the models used in America and Germany for judicial appointments.

[EXTRACT]

Thursday 8 March 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Mr Colum Eastwood MLA
Mr Basil McCrea MLA

2.02 p.m. The meeting commenced in public session.

9. Briefing by the Northern Ireland Judicial Appointments Commission on the Review of Judicial Appointments in Northern Ireland

The Lord Chief Justice, Sir Declan Morgan, Chairman of the NI Judicial Appointments Commission, Edward Gorringe, Chief Executive, NI Judicial Appointments Commission, Ruth Laird, Lay Commissioner, NI Judicial Appointments Commission and Laurene McAlpine, Principal Private Secretary in the Lord Chief Justice's Office joined the meeting at 2.07 p.m.

The Lord Chief Justice briefly outlined the Commission's views on the current arrangements for Judicial Appointments and Removals in Northern Ireland.

A detailed question and answer session followed covering issues such as the possible impact of moving the work of NIJAC into the Lord Chief Justice's Office with support from HR Connect; the role of the Lay Commissioners in NIJAC and their appointment process; how the merit principle is applied and what it means; the impact of the 2009 Act on how Judges to the Court of Appeal are appointed; the range of processes used in the appointment of judges; what role the Legislature could play in the judicial appointments process; the lack of women representative in senior judicial posts and the reasons for this; the role of the Judicial Appointments Ombudsman in the process; the roles of the Prime Minister and NIJAC in the future appointment of judges to the Court of Appeal; the length of time appointment competitions take; the process for setting the number of judges in Northern Ireland and the current number of High Court vacancies; and what accountability the present system provides.

The evidence session was recorded by Hansard.

The Chairman thanked the Lord Chief Justice and the other representatives and they left the meeting.

[EXTRACT]

Thursday 27 March 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Colum Eastwood MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

12.36 p.m The meeting commenced in closed session.

1. Apologies

None.

2. Assembly Legal Advice on changes made to the process of judicial appointments by Schedules 2 - 5 of the Northern Ireland Act 2009

12.37 p.m Tara McCaul, Assembly Senior Legal Advisor, joined the meeting.

Ms McCaul outlined the changes made by Schedules 2 - 5 of the Northern Ireland Act 2009 to Judicial Appointments and Removals in Northern Ireland and answered questions.

12.42 p.m Mr Weir joined the meeting.

12.45 p.m Mr Dickson joined the meeting.

12.50 p.m Mr Lynch joined the meeting.

Ms McCaul undertook to provide further advice on an issue raised in relation to the possibility of carrying out a further review in due course.

The Chairman thanked Ms McCaul for her advice and she left the meeting.

3. Briefing on Assembly Research Papers on the Judicial Appointments process in Germany and the United States and the process of appointments to the Court of Appeal in England and Wales

12.58 p.m Fiona O'Connell, Assembly Researcher, joined the meeting.

12.58 p.m. Mr Givan left the meeting.

Agreed: The Committee agreed that Mr Maginness should chair the meeting in the absence of the Chairman and Deputy Chairman.

12.58 p.m. Mr Maginness took the Chair.

Ms O'Connell outlined the key points in two research papers covering the Judicial Appointments process in Germany and the United States and the process of appointments to the Court of Appeal in England and Wales and answered questions on issues such as the role

of the legislatures in the appointment of judges in the United States and Germany and the gender imbalance, if any, in other jurisdictions.

1.03 p.m Mr McCartney joined the meeting.

1.14 p.m Mr McCrea joined the meeting.

The Chairman thanked Ms O'Connell for the briefing and she left the meeting.

4. Discussion of the key issues arising from the written and oral evidence received in relation to the Review of Judicial Appointments

The Committee considered a document summarising the key issues arising from the written and oral evidence received in relation to the Review of Judicial Appointments and discussed a number of the issues.

1.29 p.m. Mr Givan rejoined the meeting and took the Chair.

1.29 p.m Mr Lynch left the meeting.

1.32 p.m Mr Weir left the meeting.

Agreed: The Committee agreed that Members should consider the issues further and submit views at the meeting on 29 March 2012.

Mr Paul Givan MLA
Chairman, Committee for Justice
19 April 2012

[EXTRACT]

Thursday 29 March 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Colum Eastwood MLA
Mr Sean Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Basil McCrea MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Mr Stewart Dickson MLA

2.06 p.m. The meeting commenced in open session

3. Matters Arising

2.07 p.m. Mr McCartney joined the meeting.

2.07 p.m. Mr McCrea joined the meeting.

iii. The Committee considered the summary paper on the Review of Judicial Appointments in Northern Ireland and noted a relevant newspaper article and the House of Lords Constitution Committee, report on Judicial Appointments that had just been published.

Agreed: The Committee agreed to discuss their final views on the Review of Judicial Appointments at the meeting on 19 April.

4. Briefing by the Northern Ireland Judicial Appointments Ombudsman on the Review of Judicial Appointments in Northern Ireland

2.17 p.m. The Northern Ireland Judicial Appointments Ombudsman, Mr Karamjit Singh, joined the meeting.

Mr Singh briefly outlined his views on the current arrangements for Judicial Appointments and Removals in Northern Ireland based on the complaints that he had dealt with.

2.44 p.m. Mr Wells joined the meeting.

A question and answer session followed covering issues such as whether the Ombudsman's role could be expanded to include the investigation of complaints from the public about the judiciary; whether there needs to be a separate Judicial Appointments Ombudsman or whether the role could be incorporated into a wider Justice Ombudsman; whether the judiciary is reflective of the community in Northern Ireland and what could be done to address the gender and ethnicity imbalances; the perception that the current appointments process is dominated by the judiciary and the legal profession; the time lag between action and resulting changes; the need for any arrangements to provide confidence in the system; and the ombudsman's limited powers and ability to investigate only individual complaints from those who participated in a particular competition.

The evidence session was recorded by Hansard.

The Chairman thanked Mr Singh and he left the meeting.

[EXTRACT]

Thursday 19 April 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Colum Eastwood MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Peter Weir MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Mr Stewart Dickson MLA
Mr Basil McCrea MLA

2.04pm The meeting commenced. in open session

15. Review of Judicial Appointments in Northern Ireland – Consideration of evidence and discussion of final views in relation to findings and any possible recommendations

The Committee noted the legal advice provided in relation to the possibility of carrying out a further review in due course.

The Committee considered the evidence received in relation to the Review of Judicial Appointments and discussed possible findings and recommendations.

4.27pm Mr Weir joined the meeting.

4.36pm Ms McCann left the meeting.

Agreed: The Committee agreed that a draft report outlining the evidence and findings should be prepared for consideration and agreement at the meeting on 26 April.

Agreed: The Committee agreed that a motion to debate the Committee report on the Review of Judicial Appointments in the Plenary should be drafted.

Agreed: The Committee agreed the content of the proposed appendices to the report.

5.01pm The meeting was adjourned.

Mr Paul Givan MLA

Chairman, Committee for Justice
26 April 2012

[EXTRACT]

Thursday 26 April 2012
Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Tom Elliott MLA
Mr Alban Maginness MLA
Ms Jennifer McCann MLA
Mr Patsy McGlone MLA
Mr Peter Weir MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Mr Vincent Gribbin (Assistant Assembly Clerk)
Mr Joe Westland (Clerical Supervisor)
Mr Kevin Marks (Clerical Officer)

Apologies: Mr Stewart Dickson MLA
Mr Sean Lynch MLA
Mr Jim Wells MLA

2.06 p.m. The meeting commenced in closed session.

1. Review of Judicial Appointments in Northern Ireland – Consideration of Draft Report

2.10 p.m. Ms McCann joined the meeting.

The Committee considered a draft report on the Review of Judicial Appointments. No amendments were proposed.

Agreed: The Committee agreed to consider and approve the final report later in the meeting.

12. Review of Judicial Appointments in Northern Ireland – Formal consideration of Draft Report

The Committee formally agreed the final draft of the Report of the Review of Judicial Appointments in Northern Ireland.

Agreed: that the title page, Committee Membership and Powers, and Table of Contents stands part of the report put and agreed to.

Agreed: that paragraphs 1 to 11 stand part of the Report.

Agreed: that paragraphs 12 to 22 stand part of the Report.

Agreed: that paragraphs 23 to 91 stand part of the Report.

Agreed: that paragraphs 92 to 105 stand part of the Report.

Agreed: that paragraphs 106 to 131 stand part of the Report.

Agreed: that paragraphs 132 to 133 stand part of the Report.

Agreed: that the Appendices stand part of the Report.

Agreed: that the Executive Summary stands part of the Report.

Agreed: that the Chairman approve an extract of the Minutes of Proceedings of today's meeting for inclusion in Appendix 1.

Agreed: that the report on the Review of Judicial Appointments be printed.

The Committee considered the wording of a motion to debate the Report and possible dates for the debate.

Agreed: The Committee agreed the wording of the Committee motion to debate the Report and that the Business Committee should be advised of a preference for 14 or 15 May 2012 for the debate.

The Chairman advised the Committee that the report will be embargoed until the start of the debate.

The Chairman thanked the Committee team for assisting the Committee during its Review and in the production of the Report.

[EXTRACT]

Appendix 2

Minutes of Evidence

1 March 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Mr Alban Maginness
Mr Basil McCrea
Mr Peter Weir

Witnesses:

Mr John Larkin QC — *Attorney General for Northern Ireland*

1. **The Chairperson**: I welcome the Attorney General for Northern Ireland, Mr John Larkin QC. This session will be recorded by Hansard. If you want to outline briefly your submission, I am sure that members will have some questions for you after that.

2. **Mr John Larkin QC (Attorney General for Northern Ireland)**: Let me thank you formally for asking me to attend today to assist with your deliberations, as the Committee explores the hugely important issue of judicial appointments, particularly the amendments effected by schedules 2 to 5 of the Northern Ireland Act 2009. As always, I am delighted to assist the Committee. Central to my role as Attorney General is upholding the rule of law. It is in that context that I want to make some general comments and observations about what the Committee may wish to consider as part of its review.

3. First, I want to touch on the merit principle. As you know, schedule 3 to the Act continues the statutory requirement that appointments or recommendations for appointment to a listed judicial office be based solely on merit. In one sense, there may be very little that is new in that, because any rational system of appointment should seek to appoint those who are best for the job. A fundamental question about the Northern Ireland Judicial Appointments Commission (NIJAC) is whether the highest score at one or more interviews or exercises is necessarily indicative that one has identified the best candidate. I note that research commissioned by NIJAC found that few respondents could define merit clearly and that the methodology used to assess candidates was unfamiliar to many applicants. Indeed, it appears that those who had previous public-sector experience were the most comfortable with the NIJAC recruitment method. I understand that NIJAC has put in place arrangements that have enabled the public and the professions to get a better sense of what the judicial world and the judicial role are all about, and it has published questions and model answers to some of its written tests. It has also done useful work in enabling potential applicants for judicial office to better understand judicial life and its implications.

4. Judicial training for those interested in a career in the judiciary might also be considered. That was recommended by Baroness Neuberger in her 2010 advisory panel report on judicial diversity and is useful work. It would be helpful if potential candidates could reflect on whether they were truly suited for the work of a judge; that would allow them to identify and develop, at a pre-appointment stage, the necessary skills that might be prerequisites for judicial appointment. Training is particularly relevant when the candidate at issue is a specialist lawyer and a generalist post is under consideration.

5. It is also worth considering whether the top candidate on an individual scoring system is what is truly desired or whether a process could identify several candidates as being worthy of appointment. That would allow a judgement to be made on whether

someone, for example, has the particular criminal law or family law experience that is needed to fill the particular vacancy under consideration. It is essential that the selection process identify those who will be the best judges, and, to do that, it may be insufficient to rely solely on a candidate's past prowess as a lawyer. Historically, that method has served us quite well, and, under the old style of appointment, we identified judges on the basis of their success, typically, at the Bar. However, there is no necessary correlation between success as an advocate, which requires one set of skills, and success as a judge, which may require an additional set of skills.

6. As you will know, Chairperson, the NIJAC merit system does not operate formally for appointments to the Court of Appeal or the position of Lord Chief Justice. Although there was an ad-hoc selection process that led to the selection of the current Lord Chief Justice, appointments to the Court of Appeal appear to have been based, for some time, on seniority among existing judges of the High Court. The 2009 Act introduced a requirement that the Prime Minister consult NIJAC before making those appointments. However, if the NIJAC system is considered the best one, there seems to be no clear reason for senior appointments not to be made in accordance with it. The point is perhaps particularly important in relation to Court of Appeal Appointments. Appointment solely on the basis of mere seniority involves a formal departure from the merit principle, and some of the qualities that go towards making a good appellant judge may not be those that necessarily go towards making a good judge at first instance and vice versa. Mere length of service alone does not seem to be the wisest basis for appointment.

7. I will now move on to another area that may be of interest to the Committee: ministerial involvement or that of the legislature in judicial appointments. Stepping back from the detail and looking at the larger question of principle, I have been struck by what the former permanent secretary of the Lord Chancellor's Department, Sir Thomas Legg QC, said about that issue and the constitutional principles that are engaged on two separate occasions. The first was in an article that he wrote for the journal 'Public Law' in 2001; the second was his written evidence to the Select Committee of the House of Lords, which is, as you will know, looking at the issue. In his 2001 article he wrote:

"appointing judges is not merely a technical and professional exercise, although that is one element. It is a political act in the broad sense and it should be the responsibility of a political authority. In our constitution that means accountable Ministers."

8. That would have been before the establishment of the Judicial Appointments Commission in England and NIJAC here. Of course, that was written before the establishment of the Judicial Appointments Commission in England and NIJAC here. Interestingly, in June 2011, he offered the following in his written evidence. The 2005 Act, he said:

"strikes the balance of roles and powers too far towards the judges and too far away from the Executive".

9. As I have mentioned, the House of Lords Select Committee on the Constitution, before which Sir Thomas was giving evidence, is due to report this month on its inquiry into the judicial appointments process. Interestingly, it has focused to date on two key questions. Who is responsible for the appointment of judges? And what are the substantive criteria governing those appointments?

10. I know that there is a horror in certain circles of any involvement of the legislature in judicial appointment, but, for my part, I think that there is much to be said for further exploration of Sir Thomas Legg's suggestion in paragraphs 11 to 14 of his written evidence and how that might work in the context of the Assembly. Sir Thomas proposes that, for appointments to the UK Supreme Court, the Lord Chancellor should select a candidate from a list of four or five potential appointees; that is, persons who are eminently appointable.

That candidate would then be considered by a joint committee of both Houses of Parliament and, while there would be a reasonable presumption in favour of the candidate, the Committee, after a public interview, could either accept or reject the candidate.

11. Coming back to our local position, the Committee may wish to consider whether it is ultimately healthy, in constitutional terms, for High Court judges to be appointed by a commission dominated by the higher judiciary, as is, at present, the reality, or whether there should be greater involvement by the executive and the legislature.

12. Finally, in relation to the issue of judicial removals which, as you know, has arisen only on one occasion, in the case of Sir Jonah Barrington in the early 1830s. I see no real reason why there should not be a restoration of the classic constitutional position, that removal of a judge of the Court of Judicature in Northern Ireland should be possible by Her Majesty only following a resolution of both Houses of Parliament.

13. **The Chairperson**: Thank you very much, Mr Larkin. There are a couple of points that I want to pick up on. The more recent one that you talked about is the political process. Obviously, in Northern Ireland there is a particular reason why the Office of the First Minister and deputy First Minister (OFMDFM) is removed from doing that. Trying to move from the current position to one of greater political scope will present a particular challenge. We will have to overcome a lot of the political issues that people have about it. I am intrigued by the proposition that the House of Commons and the House of Lords might be involved in that as a joint Committee. Are you suggesting that this Committee, dare I say it, would scrutinise judicial appointments and we would have a vote to say "You are going to be appointed"? Is that an option?

14. **Mr Larkin**: Of course it is an option. You will know, Chairman, that I express myself carefully, I trust. These are issues that are worthy of further exploration. You will be familiar with the role of the United States Senate in judicial appointments and that of the Judiciary Committee of the United States Senate, which is obviously central to the exercise of appointment. Under the United States constitution, as you all know, the President nominates by and with the advice of the Senate. The Senate has a huge blocking role in relation to a range of judicial appointments, not merely with regard to the nine judges of the United States Supreme Court, which cases we tend to hear about. It also has a role in appointment of federal judges at appellate and district level.

15. **The Chairperson**: I have a lot of interest in how that particular system operates. It gives politicians a much greater role in the appointment of the judiciary, but when I put that into the Northern Ireland context and its political realities, it is extremely difficult. Nevertheless, it is interesting.

16. Let me pick up on one of your other options: that the Lord Chief Justice would appoint judges to the Court of Appeal. Is that right?

17. **Mr Larkin**: No. What happens at present is that appointments to the Court of Appeal are made, as a matter of strict constitutional propriety, by Her Majesty on the recommendation of the Prime Minister. The Prime Minister has to consult NIJAC and, I think, also the Lord Chief Justice, before he puts forward a candidate's name. In practice, and this has been the position for some time, appointments to the Court of Appeal are made on the basis of mere seniority.

18. **The Chairperson**: Before I pick up on that point, I want to tease out this suggestion about the Assembly, the legislature, having a role in scrutinising appointments. Politicians are supposed to resolve the difficulties here, but how could you overcome the political sensitivities here when the final appointment is not going to be by a politician. That is not going to happen. It is not going to be through OFMDFM. How could this legislature have a role in

scrutinising potential appointments to the judiciary?

19. **Mr Larkin**: Far be it from me to attempt to circumvent the extent of the creative imagination that exists both in this room and elsewhere in the Assembly, but it strikes me that — if I can focus on what may be negative aspects of the system that we are currently working — there is at least a danger of the creation of a self-perpetuating mandarin class of judges appointing themselves. Appointing very clever people, bright people, very accomplished lawyers, but doing so in a way that is, to all intents and purposes, immune from broader constitutional scrutiny. Historically, we do not have an absolute separation of powers under our constitution. In many ways, it is valuable that we do not have an absolute, rigid separation of powers in our constitution. There is absolutely no impairment of judicial independence or impartiality caused by the appointment being made by the executive and that appointment by the executive being accountable to the legislature. There are modalities of that accountability to be considered. Many examples exist — we have discussed the United States — but there are also possible modifications of that. One would not, in putting that forward as a matter for investigation, lose sight of some of the unfortunate aspects of the US experience, for example. People will be familiar with the Bork nomination and how that became hugely politicised in a very intemperate and what many would regard as a very unjust way, possibly resulting in the loss of an otherwise exceptional candidate for Supreme Court appointment. The issue will be to attempt to confine scrutiny by a legislature, or a Committee of a legislature, to the issues that are legitimately in play.

20. **The Chairperson**: The Justice Committee could scrutinise individuals and establish a qualified pool of recruits. I have heard that phrase before in a policing context. That could be handed over to a non-political appointments body.

21. **Mr Larkin**: The model that Sir Thomas Legg suggests for the UK Supreme Court is that the Lord Chancellor will identify from a pool and put forward his selection of an individual to a joint Committee. The joint Committee would then have a look at that candidate in an interview, as it is described, which is nonetheless open to the public, and will take a view.

22. **Mr Weir**: I thank Mr Larkin for his evidence. I will pick up on a couple of points, taking the previous position first. I have a little bit of scepticism, first of all, about what we have seen in America. What I would like, and I suspect that would be fairly widespread, is to get the best people possible filling the roles. From what I have picked up in America, there is a tendency — hopefully the American principle does not apply to the election of MLAs —

23. **The Chairperson**: Speak for yourself. *[Laughter.]*

24. **Mr Weir**: There is a tendency, from what I have seen in America, that, at times, those who are deemed less controversial people, and who may even be seen to be less able, but may not rock the boat as much for either side, will then get preferment, and that is not necessarily on the basis of merit. I see certain degrees of weakness. I am sceptical. I think you described the people who tend to reach the upper echelons of the judiciary, rightly, as clever, bright people. I am not sure that putting clever, bright people through the mincer of an Assembly Committee, even one as august as the current Justice Committee, will necessarily produce the highest quality, or an improvement in the quality of judicial appointments, but I will leave that aside.

25. May I probe you on the merit principle, John? You raised a concern that, in certain circumstances, the merit principle does not apply and a level of seniority takes effect. I infer a degree of criticism from that comment. You also said that a simple interview situation has limitations in that they often do not produce the best person on merit. Will

you comment on whether there is a case for looking at the interview process? You mentioned that, depending on where the vacancy is, you may be looking for someone with particular experience in criminal law, for example.

26. You also made a very valid point that there are different skills and that the best advocate will not necessarily be the best judge. I wonder whether that is an argument for a slightly more flexible approach to the interview process. Perhaps the scoring system of the interview could be weighted differently and vary a little bit from circumstance to circumstance. To use an obvious pun, there may be merit in doing that to try to reach the best person for the job on merit. Will you comment on that?

27. **Mr Larkin**: These are hugely difficult issues. As you know, the legal community in this jurisdiction is a small one. Across that community, there tends to be a good deal of knowledge about abilities and so forth. However, the understandable rigidity of the NICS recruitment system confines one very much to a competence-based interview. I have had the unpleasant experience of interviewing candidates who are known to me personally as excellent lawyers but who simply did not perform well before an interview panel that I chaired. Yet it is not open to me — one can quite see why — to turn round to my colleagues and say, "That was a bad answer today, but that person is great." We cannot do that.

28. There needs to be a tailoring of assessment exercises, which may include role play or giving presentations. I make this general criticism of aspects of the NICS recruitment system: a purely competence-based system will not always deliver. It delivers an eminently defensible outcome, and, for various reasons, we have been very happy to have that in this jurisdiction. It does not necessarily always guarantee the best outcome in an individual case. Happily, NIJAC, of course, will say that it does not employ a purely competence-based system. However, and I base this solely on my personal experience of recruiting lawyers, I have seen people, who are outstanding lawyers by any reckoning, not do well on the day.

29. **Mr Weir**: I appreciate that, John. I concur with the idea of having a certain level of tailoring and flexibility, and placing people in situations that are a little bit outside the comfort zone of a set four questions. I have seen that being done in other cases. I found it particularly useful when I was on an interview panel for a headmaster's job. We gave the candidates a role play exercise that, in many ways, teased out more than the pre-prepared answers.

30. I am sure that, like you, we have all found ourselves in interview situations in which we have some knowledge of the person but he or she dies not perform well at interview. However, I presume that you are not saying that the flexibility should be such that knowledge of how good a person is outside the interview can be brought into any scoring system. That would place judges in a very different sphere from any other walk of life. We have all seen people perform badly at interview, but, with the best will in the world, that is effectively that person's tough luck.

31. **Mr Larkin**: That is right. I reassure you that, sadly for both me and the candidates, that is what happened on those occasions too. I look, again, at a process of which I have some experience, namely the process that has led to the selection of Queen's Counsel. There, heavy use is made of referees, not simply the old-style reference with which many of us will be familiar in that you are about to be appointed but the employer has a check that this person is not quite as he or she appears.

32. If memory serves me right, and I am sure that I will be assisted if I get this wrong, an issue in the last two QC appointment processes was integrity. Ex hypothesi, integrity is probably not something on which the candidate is necessarily the best authority because the con man will assure everyone that he is a person of boundless integrity. What matters more is the view of well-informed

observers as to that person's integrity. So, in the case of an advocate —

33. **Mr Weir**: We can say that QCs have been con man-proofed. *[Laughter.]* We are all well aware of the referee providing a check just to make sure that the person is not a fraud. How do you see that being extended?

34. **Mr Larkin**: It really does play a part.

35. **Mr Weir**: For those of us who are in less hallowed circles in the appointment of QCs, maybe you will explain how it operates.

36. **Mr Larkin**: It plays a part in the appointments of Queen's Counsel and, already, in NIJAC in that people are asked to identify persons, typically judges, who can speak about their work. I suppose the difficulty from the candidate's perspective is that, if they do that, they themselves have no control over what the —

37. **Mr Weir**: Is then the judge or whoever they have nominated interviewed in some way as part of the process?

38. **Mr Larkin**: It is largely a written exercise.

39. **Mr Weir**: A written exercise. OK.

40. **Mr A Maginness**: I thank the Attorney General for his submission: a very intriguing submission at that. NIJAC seems to have considerable power. It has the power to appoint judges up to the High Court. It seems also that that power has been extended to the Court of Appeal and to the Lord Chief Justice, in a sense anyway.

41. **Mr Larkin**: They are consulted, but they do not handle the process.

42. **Mr A Maginness**: As far as the Court of Appeal is concerned, it is simply on seniority anyway, as is customary, so they simply count how many years you have served in the High Court and tell the Prime Minister, I presume. That is, in essence, what they are doing.

43. **Mr Larkin**: It is. It is an exercise in identifying who is most senior but that is known in one sense. At any given time with regard to the Court of Judicature in Northern Ireland it is not always possible to say who the senior puisne judge is.

44. **Mr A Maginness**: In any event, another interesting power that it has relates to the numerical complement of judges. It seems quite extraordinary that that independent and unaccountable body should determine the number of judges that we have.

45. **Mr Larkin**: I agree. That is, par excellence, a matter for politically accountable judgements.

46. **Mr A Maginness**: That is a new power, is it not?

47. **Mr Larkin**: It is.

48. **Mr A Maginness**: We also have the removal of judges. I suppose that not necessarily NIJAC does that, but the Lord Chief Justice can remove a judge by establishing a tribunal that looks into whatever a judge is supposed to have done wrong, and report back. That tribunal can say that the judge is guilty of such and such and should, therefore, be removed. It is then up to the Lord Chief Justice to determine whether or not to remove that judge. He has that discretion.

49. **Mr Larkin**: For some lower judicial posts, but the High Court is the paradigm of the constitutional interplay between the legislature, the Executive and the judicial branch of Government. Its classic position as I have described it is that there will be an address. Now, the limitation is that the address can only be moved by the Prime Minister, and it can be made only if there has been a prior determination by the tribunal of which you speak.

50. **Mr A Maginness**: Yes, but there is still a discretion with the Lord Chief Justice. The Lord Chief Justice can say that the tribunal has got it wrong.

51. **Mr Larkin**: I am not sure of the precise modalities in relation to the High Court. The discretion might exist about whether

or not to refer it all. I speak subject to correction, but, having referred it, there would be little room for manoeuvre if the tribunal were to report in a particular way that an address should be made.

52. **Mr A Maginness**: Is that a new power?

53. **Mr Larkin**: It is. Previously, any MP could have introduced a motion praying for removal.

54. **Mr A Maginness**: Yes, they could have put it in front of the House of Commons or the House of Lords. The other point is that the Lord Chief Justice is not simply the Lord Chief Justice. He is head of the judiciary, and, formerly, the Lord Chancellor held that position.

55. **Mr Larkin**: The position is very complex. As you know, in 1920, some of the functions of the Lord Chancellor of Ireland migrated to the office of Lord Chief Justice of Northern Ireland. Oddly, they also seemed to migrate to the Governor of Northern Ireland, and there was an uneven distribution. The Lord Chancellor of England and Wales has only in relatively recent times become involved more overtly in the judicial business of this jurisdiction. Therefore, you are absolutely right that many of the functions that were exercised by the Lord Chancellor are now exercised by the Lord Chief Justice. Of course, some that were exercised by the Lord Chancellor are now exercised by the Minister of Justice.

56. **Mr A Maginness**: The Lord Chief Justice is head of the judiciary and is also chair of NIJAC. Is it in statute that he be chair?

57. **Mr Larkin**: From memory, I think that it is, but I speak subject to correction.

58. **Mr A Maginness**: The head of the judiciary is the head of the body that appoints the judges, and that is made up of three senior judges, including the Lord Chief Justice, and the Bar, the Law Society and five lay members. The weight in that body lies with the senior judges.

59. **Mr Larkin**: It does. Even if, as seems to be case numerically based on your analysis, the higher judiciary does not form a majority, there is no doubt that, de facto, it is the dominating element in NIJAC.

60. **Mr A Maginness**: Yes, so, in a sense, the senior judges determine the number of judges, and who should become a judge.

61. **Mr Larkin**: That is absolutely right. One can speak of it as a constitutional issue of a hermetically sealed circularity of judges largely appointing judges.

62. **Mr A Maginness**: Do you think that that is a healthy situation?

63. **Mr Larkin**: Put the way that I have put it, no. *[Laughter.]*

64. **Mr A Maginness**: I have a couple of final points, Chairman, if you will indulge me. In your letter, you said that NIJAC might be less transparent than more traditional methods of appointment. What did you mean by that?

65. **Mr Larkin**: One can flesh that out by posing the following: if a Minister makes a judicial appointment, that Minister can be questioned about that appointment on the Floor of the Assembly. You cannot question NIJAC on the Floor of the Assembly.

66. **Mr A Maginness**: NIJAC is unaccountable to the Assembly as such. It is not even accountable to OFMDFM.

67. **Mr Larkin**: OFMDFM is responsible for pay and rations, to use the well-worn phrase. However, I do not think that it has a policy.

68. **Mr A Maginness**: Mr Allister, in his letter, suggests that the pay-and-rations element should be with the Department of Justice. However, that would not make any real difference in terms of accountability.

69. **Mr Larkin**: That is probably correct.

70. **Mr A Maginness**: I was intrigued by one other point that you made. An alternative that the Committee may wish to explore and which would certainly be less expensive than NIJAC would

be to have judicial appointments and reappointments handled through the Lord Chief Justice's office with the assistance of HR Connect. In a sense, do we not already have that, except that it is a more expensive model — or more ornate model?

71. **Mr Larkin**: You anticipated my answer. I float that for further investigation on the issue of expense.

72. **Mr A Maginness**: Yes. It costs £1·4 million a year and has 18 members of staff. There would be no real difference, however, between NIJAC and the Lord Chief Justice's doing appointments in a contracted office.

73. **Mr Larkin**: You are absolutely correct. Among the ideas that I am throwing out for further investigation and reflection is the constitutional issue. Quite separate from that is the issue that you have identified, which is purely one of expense. If you are resolutely committed to a NIJAC-type model, may it be NIJAC that delivers it, it could, probably, be done much more cheaply through the Lord Chief Justice's office if that were desired.

74. **The Chairperson**: I want to pick up on that. As regards your role as the guardian of the rule of law on behalf of the people of Northern Ireland, where does that scenario or picture that has been painted of senior judges who are responsible for the number and appointment of judges reflect on people's confidence in the rule of law? Is there a view on whether that is damaging to people's confidence in the law?

75. **Mr Larkin**: I would not say "damaging", Chairman. However, if I use the phrase, "guardian of the constitution" and asked, for example, a series of law students to say who is evoked by that, they will almost certainly say it is judges and the judiciary. However, the phrase "guardian of the constitution" was first used in a UK constitutional context by Sir William Blackstone in the early parts of his commentaries on the laws of England in the late eighteenth century. By "guardian of the constitution", he was actually referring to Members of Parliament. There has been a shift — in some ways, an understandable shift — and emphasis put on the role of the judiciary. Members of Parliament and legislatures are, as Sir William Blackstone said, "guardians of the constitution" and have a vital role in that regard. We downplay that role as a community, ultimately, at our peril.

76. **Mr McCartney**: Thank you very much for your presentation. In our previous discussion, we talked about the independence of the judiciary. We were cautioned not to stray too far. We have to watch that we do not stray into the merits of the judiciary in this particular discussion.

77. As regards appointments, how did it come into place that the Lord Justice of Appeal and the Lord Chief Justice were not appointment by the merit system? Was that just by convention?

78. **Mr Larkin**: It was not done by the NIJAC system. In the case of the Lord Chief Justice, he was appointed following the establishment of ad hoc committee for that purpose. One has to be very clear that he was not simply appointed on seniority. Therefore, a very deliberate attempt was made by establishing that ad hoc system to identify the best candidate.

79. **Mr McCartney**: At that particular time, with regard to the Lord Justice of Appeal and the Lord Chief Justice, if a vacancy were open, was it open for application or filled by appointment?

80. **Mr Larkin**: Typically, and certainly recently, there has been no opening of a process. The most recent appointments to the office of Lord Justice of Appeal have been simply the senior puisne judges. Readers of Mr Hain's book will know that in the frankly scandalous passage in which he discusses a very senior member of the judiciary, he refers to the fact that that person's name was passed to him. It was simply a formal process, and you can rest assured that, regrettably, from the tone of Mr Hain's book, had he had a free hand he would not have appointed

that person to the Court of Appeal. However, he felt constrained to do it, simply because, although he does not say so in the book, that person was the senior puisne judge.

81. **Mr McCartney**: Therefore if a Justice of Appeal is being appointed, it could be someone who is not aware that they are even being considered.

82. **Mr Larkin**: That person will know, because they will be the senior puisne judge. We will not name names, but there is a judge holding that office right now.

83. **Mr McCartney**: Therefore the idea is that the senior Lord Justice of Appeal is a named person; it is not a generic thing.

84. **Mr Larkin**: It has been the practice that the senior puisne judge in the High Court is appointed to the Court of Appeal when a vacancy arises. As far as one can tell, it is done purely on seniority.

85. **Mr McCartney**: Would there be any basis, given that other appointments are made on the merit principle, for saying that that system could be challenged in law? Would equality law not apply in such a case? Could someone ask why all appointments are not made on merit? I am not questioning the process, but technically speaking —

86. **Mr Larkin**: Chairperson, I am happy to say that I have not turned my mind to that very large question.

87. **The Chairperson**: Forgive my ignorance, but how do you become a senior puisne judge?

88. **Mr Larkin**: In the High Court? Again, by seniority.

89. **The Chairperson**: OK. Is seniority identified purely by length of service? You get the job because you have been in another job for x number of years?

90. **Mr Larkin**: Yes. Let us take it to the realm of the abstract so that we do not appear to be discussing individual judges. In jurisdiction A, which applies purely the seniority system, you might have a senior High Court judge who is inadequate or senile. Purely on seniority, she or he will graduate to the Court of Appeal ahead of the genius who was appointed last year.

91. **The Chairperson**: You referred to Mr Hain's book. What was the point of his even having a role if he felt constrained that it was just an automatic sign-off? Did that not give it a veneer of democracy? If he felt that he did not want to do it but had to, why was it ever even part of the process?

92. **Mr Larkin**: It is because of the constitutional formalities. The sovereign, I imagine, does not, save in very rare cases, have a personal acquaintance with the candidates for judicial office who are proposed to her. Nonetheless, that is where the appointment comes from.

93. **The Chairperson**: I ask because if you were to have any kind of democratic role in the process, it would need to be meaningful; it should not just be a façade or gloss or a box-ticking exercise.

94. **Mr Larkin**: Absolutely. Of course, the gloss is what exists at present because NIJAC does not appoint; it puts forward a recommendation that must be accepted. If a Minister — and indeed the public — concluded, on what to him seemed very good grounds, that a particular candidate was a disaster, in human terms, that Minister is powerless.

95. **The Chairperson**: Is it correct that, in a Northern Ireland context, NIJAC makes a recommendation to the Lord Chief Justice and that has to be approved?

96. **Mr Larkin**: The recommendation is not made to the Lord Chief Justice.

97. **The Chairperson**: Does the Lord Chief Justice have a role in approving judges for the other courts?

98. **Mr Larkin**: Yes, but I think that I am right in saying that county court judges are appointed by royal warrant. They will show you their warrants of appointment.

99. **Mr McCartney**: Is there no mechanism whereby he can say that he does not

feel that it is a proper appointment, and it can then go back to NIJAC?

100. **Mr Larkin**: That system previously existed; however, it no longer exists.

101. **Mr A Maginness**: Was the previous position that NIJAC made a recommendation to the Lord Chancellor, and the Lord Chancellor had to accept it?

102. **Mr Larkin**: Under the former system that applied to the previous High Court competition, the Lord Chancellor had a second bite at the cherry; he could invite further consideration, but he could not refuse an appointment.

103. **Mr A Maginness**: If NIJAC reconsidered and still felt that Mr X was the right candidate, would the Lord Chancellor have to accept that recommendation?

104. **Mr Larkin**: Yes.

105. **Mr A Maginness**: What is the situation now? The Lord Chief Justice is the head of the judiciary. Does NIJAC simply tell him that it feels that Mr X is the best candidate?

106. **Mr Larkin**: That would be correct of judicial appointments that come within the NIJAC scheme for which the formal appointment is in the gift of the Lord Chief Justice. For the purposes of constitutional formality, NIJAC is the recommender. However, the appointer to whom the recommendation is made has no grounds for declining to make the appointment.

107. **Mr A Maginness**: For the more senior positions, would the appointer be the Queen in most instances?

108. **Mr Larkin**: Yes.

109. **Mr A Maginness**: Therefore, it is automatic. Is there a sense in which the Lord Chief Justice, as the chairman of NIJAC, recommends appointments to himself? That would be absurd.

110. **Mr Larkin**: No. I cannot identify the judicial offices for which the Lord Chief Justice is the appointer. He chairs the commission that will select his future colleagues, but there is nothing exceptional about that.

111. **Mr A Maginness**: That is exceptional.

112. **Mr Larkin**: I have been engaged in legal recruitment exercises through which, with the assistance of a panel, I have selected people who will be my colleagues.

113. **Mr A Maginness**: If, for example, I was ambitious enough to want to become a High Court judge, would I not try to keep on the right side of the person who will appoint me?

114. **Mr Larkin**: Yes, but that brings us back to Mr Weir's question about how we identify merit. In those circumstances, it is hard to imagine a candidate being asked how many times he or she had played golf with the Lord Chief Justice in the past six months.

115. **Mr Weir**: And mysteriously lost on every occasion. *[Laughter.]*

116. **Mr Larkin**: Yes; that is the important part.

117. **Mr Weir**: Those three-foot putts can be tricky.

118. **Mr Lynch**: It seems to be an outdated system under which the Lord Chief Justice is powerless. How long will the review take? How will it come to a conclusion? Who has the power?

119. **Mr Larkin**: There are two reviews. There is the review that the Committee has embarked on, and, of course, that is a matter over which you are guardians of the timetable. The House of Lords Select Committee will, I think, report in the next month or so.

120. **The Chairperson**: You highlighted the senate system, but are there other models to which you could point us?

121. **Mr Larkin**: One interesting way is to look at how you recruit from judges to the higher courts, and we have some experience of how the German judiciary is organised. One thing that one learns from the German experience is how you can combine an absolute commitment to judicial independence, such as that

which we all share and value, with quite flexible ways of working it out in practice. For a German judge to be promoted from, for example, a first instance position to the Court of Appeal, account is not taken of the quality of judgements because, in one sense, who is to tell which is a good and which is a bad judgement? Another judge? It is taken on the basis efficiency. You look at, for example, a judge who began in January 2009 with 600 files and ended that year with 400 files; there is a net diminution. If he ends the year with more files, he will never go to the Court of Appeal.

122. Another interesting point about identifying suitability for appellate work is that, in Germany, there is a flat salary structure. The difference between a minor judicial office and the most elevated post is, in salary terms, perhaps between the equivalent of a district judge in the criminal courts here and the Lord Chief Justice. The actual difference — again, I speak subject to correction — is very flat indeed, whereas here it is quite substantial, as you know.

123. The German judiciary is also open to taking what are, essentially, the equivalent of judicial career breaks. The Brussels office of the Bavarian State Government has the benefit of a serving judge who is, during his time there, simply working as an official in the service of the Bavarian State Administration. He will go back and will resume being a judge, and he will have exactly the same formal commitment to judicial independence when he resumes that. However, in the meantime, the Bavarian Government have the advantage of that set of skills being deployed in the service of that region in Europe. Introducing a similar practice here would be nothing short of a legal and cultural tsunami. Ultimately, the work patterns of some of our European colleagues have to be seriously looked at.

124. **The Chairperson**: If the Lord Chief Justice's office, rather than NIJAC, were dealing with appointments, what would the judicial appointments ombudsman's role be in scrutinising that work?

125. **Mr Larkin**: It would be exactly the same. Needless to say, it would be idle to think that moving those responsibilities to the Lord Chief Justice's office would not have resource implications for that office. However, it could be done much more cheaply, because it may be different if some of the quite populist tribunals go to NIJAC, but, right now, NIJAC does not run that many competitions in any given year.

126. **The Chairperson**: Therefore would a different number of people be involved in advising the Lord Chief Justice?

127. **Mr Larkin**: It is quite a technical HR job or series of jobs. When you look at how relatively few competitions NIJAC runs at present, one wonders whether it could not, with a little resource addition in the Lord Chief Justice's office, be done quite easily there. If you are committed to an unmodified NIJAC model, bear in mind that the expertise and the sense of what is required will be there.

128. **The Chairperson**: In essence, you are rearranging the deck chairs to make it more cost-effective; you are not fundamentally changing how it operates.

129. **Mr McCartney**: In your experience, has there ever been an instance of a senior judge not moving into the Court of Appeal?

130. **Mr Larkin**: Once the practice of seniority began, no. As you know, between 1920 and 1972 appointment to the then Supreme Court of Judicature in Northern Ireland was not devolved; it was a matter for the Lord Chancellor. He would, of course, have consulted the Prime Minister of Northern Ireland and, often, the Lord Chief Justice of Northern Ireland. I have seen a little of the interesting work being done on the history of judicial appointments during that time. For example, there is correspondence from a disappointed candidate for the Court of Appeal in the early 1960s, I think, who complained that he was not sufficiently well considered. At that stage, it was not mere seniority; it was simply a judgement

by the Lord Chancellor as to who was the best candidate for promotion.

131. **The Chairperson**: If you are applying the merit principle at one level, why not at all levels if that is what you believe to be the best process?

132. **Mr Larkin**: Indeed, and that is the suggestion that I throw out to the Committee, Chairman.

133. **Mr S Anderson**: Is there any possibility that an appointment based on seniority may not be made for the most experienced judge for promotion? Could that happen?

134. **Mr Larkin**: Yes. There are several permutations. Mere length of service is not necessarily to be equated with experience; nor, as I suggested, is it to be equated with merit. That is why I suggested that appointment may involve a formal bypass of the merit principle. On occasion, the fact that you have appointed on seniority might also lead, coincidentally, to the selection of the best candidate for the job. However, you would not be doing it on merit; you would be doing it on seniority, on the basis —

135. **Mr S Anderson**: Is there somewhere in between that involves experience and merit?

136. **Mr Larkin**: Certainly. As we know, experience is a powerful tool in the recruitment assessment exercise.

137. **Mr S Anderson**: In the judiciary, yes.

138. **The Chairperson**: OK. That was interesting. Thank you, Mr Larkin.

139. **Mr Larkin**: Thank you, Chairman.

8 March 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Edward Gorringe	*Northern Ireland Judicial Appointments Commission*
Ms Ruth Laird	*Northern Ireland Judicial Appointments Commission*
Ms Laurene McAlpine	*Office of the Lord Chief Justice*
Sir Declan Morgan	*The Lord Chief Justice*

140. **The Chairperson**: I welcome the Lord Chief Justice, Sir Declan Morgan, chairman of the Northern Ireland Judicial Appointments Commission (NIJAC), to the meeting. I welcome you to the first meeting of the Committee for Justice in which you have been able to take part. Your input into the review will be much appreciated. I will hand over to you at this stage. Perhaps you would introduce your team and outline your submission. Then, I am sure that members will have questions. Our meeting will be recorded by Hansard.

141. **Sir Declan Morgan (The Lord Chief Justice)**: Thank you very much, Mr Chairman, and thank you for your generous welcome. I have with me Edward Gorringe, the chief executive of the Judicial Appointments Commission; Ruth Laird, one of the non-legal commissioners; and Laurene McAlpine, my principal private secretary.

142. As you noted, it is unusual, but not unheard of, for the Chief Justice to appear at an Assembly Committee. Although this is my first appearance at the Committee for Justice, my predecessor appeared at the Assembly and Executive Review Committee, and I appeared at the Committee for Finance and Personnel while I was chairman of the Law Commission.

143. The formal separation of our respective constitutional roles means that such appearances will be infrequent. However, on this occasion, I can see that, as head of the judiciary and chairman of the Judicial Appointments Commission in Northern Ireland, I have a particular interest in your review of judicial appointments. There may, therefore, be areas where I can assist in your deliberations. However, you will understand and, I hope, welcome the fact that I have a firm policy of not straying into areas that are properly the responsibility of Ministers and the Assembly. I am sure that Committee members likewise would not wish to stray into areas that are the proper responsibility of the judiciary.

144. As you noted, our written evidence explains the background to NIJAC's role and the enhanced functions that it took over under the Northern Ireland Act 2009 as part of the devolution of justice arrangements. One of the most notable features of the 2009 provisions is that NIJAC became a body that appointed persons to certain judicial offices as well as selecting them. On one view, that might be regarded as unusual as such appointments are more routinely a matter for Ministers. That said, the arrangement appears to have worked perfectly well in practice.

145. NIJAC does not appoint to all judicial offices, however; the Lord Chancellor and the Prime Minister retain a role in respect of those judicial appointments

that are made by the Queen. The Prime Minister has a substantive role in relation to the appointments of the office of Lord Chief Justice and the office of Lord Justice of Appeal. The Lord Chancellor has a formal role in relation to appointments to the High Court, county courts, magistrates' courts, and of Social Security or Child Support Commissioners. Appointments made by the Lord Chancellor are on foot of a selection by NIJAC, and all selections are, of course, made solely on the basis of merit.

146. Although merit is the criterion for appointment, in our written evidence we set out some of the steps that we have taken to encourage a reflective applicant pool and a reflective judiciary. I think that we have given a reasonably good account of ourselves in that regard, but we are not complacent and recognise that there remains a gender issue at the highest court tiers. NIJAC also has a role now in relation to determining the number of judges at a particular tier. On that, it is informed by the Northern Ireland Courts and Tribunal Service, and any determination that it makes has to be agreed by the Department of Justice.

147. From the Committee's discussion of the matter last week, I am aware that there is a perception that NIJAC is dominated by the judiciary. That impression does a serious disservice to the very real contribution that the laymembers make to the selection process. A laymember sits on all our schemes and makes as weighty a contribution as anyone else. All members of the commission have an equal status and contribute equally to the selection process.

148. It is in the interests of all Northern Ireland society to have the very best lawyers appointed to judicial office; I cannot overstate the importance of that. A strong and independent judiciary is essential to our democracy, and that requires persons of the right skills and character to be selected for appointment. NIJAC has carried out that function effectively and in an open, fair and transparent way.

149. I gather that you prefer short statements, so I am happy now to take questions.

150. **The Chairperson**: Thank you, Sir Declan. I am sure that members will have questions. Has your office received a copy of what was said at our meeting with the Attorney General?

151. **Sir Declan Morgan**: Yes; I have read a transcript of what the Attorney General said.

152. **The Chairperson**: I am sure that members will want to refer to some of the issues that were raised at that meeting. I have a couple of questions. One of the issues highlighted in the Attorney General's submission relates to the cost of NIJAC and the potential for its being handled by the Lord Chief Justice's office, with the assistance of HR Connect. That, for me, would not be a fundamental departure from the principle of independence. Could that be facilitated?

153. **Sir Declan Morgan**: I do not know that it would necessarily affect independence, depending on how one set up the arrangement. However, it would be a serious departure from the aim of securing the statutory objective of ensuring a diverse and reflective pool of applicants.

154. An enormous amount of work at NIJAC is done in relation to securing diversity in applicant pools. If you have read some of the evidence before the Select Committee on the Constitution in the House of Lords, which is dealing with the judicial appointments side, you will have seen that such work normally takes considerable time and will have to be carried out in a consistent manner over a reasonably long period before you begin to see effective results. First, I would have grave concerns that transferring it in the way that you suggest might imperil that.

155. Secondly, in the discussion last week before the Committee there seemed to be a perception that, in some way or other, the senior judiciary held the whip hand in the selection of judges.

Nothing could be further from the truth. The whole point of NIJAC is that it brings together people with a range of skills. In NIJAC we have, therefore, the skills that come from those who are members of the judiciary; however, we also have the skills that come from the five members appointed by the Office of the First Minister and deputy First Minister. They come with extremely able human resource backgrounds, which contribute significantly to the way in which we set about our task. Unlike HR Connect, for instance, we try to tailor each of our competitions to identify what it is we are looking for in relation to a judge at a particular tier and set those criteria in advance so that those who wish to take judicial appointment understand that we know what we are looking for and that they can see whether they can achieve it. It seems to me that it would be pretty difficult, from a functional point of view, to achieve the diversity and equality that we need through HR Connect.

156. The third thing that concerns me is that if it fell within my office, it would rather reinforce the quite false impression that it is, in some way or other, an appointment of which I am in control, as it were. I would be seriously concerned about the effect that that might have on public confidence in the judiciary. The one thing that we all want to ensure is that people are confident that they have an independent and impartial judiciary that is selected purely on merit.

157. **The Chairperson**: The inference from last week's session was — well, rather than my saying it I will quote Mr Larkin, as he put it in better and more colourful language.

158. **Mr Weir**: Certainly more caustic language.

159. **The Chairperson**: That, too. He said:

"One can speak of it as a constitutional issue of a hermetically sealed circularity of judges largely appointing judges."

160. The Lord Chief Justice also being the chairman of NIJAC creates a perception about how appointments are made. How can we deal with that more effectively so that we can say to the public, "That is not the case."?

161. **Sir Declan Morgan**: You say that the Lord Chief Justice being chairman of NIJAC creates an impression. I am disappointed to hear that. Let me say something about how NIJAC works. NIJAC was set up in a shape that was defined by the criminal justice review; it was designed to ensure that there was contribution from the judiciary and from the non-legal members appointed by OFMDFM. What we have in NIJAC, therefore, is a range of skills. We have the skills of persons in the judiciary who understand the nature of the post and what is expected of the postholder, and we have extremely experienced HR people appointed by OFMDFM to bring their skills to bear and to ensure that NIJAC recognises that it has a public face.

162. In our work, the impression seems to be generated that there is conflict between the skills that the judges bring to the issue and those that the HR people bring to it. However, it seems to me that that is an underlying inaccuracy, as we try to bring both skills sets together to create a better outcome. Anyone who attends a NIJAC meeting is bound to come away understanding that what I, as chairman, seek to do is to bring all the skills forward with a view to ensuring that we achieve better outcomes in everything that we do.

163. We carried that into selection committees as well. Non-legal members always participate in selection competitions. The notion that I, as chairman of NIJAC, in some way organise how the judiciary is appointed is also shown to be doubtful by the fact that I have sat on one selection committee since my appointment more than two and a half years ago. Otherwise, I have been conducting my work through the plenary committee.

164. I have asked that Mrs Laird, who is a non-legal member, be here, and she will be content to deal with any issues that there may be about this. I am afraid that that impression is wrong. My job is to seek to deal with any questions that you

may have that might assist in dispelling that impression.

165. **The Chairperson**: Another point raised is that NIJAC applies the merit principle to all appointments. The evidence seems to indicate that not everybody understands exactly what is used to measure or score people and then select them. Perhaps you could comment on what you mean by the merit principle and then take on the issue that appointments to the Court of Appeal are based on seniority and that merit should be extended to that arena as well.

166. **Sir Declan Morgan**: The merit principle is essentially that you look for the person who can best do the job that you have for them to do; there is nothing complicated about it. Perhaps what has made the position somewhat more complicated is that, over the past six or seven years, a series of competences has been designed to represent the core attributes that you might expect from members of the judiciary.

167. We have worked on the core competences with a view to developing from them, and from our joint understanding of the post, what I call personal profiles so that, for instance, for the most recent competition that we advertised, we set out four aspects of what we were looking for in a High Court judge. Knowledge was one attribute; the others were experience, personal qualities and skills. Within each of those we set out about 10 different features that we would seek. The perfect High Court judge, if you like, would have all those features, which included, as you might imagine, legal knowledge, diversity, the ability to work with people, manage situations and to understand people in highly emotionally charged situations; being able to communicate and to write material that people can understand, because a judgement is for the benefit of the parties, the public and the press, as well as for legal commentators. My understanding is that the professions support that approach. I believe that it has been of benefit in ensuring greater transparency about what we are looking for and, for those who wish to take up such posts, a much better opportunity to gather and demonstrate those skills.

168. If convenient, I will move on to the Court of Appeal. As the evidence before the Committee indicated on the previous occasion, there has been for some time a practice in this jurisdiction of appointment on the basis of seniority. That practice was debated with the Attorney General at your meeting. However, there has been a change in the legislative structures since the most recent appointments to the Court of Appeal. The 2009 Act provides that the Prime Minister, whose responsibility it is to proceed with this, must consult NIJAC and me, as Lord Chief Justice. NIJAC had not previously been involved in those appointments, and it is, as you know, under a statutory obligation to pursue all appointments on the basis of merit. When it is consulted, it seems to me inevitable that it will recommend that appointments to the Court of Appeal should be on merit. It will also recommend that there should be a process to ensure that appropriate candidates can participate. It will be for the Prime Minister to form his view of what to do with that recommendation; I cannot bind him. However, it is fair to say that NIJAC's new role will involve a new process.

169. **The Chairperson**: Will the Prime Minister be able to tell NIJAC that he wants it to review its recommendation or will it be binding?

170. **Sir Declan Morgan**: The Prime Minister consults NIJAC, but only on the process; it will be for the Prime Minister to determine what the process should be. For instance, the Prime Minister may, as happened in the case of my appointment as Lord Chief Justice, decide to involve the chairman of the Judicial Appointments Commission in England, a lay commissioner from NIJAC and two judges. They would make a recommendation to the Prime Minister, who would decide what to do with it.

171. **The Chairperson**: OK.

172. **Mr Weir**: Thank you, Sir Declan. I note the reference in your submission to core competences. You also talked about being in a position to tailor the process to the competition. Is that a reference to the mix of core competences that you are looking at?

173. **Sir Declan Morgan**: Yes.

174. **Mr Weir**: You refer to interview processes that go beyond what may be considered a normal interview. You look at role play or case studies. Will you give examples of how you use those?

175. **Sir Declan Morgan**: We have regularly used role play for appointments to senior posts, particularly for county court posts. We used presentations, both oral and written, in the recent High Court competitions. We use the self-assessment form, which is the application form, and we use the interviews and the consultations as confirmatory evidence. Where applicants for senior appointments have published work, whether lectures or judgements, we consider ourselves entitled to examine them with a view to looking at the competences. We try to use a broad range of tools to assist us. For instance, in the High Court competition, because of the importance of the position, we felt that we should interview all those who applied; we then shortlisted and conducted a second interview, all of which was directed to the four areas: knowledge, experience, skills and personal qualities.

176. **Mr Weir**: As a secondary question, I want to probe you on this. Obviously, you are aware of the transcript of what the Attorney General said last week. Unlike the Chair, I do not have it directly in front of me. The Attorney General obviously identified what he perceived as a problem. I appreciate that it would not be one that you would share; there is a reference to a "hermetically sealed" process. One solution that he offered, or one component of it — and it would not necessarily be one that I would share — was that he floated the idea of some role for the legislature in the appointments process. He gave the example of Germany as an example rather than America. What is your reaction to that proposal? Do you feel that there is any threat to the independence of the judiciary?

177. **Sir Declan Morgan**: There has often been some legislative involvement in the appointment of judges. The core of judicial independence is the ability of a judge, without pressure of any sort, to decide independently and impartially the case before him or her, no matter who the parties involved may be — Government or anyone else. That is the core.

178. Beyond that, as it were, there are other important factors, one of which is ensuring that the public is confident that able judges are appointed on merit. Another is that there are enough judges and court houses: judicial independence does not mean anything if you cannot get on with it. In relation to those aspects of judicial independence, it seems to me that there is room for the involvement of both the judiciary and legislature, or the executive in certain aspects. It is no surprise that, for instance, Ministers regularly make judicial appointments; or that there are, in some procedures, mechanisms whereby Ministers can ask appointments committees to have another look.

179. However, the question for me is: what is legislative involvement going to do? How will it assist in ensuring that an appointment is on merit? That is, what questions will be asked to ensure that? Will it improve public confidence? Can we be sure that judicial appointments will not become a political football? You must answer all those questions positively in relation to any scheme. Only then can you consider the involvement of the —

180. **Mr Weir**: To be fair, this is closer to the American example than to Germany. Would there be a danger, if a degree of approval were required by an Assembly Committee, that people seeking judicial appointments would steer themselves towards an uncontroversial middle rather than give the sort of judgements that

they should? Might they try to avoid making some of the tough decisions if they felt that they should keep everyone on board as regards a future appointment?

181. **Sir Declan Morgan**: I think that there would be a definite risk of that. One of the criticisms of the commission is that our procedures are too complex and that they put people off. However, I imagine that being interviewed by the Justice Committee about appointments would put a few others off.

182. **The Chairperson**: Is there a role for individuals on NIJAC? Five lay people are appointed, but is there any scope for involving legislators?

183. **Sir Declan Morgan**: Having some legislative involvement is not necessarily contrary to the fundamental principles of judicial independence. However, I wonder what the legislature would bring. We have five people with human resources skills, and they contribute enormously to the understanding of what is required. One has to think through what the Executive or the legislature, if they were present on the commission, would bring by way of skills to ensure that the process of selection on merit was better achieved. In all these discussions, in the United Kingdom and elsewhere, that has been the question that nobody has been able, to my mind, to answer satisfactorily so far. I think that that is why my predecessor indicated that he was not in favour of legislative involvement when he gave evidence to the House of Lords Select Committee. It is not for an entirely principled reason, but it is for a perfectly understandable, practical one.

184. **Mr A Maginness**: I thank the Lord Chief Justice for coming into the lions' den.

185. **Sir Declan Morgan**: That is a perception, Mr Maginness; I am trying to avoid preconceptions.

186. **Mr A Maginness**: Your work in establishing outreach with the community is very much appreciated. That is the good bit.

187. You referred to your learned and distinguished predecessor Lord Kerr and his contribution to the House of Lords inquiry into the appointment of the judiciary. There was a bit of a duel between him and Lord Justice Etherton. He put the cat among the pigeons during a meeting of the Select Committee on the Constitution on Wednesday 13 July 2011, when he said on question 41:

"Of course the separation of powers is an important underlying factor in the appointment and operation of the judges, but that principle cannot be an absolute one in relation to the appointment of judges because the judges cannot be purely a self-appointing body. At some point and in some way the executive or Parliament, or both, must be involved, if only, and at the very least, in the appointment of people other than judges who themselves undertake the selection."

188. He was saying, fairly bluntly, that judges were appointing one another.

189. **Sir Declan Morgan**: I am not sure whether that is true in England and Wales. There is nothing in that with which I would take issue. In our jurisdiction, the fact that OFMDFM appoints five lay people to make a different contribution from that of the judges in appointment on merit seems to me an example of exactly what Lord Justice Etherton was saying. I know him quite well since he was chairman of the Law Commission in England and Wales while I was chairman of the Law Commission here.

190. **Mr A Maginness**: Therefore you know his views.

191. **Sir Declan Morgan**: Yes. He is extremely able and articulate.

192. **Mr A Maginness**: Yes. I am sympathetic to those views, because we have stripped out any political involvement, possibly for good historical reasons. We live in a very contested society in many ways; nonetheless, as a result of the 2009 Act, we do not even have a vestigial aspect of political appointment locally. The Office of the First Minister and deputy First Minister has no involvement in appointment as opposed to selection, so we have gone in a

radically different direction where we have depoliticised the appointment as well the selection process.

193. **Sir Declan Morgan**: You will understand that it is not for me to decide precisely how those methodologies should be secured. I have accepted that the principles, as stated by Lord Justice Etherton, are being applied in this jurisdiction, in the sense that he talks about, at the very least, selection in the appointment of people other than judges who themselves undertake the selection. That is happening.

194. **Mr A Maginness**: That is a reference to lay participation. What about having politicians on that?

195. **Sir Declan Morgan**: Everyone is, I think, committed to the notion of selection on merit and to the notion that we all have to make sure that the public is confident that we have an independent and impartial judiciary. Therefore, I ask the question that has been asked in the course of this discussion: what will politicians bring to selection on merit in a better way than experienced human resources people who have been sought out and identified by the Office of the First Minister and deputy First Minister?

196. **Mr A Maginness**: Yes, but you do not rule out some political involvement. You are neutral on that.

197. **Sir Declan Morgan**: It seems to me that there has been, as one can see, political involvement in various aspects of the appointment process, and I certainly do not stand in the way of that. That seems to be a matter for politicians and not for me.

198. **Mr A Maginness**: It is for politicians to determine, and, of course, we can consider that, not just now but perhaps in future. That is very helpful.

199. I refer you to the annual report of the Northern Ireland Judicial Appointments Ombudsman for April 2010 to 31 March 2011. I will not go into the complaint; however, in the recommendations on a second complaint his conclusion, on page 19, is:

"I note that there is no formal agreement between my role as Ombudsman and the Commission whether the appointment process should continue whilst I am still considering a complaint. In this particular competition the Commission had decided to make a formal recommendation to the Lord Chancellor before I had issued my final report. I am mindful the Commission is an independent statutory body and I am also aware I have no power to substitute my own decision in any selection process. I consider that such decisions taken in the midst of a complaints process can give rise to the perception on the part of complainants and others that the complaint is viewed as being of little value or there are closed minds with regard to the outcome. Confidence in the integrity of the selection process can only be a casualty of such perceptions. I recommend that the Commission gives consideration to adopting a general policy that no formal part of the appointment process to fill a post will be made unless any outstanding complaints process relating to the same competition has been completed."

200. Did the commission take that on board?

201. **Sir Declan Morgan**: Yes. We have a very positive relationship with the ombudsman; I meet him during the year when he visits. We look extremely carefully at all the recommendations that he makes as a result of his involvement. We have accepted and implemented that particular recommendation and, indeed, others. We are grateful for his advice, and, in virtually every case, we re-examine our procedures and, almost invariably, accept his recommendation.

202. **Mr A Maginness**: On page 19 of the report, he stated:

"the delay in appointments can…have a considerable impact on court business and confidence".

203. He recommended:

"the Commission seeks to complete competitions without undue delay and also make clear to candidates in its competition literature that any timescales should be regarded as being indicative only."

204. Is that a recommendation that you took into consideration?

205. **Sir Declan Morgan**: Yes. We looked at the time taken to recruit under previous schemes. The total period for recruitment under the past 24 schemes from beginning to end was 241 days; under the past 13 schemes, that total had reduced to 227 days, and over the past five schemes it had reduced to 180 days. You have to appreciate that sometimes a great deal of that time was taken up by the processes. However, depending on the competition, the process seemed to take for ever, particularly if you were sitting at my end waiting for a judge to be appointed in London.

206. **Mr A Maginness**: Did that process commence in 2009 or 2010?

207. **Sir Declan Morgan**: Do you mean this particular competition?

208. **Mr A Maginness**: Yes.

209. **Sir Declan Morgan**: I cannot really get involved in discussions about individual competitions.

210. **Mr A Maginness**: That is fair enough.

211. **Sir Declan Morgan**: However, I can say that it commenced in 2009.

212. **Mr A Maginness**: There are a couple of other matters. On page 30 of his evidence to the House of Lords Select Committee, and in answer to question 68, Lord Kerr said of the appointment of women to the bench:

> *"As I said, it was a matter of acute embarrassment to me that we did not have a woman on the High Court Bench in Northern Ireland, and you may be sure that I regarded the appointment of a woman as extremely urgent and necessary, but when we tackled the problem, when we talked to women who might make the application, we realised that there were deep-seated problems that operated as a very active disincentive to them, particularly the working patterns."*

213. The commission has been up and running since 2005, and, to my knowledge, no woman has been appointed to the High Court. Do you share Lord Kerr's disappointment?

214. **Sir Declan Morgan**: I certainly do. It is very odd that the top fourteen places in the judiciary here are populated by men and that there are no women. We have looked at why that might be and how we might deal with it.

215. As to the why, a research project is being undertaken by Queen's University, and some of the figures from it are startling. For instance, at the entry point to the Northern Ireland Bar, the percentage of women is about 58% and the percentage of men about 42%; seven years later, that cohort is split at about 50% each; a further seven years later, the cohort of women drops to under 30%; and the cohort of men increases to more than 70%, and it continues to diverge from there. First, we have established that, in that profession, women drop out and that the further you go into the pool from which we would draw senior judicial appointments, the cohort of women diminishes considerably. The same issue arises among members of the Law Society.

216. We have set up a joint liaison committee with the professions to look in particular at why we are losing the excellent talents of some extremely able women. It is not merely the professions that are losing the benefits of those people; the judiciary is losing out as well. One of the things that we are trying to work through at the moment is how we might manage that.

217. We put in place a shadowing scheme, which seems to have been particularly successful in relation to the involvement of women solicitors. We also recently visited locations in England and Wales that are looking at whether work could be conducted on a more hour-friendly basis. Among the things being discussed are the possibility of term-time working, part-time working, which, in other words, is doing a number of days, and annualised hours, which is another approach. At the moment, those present management issues; however, in order to address a significant issue, we have to start thinking further outside the box than we have been.

218. **Mr A Maginness**: In your report, you say as an objective fact that 43% of the judiciary are women. Surely, if you

have 43% of women at a lower level in the judiciary, you could have some representation at the High Court.

219. **Sir Declan Morgan**: That 43% includes lay magistrates; if you strip out lay magistrates, the percentage of women in the judiciary is 22%. At the moment, four county court judges of 17 are women, five district judges at magistrates' courts out of 21 are women, two masters out of seven are women, and two district judges civil out of four are women.

220. One should remember that those appointed to the High Court will generally be people who, one can be satisfied, will be outstanding in how they will conduct their work. Therefore, they will generally be people who have a pretty broad range of experience. It is no surprise, therefore, that they will generally have 20-plus years of building up experience to show that they have reached that level. It is not that people under that figure are excluded; it is simply that they will have enormous difficulty in demonstrating that they have gathered the skills without such experience.

221. **Mr A Maginness**: On Wednesday 6 July 2011, Professor Brice Dickson said, on page 33 in response to question 38:

"It is true that the commission has done good work in explaining to potential candidates what being a judge is like. It has engaged in objective testing and defining competences, but I get the impression from senior members of the profession that they are put off from applying not just because they have little experience of applying for jobs — barristers may never have actually attended an interview for any job — but also because the system itself is ponderous and time-consuming. Further, although it is meant to be confidential, in practice it is not. Some steps need to be taken to ensure that applications are kept more confidential."

222. That is a fairly strong criticism of how barristers see the commission. That does not mean that it is necessarily true, but it is a perception. Moreover, there is the issue of the testing and so forth being more in line with what somebody may have to undergo in the public service.

223. **Sir Declan Morgan**: In answering that, may I just repeat what the chairman of the Bar Council, Mr Mulholland, said to you in his letter of 23 February 2012:

"First, in relation to the most recent competition, the adopted criteria were well drafted and appropriate for the appointment. Secondly, through the considerable commitment of the individual commissioners, the appointment process was expeditious and efficient. Thirdly, there was a marked improvement in the confidentiality surrounding the process. Fourthly, through my efforts and the commission, those efforts to improve confidence in the process must be recognised."

224. I take some comfort from those comments.

225. **Mr A Maginness**: Do you understand what Professor Dickson was saying? Have you heard that before from others?

226. **Sir Declan Morgan**: I have, which is why we have done the things that Mr Mulholland has recognised. We continually seek to ensure that we secure the confidence of all members of the public in the processes that we manage.

227. **Mr A Maginness**: Thank you very much, Lord Chief Justice.

228. **The Chairperson**: I want to pick up on a point that Mr Maginness raised when we were talking about the ombudsman. In the submission it was highlighted that our ombudsman, unlike the Judicial Appointments and Conduct Ombudsman in England and Wales, does not have the remit for investigating complaints of conduct against judicial office holders. Should the Northern Ireland ombudsman have to investigate complaints against a judicial office holder?

229. **Sir Declan Morgan**: We have a system of complaints in relation to judicial office holders that comes through my office at the moment. I am not aware of any sense of public dissatisfaction with the outcome of that process, which is managed expeditiously and for virtually no money. If there is another

process that might achieve better public confidence, I would certainly be open to looking at it. However, one needs to make sure that that process will attract public confidence and that it will be affordable. As long as those factors are borne in mind, I am open to looking at any alteration to the system.

230. **The Chairperson**: I agree that it should not be just a tick-box exercise for the sake of dealing with something, but issues have been raised with me around having confidence in the transparency and integrity of the process.

231. **Mr McCartney**: Thank you very much for your presentation, Lord Chief Justice. Some of these questions came at us last week when the Attorney General was in; he left us with some things to ponder. All appointments under the NIJAC process are on the basis of merit; however, the appointment of Lord Justice of Appeal is done by seniority.

232. **Sir Declan Morgan**: No. That is no longer the position. The 2009 Act changed the arrangements for the appointment of the Lord Justices of Appeal; it now requires the Prime Minister to consult NIJAC and me. NIJAC makes appointments only on merit; it has never been consulted before about the appointment of Lord Justices of Appeal. In other words, the statutory mechanism was changed as a result of the 2009 Act. Therefore, NIJAC will be consulted on the process and the approach. It will be a matter for NIJAC to make its recommendations as it sees fit. However, since NIJAC is committed to the merit principle, I find it impossible to see that NIJAC will not recommend to the Prime Minister that the selection should be on merit.

233. **Mr McCartney**: If there is a vacancy for a Justice of Appeal, how does the name go forward?

234. **Sir Declan Morgan**: The Prime Minister will initiate the process of consultation, which will involve the Prime Minister taking NIJAC's and my views and then deciding on what process to run. That will include how he decides on the pool of candidates and the criteria for their selection. It is not my decision; neither is it NIJAC's, although we are consulted. It will be his decision to bring those forward, and it will be up to him to decide the appropriate way forward. My understanding is that, in England and Wales, the process generally involves two judges and two members of JAC or people appointed by JAC; those are the people who carry out the selection on the basis of merit.

235. **Mr McCartney**: Has that happened since 2009?

236. **Sir Declan Morgan**: It has happened in England and Wales.

237. **Mr McCartney**: Has it happened here?

238. **Sir Declan Morgan**: No, because we have not had an appointment to the Court of Appeal within the timescale of this legislation.

239. **Mr McCartney**: Therefore the process that will now be in place —

240. **Sir Declan Morgan**: — is the 2009 Act process.

241. **Mr McCartney**: Will there be two judges?

242. **Sir Declan Morgan**: The process that will now be in place will be decided by the Prime Minister having consulted NIJAC.

243. **Mr McCartney**: Therefore it could be different for different —

244. **Sir Declan Morgan**: I cannot say.

245. **Mr McCartney**: Last week, the Attorney General informed us that a vacancy in the Court of Appeal is filled by seniority, but we are hearing something different today.

246. **Sir Declan Morgan**: That is not right. However, in fairness to the Attorney General, that might have been because he was not alert to the consequences of the 2009 Act. I am sure that he was quite aware of them, but he might not have been as alert as we are because we are involved directly with the consequences of the 2009 Act.

247. **Mr McCartney**: That is obviously being seen as an improvement.

248. **Sir Declan Morgan**: It is a change. We have been fortunate to get extremely able Court of Appeal judges to take the appointments, but it is a legislative change in the position.

249. **Ms J McCann**: I want to touch on the lack of women at that level. I read your briefing paper in which you state that you want to be reflective of the community. You said earlier that the top fourteen places are populated by men. You say that it is no longer the case, but would it have been the case that women might not have seen themselves as capable of getting to that position, because, until the 2009 Act, people reached the Court of Appeal based on seniority? Might one of the reasons why some women dropped out at a lower level have been that they did not see their career prospects being fulfilled as it was dominated by men?

250. **Sir Declan Morgan**: The entry point to the Court of Appeal has generally been the High Court bench. Therefore, in a sense, the question is: why have women not been making their way onto the High Court bench? That is exactly what we are trying to bottom out in the research that we are conducting through Queen's.

251. The figures for participation in the professions are very disturbing. They are disturbing not because some women might be expected to take what is sometimes called a balanced view of life: take time out and then return to full-time work in the professions. They are disturbing because there is no return. We need to find out the reasons for that.

252. It is dangerous to speculate, because there may be a wide range of reasons. If we are to fix the problem, we will have to understand what those reasons are and ensure that we identify effective steps to deal with the problem. All the material that I have read states that this is not a quick fix. However, it is important to start fixing it now; otherwise the solution will be even further away.

253. **Ms J McCann**: I do not believe that being in a job for a long time means that you are more experienced.

254. **Sir Declan Morgan**: I agree.

255. **Ms J McCann**: I am glad to hear you say that it is changing because young people as well need to be at that level.

256. **Sir Declan Morgan**: I agree. One needs to recognise that although there is breadth of experience, there is also such a thing as depth of experience, and that is extremely important for the quality of what you can give.

257. **Mr Lynch**: Thanks for the presentation, Declan. To follow up on Jennifer's point about women, you said that you set up a joint liaison committee. Did it look at the cultural practices in the system, because often they can be a blockage to people?

258. **Sir Declan Morgan**: That is one of the things that we want to explore through the liaison committee but also through the research to see whether there are issues about how work is done. That does not mean just the hours during which it is done but the manner in which it is done, which is a disincentive to women. We need to understand why this is happening because if we do not understand the problem, we will not put in place the remedy to address it.

259. **The Chairperson**: How many vacancies are there at High Court level and how long would it normally take to appoint a High Court judge?

260. **Sir Declan Morgan**: Our average time in recent competitions has been 180 days, although I hope to improve on that. A competition was advertised in about mid-November, and I hope to have an appointee about Easter. We have two vacancies at the High Court that I hope to fill as soon as possible.

261. **The Chairperson**: How do you set the number of High Court judges necessary for Northern Ireland? What is the assessment?

262. **Sir Declan Morgan**: The maximum number is fixed by statute and can

be changed only by the Department of Justice in agreement with NIJAC. That, in a sense, is one of the features of judicial independence. I have an interest in making sure that I have enough judges to do the work that I have to do, so I am looking for an input. However, my input to that, in part, is through NIJAC. Moreover, I also have to recognise that, from the public purse and public interest point of view, money spent on judges is money that is not available for other things. Therefore it is perfectly proper that that decision must also critically depend on the Department of Justice taking the view that money is available to do it.

263. If I want to make a case, as I am at the moment, for instance, for an additional county court judge, a business case has to be put forward to be analysed. I have to look at that as well and see whether it stands up in demonstrating, from the public point of view, that an additional judge is required to ensure that the public's expectation of a judicial service is achieved and that we do not face delays or cases not being heard.

264. **The Chairperson**: I do not want to put Ruth in a position — obviously, you are leading the delegation —

265. **Sir Declan Morgan**: Yes, but Ruth is here because of some of what I read last week. Sometimes, I think that you have to hear it from the people who are there rather than hearing it from me; so she is here to answer any questions that you have specifically for her.

266. **The Chairperson**: Let me pose the question to Ruth. I will quote what the Attorney General said last week about the composition of NIJAC:

"Even if, as seems to be case numerically based on your analysis, the higher judiciary does not form a majority, there is no doubt that, de facto, it is the dominating element in NIJAC."

267. Are you dominated? *[Laughter.]*

268. **Ms Ruth Laird (Northern Ireland Judicial Appointments Commission)**: That is a leading question. First and foremost, it is unfortunate that we are called lay commissioners because, just as our colleagues come from a professional legal background, we come from a professional "other" background, and that is what we bring to the commission. Of course, we go through a rigorous open competition to be appointed; we are drawn from education, health, the business sector, and we bring skills to the commission that range from recruitment, selection, assessment, equality, inclusivity, outreach, corporate governance and finance. That is just a short list. In many of those areas, we have better and wider experience than our legal counterparts, including the most senior judges.

269. We also take a very active role in the design of the selection and assessment as well as the implementation of it because of our skills, knowledge and background. As a commission, we not only appoint to what are traditionally known as court-based judicial offices, but we also contribute very effectively to offices that are essential in our community, particularly in a divided community, in areas such as medical appeals tribunals, pensions appeals, social security, charities and valuation tribunals. As independent commissioners, we contribute to setting strategic direction for the commission, and to policy, decision-making and corporate governance; we also look at how the commission will develop its policies and strategies over a long period. At the moment, for instance, I am serving on working groups that are looking at flexible working patterns, part-time working and research statistics and what that means for our work, including perhaps new initiatives on the mentoring of under-represented groups; and, of course, that is not just a gender issue.

270. I want to dispel any notion that our contribution is less than effective; I also want to dispel the notion that we are dominated in any way or unduly influenced in any direction. The absolute rigour of our debate can be well demonstrated to anyone who wants to attend the commission's meetings.

271. **The Chairperson**: Can you enlighten me on the process? When you interview someone, does each member of the panel score the person independently or is there a collective discussion on the score? Is there ever tension between the judges on the commission if one candidate is considered better than another?

272. **Ms Laird**: Scoring and assessment are done individually and moderated by a panel; that is where the cut and thrust of debate and discussion will go on. However, you would be wrong to assume that there are always tensions with that, because when you get your selection and assessment methodology, the analysis of the post and what you are looking for right, the assessment usually follows in good order.

273. **Mr McCartney**: Are meetings held in public session?

274. **Sir Declan Morgan**: The difficulty with commission meetings is that there are issues of candidate confidentiality. It would be helpful to hold them in public so that you could see what happens; however, I am afraid that it would not be possible to do it for that reason.

275. **Mr A Maginness**: It seems to me that there is a very laudable aim of reinforcing the independence of the judiciary by an independent process of appointment or selection. We could leave that process as separate. However, in Northern Ireland we have completely depoliticised it, apart from perhaps the Prime Minister and the Lord Chancellor in Westminster. Moreover, there is no sense of accountability to any local political body, a bit like the Public Prosecution Service (PPS) as a body and a bit like the Chief Constable to a certain extent, although there is a different model there. There is a tension between trying to maintain independence and getting accountability. Can you see how that could be resolved? Perhaps you do not see it as a problem.

276. **Sir Declan Morgan**: I have already indicated that it seems to me that some of this is purely a matter for political decision makers; they need to make judgements about it. I am not sure that I would accept entirely that there is no accountability, in the sense that the Judicial Appointments Ombudsman is there to ensure that there is a measure of accountability through the complaints process. The Judicial Appointments Ombudsman is also there as an ongoing process for us to discuss with him ideas that he may have on how we might improve what we do on a rather more informal basis. The difficulty is deciding what sort of political accountability you will have in relation to the conclusion that one individual was more meritorious than another in a particular appointment. That is difficult, but it is not my task; it is a task for political decision makers. I will not go down that route, despite the generous invitation. *[Laughter.]*

277. **Mr A Maginness**: Not even a wee bit?

278. **Sir Declan Morgan**: Not even a little.

279. **The Chairperson**: I think that we are trying to discover whether you feel that there is a lack of political legitimacy in the appointment of the judiciary. One the one hand, I hear what you say about the practical input of ensuring that someone is appointed on merit. Is there any benefit in addressing what some may regard as a lack of political legitimacy in the appointments process?

280. **Sir Declan Morgan**: I have sought to explain the process and how it works, but it must surely be for those involved in the political process to form a judgement as to how they think the confidence of the public can best be secured in these appointments. The critical thing is to make sure that the procedures that we put in place ensure that the public is confident, and it seems to me that we can also be entirely satisfied that those who seek appointment will know that there is an independent process based on merit that leads to the appointment and that there is no question of there being any interference with that.

281. **Mr McCartney**: To pick up on your last point, should the appointment of the Justice of Appeal come under the NIJAC process? Does the commission have a view on that?

282. **Sir Declan Morgan**: That is a matter for government. Court of Appeal appointments in England and Wales are subject to a statutory scheme, but in Northern Ireland they are not. It is entirely a matter for government.

283. **Mr McCartney**: It strikes me that there is a bit of a gap in what you said about the place of merit in the process.

284. **Sir Declan Morgan**: There is a role for NIJAC in the 2009 process, but whether those should be subject to NIJAC procedures is entirely a matter for government.

285. **The Chairperson**: I will come to you in a moment, Ms McCann; I have neglected Mr Dickson. Apologies.

286. **Mr Dickson**: Thank you for coming today, Lord Chief Justice, and for the very helpful insight that you and the independent commissioner have given me, and, I hope, the whole Committee, into the processes that are used. They should inspire a great deal of confidence in the appointment processes across the judicial system. If you are appointing on the basis of merit, skills and competences that have been clearly set out, I find it difficult to see where there is a political role. Unless I, as a politician, have a contribution to make to that from a technical perspective, I really do not see where there is a place for me or any of my colleagues to fit into it. What you are doing provides more community confidence, not less.

287. May I ask about the processes that you go through? How much time is spent in providing feedback to unsuccessful candidates? I am interested in this issue in respect of women and minority applicants for posts in the judiciary. I appreciate the efforts that are being made, but those issues have been addressed in other areas of public office and, although I appreciate the amount of research that you have commissioned and wish to undertake, many of the answers may already be there in other organisations.

288. **Sir Declan Morgan**: To deal with the last point, I am not sure that the answers are so easily found in other organisations because the manner in which the legal profession organises itself is a little bit different. However, we face the issues that England and Wales face. It is no coincidence that the percentage of women judges in Northern Ireland, outside the lay commissioners, is 22%. Under JAC in England and Wales, which is also pushing very hard on diversity issues, it is also 22%. Baroness Neuberger's report also emphasises that this process will last some time.

289. My concern is that until we understand exactly how we can enable women to take those posts, we will continue to have that issue.

290. Your first point was in relation to feedback for unsuccessful candidates. All unsuccessful applicants who have been subject to interview are offered the chance to speak to the chairman of whatever selection committee it may have been; they will then get feedback on their performance in the various aspects of the competition. They will get feedback on the forms and structure of the competition itself and sometimes, where appropriate, advice on what they might do to improve their situation. In competitions with a large number of candidates we give feedback by way of publishing model answers to questions, for instance, with a view to ensuring that there is as wide as possible a dissemination of what has made the difference so that people with those attributes know that those are the qualities that they should bring to the fore. We recognise that feedback is an extremely important element of making sure that potential candidates know what is required of them.

291. **Ms J McCann**: I ask this question of Ruth: how are the independent members of NIJAC recruited? Are they selected by

appointment, open competition, or job interview?

292. **Ms Laird**: It is an entirely open competition, and it is now the responsibility of OFMDFM. One would then be appointed for a term of office.

293. **Ms J McCann**: What is that term, normally?

294. **Ms Laird**: I was initially appointed for a three-year term, and then re-appointed for four years. That is coming to an end. I understand that it is likely to be for five, six or seven years. Initially, however, it is for three years.

295. **Ms Laurene McAlpine (Office of the Lord Chief Justice)**: It may also be worth saying that the commission itself should be reflective of the community.

296. **The Chairperson**: Lord Chief Justice, thank you very much for your contribution; I have found it very beneficial as part of our deliberations on the review. Your time is much appreciated. I trust that these roles will never be reversed — *[Laughter.]*

297. **Sir Declan Morgan**: Thank you, Chairman; you have been very kind.

29 March 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Colum Eastwood
Mr Seán Lynch
Mr Basil McCrea
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witness:

Mr Karamjit Singh — *Northern Ireland Judicial Appointments Ombudsman*

298. **The Chairperson**: We have the Judicial Appointments Ombudsman with us today. You are very welcome, Mr Singh, and thank you for coming along. Please outline your briefing paper, after which I am sure that members will raise some questions.

299. **Mr Karamjit Singh (Northern Ireland Judicial Appointments Ombudsman)**: Thank you, Chairman, for inviting me to give evidence to your review that covers schedules 2 to 5 to the Northern Ireland Act 2009. I had not intended to repeat at length what is in my written submission, as I felt that you might think that brevity was better and that we could go straight to questions. I have tried to pick up three or four themes, the first of which gives you the background to my appointment. The second is that, in my first year, I had the opportunity to talk about judicial appointments to over 60 individuals active in different aspects of civic life in Northern Ireland. I have tried to summarise some of the points and themes that came out of that. I have also tried to summarise some of the themes that came out of the complaints that I have considered, and, finally, I have listed some additional points that I thought would be of interest to the Committee.

300. In the past five years, I have published five annual reports, and I made three assumptions in them. First, there should be demonstrable independence and impartiality of the judiciary in discharging its responsibilities. Secondly, judicial appointments should be free of bias, actual or perceived, and, thirdly, judicial appointments ought to be a matter of interest to the wider public rather than just the legal community. I say that because the notions of fairness and promoting public confidence in the administration of justice ought to be integral to being a judge, as should a commitment to equal treatment in discharging responsibilities in the justice system.

301. My perspective comes from considering individual complaints. In addition to having had the opportunity to look at judicial appointments processes here in Northern Ireland, there are two other aspects of my personal experience that I would particularly like to highlight. In the past, I was a Civil Service commissioner in a Great Britain context. I was also, for a number of years, a member of the independent panel that selected Queen's Counsel in England and Wales. I am happy to take questions.

302. **The Chairperson**: Thank you. I think that members will want to pick up on points that others have made. One of the issues that has been talked about is that the Lord Chief Justice investigates complaints about the judiciary. Could your role be expanded to deal with complaints from the public about their experiences of the judiciary?

303. **Mr Singh**: That is a matter for you to take on board. In my briefing note, I have drawn attention to the distinctive system that you have here in Northern Ireland. You have that system because the Justice Act 2002 did two things: it set out in principle that the Northern Ireland Judicial Appointments Commission

(NIJAC) should be established, and it set aside the responsibility for investigating complaints and left that with the Lord Chief Justice. We then moved to the Constitutional Reform Act 2005, which set up the Judicial Appointments Commission (JAC) and the ombudsman in England and Wales and gave that responsibility to them. In Northern Ireland, your legislation of 2004, which established the commission, did not transfer that responsibility. One must look at whether establishing those responsibilities would provide greater confidence. I am not sure that I am the person who ought to be giving a view on whether I should have an expansion of my responsibilities. If I may put the question back to you, you must ask whether that would enhance confidence in the administration of justice.

304. **The Chairperson**: That is the question that we are trying to grapple with. Some have questioned the need for a Judicial Appointments Ombudsman at all. We are considering a consultation on the Police Ombudsman, and there are questions about the Prisoner Ombudsman. Do you think that the distinct office of Judicial Appointments Ombudsman is needed, or could that role be absorbed into that of a broader justice ombudsman who looks at all branches of the Department of Justice?

305. **Mr Singh**: If I may, I will take the opportunity to put that question into a slightly wider context. At the very beginning, when I was talking to the 60 or so people whom I mentioned, someone expressed the view that perhaps Northern Ireland was replete with too many accountability mechanisms. We also have to take note of the fact that, in public sector expenditure, there is an issue of having proportionality in your accountability mechanisms. It is important that, whatever mechanism you have, such as a justice ombudsman covering all sectors, it must not only have the confidence of the sector that is being investigated but be able to project a sense of confidence to a wider public. In my case, the legislation stipulates that I should not be a lawyer and that I should have not sat in a judicial capacity. It seems to me that those are important characteristics, and I am not saying that simply because I was appointed.

306. I am not sure that, if you were to combine this role with another ombudsman's role simply because it was another ombudsman's role, it would be particularly helpful, because there is such a wide range of public services. On the other hand, if you are going to limit it to the justice system, you have to ask whether that would be sufficient. Another comment that was echoed back to me at the very beginning is that, in Northern Ireland, there seems to have been a lot more concentration and emphasis on policing and prison issues than on the rest of the justice system. If you were to take the route of a single justice ombudsman, you would have to ensure that he or she gave equal weight to all sections.

307. **The Chairperson**: How many complaints have you had to deal with? Is it five in five years?

308. **Mr Singh**: I am currently dealing with a sixth.

309. **The Chairperson**: It seems to be an incredibly small amount of complaints to justify the office.

310. **Mr Singh**: It is a small number, and I would not want you or the Committee to go away with the impression that I am seeking to justify the continuation of the office.

311. **The Chairperson**: No, I appreciate that you are filling the structure that we established. You probably cannot go into the detail of the nature of those complaints, but are there serial complainers?

312. **Mr Singh**: Statute does not allow me to discuss the intimate details of complaints, but I produce annual reports. I report on each complaint that I receive and the issues arising, and I highlighted those in my briefing note to the Committee. I am not sure that I can go any further than that.

313. **Mr Lynch**: Thank you for coming here. There is a view out there that NIJAC is a method of judges appointing judges. You also said that the judiciary needs to be reflective of the community. Do you think that the current judiciary is reflective of the community?

314. **Mr Singh**: I will, if I may, make two points before we come to that. I have been looking at the sections of the Act that you are reviewing. Section 3, Part 4 concerns the responsibilities of NIJAC:

"The selection under this Schedule of a person to be appointed, or recommended for appointment, to a listed judicial office must be made solely on the basis of merit."

Also in Part 4:

"It requires the Commission, so far as it is reasonably practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is selecting a person to be appointed, or recommended for appointment".

315. That is the statutory background, and that is NIJAC's responsibility. If we then move forward, and you will have seen this in my comments in my report and I have picked this up elsewhere, clearly there has been a perception that the judiciary is not currently reflective of the community in Northern Ireland in terms of, for example, gender. Certainly, less concern has been expressed to me about community background; the concerns are more about gender and ethnicity. That raises two questions: given the statutory responsibility on the part of the commission, what can the commission do to enhance that confidence, and how does the commission go about making the wider public aware of what it is trying to do in that area? I have been involved in various roles trying to create change within institutions, and part of that has involved diversity issues. In my experience, there is always a time lag between external expectations and changes occurring. As part of any process of accountability, one ought to say, "This is the system that has been established: what changes does one hope to see coming through?" One ought then to monitor the situation. I do not know whether that addresses your point.

316. **Mr Lynch**: It does to an extent, but there are no women currently on the bench. I think that the Southern Government appointed a female Chief Justice last year. The majority of people going into law are women, yet all those at a higher level are male. Is the cultural mindset an issue, and is it being dealt with?

317. **Mr Singh**: I can talk about the Northern Ireland context only on the basis of the complaints that I get. However, in a slightly wider context, I have also been a member of the Judicial Studies Board in England and Wales. Therefore, I have also had a chance to look at issues relating to the judiciary from the dimension of equal treatment.

318. We have to recognise that there are all sorts of reasons why a judiciary ends up having a certain composition. The issue here and over there — I have seen this in QC appointments — is that it takes some time for people to start coming through the system. The questions that you must ask yourself, however, are these: are there issues relating to the current pool that limit it, and could you expand that pool in some way? I suppose that a radical question might be whether you would look at a pool beyond Northern Ireland, for example. Do you look at working practices and opportunities for part-time appointments? Do you look at whether there are factors that hold people back from applying? Are people reticent in applying? Do you look at people's progress through the appointments system and at why people are not successful?

319. There is a range of issues here. You mentioned culture, and there may be a cultural issue when it comes to working practices, for example, and other issues that inhibit people from coming through. If I may, I will personalise my response for a moment. For the past 30 years or so, I have, probably, been the first person of my background and heritage to take on a whole series of roles.

At times, seeking to understand the culture of the setting in which I found myself has been very interesting. I have always seen that as being an essential prerequisite to being able to move on in that context.

320. **Mr A Maginness**: Thank you for coming today. Thank you for your contribution to this field and for your submission to the Committee. I wish to make a point that reflects what Mr Lynch said about our having a gender problem on the High Court bench. According to the Lord Chief Justice, throughout the judiciary, the real level of female representation is about 22%. If you included lay magistrates or lay appointments, it would be about 43%. Therefore, there is a significant under-representation of women at many different levels of the judiciary. Yet, we have had the commission since 2005. Seven years is a considerable time, yet the commission has not been able to crack the nut of increasing female representation at the highest level, which is the High Court. Is that really acceptable?

321. **Mr Singh**: You are asking me to express a personal opinion, and I am sure that that is not really what you are looking for. If I may, I will answer your question from two perspectives. From my experience and insight, I thought that Baroness Neuberger's report was very interesting because she made a number of recommendations on how you could try to bring about change. I do not think that this is an issue only for me as the Northern Ireland Judicial Appointments Ombudsman. Baroness Neuberger made the point that the Judicial Appointments Commission for England and Wales faced similar challenges in relation not only to gender but ethnic background. If a commission has a statutory responsibility to appoint judges on the basis of merit — it must be on the basis of merit and excellence — it must also recognise that diversity is not a bar. Diversity is about increasing the pool and considering a wider pool of eligible people, but how do you facilitate the creation of that large pool? From my experience, as it is possible in other walks of life, there is no reason why it should not be possible in appointing the judiciary.

322. As Northern Ireland has a relatively small judicial community, the numbers of vacancies and opportunities to fill posts are much smaller. Therefore, any change will probably take longer. It is not just a question of who is appointed. The last thing that anyone wants is for someone to be appointed solely because she is a woman. That is not good enough. You want good, able, female lawyers applying and being considered for those roles, so you must ask how many able women lawyers are actually applying? Are they being encouraged, and what kind of messages are going out?

323. The other issue is what connection, if any, is there between having a successful career as a lawyer as opposed to being a good judge. My experience on a panel that selects QCs, for example, raised the point in my mind that being a very good advocate does not necessarily mean that someone will go on to be a very good judge. It is about also looking at what the criteria and issues are. When trying to select on merit, what are you trying to identify and how do you go about doing that?

324. My final comment on this is that the commission, like other public bodies, was always going to face the challenge of expectations of what it could deliver as opposed to what it is able to deliver within a certain period.

325. **Mr A Maginness**: Central but not exclusive to the pool that you mentioned is the number of senior counsel. Do you know how many women occupy the position of senior counsel?

326. **Mr Singh**: Not in a Northern Ireland context, as I have not viewed that as part of my role. What I can tell you from my experience in England and Wales, as someone who was on that panel for seven years from its inception, is that we were very successful in increasing the number of women Queen's Counsel. The considerable number of women practising one level below as senior

junior counsel meant that there was a considerable pool. A significant number of people were making applications, so we went out and really tried to encourage people to apply.

327. **Mr A Maginness**: We received today a very useful article from 'The Guardian' on Monday 26 March. It was written by Joshua Rozenberg, a very distinguished legal journalist. The article is based on a report by the liberal think tank CentreForum, the authors of which are Chris Patterson and Professor Alan Patterson from the University of Strathclyde. You may not be familiar with the article, but I will read from it. The authors of the report were looking at the equivalent of NIJAC in England and Wales. They came to the conclusion that it:

"shows the 'potential danger for this branch of government to become a self-perpetuating oligarchy'."

328. They are talking really about judges appointing judges, as Mr Lynch's initial question reflected. They also quote Lord Justice Etherton, a strong supporter of judicial diversity, who argued:

"the dominant extent to which the senior judiciary is involved in the selection of the senior judiciary as 'quite unacceptable ... for constitutional legitimacy'."

329. In the course of the House of Lord's sessions — its inquiry has just been produced — Lord Etherton argued that, really, judges were appointing judges, which he did not find acceptable. He wanted a broader selection process. Have you any sympathy with that view? Is that something on which you can comment on?

330. **Mr Singh**: First, I apologise to Mr Lynch. If that was the question that you were trying to get at, Mr Lynch, and I did not —

331. **Mr A Maginness**: I think that his question was in two parts, and that formed the first part.

332. **Mr Singh**: If the perception is that judges are appointing judges, it seems to me that the whole assumption behind setting up judicial appointments commissions, whether that is here, in England and Wales or in Scotland, is fundamentally flawed. The whole assumption, surely, behind setting up independent commissions is that it is about promoting public confidence in the way in which judges are being appointed. If it is seen that this is simply judges appointing judges, as it were, the argument for having any kind of independent body does not stand up. Today, I opened by saying that this is not a matter of interest solely for the legal and judicial community, but for the wider public. I am not talking only about constitutional issues; this is a matter of wider public interest. The administration of justice and confidence in it is, or should be, an integral part of our democracy. I think that the challenge for any judicial appointments commission, whether in Northern Ireland, England or Scotland, must be to be able to put across very clearly what the commission does and how it discharges its responsibilities in seeking not only to ensure that appointments are being made on merit, but that they deal with the question of diversity and having a judiciary that is reflective of the community in which it is based.

333. I am aware that, over the years, commentators have, from time to time, had the perception of the judiciary's appointing the judiciary. I have not seen the article from which you quoted, but I am sure that it makes the same point.

334. That brings me to the challenge of the individual commission, which is composed of different types of members. Around the table are those who are non-legally qualified; those who represent the legal profession, such as solicitors and members of the Bar; and judicial members. In my briefing note to you, I made the point, in passing, that they all come to that table via different routes. Some come through the publicly advertised route, and, as I understand it, some are nominated. If I may say so, the challenge for the different members is a bit like the role that you as a Committee have. All of you are members representing different viewpoints, but you have to come together and work

together as a Committee to come to a common view, presumably. It seems to me that judicial appointments commissions have to harness those different perspectives round that table in a way that ensures an appointments system and processes that enjoy confidence. Those skills should also be used in such a way that people, externally, can see and appreciate that.

335. **Mr A Maginness**: Thank you for that. In your annual report of April 2010 to March 2011, you made some recommendations in relation to what you call the second complaint. We will not go into the actual complaint, but you said:

"I note that there is no formal agreement between my role as Ombudsman and the Commission whether the appointment process should continue whilst I am still considering a complaint. In this particular competition, the Commission had decided to make a formal recommendation to the Lord Chancellor before I had issued my final report. I am mindful the Commission is an independent statutory body and I am also aware I have no power to substitute my own decision in any selection process. I consider that such decisions taken in the midst of a complaints process can give rise to the perception on the part of complainants and others that the complaint is viewed as being of little value or there are closed minds with regard to the outcome. Confidence in the integrity of the selection process can only be a casualty of such perceptions. I recommend that the Commission gives consideration to adopting a general policy that no formal part of the appointment process to fill a post will be made unless any outstanding complaints process relating to the same competition has been completed."

336. When the Lord Chief Justice appeared before the Committee, I raised that with him. Can I take it from your recommendation that, despite the fact that a complaint was being considered, the commission went ahead and made an appointment or made a recommendation for appointment?

337. **Mr Singh**: I think that that is very clear from my comments.

338. **Mr A Maginness**: Yes. That was a rather unusual thing to do, was it not?

339. **Mr Singh**: It was a surprising thing to do. I felt that it ought to be commented upon. At the end of the day, an ombudsman — not just me, but any ombudsman — does not have mandatory powers. An ombudsman has to work, obviously, on the basis of persuasion, if you like, or put forward comments that he or she thinks will enhance the process. My view is that I am here to be fair to complainants and the commission. However, I do not think that it is fair or helpful for the commission to make recommendations while an individual's complaint about a selection process is ongoing. I am thinking not only about the position of the complainant but the question of wider public perception at some point. Therefore, I felt that it was necessary to make that recommendation. I hope and trust that the commission will have taken that into account.

340. **Mr A Maginness**: Has that matter been completed as yet? Has the competition been completed yet?

341. **Mr Singh**: I am not sure that I ought to discuss individual competitions.

342. **Mr A Maginness**: OK. I will not press you in case it prejudices any position like that.

343. **Mr Singh**: Thank you.

344. **Mr A Maginness**: Thank you for your extremely helpful contribution.

345. **The Chairperson**: Mr Maginness touched on the perception of NIJAC. Do you think that there are too many judges on NIJAC? Obviously, their input is needed. However, there is a perception that they are the dominating block. Do we need to look at NIJAC's composition?

346. **Mr Singh**: I certainly do not think that there is anything that prevents you from doing that as part of your review of schedules 2 to 5. My one comment, however, reflects a point expressed to me at the time of my first annual report, and it is about the fundamental question of the relationship between the number of people who come from a legal background — not just judges — and

the number who come from a non-legal background. I do not think that it is a question simply of the number who sit around a table. It is a question of how to address perceptions that might exist. In a sense, the commission has got to reflect on that challenge. Again, to put it in a wider context, I might add that I do not think that it is unique to Northern Ireland. Having skimmed through the Committee for Justice report, I get a sense that the commission in England and Wales has similar difficulty.

347. **Mr McCartney**: Are complaints made to you by individuals or can someone make a thematic complaint?

348. **Mr Singh**: Towards the end of my briefing note, I made the point that, unlike the Commissioner for Judicial Appointments, whose role was prior to mine, I am unable to take up thematic complaints, look at wider issues or undertake auditing. I think that that is what you mean. The legislation clearly sets out that my role is to look at complaints from individuals who have participated in a selection process. Therefore, I cannot even take complaints from individuals on behalf of someone else.

349. The Chairperson: No other members have indicated that they wish to ask questions. Thank you very much for taking the time to come to the Committee today. It is much appreciated.

Appendix 3

Written Submissions

List of Written Submissions

1 The Attorney General for Northern Ireland

2 The Bar Council of Northern Ireland

3 Department of Justice

4 Judicial Appointments Ombudsman for Northern Ireland

5 The Law Society of Northern Ireland

6 Lord Chancellor and Secretary of State for Justice

7 Lord Chief Justice, Chairman of the Northern Ireland Judicial Appointments Commission

8 Traditional Unionist Voice

The Attorney General for Northern Ireland

Attorney General for Northern Ireland

Ms Christine Darrah
Clerk to the Committee for Justice
Northern Ireland Assembly
Parliament Buildings
Ballymiscaw
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BT4 3XX

Our Ref: AGNI/12/010

COMMITTEE FOR
16 FEB 2012
JUSTICE

Date: February 14 2012

Dear Ms Darrah

Review of Judicial Appointments in Northern Ireland

Thank you for your letter of 3 February 2012 inviting me to submit views for the Committee's consideration as part of its review of the arrangements for appointment and removal of judicial office holders.

I understand that you are tasked with reviewing the operation of the amendments made by Schedules 2 to 5 of the Northern Ireland Act 2009. Below are some comments on those provisions and some general observations.

Schedule 3 continues the statutory requirement that appointments or recommendations for appointment to a listed judicial office be made solely on the basis of merit. There may be little new in this in that any rational system of judicial recruitment would always want to appoint those who were regarded as likely to be the best judges. A fundamental question that exists about the Northern Ireland Judicial Appointments Commission (NIJAC) system is whether the highest score at one or more interviews is a necessary indication that the 'best' candidate has been identified. I note that the research commissioned by NIJAC found that few respondents were able to define merit clearly and that the methodology used to assess candidates was unfamiliar to many of the potential applicants.

The NIJAC merit system does not appear to operate for appointments to the Court of Appeal or to the office of Lord Chief Justice. Appointments to the Court of Appeal have for some time been based on seniority among existing judges of the High Court. The 2009 Act introduced a requirement that the Prime Minister consult NIJAC before making a recommendation. There does not seem to be any clear reason for these senior appointments not being

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made in accordance with the more open statutory appointment criteria. The point is, perhaps, particularly important in relation to Court of Appeal appointments; appointment on the basis of mere seniority will often involve an obvious by-pass of the merit principle.

NIJAC itself may be less transparent (and is almost certainly more expensive) than more traditional methods of appointment: NIJAC cannot answer Assembly questions, for example, while Ministers can. On analysis it may well be that NIJAC is much less accountable vehicle for appointment than the traditional politically accountable method which is still extensively deployed, for example, for Federal judges in the United States.

An alternative which the Committee may wish to explore and which would almost certainly be less expensive than NIJAC would be to have judicial appointments and re-appointments handled through the Lord Chief Justice's office with the assistance of HR Connect.

In relation to removals I see no real reason why there should not be a restoration of the classic constitutional position: that removal of a judge of the Court of Judicature in Northern Ireland is only possible by Her Majesty following a resolution of both Houses of Parliament

I am happy to explore these thoughts with the Committee in person if this would be considered useful.

Yours sincerely

John F Larkin QC
Attorney General for Northern Ireland

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The General Council of the Bar of Northern Ireland

Mr Paul Givan MLA
Chairman, Committee for Justice
Room 242
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BT4 3XX

23 February 2012

Dear Mr Givan MLA

Review of the Judicial Appointments Process in Northern Ireland

The Bar Council is the representative body of the Bar of Northern Ireland. Our members specialise in the provision of expert independent legal advice and courtroom advocacy in this jurisdiction. As the leading provider and source of legal expertise and advocacy in the courts, we welcome the opportunity to assist the Committee for Justice in the Review of the Judicial Appointments Process in Northern Ireland.

The Bar Council strongly endorses an independent judicial appointments process. It is of fundamental constitutional importance in a democracy governed by the rule of law that there are effective guarantees to the independence of the judiciary. The separation of powers must not only be endorsed but strictly adhered to in order to ensure the process remains free from political interference. The independence of the judiciary is therefore reliant on the maintenance of the independent referral bar as the recognised and natural source of current and future judicial appointees. Sustaining the integrity of the legal system is of supreme importance and any challenge to the independence of the Judiciary or the Bar will ultimately cause harm.

The Northern Ireland Judicial Appointments Commission (NIJAC) has established a selection process which members of the Bar support. It is imperative that merit is the sole criteria for appointment. We believe that the recent High Court and County Court appointment process demonstrates the work conducted by the Commission to improve the appointment process. Firstly, the adopted criteria were well drafted and appropriate for the appointment. Secondly, through the considerable commitment of the individual commissioners, the appointment process was expeditious and efficient. Thirdly, there was a marked improvement in the confidentiality surrounding the process and fourthly, the efforts of the Lord Chief Justice and the Commission to improve confidence in the process must be recognised.

We strongly welcome the commitment from the Commission to engage with the Bar. To that end, the Council is proactively encouraging senior female members of the Bar to apply for appointment in the higher courts. Members who have participated in previous recruitments have raised concerns regarding the delay involved in the appointments process. This has been addressed by the Commission who have moved expeditiously in the most recent assessment; however, the length of time involved in the confirmation of Crown appointments can have a serious impact on the professional and personal lives of candidates. The Bar Council would also highlight the impact of judicial vacancies on the smooth running of the courts, the current judicial caseloads and the avoidable delay created due to the lack of court time.

The Bar Council recognises the substantial work and progress which has been made in improving the process for appointing judicial officeholders and will continue to work constructively with the Commission.

If the Bar Council or I can be of further assistance in this or any matter, do not hesitate to contact me.

Yours sincerely

Mark Mulholland QC
Chairman

Department of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER

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Our ref SUB/300/2012

Ms Christine Darrah
Clerk to the Justice Committee
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27 February 2012

Dear Christine

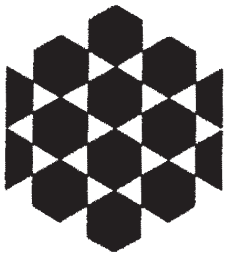
JUSTICE COMMITTEE REVIEW OF JUDICIAL APPOINTMENTS AND REMOVALS ARRANGEMENTS IN NORTHERN IRELAND

Thank you for your letter of 3 February seeking views on the above issue. We are grateful for the opportunity to respond to the Justice Committee Review and enclose the observations of the Department on the operation of arrangements for judicial appointments and removals under Schedules 2 to 5 to the Northern Ireland Act 2009 for consideration by the Committee.

We are, of course, happy to provide further assistance to aid the completion of the Review.

BARBARA McATAMNEY
DALO

Enc.



Department of
Justice
www.dojni.gov.uk

Committee for Justice Review

Arrangements for Judicial Appointments and Removals under Schedules 2 to 5 to the Northern Ireland Act 2009

Response of the Department of Justice

Summary

1.1 One of the Department of Justice's responsibilities is to ensure that there is an efficient and effective system to support the business of the courts. Delivery of that function depends on the availability of appropriate judicial resource and, therefore, on the effectiveness of the system for judicial appointments and removals.

1.2 The Department has a keen interest in the operation of Schedules 2 to 5 to the Northern Ireland Act 2009. This response notes that, although the arrangements created by the 2009 Act have only been in place for a short period of time, their operation to date has not given rise to any particular concerns. As a key stakeholder in the system, however, the Department will be keen to note the experience and comments of others and any recommendations for change which may be made by the Committee.

1.3 The Department's particular functions under Schedules 2 to 5 to the Northern Ireland Act 2009 extend to agreeing the maximum numbers of judicial office holders with the Northern Ireland Judicial Appointments Commission ('the Commission') and the terms and conditions of appointment of certain tribunal members determined by the Commission. This response notes that the Department's experience of the 2009 Act arrangements for delivery of those functions has been positive thus far.

1.4 The Department is currently considering options for reform of the tribunal system in Northern Ireland, including future arrangements for delivery of functions related to the appointment, removal and terms and conditions of appointment of tribunal members. This response notes that the Department

will be alert to any Justice Committee recommendations in settling its proposals for reform.

1.5 The Department is also considering alternative options for delivery of functions of the Northern Ireland Judicial Appointments Ombudsman. Policy will be developed in light of any recommendations made by the Committee as a result of this Review in respect of the Ombudsman's removal functions.

Response

2.1 An effective justice system is a cornerstone of a democratic society and an independent and impartial judiciary is critical to confidence in the administration of justice. We are fortunate in the calibre of the judiciary in Northern Ireland and that the highest standards prevail. An effective system for judicial appointments and removals is a key component in the infrastructure underscoring judicial independence, and, therefore, of paramount importance in maintaining those standards.

2.2 It is vital that any system for judicial appointments and removals is based on selection on merit, through fair and open competition and from the widest range of eligible candidates. It is equally important that both appointment and tenure are immune from political or partisan interest, in terms of perception and reality.

2.3 The Department of Justice recognises the significant work taken forward in recent years in that regard and acknowledges the extent to which judicial independence has been recognised in constitutional structures and statutory arrangements.

2.4 Provision made in the Justice (Northern Ireland) Act 2002 established new appointments and removals processes focusing on the need for independence and transparency. The statutory responsibility placed by that Act on the independent Judicial Appointments Commission to develop a strategy to ensure that persons appointed to listed judicial office and the range of persons available for consideration for selection are reflective of the community in Northern Ireland is also to be

welcomed. A Judiciary which is visibly reflective of society can only enhance public confidence in the justice system.

2.5 The Department notes that research commissioned by the Northern Ireland Judicial Appointments Commission in 2008 on barriers and disincentives to applying for judicial office was largely positive about the Commission's role. In that context, the modified arrangements for appointments under the Northern Ireland Act 2009, which were designed to reinforce judicial independence by limiting executive involvement and which increased the role of the Commission further still, must be seen as a positive development.

2.6 Arrangements for judicial appointments are particularly pertinent for the Department of Justice which is charged under section 68A of the Judicature (Northern Ireland) Act 1978 with ensuring an effective and efficient system to support the business of the courts. The ability to discharge that responsibility is clearly reliant on the availability of appropriate judicial resource and, therefore, on the effectiveness of the system for judicial appointments.

2.7 While the Department recognises that the changes made by the 2009 Act have been in place for only a short period of time, and that some arrangements have yet to be operated, it is not aware of any difficulties which have arisen and there has been no negative impact on the delivery of Departmental functions. The Department acknowledges, however, that those with the most substantive roles under the Act are best placed to comment on the operation of provisions, and to have identified any difficulties with them. The Department is keen to note their experience of the arrangements and any recommendations for change made by the Committee.

2.8 Similarly the Department notes that the changes made to the arrangements for removal from judicial office under the 2009 Act have only been exercised on one occasion since the devolution of justice. It nonetheless recognises that the transfer of responsibility for removals to the Lord Chief Justice afforded additional protection for judicial independence. Judicial discipline and removal are properly matters for the Lord Chief Justice as Head of the Judiciary. The requirement to act on recommendation of a removals tribunal and involvement of the Northern Ireland Judicial Appointments Ombudsman ensures appropriate checks and balances are in place.

2.9 The particular responsibilities of the Department of Justice under the 2009 Act are relatively few in number:

- agreeing the terms and conditions of appointment of certain tribunal members determined by the Northern Ireland Judicial Appointments Commission; and
- agreeing the maximum numbers of judicial office holders with the Commission.

They are nonetheless important to the operation of the overall framework and consequently to the administration of justice in general. To date, engagement with the Commission on these issues has been effective and the Department is satisfied with arrangements made for setting judicial complement and terms and conditions of appointment.

2.10 The Office of the Northern Ireland Judicial Appointments Ombudsman, which was established by the Justice (Northern Ireland) Act 2002, is primarily responsible for the investigation of complaints alleging maladministration in the conduct of judicial appointments schemes.

2.11 As noted above, the 2009 Act extended the remit of the Ombudsman so that he now also exercises functions in relation

to the removal of judicial office holders from office. Both the Ombudsman and the Lord Chief Justice may, after consulting the other, convene a tribunal to consider the removal of a listed judicial office holder. The Ombudsman is also responsible for appointing lay members of the Northern Ireland Judicial Appointments Commission to tribunals convened to consider the removal of all office holders.

2.12 The Department of Justice is responsible for recommending persons to Her Majesty, The Queen for appointment as the Northern Ireland Judicial Appointments Ombudsman. The Department is also responsible for:

- sponsorship of the Ombudsman's Office;
- determining tenure;
- determining terms and conditions of appointment; and
- making arrangements for the provision of assistance to the Ombudsman.

2.13 In delivering those responsibilities, the Department has been mindful that only a small number of complaints have been made to the Ombudsman since the Office was established (five complaints in five years) and, in light of the Executive Review of Arms length bodies, is considering possible, alternative options for delivery of his functions. Consideration is being given to whether it would be appropriate for those functions to be delivered in conjunction with those of another Ombudsman. In developing proposals the Department will consider any recommendations made by the Justice Committee in relation to the Ombudsman's removal functions.

2.14 As the Committee is aware, the Department is currently considering options for reform of the tribunal system in Northern Ireland. Proposals may include recommendations for change to:

- arrangements for the appointment of the small number of tribunal members currently within the remit of the Department rather than the Northern Ireland Judicial Appointments Commission *(eg. certain members of the tribunal established under Schedule 11 to the Health and Personal Social Services (Northern Ireland) Order 1972, Special Educational Needs and Disability Tribunal, Care Tribunal and Health and Safety Tribunal)*;
- arrangements for the removal of tribunal members whose tenure is a matter for the Department rather than the Lord Chief Justice *(eg. certain members of the Special Educational Needs and Disability Tribunal, Care Tribunal, Health and Safety Tribunal and the Members of the Tribunal established under Schedule 11 of the Health and Personal Social Services (NI) Order 1972);* and
- arrangements for the determination of those terms and conditions of appointment which are within the remit of the Department rather than the Commission *(e.g. certain members of the Lands Tribunal, Special Educational Needs and Disability Tribunal, Mental Health Review Tribunal, Charity Tribunal, Northern Ireland Valuation Tribunal, Care Tribunal, members of the Tribunal appointed under Schedule 11 to the Health and Personal Social Services (Northern Ireland) Order 1972, Criminal Injuries Compensation Appeals Panel and Traffic Management Adjudicators).*

2.15 To help inform the development of proposals for reform, the Department has recently issued a discussion document seeking views on the current system. Responses to that document are currently being analysed but, in bringing forward recommendations for change, the Department will also be mindful of comments of respondents to this review and any recommendations made by the Committee.

Northern Ireland Judicial Appointments Ombudsman

NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN

Karamjit Singh CBE

Christine Darrah
Clerk to the Committee for Justice
Northern Ireland Assembly
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21 February 2012

Dear Christine,

Review on the arrangements for appointment and removal of judicial office holders

Further to your letter and enclosures dated 3 February 2012, I enclose a written submission to the Justice Committee prepared by Karamjit Singh CBE, Northern Ireland Judicial Appointments Ombudsman, for consideration.

Yours sincerely,

Audrey Fowler

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Submission to the Committee for Justice Review on Arrangements for Appointment and Removal of Judicial Office Holders

Introduction

My submissions to the Committee are based on my perspectives which are drawn from my own position as the Judicial Appointments Ombudsman for Northern Ireland. I was appointed as the first postholder for a five year term beginning in September 2006 and this appointment was extended for a further two year term until September 2013. This role was created by the statutory framework as set out in the Justice (Northern Ireland) Act 2002 and provides an independent and external element for those individuals who wish to complain about any administrative aspect of their own experience as candidates during an appointment process for judicial office. The devolution of policing and justice issues to the Northern Ireland Assembly has meant that my accountability framework in previously reporting to the Lord Chancellor and the Westminster Houses of Parliament has now been replaced by the Minister of Justice and the Northern Ireland Assembly.

My remit is to investigate complaints for judicial appointments where maladministration or unfairness is alleged to have occurred. I do not have any role in commenting on whether a specific individual should have been appointed in any competition. Unlike the Judicial Appointments and Conduct Ombudsman in England and Wales I do not have a remit for investigating complaints of conduct against judicial office holders. The Constitutional Reform Act 2005 stipulates that I should not be a lawyer or have sat in any judicial capacity previously. I was appointed following a publicly advertised selection process.

My perspectives on the arrangements for judicial appointments and removals are drawn from my consideration of complaints during this period and contacts with the Northern Ireland Judicial Appointments Commission. Since September 2006 I have published five Annual Reports which have previously been laid before the Westminster Parliament and since the devolution of policing and justice have been laid before the Northern Ireland Assembly.

The assumptions underpinning all five of my Annual Reports are as follows:

- the demonstrable independence and impartiality of the judiciary in discharging their responsibilities ;
- that judicial appointments should be free of bias, both in terms of perception and reality;
- that judicial appointments should not just be of interest to the legal community but also to the wider public.

A statutory requirement to produce my first Report six months after my appointment for the year ending March 2007 provided me with a unique opportunity to meet with a wide spectrum of sixty individuals who were active in different facets of civic life. Their names are listed in the Appendix to that report.

Themes Arising From These Discussions

I have summarised below some of the themes that were identified by various individuals during these discussions. The full report can viewed on the website at www.nijao.gov.uk

Complainants needed to understand how the complaints process operated; and it was important for my office to show it was demonstrably independent; as well as creating a wider understanding of the Ombudsman role in that it was not acting as advocate for complainants but investigating impartially and making recommendations to ensure good administrative practice.

A relatively small legal and judicial community, as is the case in Northern Ireland, could lead to a reluctance to complain and also a possibility of candidate details circulating informally or speculation about potential applications. The judiciary should be reflective of the community and seeing judges appointed from a diverse range of non traditional backgrounds would be taken as a more open minded approach in judicial appointments. Other commentators emphasised appointments should be strictly on merit and not be influenced by seeking a community or gender balance. Although there was now a pool of women lawyers who were eligible for appointment, it was noted that few women were visible at senior levels and that organisations in the justice system should be sensitive to the image they conveyed.

The Judicial Appointments Commission should ensure there was consistency in its approach to competition procedures and appointments. It was felt by some that there was a marked lack of awareness across civic society about the role of the Commission and it should therefore focus on how it was discharging its responsibilities so that the public at large could understand how judges were being appointed on an open and fair basis. Dealing with actual or potential conflicts of interest on the part of Commissioners when appointments were advertised was also highlighted as an issue that might arise.

There were perceptions that judicial appointments were largely seen as the preserve of the Bar with an emphasis on visibility before judges and that because of this, solicitors were likely to be disadvantaged. It was noted that the justice system had been subject to considerable scrutiny and organisational change with a public focus on police and prisons whilst judicial appointments had only attracted the interest of the judicial and legal community. It was felt that the manner in which lay persons were appointed to the magistracy was also an important factor towards promoting confidence in the justice system.

A broader perspective noted that whilst Northern Ireland was changing as a society, community relations were still viewed through a traditional prism of two communities and there was little research into the experiences of minority ethnic communities or lawyers from these backgrounds.

Themes Arising From Complaints

I have published four further Annual Reports up to the period ending March 2011 and considered a small number of complaints relating to competitions administered by the Northern Ireland Judicial Appointments Commission. These reports can be viewed on the website. I summarise below the themes arising from these complaints:

- the Commission's arrangements to consider complaints ensured that a committee of different Commissioners was appointed to those involved in the selection process;
- outstanding consultee comments were now addressed by ensuring that candidates would know when the deadline for these responses required by the Commission would expire so that they could remind the consultees who had been nominated by them;
- the Commission had also published documentation which described its role, the work of judicial postholders and the opportunities for career advancement;
- the arrangements for dealing with complaints that were raised whilst competitions were still ongoing;
- the Commission had to balance transparency and fairness to complainants when responding to their complaints with respecting the confidentiality of other candidates;
- the clarity of and extent of detail in audit trails showing discussions and decisions taken at various stages of each competition;
- how feedback was drafted and communicated to candidates ;
- how the training and insights for Commissioners (whether lay or legally qualified) could be developed further to ensure a consistency of approach for all competencies and in particular when assessing applications from candidates with traditional and non traditional career paths;
- what further guidance could be issued to consultees in order to further enhance their contribution to making a rounded assessment of applicants;
- not formally completing a selection process until the process for any outstanding complaints from any candidate in that particular competition had been completed;
- when there are few candidates in any specific competition, how did the Commission satisfy itself that it had taken account of the duty to promote diversity;
- to ensure that there was no confusion over the responsibilities of the Lord Chief Justice in his capacity as Head of the Judiciary and as Chairman of the Commission ;
- and similarly that staff in his office (Office of the Lord Chief Justice) were not involved in any aspect of the responsibilities exercised by staff in the Commission however minor the tasks.

As the Ombudsman I have to respect the right of any complainant to expect as full an explanation as can be offered in the circumstances so that there is a clear understanding of the basis on which I have made my decision. Ensuring a thorough investigation does not mean that transparency must be absolute. I also have to balance the issue of confidentiality to other candidates. These competing interests are accentuated when there are only a small number of candidates in any specific competition. The Commission also has a responsibility for maintaining confidence in

the integrity of future competitions in addition to the immediate one where there may be a complaint.

Some Additional Comments

In my Annual Report for the period ending in March 2011, I reported that I had been asked by the Lord Chief Justice to nominate a member from the Northern Ireland Judicial Appointments Commission in order to sit on a Removal tribunal convened by him. I did so and. this is the one occasion that I have exercised this power.

During the past five years I have also been appointed as a Temporary Ombudsman by the Lord Chancellor in order to deal with a small number of cases in England and Wales where the Judicial Appointments and Conduct Ombudsman in that jurisdiction considered there may be a potential or actual conflict of interest. With one exception these cases were concerned with complaints about the personal conduct of judicial office holders. In the one appointment complaint I made a recommendation that the Judicial Appointments Commission for England and Wales should consider whether the Commissioners determining complaints should be separate from those taking decisions in relation to the selection process. The Commission's response to this recommendation was that it considered its existing procedures were "tried and tested".

This may highlight a difference in the role of Commissioners from that of the Northern Ireland Judicial Appointments Commission, where they are intimately involved in the detail of all competitions and that of England and Wales where they may provide the final tier of approval within the Commission. There are considerable differences in the scale of appointments in the two jurisdictions.

In Scotland where there has been a Judicial Appointments Board since 2002, there were no provisions for external investigation of complaints until legislation in 2010 provided for such complaints to be considered by the Scottish Public Services Ombudsman.

All the three Judicial Appointments Commissions/Boards in the United Kingdom have Commissioners drawn from different sectors (the judiciary, the legal professions and non legally qualified persons) and who appear to have been appointed in different ways. For example, non legally qualified Commissioners tend to come through publicly advertised processes whilst this does not appear to be the case for judicial and legal members. However there is a responsibility for all these individual Commissioners with different experiences and perspectives to work together as part of a unitary Board and engender confidence in the appointments process. As with other public bodies the Commission must take value for money considerations into account. This means that selection processes should be proportionate but must have robust audit trails in order to promote confidence that appointments are being made on merit and in a considered fashion.

Diversity should be an integral component of the appointments process. I draw on my own experience as a member of the Judicial Studies Board over a decade ago when I chaired the panel which drafted the Equal Treatment Bench Book that was circulated to the judiciary at all levels. Then (as now) a connection exists with human rights, access to justice and confidence in the administration of justice.

All the complaints that I have considered up to the present time have related to competitions that were initiated before the devolution of policing and justice functions to the Northern Ireland Assembly, so that draft and final reports have been sent to the Lord Chancellor and Lord Chief Justice (in his capacity as Chair of the Commission) and as required by the legislation.

My remit is to consider individual complaints only and I have no audit role analogous to that of the Commissioner for Judicial Appointments whose role predated the Ombudsman position.

I would be pleased to assist the Committee further if that would be helpful.

Karamjit Singh CBE
Northern Ireland Judicial Appointments Ombudsman
February 2012

The Law Society of Northern Ireland

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Introduction

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitors' profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,400 solicitors working in some 540 firms, based in over 74 geographical locations throughout Northern Ireland. Members of the Society represent private clients in legal matters. This makes the Society well placed to comment on policy and law reform proposals.

In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, the Society is keen to ensure that its voice is heard. The solicitors' profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is well placed to assess the practical out workings of policy proposals.

February 2012

1.1 The Society welcomes the opportunity to comment on the Committee for Justice Review into arrangements for the appointment and removal of judicial office holders. The judiciary in Northern Ireland are respected for their impartiality and their experience and skill in dealing with complex cases. It is important that the judiciary are supported by an appointments system that enhances the integrity and independence of the judiciary and inspires public confidence.

1.2 An independent judiciary is an essential element of a democratic society, underpinned by the rule of law. The judiciary is responsible for making independent decisions of political, social and economic importance. Whilst it is fundamentally important that members of the judiciary are able to take their decisions free from any undue political interference, it is appropriate that there is an element of democratic accountability in the way in which members of the judiciary are appointed to ensure public confidence in the standards and merit of the judiciary.

Judicial Appointments Process

1.3 The Society takes an active interest in the judicial appointments process and regularly makes representations to the Northern Ireland Judicial Appointments Commission (NIJAC) regarding the experience of solicitor applicants. The Committee will be aware that there is a view that the judicial appointments process favours the skills and experience of members of the Bar over the skills and experience of members of the solicitors' profession. Whilst there are a number of further initiatives that could be undertaken, over recent years the Society has worked with NIJAC to ensure the assessment methodologies used in the judicial appointments process take proper account of the expertise and experience of solicitors. The Society would like to see greater acknowledgement for skills in drafting legal agreements, the

provision of complex legal advice to clients and case/practice management. The Assembly Research Paper refers to another widely held view that the appointment methodologies used by NIJAC disadvantage applicants who are not from a public service background. This is accurate and again this is an issue which the Society is working with the NIJAC on.

1.4 Ensuring that the judicial appointments process is open and transparent and takes account of the full range of skills and experiences which make one suitable for judicial office will assist in ensuring a diverse judiciary. The Committee will be familiar with the work of the Advisory Panel on Judicial Diversity in England & Wales. Baroness Neuberger, the chairwoman of the Advisory Panel, recently emphasised that encouraging solicitors to apply for judicial appointments is absolutely key to ensuring judicial diversity. The Committee will wish to bear this in mind when considering judicial diversity.

Operation of the Amendments

3.1 The Society has no specific comments to make regarding the operation of the amendments introduced by way of the 2009 Act. However, the Society wishes to emphasise the fundamental importance of judicial independence. There is much debate as to whether the current arrangements for appointing members of the judiciary throughout the United Kingdom are sufficiently independent of the Executive. The Society notes the suggestion contained in the Ministry of Justice consultation paper 'Appointments and Diversity' that the Lord Chief Justice of England & Wales assume certain responsibilities relating to the appointment of members of the judiciary in England & Wales from the Lord Chancellor. As identified in the research paper, unlike in England & Wales, the Lord Chancellor no longer has the authority to ask the NIJAC to reconsider a recommendation for appointment. The Society's position is that the independence of the judicial appointments process underscores the independence of the judiciary and it is of fundamental importance that there is no interference by any member of the Government or Executive. It would therefore be inappropriate for a member of the Executive or Government to be empowered to require a judicial appointments body to refuse or re-consider a recommendation.

3.2 In line with developments in England & Wales it is in the best interests of the independence of the judiciary that there is no power to require an appointing body to reconsider a recommendation. However, to ensure confidence in the overall appointments process it is important that there is some form of political accountability for the independence and integrity of the appointments process including the equality of the process that does not compromise operational decision making on individual appointments.

4.1 The Society remains willing to assist the Committee for Justice in any way possible as it takes forward its review.

Lord Chancellor and Secretary of State for Justice

Ministry of JUSTICE

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Christine Darrah
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5 March 2012

Dear Ms Darrah,

REVIEW OF JUDICIAL APPOINTMENTS IN NORTHERN IRELAND

Thank you very much for your letter of 3 February seeking my views.

The changes introduced in 2009 had the effect of transferring some appointment processes to the Northern Ireland Judicial Appointments Commission. They also removed the previous position whereby the Lord Chancellor could ask the NIJAC to review its choice and clarified that The Queen's power to appoint a person to a listed judicial office is exercisable on the recommendation of the Lord Chancellor.

I have no specific comments to make on these changes that have been in operation for a relatively short time but I would like to draw the Committee's attention to my recent consultation paper on judicial appointments and diversity and the key principles it contains. Our proposals covered all fee-paid and salaried judicial office holders in the Courts and Tribunals of England and Wales, together with the UK Supreme Court. Of particular interest to you will be our proposals in respect of the Prime Minister where we are suggesting that we remove his role and proposals that extend part time working to the High Court and above and limiting the period of fee paid service to a maximum of three terms of five years.

Our consultation closed on 13 February. We will issue our formal response in April on the consultation proposals and the findings of the Lords Constitution Committee inquiry into judicial appointments process which we expect to appear in March.

I will ensure that our response is copied to you as soon as it is available and I look forward to seeing your report in due course.

KENNETH CLARKE QC MP

Lord Chief Justice, Chairman of the Northern Ireland Judicial Appointments Commission

Laurene McAlpine
Principal Private Secretary

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16 February 2012

Dear Ms Darrah

Review of Judicial Appointments and Removals

Thank you for your letter of 3 February which was addressed to the Lord Chief Justice.

I enclose written evidence on behalf of the Chief Justice who as you know is Chairman of the Northern Ireland Judicial Appointments Commission. The Commission will not therefore be submitting any separate evidence.

I understand that both the Lord Chief Justice and NIJAC may be invited to give oral evidence to the Committee on either 1 or 8 March. Given the Chief Justice's dual role we think, if the Committee is content, it would be sensible to combine that evidence in one session. As well as the Chief Justice the other witnesses would be Edward Gorringe (Chief Executive of NIJAC) and myself. I hope the Committee would find that acceptable.

I am sure Committee members will appreciate that the Chief Justice will not be able to answer questions about any individual judicial appointment scheme nor will he want to comment on policies which are a matter for Ministers or which would compromise judicial independence. Subject to that the Chief Justice would welcome the opportunity to assist the Committee's deliberations if the members would find that helpful

I look forward to hearing from you.

Yours sincerely

Laurene McAlpine

Ms Christine Darrah
Clerk to the Commission for Justice
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NIJAC evidence to

Justice Committee

February 2012

Index

1. Introduction and Summary

1.1 The Justice Committee has invited evidence on its review of the judicial appointment and removal provisions made by the Northern Ireland Act 2009.

1.2 NIJAC is an independent non-Government body responsible for judicial appointments in Northern Ireland. It is chaired by the Lord Chief Justice and has a mix of judicial, legal and lay members.

1.3 It has a statutory remit to select, and recommend for appointment or select and appoint, persons for judicial office solely on the basis of merit.

1.4 NIJAC also has a statutory duty to engage in a programme of action to ensure that the Northern Ireland judiciary is reflective of society and that the widest possible range of people are available for selection and appointment.

1.5 NIJAC's sponsoring department was originally the Northern Ireland Court Service but on devolution sponsorship became the responsibility of the Office of the First Minister and the Deputy First Minister (OFMDFM).

1.6 There is a varied and wide range of judicial posts to which NIJAC recruits i.e. legal and lay/ordinary and posts which require other experience outside the legal profession i.e. land valuation, medical, finance, HR and health and social care (58% are non legal posts).

1.7 Since June 2005, NIJAC has run 43 recruitment campaigns. There have been 254 appointments to judicial office; 110 legal offices, 20 medical and 124 others.

1.8 In addition, NIJAC has overseen 551 judicial appointment renewals.

1.9 NIJAC has developed and maintained a judicial equity monitoring database, plus mechanisms for collating and analysing feedback, to inform the judicial appointments process and the programme of action.

1.10 It has also commissioned research into the barriers and disincentives to applying for judicial office and undertakes regular benchmarking exercises in relation to other jurisdictions organisations, to ensure awareness and best practice.

1.11 In relation to equity monitoring:

53% of judicial officers declared a Protestant community background, 41% declared a Catholic background and 6% stated that they were from neither;

1.35% of current NI judicial office holders have declared a non-white ethnic background.

43% of the judiciary are women (although there are no women in on the High Court bench).

1.12 To ensure the merit principle is adhered to and that the appointments process is open and transparent, NIJAC has developed a generic Judicial Selection Framework which can be tailored to the specific requirements of the judicial office to which an appointment is to be made.

1.13 A range of assessment and selection methods have also been developed i.e. role plays, case studies, shortlisting tests, to ensure robustness, transparency and openness in the judicial appointments process.

1.14 Given Northern Ireland's demographics and smaller jurisdiction, NIJAC recruits on a competition-by-competition basis. Typically, it does not routinely retain reserve lists or undertake 'batch recruitment exercises',

as is the practice in England & Wales and Scotland. This approach helps to ensure that the applicant pool is not limited.

1.15 In addition, again due to a smaller jurisdiction and NIJAC's statutory duty to ensure the widest possible range of people are available for selection, NIJAC does not restrict recruitment to substantive office to those already holding fee-paid judicial office (sometimes referred to as deputy judges).

1.16 NIJAC has in place a robust programme of action and undertakes specific tailored outreach (Competition Outreach Plans) and general outreach to the legal and medical profession, other professional bodies, law students and civic society.

1.17 Commissioners, under the Chairmanship of the Lord Chief Justice and Head of the Judiciary of Northern Ireland, carry out their work ensuring NIJAC fulfils all of its statutory obligations, free from any improper influence or interference.

NIJAC's Statutory Powers and Duties

2. The Justice (NI) Act 2002 (as amended by the Justice (NI) Act 2004) set out NIJAC's key responsibilities.

- To conduct the appointments process and to select and recommend for appointment in respect of all listed[1] judicial appointments up to, and including, High Court Judge.
- To select individuals for appointment solely on the basis of merit.
- To engage in a programme of action to secure, so far as it is reasonably practicable to do so, that appointments to judicial office are reflective of the community in NI.

[1] These listed offices are set out in Schedule 1 of the 2002 Justice Act (approximately 680 judicial offices including many of NI's Tribunal appointments).

- To engage in a programme of action to secure, as far as it is reasonably practicable to do so, that a range of persons reflective of the community in NI are available for consideration by the Commission whenever it is required to recommend a person for appointment to a listed judicial office.

- To publish an annual report setting out the activities and accounts for the period.

3. The 2009 Act extended NIJAC's statutory duties so that:-

- NIJAC is not only a **recommending** body in respect of appointments made by the Queen, but also an **appointing body** in respect of other appointments. (The different types of appointment are at Annex A).

  - It is empowered to –

    - agree with the DoJ the maximum number of persons who may hold a judicial office at any one time;

    - agree legislative change governing the maximum number of judicial offices;

    - decide elements of terms and conditions for certain judicial offices;

  - a Lay Commissioner could be asked to sit on a statutory tribunal to consider the removal of a member of the judiciary from office. Such a tribunal might be convened by the Lord Chief Justice or by the Judicial Appointments Ombudsman for NI.

Commissioners

4. The Commission is chaired by the Lord Chief Justice and its other members are appointed by FM/dFM in accordance with the Justice (NI) Act 2002 comprising:-

- five judicial members nominated by the Lord Chief Justice (to include a Lord Justice of Appeal, a judge of the High Court, a county court judge, a district judge (magistrates' courts) and a lay magistrate);
- two legal members (to include a barrister nominated by the General Council of the Bar of NI and a solicitor nominated by the Law Society of NI); and
- five lay persons.

5. NIJAC's Commissioners have an expansive role in that, they not only serve on Selection Committees in relation to judicial appointments, but they are also responsible for strategic direction, policy decision making, governance and finance.

6. In addition Commissioners may be asked to sit on other judicial appointment schemes for example to the UK Supreme Court or the European Court of Human Rights.

Staff and Budget

7. NIJAC has an annual budget of £1,463,910 and 18 staff, a number of whom work part time and term time. It is based at Headline House in Belfast.

Selection Process

8. Given NI's demographics and smaller jurisdiction, NIJAC will generally recruit on a competition-by-competition basis (unless there is a clear

business reason to the contrary). This approach assists in underpinning the merit principle and also allows for those who may have just attained the appropriate eligibility requirements to apply for judicial office. For example, if a competition was not run each time a need arose but someone was appointed from a reserve list, this would be limiting the applicant pool especially where e.g. fewer females had the requisite years' standing for a particular post.

9. NIJAC does not restrict recruitment to legal substantive posts to fee-paid judicial office holders nor retain reserve lists or engage in 'batch recruitment exercises'.

10. Since June 2005, NIJAC has run 43 recruitment campaigns. There have been 254 appointments to judicial office; 110 legal offices, 20 medical and 124 others. In addition, NIJAC has overseen 551 judicial appointment renewals

11. Commissioners have continually strived to ensure that NIJAC fulfils all of its statutory responsibilities. An open and transparent system for judicial appointments enhances public confidence in the justice system as a whole.

12. For each competition a Selection Committee (representative of the Commission) will be established. The Committee will agree the shortlisting criteria, assessment methods (which may include e.g. role playing and case studies) and interview questions.

13. Regardless of the route to application and the assessment methods to be used – NIJAC uses a Judicial Selection Framework for assessment and selection across all competitions. This Framework has been well researched and tested and applicant feedback would indicate that it has become embedded, and accepted, in the judicial appointments process. It can also be tailored to reflect the requirements of the specific office under recruitment.

14. The Framework consists of knowledge requirements and four areas of competence: analysis/decision making, leadership/management, communication and understanding people and society.

15. NIJAC has its own published complaints procedure, and ultimately, an individual can go to the NI Judicial Appointments Ombudsman.

16. In addition to the above, each competition is also evaluated at each stage of the appointments process and an evaluation report is produced for each competition.

Reflective of the Community

17. Out of approximately 670 judicial officeholders (42% of which are legal posts) the following appears from out database and survey of officeholders.

Gender

18. Approximately 43% of the judiciary are women:-

- almost a quarter of County Court Judges and District Judges Magistrates' Courts) are women;
- a third of Masters are women;
- half of District Judges (Civil) are women;
- a third of Coroners are women;
- a quarter of 10 legal tribunal offices are held by women;
- a third of tribunal medical members are women; and
- over half of the lay magistracy are women.

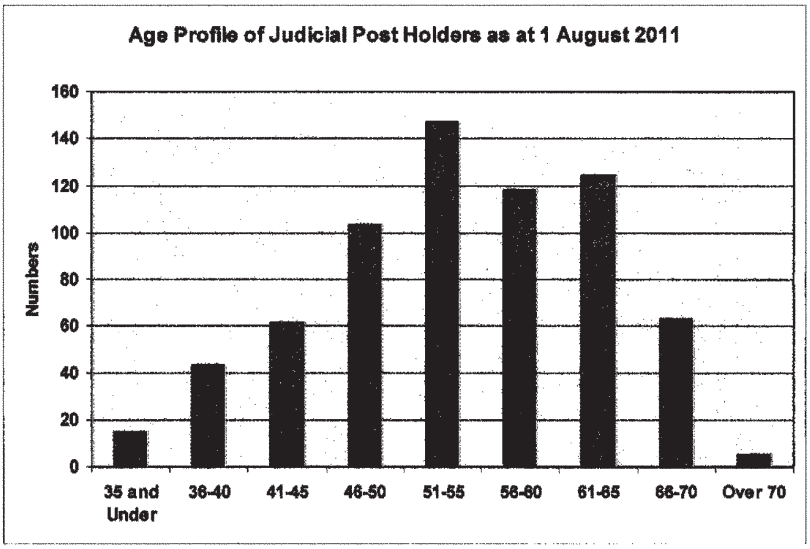
To date there are no women serving on the High Court Bench. This may be indicative of other 'professions' e.g. low female representation within the legal profession itself (partnership level within law firms and at QC level).

Community Background

19. Approximately 53% of the judiciary have a Protestant Background, 41% declared a Catholic background and 6% stated that they were from neither.

Age Profile

20. Approximately 54% of judicial post holders are aged 55 and under (see below).



Ethnicity

21. Approximately 1.35% of the judiciary have declared a non-white background. While all legal judicial office holders (substantive and fee-paid) are white, 7 fee-paid judicial medical members declared a non-white ethnic background and one 'other' judicial office holders declared a Chinese ethnic background.

Outreach and Programme of Action

22. In conjunction with establishing a judicial equity monitoring database, NIJAC also commissioned a research project into the 'Barriers and Disincentives to Judicial Office'. The research findings were published in October 2008 and informed NIJAC's programme of action. Measures undertaken in that programme include:

- the introduction of a judicial shadowing scheme (launched in October 2009);
- publication of a Guide to Judicial Careers which contains interviews with judicial post holders, deals with some of the myths and misconceptions about judicial office and highlights the range of work available; and
- the launch of the NIJAC website (www.nijac.gov.uk) which is regularly updated with vacancies, guidance, appointments, renewals and tips re applying (weblog/evaluation reports have indicated that it has now become the primary source of information for judicial vacancies and news).

During 2010/2011, NIJAC contributed to or hosted 16 events reaching over 1,200 people across various legal and other professional organisations (including law students at both under and post graduate level).

Conclusion

23. Since NIJAC's inception in June 2005 there is now in place in NI:

- an independent judicial appointments body;
- a judicial appointments process that is robust, open and transparent;
- a programme of action to ensure that the widest possible range of people are available for selection, to help to achieve a NI judiciary that is reflective of the community it serves;

10

- a judicial equity monitoring database that allows for the identification of any under-representation;
- a generic Judicial Selection Framework which can be tailored to the specific requirements of the post under recruitment and a range of assessment/selection methods to ensure the judicial appointments process is open and transparent; and
- mechanisms which allow for continual evaluation/analysis to further improve/refine the judicial appointment process and inform the programme of action.

24. It is positive to note that community background is not an issue and that there is an increasing number of women being appointed to judicial office. There is also a positive picture emerging in terms of the age profile of the judiciary in NI.

25. NIJAC Commissioners are well aware that more work needs to be done in encouraging applications from women for the higher court tiers but the issue of low women representation at senior levels is replicated across other areas e.g. the legal profession itself, public appointments etc.

26. NIJAC continues to work with key stakeholders i.e. judiciary, Bar Council, Law Society, Northern Ireland Courts and Tribunals Service etc to influence those policies which may impact upon NIJAC's statutory remit to ensure the NI judiciary is reflective of the society it serves and that the widest possible range of people is available for judicial selection.

27. The Commission also work closely with the Northern Ireland Courts and Tribunals Service in identifying vacancies at relevant judicial tiers.

28. The Commission also has an effective working relationship with its sponsor department FM/dFM in relation to finance and governance. FM/dFM does not take any role in relation to judicial appointments.

29. NIJAC carries out its work, under the Chairmanship of the Lord Chief Justice who is also Head of the Judiciary in NI and free from any political influence.

APPENDIX A

Appointments made by Her Majesty the Queen which will continue to be made on the recommendation of the Lord Chancellor following selection by the Northern Ireland Judicial Appointments Commission:

- Judge of the High Court;
- County Court judge;
- District Judge (Magistrates' Court);
- Chief Social Security Commissioner for Northern Ireland;
- Social Security Commissioner for Northern Ireland;
- Chief Child Support Commissioner for Northern Ireland; and
- Child Support Commissioner for Northern Ireland,

Appointments which will be made by the Northern Ireland Judicial Appointments Commission:

- Deputy County Court Judge;
- Temporary High Court judges;
- Deputy District Judge (Magistrates' Courts);
- Coroners and deputy Coroners;
- Statutory Officers;
- Deputy and temporary Statutory Officers;
- Deputy Social Security Commissioner for Northern Ireland;
- Deputy Child Support Commissioner for Northern Ireland;
- President of Appeal Tribunals;
- Panel of Persons to Act as Members of Appeal Tribunals;
- Chairman of an Appeal Tribunal for the purposes of the Adoption (NI) Order 1987;
- Member of Panel of Chairmen of Industrial Tribunals;
- President and Vice President of the Industrial Tribunals and the Fair Employment Tribunal and Chairman of the Fair Employment Tribunal;
- Acting President and Acting Vice President of the Industrial Tribunals and the Fair Employment Tribunal;
- President and other Members of the Lands Tribunal for Northern Ireland;
- deputy President and Temporary Members of the Lands Tribunal for Northern Ireland;
- President and Panel of Persons to serve as Chairman of the Special Education Needs Tribunal;
- Members and Chair of Tribunal established under section 91 of the Northern Ireland Act 1998;
- Members of the Mental Health Review Tribunal for Northern Ireland;
- Lay Magistrates;
- Member of the Panel of persons who may serve as Chairmen of a tribunal established for the purposes of the Deregulation (Model Appeal Provisions) Order (Northern Ireland) 1997;
- Chairman of a Tribunal appointed under Schedule 3 to the Misuse of Drugs

Act 1971 in its application to Northern Ireland; • Member of a Tribunal appointed under paragraph 2(1) of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland;
• President or Deputy President of Pensions Appeal Tribunals appointed under paragraph 2B of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland;
• Chairman of the Plant Varieties and Seeds Tribunal for the purpose of proceedings brought before it in Northern Ireland;
• Member of the panel of persons to act as Chairmen of Reinstatement Committees sitting in Northern;
• President of the Northern Ireland Valuation Tribunal;
• Member of the Northern Ireland Valuation Tribunal;
• Member of Panel of Persons who may serve as Chairmen of the Care Tribunal established by Article 44 of the Health and Personal Social Services (Quality, Improvements and Regulation) (Northern Ireland) Order 2003;
• President, legal and other members of the Charity Tribunal;
• Adjudicator and Chairman appointed under the Criminal Injuries Compensation (NI) Order 2003;
• Adjudicator appointed under the Article 29 of the Traffic Management Order; and
• Chairman of an Appeal Tribunal for the purposes of the Adoption (NI) Order 1987.

Traditional Unionist Voice

Northern Ireland Assembly

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Ref:JA/SM/Justice/5295

Clerk to the Committee for Justice
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BT4 3SG

14 February 2012

Dear Ms Darrah,

Thank you for your letter of 3rd February seeking views relevant to your committee's review of the arrangements for the appointment and removal of judicial office holders.

The TUV position is that the changes made by the 2009 Act should remain undisturbed, save that the function of overseeing NIJAC's governance and finance should be passed from OFMDFM to the Department of Justice, in that this is the natural home for these powers.

There should be no question of reviving the framework anticipated in the Review of 2000 and reflected in the 2002 Act, as amended by the 2004 Act, whereby the dysfunctional and highly politicised office of OFMDFM would be empowered to meddle in judicial affairs, including appointments and removals. To this we remain unalterably opposed.

Yours sincerely,

James H Allister QC MLA

Appendix 4

NI Assembly Research and Information Service Papers

Research and Information Service
Research Paper

Paper 19/12 11 January 2012 NIAR 954-2011

Ray McCaffrey & Fiona O'Connell

Judicial appointments in Northern Ireland

This paper looks at the process of judicial appointments in Northern Ireland, including the changes that have taken place since the Review of Criminal Justice following the Belfast (Good Friday) Agreement. It compares the process in Northern Ireland with that operating in the rest of the UK and in the Republic of Ireland. It also describes the processes in Australia and Canada.

Executive summary

Judicial appointments

The process of judicial appointments in the UK has undergone significant change in the last decade. Legislation has sought to remove the executive from the appointments process in an attempt to increase its transparency and accessibility and to encourage a judiciary more reflective of wider society. The impetus for change in Northern Ireland came from the Review of Criminal Justice report in 2000 which recommended the setting up of an independent commission to oversee appointments from the level of High Court judge downwards.

The Justice (Northern Ireland) Acts of 2002 and 2004 established the Northern Ireland Judicial Appointments Commission (NIJAC) with a statutory remit to ensure that appointments to judicial office were based solely on merit. NIJAC was established in June 2005 and is an independent Non-Departmental Public Body. It performs a similar role to that of the Judicial Appointments Commission in England and Wales established under the Constitutional Reform Act 2005. The Northern Ireland Act 2009 extended NIJAC's statutory duties further in that NIJAC became not only a recommending body in respect of Crown appointments, but also an appointing body in respect of non-Crown appointments.

In relation to Crown appointments, NIJAC is responsible for selecting a person for appointment and must notify the Lord Chancellor when the recommendation has been made. The Lord Chancellor must, as soon as is reasonably practicable, recommend the selected person for the office in question.

Furthermore, NIJAC must be consulted on the appointments of the Lord Chief Justice and Justices of Appeal.

The 2009 Act provided for certain functions relating to the office of judicial office holders to be exercised by NIJAC rather than the First and deputy First Ministers as had previously been envisaged under the Justice (Northern Ireland) Act 2002. In addition, removal of listed judicial office holders became primarily the responsibility of the Lord Chief Justice, again rather than the First and deputy First Ministers.

The new Schedule 3 of the 2002 Act (as inserted by the 2009 Act) did not include a provision for the Lord Chancellor to ask NIJAC to reconsider their selection of a candidate. This amended the previous position when, under the 2002 Act, NIJAC would have made a selection for the Lord Chancellor to consider and he could ask NIJAC to review its choice.

Gender and community balance

Research commissioned by NIJAC in 2008 showed that most people who went through an appointments process were happy with the systems put in place by NIJAC and there was a belief that it had led to an increase in female appointments to judicial office. The under-representation of women had been highlighted in the Review of Criminal Justice. NIJAC said that the findings from the research would be used to inform its future work.

Complaints

The Northern Ireland Judicial Appointments Ombudsman is responsible for handling complaints about the process of judicial appointments, but not the conduct of judicial office holders. This is the responsibility of the Lord Chief Justice. The Ombudsman has dealt with five complaints since the office was established in 2006. In England and Wales, the Office for Judicial Complaints supports the Lord Chancellor and Lord Chief Justice in investigating complaints about judicial conduct.

Republic of Ireland

The Judicial Appointments Advisory Board is responsible for identifying suitable candidates for appointment to judicial office. Recommendations are made to the Government (Minister for Justice), but the Government is not bound to accept the Board's candidates.

Other jurisdictions

The Executive still plays a role in approving judicial appointments at the federal level in Canada and Australia, although mechanisms are in place to try to ensure a transparent appointments process. Australia has recently introduced reforms so that all appointments are based on merit, but stopped short of establishing an independent body to oversee the process. In both countries, the recommendations put forward to the Executive are subject to approval by not only the Cabinet but also subsequently the Governor General.

Contents

1 Introduction

This research paper has been prepared to inform the Committee for Justice's review of the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009. The review is required by Section 29C of the Northern Ireland Act 1998 as amended by Schedule 6 of the Northern Ireland Act 2009 and as set out in Standing Order 49A. The Committee must report on its review by 30 April 2012 and include in its report any recommendations it has for changes to the way in which judicial office holders are appointed and removed[1].

The paper also looks at the process of judicial appointments in Northern Ireland and compares it with the processes operating in the rest of the UK and Republic of Ireland. It also describes the processes followed in Canada and Australia.

2 Northern Ireland

This section looks at the background to changes to the process of judicial appointments in Northern Ireland dating back to the Review of Criminal Justice in 2000. One of the key recommendations of this Review was the establishment of a judicial appointments commission for Northern Ireland, and the role and remit of this body is outlined below. Furthermore, it examines the legislative context within which changes to the process of judicial appointments took place.

Review of Criminal Justice

In Northern Ireland, the impetus for change was the Criminal Justice Review Group established under the Belfast (Good Friday) Agreement. Its report *Review of Criminal Justice* in 2000 recommended, among other measures, a Judicial Appointments Commission which would have responsibility for "organising and overseeing…judicial appointments from the level of High Court judge downwards"[2]. The report highlighted concerns about the 'unrepresentative nature of the bench in Northern Ireland in terms of community background', with a 'need to secure Nationalist representation amongst the judiciary'[3]. Concerns were also expressed about the lack of women, people from ethnic minorities and those from lower socio-economic groups in judicial roles. The Justice (Northern Ireland) Act 2002 (the 2002 Act) gave effect to the recommendations in the Review of Criminal Justice.

Northern Ireland Judicial Appointments Commission

NIJAC is an independent executive Non-Departmental Public Body and has a statutory duty under section 5(8) of the 2002 Act to ensure that appointments to judicial office are based solely on merit.

The 2002 and 2004 Justice (Northern Ireland) Acts set out NIJAC's key statutory responsibilities:

- To conduct the appointments process and to select and recommend for appointment in respect of all listed judicial appointments up to, and including, High Court Judge
- To recommend individuals solely on the basis of merit

1 Standing Orders of the Northern Ireland Assembly

2 'Review of the Criminal Justice System in Northern Ireland', Criminal Justice Review Group, March 2000: http://www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf retrieved 9 February 2011

3 As above

- To engage in a programme of action to secure, so far as it is reasonably practicable to do so, that recommendations for appointments to judicial office are reflective of the community in NI
- To engage in a programme of action to secure, as far as it is reasonably practicable to do so, that a range of persons reflective of the community in NI are available for consideration by the Commission whenever it is required to recommend a person for appointment to a listed judicial office
- To publish an annual report setting out the activities and accounts for the period

The 2009 Act extended NIJAC's statutory duties further in that NIJAC became not only a recommending body in respect of Crown appointments, but also an appointing body in respect of non-Crown appointments.

In addition, the 2009 Act also gave NIJAC a say over the judicial complement and determining certain elements (non-financial) of some terms and conditions. NIJAC's new post devolution responsibilities can be summarised as follows[4]:

- agreeing with the Department of Justice the maximum number of persons who may hold a judicial office at any one time;
- agreeing legislative change governing the maximum number of judicial offices;
- deciding elements of terms and conditions for certain judicial offices;
- supporting the Department of Justice in judicial succession planning; and
- providing Commissioners to participate in 'removal tribunals' convened by the Lord Chief Justice or the Judicial Appointments Ombudsman for NI.

The Justice (Northern Ireland) Act 2002 Act provided for the First Minister and deputy First Minister to appoint Commissioners.

What are Judicial appointments?

In its submission to the House of Lords inquiry on judicial appointments, NIJAC stated that:

There is a varied and wide range of judicial posts to which NIJAC recruits i.e. legal and lay/ ordinary and posts which require other experience outside the legal profession i.e. land valuation, medical, finance, HR and health and social care (58% are non-legal posts).

Since inception in June 2005, NIJAC has recommended 234 people for judicial appointment across 43 recruitment campaigns: 88 legally-qualified, 24 medically qualified and 122 others. As at the 1 August 2011, there were 679 judicial post holders – 43% are women. In addition, NIJAC has also overseen 507 judicial appointment renewals[5].

4 NIJAC submission to House of Lords Inquiry on Judicial Appointments, September 2011

5 NIJAC submission to House of Lords inquiry into Judicial appointments

Crown appointments (appointments by the Queen)	Non-Crown appointments (by NIJAC)
These are mainly full-time substantive posts in various Courts and Tribunals throughout Northern Ireland e.g. High Court Judge, County Court Judge, District Judge, District Judge (Magistrates' Courts) and Chief Social Security Commissioner/Chief Child Support Commissioner[6].	These are mainly fee-paid posts in various Courts and Tribunals throughout Northern Ireland e.g. Deputy District Judge (Magistrates' Courts), Deputy Statutory Officers, fee-paid members of Tribunals including: Appeal Tribunals, Northern Ireland Valuation Tribunal, Health & Safety Tribunal, Charity Tribunal for Northern Ireland, Industrial Tribunals and Fair Employment Tribunal, Northern Ireland Traffic Penalty Tribunal for Northern Ireland etc. It should also be noted that Tribunal membership can consist of legal professionals and people from other professional backgrounds i.e. medical, finance, HR and health and social care[7].

The Lord Chief Justice and Lords Justices of Appeal are appointed by the Queen on the recommendation of the Prime Minister who must consult with the current Lord Chief Justice and NIJAC before making a recommendation.

The legislative context: the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004

The purpose of the Justice (Northern Ireland) Act 2002 was to implement the recommendations of the Review of Criminal Justice. The Act provided for the establishment of the Northern Ireland Judicial Appointments Commission (NIJAC) which was established in June 2005. In addition, the Act amended the law relating to the judiciary and courts in Northern Ireland, including provision for the removal of judges, changes to eligibility criteria, a new oath and provisions to make the Lord Chief Justice head of the judiciary in Northern Ireland.

The 2002 Act provided that NIJAC would make recommendations to the First and deputy First Ministers on the appointment of judicial office holders from the High Court downwards.

The Justice (Northern Ireland) Act 2004 transferred functions of the First and Deputy First Ministers in relation to the Commission to the Lord Chancellor. These functions were the power to make appointments, or recommendations for appointment, to listed judicial offices. This allowed NIJAC to be brought into operation before the devolution of responsibility for criminal justice. Schedule 1 amended Part I of the 2002 Act to effect this transfer of functions. The Explanatory Memorandum to the 2004 Act stated: "On devolution of criminal justice, these functions will be transferred back to the First and Deputy First Ministers, acting jointly, as provided for in the 2002 Act".[8]

Northern Ireland Act 2009

The Northern Ireland Act 2009 made amendments to the process of judicial appointments set out in the 2002 and 2004 Acts, giving NIJAC additional responsibilities.

Schedule 2 of the Act replaces Section 12 of the Judicature (Northern Ireland) Act 1978, inserting new sections 12 and 12A relating to the appointment of judges to the High Court and Court of Appeal.

6 NIJAC Information leaflet

7 As above

8 Explanatory Memorandum to the Justice (Northern Ireland) Act 2004

The new section 12 of the 1978 Act inserted by Schedule 2 of the 2009 Act provides for the appointment of the Lord Chief Justice and Lords Justices of Appeal by the Queen on the recommendation of the Prime Minister. The Prime Minister must consult the current Lord Chief Justice and NIJAC before making a recommendation.

The new section 12A of the 1978 Act provides for the appointment of High Court judges by the Queen.

The new sections 12B and 12C deal with tenure of office of the Lord Chief Justice, Lord Justices of Appeal and certain High Court Judges. These sections also provide for the removal of office. The Queen may remove one of these judges on address by both Houses of Parliament. Such an address can only be moved if a tribunal has been convened and recommended the removal from office on grounds of misbehaviour. The 2009 Act also provides that the tribunal must include a lay member of NIJAC.

Schedule 3 of the Northern Ireland Act 2009 made a number of further changes to the appointment of judicial office holders. Schedule 3, paragraphs 5 to 7 amend sections 6 to 8 of the 2002 Act. It provides that the power to remove a person from a listed judicial office is exercisable by the Lord Chief Justice. Previously, the 2002 Act provided that the power was exercisable by the First Minister and Deputy First Minister. The First Minister and Deputy First Minister could act only on the basis of a tribunal recommendation and only on agreement of the Lord Chief Justice. Under the 2009 Act, removal of a listed judicial office holder requires a recommendation to have been made by a specially convened tribunal. The Lord Chief Justice has discretion not to remove or suspend someone even if a recommendation has been made but must notify the person and the tribunal and if a tribunal was convened by the Northern Ireland Judicial Ombudsman, the Ombudsman of the reasons for not removing or suspending the person.

Schedule 3, paragraph 13 of the 2009 Act inserted a new Schedule 3 into the 2002 Act. This schedule deals with appointments to listed judicial offices. Listed judicial offices are those offices listed in schedule 1 of the 2002 Act up to and including the High Court.

Part 1 of the new Schedule 3 of the 2002 Act (inserted by Schedule 3 of the 2009 Act) deals with the appointment of listed judicial offices appointed by the Queen, known as Crown appointments. The Queen's power to appoint a person to a listed judicial office is exercisable on the recommendation of the Lord Chancellor. NIJAC is responsible for selecting a person for appointment and must notify the Lord Chancellor when the recommendation has been made. The Lord Chancellor must, as soon as is reasonably practicable, recommend the selected person for the office in question. Crown appointments are mainly full time substantive posts in a number of courts and tribunals in Northern Ireland including: High Court Judge, County Court Judge, District Judge, District Judge in Magistrates Court and the Chief Social Security Commissioner and Child Support Commissioner.[9]

Part 2 of the new Schedule 3 inserted in the 2002 Act by Schedule 3 of the 2009 Act deals with appointments made by NIJAC, known as non-Crown appointments.[10] Under the 2009 provisions, NIJAC makes the appointments to these listed judicial offices, differing from the 2002 Act provision where it was envisaged that the power to make appointments to listed judicial offices would be exercised by the First Minister and Deputy First Minister.[11] As highlighted earlier, these functions were transferred under the 2004 Act, from the First and Deputy First Minister to the Lord Chancellor. Appointments made by the Commission are mainly fee paid posts including Deputy District Judge at the Magistrates Court, Deputy Statutory Officers and fee paid members of a number of tribunals[12].

9 http://www.nijac.gov.uk/index/what-we-do/general_information_leaflet_2011_amended_191011.pdf

10 http://www.nijac.gov.uk/index/what-we-do/general_information_leaflet_2011_amended_191011.pdf

11 Explanatory Memorandum to the Northern Ireland Act 2009, para 7; section 5 of the 2002 Act as enacted.

12 http://www.nijac.gov.uk/index/what-we-do/general_information_leaflet_2011_amended_191011.pdf

The 2009 Act provided a role for the Department of Justice in respect of the judicial complement. Part 3 of Schedule 3 of the 2009 Act placed a duty on NIJAC to agree with the Department of Justice the maximum number of persons who may hold a judicial office at any one time. NIJAC, with agreement of the Department, may also revise the determination.

Part 4 of Schedule 3 requires selections to be based solely on merit and requires the Commission to pursue a programme of action to ensure that judicial appointments are reflective of the community in Northern Ireland and that a range of persons reflective of the community are available for consideration by the Commission when selecting a person or recommending for appointment. This reflects provisions inserted in the 2002 Act by the 2004 Act.

Parts 1 and 2 of the new Schedule 3 of the 2002 Act did not include a provision for the Lord Chancellor to ask NIJAC to reconsider their selection. This amended the previous position under the 2002 Act, when NIJAC would have made a selection for the Lord Chancellor to consider and he could ask NIJAC to review its choice.

Paragraphs 5 to 7 of Schedule 3 amended sections 6 to 8 of the 2002 Act so that the removal of listed judicial office holders became primarily the responsibility of the Lord Chief Justice, rather than the First and deputy First Ministers as had originally been anticipated.

Schedule 4 of the 2009 Act transferred the power of the Lord Chancellor under specified enactments to NIJAC the power to appoint certain judicial office holders previously appointed by the Lord Chancellor, including tribunals and to agree with the Justice Department to determine terms and conditions of appointment, including payment of fees and allowances.

Schedule 5 of the 2009 Act makes a number of consequential amendments and transitional provisions to the 2002 Act relating to appointments, removals and investigation of complaints of maladministration initiated that commenced before the 2009 Act came into force.

Changes to the 2009 Act

The Department of Justice Act 2010 (Northern Ireland) makes minor amendments to the 2009 Act and legislation amended by the 2009 Act, mainly to harmonise terminology. The 2010 Act changes references in paragraph 5(2) and 5(3) of the new Schedule 3 of the 2002 Act (itself inserted by the Schedule 3 of the 2009 Act) from “justice department” to “Department of Justice” (Paragraph 14, Schedule to the 2010 Act). The 2010 Act also amends some of the legislation amended by the 2009 Act so as to change references from “justice department” to “Department of Justice”. Paragraph 21 and 22 of the Schedule to the 2010 Act removes certain other specified references to the “justice department” in Schedule 3 and Schedule 4 of the 2009 Act.

The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 omitted paragraph 18 of Schedule 4 of the 2009 Act. This concerns making and control of subordinate legislation and does not affect appointments.

Ministerial involvement in judicial appointments

OFMDFM’s role is one of oversight, ensuring accountability for NIJAC’s governance and finance; it does not have any role in the judicial appointments process. This contrasts with the view of the Criminal Justice Review Group in 2000 which recommended that “On devolution (of policing and justice), political responsibility and accountability for the judicial appointments process should lie with the First Minister and the Deputy First Minister”[13].

The Review also recommended that for all judicial appointments, from lay magistrate to High Court judge, and all tribunal appointments, the Commission should submit a report of the selection process to the First Minister and deputy First Minister together with a clear

13 Criminal Justice Review Group (2000) Review of the Criminal Justice System in Northern Ireland”, para 6.96 http://www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf

recommendation. The First Minister and deputy First Minister would be required either to accept the recommendation or to ask the Commission to reconsider, giving their reasons for doing so; in the event of their asking for a recommendation to be reconsidered, they would be bound to accept the second recommendation[14].

House of Lords Inquiry on Judicial Appointments

In May 2011 the House of Lords Select Committee on the Constitution launched an inquiry into the judicial appointments process for the courts and tribunals of England and Wales and Northern Ireland and for the UK Supreme Court .The Committee is currently in the process of taking evidence. Among the issues the inquiry is seeking to address are:

- Does the judicial appointments process secure an independent judiciary?
- Should Parliament scrutinise judicial appointments?
- How can public understanding of the appointments process be improved?
- Is the system based on merit?
- Does the UK have a sufficiently diverse judiciary?

The consultation asked the following question relating to Northern Ireland: "How would you assess the judicial appointments process in Northern Ireland, in particular in relation to the Northern Ireland Judicial Appointments Board?"

NIJAC submitted its response to the inquiry in September 2011. To date, the final report of the committee has not been published.

Gender and community balance in judicial appointments

According to NIJAC's submission to the House of Lords inquiry:

The overall gender breakdown of the NI judiciary is fairly balanced, out of the 679 judicial office holders 292 are women (43%). To date there are no women serving on the High Court Bench. However, there is a better balance at other tiers:

- overall, over 4 out of 10 judicial office holders are women;
- almost 1 in 4 of County Court Judges and Magistrates' Courts District Judges are women;
- 4 out of 10 legal tribunal offices are held by women;
- a third of tribunal medical members are women; and
- women represent over 50% of the lay magistracy.[15]

Perceptions of the judicial appointments process in Northern Ireland

Since June 2005, NIJAC has recommended 234 people for judicial appointment across 43 recruitment campaigns: 88 legally-qualified, 24 medically qualified and 122 others. Part 1 of Schedule 3 of the Northern Ireland Act 2009 lists the judicial offices under the NIJAC's remit and is reproduced at Annex 1. The website of the Commission sets out clearly the steps involved in the process and an overview of the Northern Ireland process is provided at Annex 2.

In 2008 NIJAC commissioned research[16] to identify potential barriers in the judicial appointments process. The research was carried out primarily via survey followed up with more in-depth discussions with key respondents and in focus groups. Some of the key findings from the research were:

14 Criminal Justice Review Group (2000) Review of the Criminal Justice System in Northern Ireland", para 6.106 http://www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf

15 NIJAC submission to House of Lords September 2011

16 http://www.nijac.gov.uk/index/what-we-do/publications/qub_research__full_version__october_2008.pdf

- Religion was perceived as irrelevant as a factor in applying for judicial posts
- The methodology used by NIJAC to assess candidates…was popular primarily with potential applicants who had a public service background. It was generally viewed suspiciously by other respondents such as barristers in private practice, who were used to being assessed by peers in a professional context. It was recognised that the new system required interview skills when most of these respondents had never been interviewed before
- belief that appointments of women to non-High Court judicial posts under the NIJAC system were being viewed as successful and that these people may become role models for other women wishing to undertake this career route
- NIJAC was generally perceived to be a 'good thing'. Most of those who have close contact with it have been happy with the processing of their application for judicial post…Only those concerned with High Court posts felt that NIJAC was either irrelevant to the process or negatively affected the process
- Concern that given the small scale of the legal profession in Northern Ireland, the consultation process undertaken by the NIJAC would mean that it would become widely known who had been unsuccessful for a post
- Steps could be taken to make the appointments system more appealing to women, in particular to increase the number of female applicants. There were fears among female respondents about fitting in to the judicial culture and one suggestion was the inclusion of female High Court judges within the appointment panels
- Merit was the most important aspect of the appointments process, although few respondents were able to clearly define it. NIJAC, if it wished to encourage a wider professional background in the higher judiciary, should consider what may be done to highlight what it perceives as the requisite elements which make up merit…for each judicial post
- The application process was viewed as fair and open, with minor concerns over the administrative aspects such as form-filling and assessment methods, although there were also problems with consultees leaking information
- There was a disparity of knowledge over the existence, basic purpose and role of NIJAC, especially in the solicitors' profession. It was suggested that NIJAC should be more pro-active in seeking out applicants…outside the greater Belfast area, especially in the west of Northern Ireland.

3 Great Britain

The Labour government elected in 1997 sought to implement fundamental changes to the legal system in England and Wales which culminated in the Constitutional Reform Act 2005. This transferred responsibility of judicial appointments to the independent Judicial Appointments Commission and replaced the Lord Chancellor with the Lord Chief Justice as head of the judiciary: "The…statutory Judicial Appointments Commission has a duty to report to the Lord Chancellor on the selection of judges. It is for the Lord Chancellor to make the appointment or the recommendation for appointment to The Queen. However, in effect, he has only strictly limited powers to challenge the recommendations of the JAC for appointment"[17].

The Constitutional Reform Act was aimed at clarifying the relationship between the three arms of state and increasing the transparency of the system:

17 House of Commons Briefing Paper November 2005

- **Reforming the role of the Lord Chancellor**: the CRA removed him as Head of the Judiciary and Speaker of the House of Lords, a move designed to increase the separation of powers and to enhance the independence of the judiciary
- **Provision for a new Supreme Court**: established as a final appeal court for the UK, with judges no longer in the House of Lords
- **Reform of the system for judicial appointments**: the CRA set up the Judicial Appointments Commission which now has key responsibility for selecting judges, and ensures there is a system of checks and balances in place aimed at ensuring a high quality, independent judiciary appointed solely on merit

Previously, the "Lord Chancellor had a high level of autonomy over recommending judicial appointments, making selections following confidential, informal discussions with senior judiciary. This was a largely closed system and led to accusations that talented people were being excluded without good reason"[18]. The JAC significantly limited the role of the Executive in making judicial appointments. The JAC consists of 15 Commissioners: a lay Chair, five judicial members, two members from the legal professions, a tribunal office holder and a magistrate. The Commissioners are appointed by the Queen on the advice of the Lord Chancellor in accordance with the procedures set out in Schedule 12 of the CRA, which is designed to ensure appointments to the JAC are non-partisan. The appointments process is also regulated by the Commissioner for Public Appointments[19].

The Lord Chancellor retains the right to accept, reject or ask the JAC to reconsider a candidate, but the reasons for doing so are limited and he must provide an explanation in such circumstances[20]. He can only exercise that power once for each candidate and cannot select an alternative candidate[21].

The Lord Chancellor can, however, withdraw a vacancy if he considered the process unsatisfactory, for example in the event of a procedural error. The Constitutional Renewal Bill put forward by the previous Labour government would have removed the Lord Chancellor's discretion to accept or reject a JAC recommendation for appointment to a judicial office below the High Court.

In November 2011 the Ministry of Justice launched a consultation on appointments and diversity relating to the judiciary[22]. Proposals for change include:

- whether the Lord Chancellor should transfer his decision-making role to the Lord Chief Justice in relation to appointments to the Courts and Tribunals below the level of Court of Appeal or High Court;
- whether the role of the Lord Chancellor should have more meaningful involvement in appointments for the most senior judiciary in England and Wales (Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lords Justices of Appeal) as well as appointments for the President of the UK Supreme Court;
- the role of the Prime Minister in judicial appointments;
- the composition and balance of independent responsibilities on selection panels; and
- the role of the Judicial Appointments Commission.

The closing date for responses is 13 February 2012.

18 The Governance of Britain: Judicial Appointments, October 2007

19 As above

20 House of Commons Justice Committee Appointment of the Chair of the Judicial Appointments Commission, January 2011

21 Judicial Appointments Commission Selection Policy http://jac.judiciary.gov.uk/about-jac/9.htm

22 Ministry of Justice 'A Judiciary for the 21st Century': http://www.justice.gov.uk/consultations/judicial-appointments-cp19-2011.htm

Scotland

Scotland was the first jurisdiction within the UK to introduce an independent body for judicial appointments: the Judicial Appointments Board for Scotland. The Board was initially established by virtue of an executive mandate issued in 2001 by the Scottish Ministers to recommend to the First Minister candidates for judicial office. It became an advisory non-departmental public body on 1st June 2009 under the provisions of the Judiciary and Courts (Scotland) Act 2008. The Board is responsible for recommending individuals for appointment to the following offices: Judge of the Court of Session, Chair of the Scottish Land Court, Sheriff Principal, Sheriff and Part-time Sheriff. The Commission stated that the findings from the research would be used to inform its future work.

4 Complaints handling

Northern Ireland Judicial Appointments Ombudsman

The Constitutional Reform Act 2005 provides the statutory framework for the establishment of the Northern Ireland Judicial Appointments Ombudsman (NIJAO), which is a part-time appointment. Sections 124 to 131 of the Act[23] outline the arrangements for investigating complaints which are made to both the Judicial Appointments Commission and to the Ombudsman respectively and how they are to be reported.

The Ombudsman's remit is to investigate complaints where maladministration or unfairness is alleged to have occurred during the judicial appointments process by the Northern Ireland Judicial Appointments Commission or Committees of the Commission, the Northern Ireland Court Service or the Lord Chancellor.

The Ombudsman does not investigate complaints relating to judicial conduct as these are dealt with by the Lord Chief Justice of Northern Ireland:

> *This difference with the framework as it exists in England and Wales occurs because complaints relating to judicial conduct were identified as a distinct issue in the review of criminal justice, and the current process was formally legislated for in the Justice (Northern Ireland) Act 2002. By contrast, the statutory provision for investigating complaints relating to judicial conduct in England and Wales was established within the Constitutional Reform Act 2005 and included within the remit of the Ombudsman for that jurisdiction[24].*

In the period September 2006 to 31 March 2010, the NIJAO received three complaints about appointments to judicial offices and two of these came from the same complainant regarding one post. Although none of the complaints were upheld, the Ombudsman did make minor recommendations to the NIJAC to improve the administrative process[25].

Responsibility of Lord Chief Justice for removal of judicial office holders

The Lord Chief Justice for Northern Ireland is responsible for complaints made against members of the judiciary. He publishes a Code of Conduct which includes the steps that will be taken when a complaint is made about the conduct of an office holder. If the complaint is serious it could be referred to a 'removal tribunal' which could see the office holder dismissed. Removal of a listed judicial office holder will require a recommendation for removal to have been made by a tribunal drawn from the Judicial Appointments Commission's membership and convened by the Lord Chief Justice or the NIJAO.

23 Constitutional Reform Act 2005

24 Annual report of the NIJAO 2010-2011: http://www.nijao.gov.uk/Documents/NIJAO_AnnualReport_20102011.pdf

25 As above

England and Wales - Office for Judicial Complaints

The Office for Judicial Complaints (OJC) deals with complaints about the personal conduct of judges. This might include use of "insulting, racist or sexist language in court, or inappropriate behaviour outside the court such as a judge using their judicial title for personal advantage or preferential treatment"[26].

The Office is an "associated office of the Ministry of Justice (MoJ). Its status, governance and operational objectives are set out in a Memorandum of Understanding between the Department of Courts Administration, the Judicial Office for England and Wales and the Complaints Office"[27].

The Complaints Office deals with complaints about the personal conduct of a judge, member of a small tribunal or coroner. Examples of personal misconduct would be the use of insulting, racist or sexist language.

According to the Judiciary of England and Wales: "Both Houses of Parliament have the power to petition The Queen for the removal of a judge of the High Court or the Court of Appeal. This power originates in the 1701 Act of Settlement and is now contained in section 11(3) of the Supreme Court Act 1981. It has never had to be exercised in England and Wales"[28].

Other judicial office holders can be removed by the Lord Chief Justice for incapacity or misbehaviour. This is very rare, and the case of a full-time serving judge needing to be removed, has happened just twice - once in 1983 when a judge was caught smuggling whisky from Guernsey into England; the other in 2009, for a variety of inappropriate behaviour[29].

Fee-paid, or part-time, office holders who are usually appointed for at least five years, may not have their contracts renewed on the following grounds: misbehaviour; incapacity; persistent failure to comply with sitting requirements (without good reason); failure to comply with training requirements; sustained failure to observe the standards reasonably expected from a holder of such office; part of a reduction in numbers because of changes in operational requirements; and part of a structural change to enable recruitment of new appointees.

England and Wales - Judicial Appointments and Conduct Ombudsman

The Judicial Appointments & Conduct Ombudsman investigates complaints from candidates for judicial office, including members of tribunals, about the way in which their application for appointment has been handled[30].

The Ombudsman can also consider complaints about how the Judicial Appointments Commission dealt with a complaint about the appointment process. Before the Ombudsman will take up a complaint a person must have already complained to the Judicial Appointments Commission.

Members of the public may also seek the assistance of the Ombudsman if they are unhappy with the service offered by the Office for Judicial Complaints, but only after they have complained to that body in the first instance.

The Ombudsman assumed his responsibilities on 3 April 2006 under the Provisions of the Constitutional Reform Act and is independent of Government and the judiciary.

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26 Office for Judicial Complaints: http://judicialcomplaints.judiciary.gov.uk/about/about.htm

27 As above

28 Judiciary of England and Wales: http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/judges-and-parliament

29 As above

30 How to complain about the handling of complaints concerning the personal conduct of the judiciary, Judicial Appointments and Conduct Ombudsman: http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/jaco/how-to-complain-personal-judiciary.pdf

The Ombudsman can:

- set aside a decision made by the Office for Judicial Complaints, Tribunal President or Magistrates' Advisory Committee and direct that they look at a complaint again
- recommend that an investigation or determination should be reviewed by a Review Body
- ask the Office for Judicial Complaints, Tribunal President or Magistrates' Advisory Committee to write to a person and apologise for what went wrong
- recommend that changes are made in the way the Office for Judicial Complaints, tribunal Presidents or Advisory Committees work in future to prevent the same things happening again
- suggest payment of compensation for loss which appears to the Ombudsman to have been suffered as a direct result of the poor handling of your complaint[31].

The Ombudsman cannot:

- reprimand a judge
- re-open a case
- remove a judge from office; or
- enforce payment of compensation

5 Republic of Ireland

Prior to 1995, all appointments to the courts were made upon recommendation by the Government to the President, as provided for in the Constitution. The system was reformed following controversy about the appointment of the Attorney General to a senior judicial post after his role in delaying bringing charges in a sexual abuse case[32]. The Courts and Court Officers Act 1995 created the Judicial Appointments Advisory Board, which commenced operation in 1996. The "purpose of the Board is to identify persons and inform the Government (Minister for Justice) of the suitability of those persons for appointment to judicial office"[33]. Judicial office encompasses an ordinary judge of the Supreme Court, ordinary judge of the High Court, ordinary judge of the Circuit Court or judge of the District Court.

The Board is made up of:

- the Chief Justice; who is Chairperson of the Board;
- the President of the High Court;
- the President of the Circuit Court;
- the President of the District Court;
- the Attorney General;
- a practising barrister who is nominated by the Chairman for the time being of the Council of the Bar of Ireland;
- a practising solicitor who is nominated by the President for the time being of the Law Society of Ireland; and

31 How to complain about the handling of complaints concerning the personal conduct of the judiciary, Judicial Appointments and Conduct Ombudsman: http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/jaco/how-to-complain-personal-judiciary.pdf

32 http://findarticles.com/p/articles/mi_m1141/is_n6_v31/ai_15985421

33 Judicial Appointments Advisory Board, Annual Report 2009: http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/6394D92252CA383F80257749004C012E/$FILE/JAAB%20Annual%20Report%202009.pdf

- not more than three persons appointed by the Minister for Justice and Law Reform, which are persons engaged in or having knowledge or experience of commerce, finance, administration, or persons who have experience as consumers of the service provided by the Courts that the Minister considers appropriate.

The 1995 Act also gives the Board the options to:

- Advertise for applications for judicial appointments
- Require applicants to complete application forms
- Consult persons concerning the suitability of applicants to the Board
- Invite persons, identified by the Board, to submit their names for consideration by the Board
- Arrange for the interviewing of applicants who wish to be considered by the Board for appointment to judicial office (to date the Board has not exercised this power due to the 'serious practical obstacles[34]' this would present)
- Do such other things as the Board considers necessary to enable to discharge its functions under the Act[35]

The procedure for judicial appointments in the Republic of Ireland has come under criticism, especially when compared to recent reforms in the UK. Previous research noted that:

The Board is limited in exercise of its functions to a specific range of judicial offices. These are ordinary judges of the Supreme Court; High Court; Circuit Court and District Court. Thus, the following judicial appointments are not made by the Board: Chief Justice; President of the High Court, Circuit Court or District Court, and any promotion forma lower court…(meaning) there are a significant number of persons elevated where an independent body has no role in advising the Government[36].

Furthermore, the Government is obliged only to consider the names put forward by the Board and is not bound to accept any of the nominees. It has also been suggested that:

> *Beyond the JAAB, there is a lack of transparency in the Government's selection of candidates; both in relation to the Board's recommendations and in relation to those posts over which the Board has no role. The Government does not publish criteria on the process of selection, nor does it publish reports on its deliberations…there is no independent audit of the Government process[37].*

This was contrasted with the situation in Northern Ireland where:

> *The Northern Ireland Judicial Appointments Ombudsman is empowered to investigate complaints for judicial appointments where maladministration or unfairness is alleged to have occurred…in the Republic of Ireland, the only legal sanction against the Government or JAAB would appear to be judicial review[38].*

34 As above

35 Section 14, Courts and Court Officers Act 1995

36 Dermot Feenan, 'Judicial Appointments in Comparative Perspective' in Judicial Studies Institute Journal, volume 1 2008

37 As above

38 As above

6 Australia and Canada

Australia

The judicial appointments process in Australia was revised in 2008 when the Attorney General introduced new processes for appointing judges and magistrates to federal courts, including:

- broad consultation to identify persons who are suitable for appointment
- notices in national and regional media seeking expressions of interest and nominations
- notification of appointment criteria
- appointing advisory panels to assess expressions of interest and nominations against the appointment criteria to develop a shortlist of highly suitable candidates[39]

In 2009 the Senate Legal and Constitutional Affairs Committee of the Parliament of Australia produced a report on the Australian judicial system. The report provided an overview of the judicial appointments process:

Appointments to the High Court and the Chief Justice of the Federal Court

Federal judges and magistrates are appointed by the government of the day.

The Australian Constitution does not set out specific qualifications required by federal judges and magistrates. However, laws made by the Commonwealth Parliament provide that, to be appointed as a federal judge, a person must have been a legal practitioner for at least five years or be a judge of another court. To be appointed as a federal magistrate, a person must have been a legal practitioner for at least five years. To be appointed as a judge of the Family Court of Australia, a person must also be suitable to deal with family law matters by reason of training, experience and personality.

All federal judges and magistrates are appointed to the age of 70. The Australian Constitution provides that a federal judge or magistrate can only be removed from office on the ground of proved misbehaviour or incapacity, on an address from both the House of Representatives and the Senate in the same session.

The Attorney General invites nominations from a broad range of individuals and organisations including the heads of federal courts, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

Letters inviting nominations are also sent to State Attorneys General (for High Court appointments this is required under section 6 of the High Court Australia Act 1979), Justices of the High Court, State and Territory Chief Justices.

Candidates must meet the relevant qualifications set out in section 7 of the High Court Act 1979 or section 6(2) of the Federal Court Act 1976.

The Attorney-General considers the candidates nominated and, for each position available, identifies the person whom he considers most suitable, and then recommends this appointment to the Cabinet. Appointments are made by the Governor General in Council.

39 'Australia's judicial system and the role of judges', Legal and Constitutional Affairs Committee, December 2009 http://www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/report/report.pdf

Appointments to the Federal Court (other than the Chief Justice), Family Court and Federal Magistrates' Court

The Attorney General invites nominations from a broad range of individuals and organisations including the Chief Justices of the Federal Court and Family Court, the Chief Federal Magistrate, the Chief Judge of the Family Court of Western Australia, Law Council of Australia, Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Board.

Information regarding expressions of interest and nominations for appointment is also published in Public Notices in national and local newspapers and on the Attorney-General's Department's website.

Candidates must meet the relevant qualifications set out in section 6(2) of the Federal Court Act 1976, section 22 of the Family Law Act 1975 or Schedule 1, Part 1 of the Federal Magistrates Act 1999.

Candidates for appointment to the Federal Court and Family Court must also demonstrate the following qualities to the highest degree:

- legal expertise
- conceptual, analytical and organisational skills
- decision-making skills
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments
- the capacity to work effectively under pressure
- a commitment to professional development
- interpersonal and communication skills
- integrity, impartiality, tact and courtesy
- the capacity to inspire respect and confidence.

Candidates for appointment to the Federal Magistrates Court must also demonstrate the same qualities to a high degree.

An Advisory Panel which includes the Chief Justice (or Chief Federal Magistrate) or their nominee, a retired judge or senior member of the Federal or State judiciary and a senior member of the Attorney-General's Department considers the nominations and provides a report to the Attorney-General recommending appropriate candidates for appointment. To assist in preparing its report, the Advisory Panel may conduct interviews of candidates.

The Attorney General considers the Advisory Panel's report and, for each position available, identifies the person whom he or she considers most suitable. The Attorney General then recommends this appointment to the Cabinet. Appointments are made by the Governor-General in Council.

The Committee's report said that it was:

> *appropriate for the Attorney General to retain the final decision making authority, but this point goes to the transparency of the process and, if the Attorney is making appointments other than based on an assessment against selection criteria, it also goes to the integrity of the process*[40].

The report went on to say:

> *the concept of merit and what is meant by it was raised with the committee by a number of submitters (of evidence). The overwhelming view put to the committee is that merit should be the fundamental criterion for the selection for judicial appointments.*

The Committee found that there was general satisfaction with the appointments process and concluded that the Attorney General's approach is not inconsistent with a selection process

40 'Australia's judicial system and the role of judges', Legal and Constitutional Affairs Committee, December 2009 http://www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/report/report.pdf

based on merit. It considered that the establishment of an independent advisory body could not be justified in terms of cost, but that it was a situation that deserved to be monitored[41].

Canada

The Office of the Commissioner for Federal Judicial Affairs is responsible for the administration of the judicial appointments process at the federal level. The Canadian Judicial Council promotes efficiency, uniformity, and accountability within the superior court system. It also receives complaints about superior court judges. The role and remit are of these organisations is outlined below:

Office of the Commissioner for Federal Judicial Affairs[42]

The Office of the Commissioner for Federal Judicial Affairs Canada (FJA) was created in 1978 under an Act of the Parliament of Canada to safeguard the independence of the judiciary and put federally appointed judges at arm's length from the Department of Justice. Its mandate extends to promoting better administration of justice and providing support for the federal judiciary.

In supporting federal judicial activities, FJA has three key priorities:

- protect the independence of the judiciary
- achieve greater administrative efficiency in the judiciary using up-to-date technology
- support the judiciary and provide central administrative services to judges.

The Judges Act provides for the designation of an officer called the Commissioner for Federal Judicial Affairs Canada. One of the roles and responsibilities of the Commissioner is to act on behalf of the Minister of Justice in matters related to the administration of Part I of the Judges Act, which deals with the terms of appointment, age limit and salaries applicable to federally appointed judges. The Commissioner operates through 17 Federal Advisory Committees.

Federal judicial appointments are made by the Governor General acting on the advice of the federal Cabinet. A recommendation for appointment is made to Cabinet by the Minister of Justice with respect to the appointment of ordinary judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.

The recommendation to Cabinet is made from amongst the names which have been previously reported by the committees to the Minister.

Before recommending an appointment to Cabinet, the Minister may consult with members of the judiciary and the bar, with his or her appropriate provincial or territorial counterparts, as well as with members of the public. With respect to provincial and territorial court judges who apply for appointment to a superior court, the Minister may consult with that candidate's current Chief Judge as well as with the Chief Justice of the court for which the candidate is being considered.

41 As above

42 Office of the Commissioner for Federal Judicial Affairs http://www.fja.gc.ca/fja-cmf/role-eng.html

Canadian Judicial Council

Parliament created the Canadian Judicial Council in 1971. The objectives of the Council, as mandated by the Judges Act, are to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in all superior courts of Canada. The Council has authority over the work of more than 1,070 federally appointed judges.

The Council's main purpose is to set policies and provide tools that help the judicial system remain efficient, uniform, and accountable. The Council's powers are set out in Part II of the Judges Act.

The Council asserts that Canadians 'need judges who are independent and able to give judgments in court without fear of retaliation or punishment.' To help achieve this goal, the Canadian Judicial Council was granted power under the Judges Act to investigate complaints made by members of the public and the Attorney General about the conduct (as opposed to the decisions) of federally appointed judges. After its investigation of a complaint, the Council can make recommendations, including removing a judge from office. If necessary, an Inquiry Committee may be appointed to hold a public hearing, after which the matter goes on for discussion by the full Council. After considering the report of an Inquiry Committee, the Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office. The Council's only power is to recommend to Parliament that a judge be removed from office. Where appropriate, the Council may express concerns about a judge's conduct where the matter is not serious enough to recommend that the judge be removed.

According to the Council's website, since its inception in 1971, the Council has referred eight complaints to an Inquiry Committee for formal investigation. The Council asserts that judicial independence is central to its processes and it does not believe that its role undermines the objective of judicial independence.

As part of its functions, the Council has issued a publication outlining Ethical Principles for Judges. It includes guidance under the headings judicial independence, integrity, diligence, equality and impartiality

7 Conclusion

The reforms introduced in the last decade have increased the transparency of the judicial appointments process in the UK by significantly reducing the role of the executive in the appointments process. In Northern Ireland, the process is administered by the independent Northern Ireland Judicial Appointments Commission which produces clear guidelines for potential applicants. Overall, the process compares favourably in terms of transparency with those operating in other jurisdictions such as the Republic of Ireland, where the role of the Judicial Appointments Advisory Board is more limited.

The Lord Chief Justice is responsible for the removal of judges in Northern Ireland. In England and Wales, the Office for Judicial Complaints supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for the system of judicial complaints and discipline. In both Northern Ireland and Great Britain, the most senior judges may only be removed by the Queen after an address to both Houses of Parliament.

Canada and Australia provide interesting international perspectives on the process of judicial appointments. In Canada the Office of the Commissioner for Federal Judicial Affairs is responsible for oversight of the process, with advisory committees making recommendations to the Minister for Justice on suitable candidates. The final decision on appointments is made by the Governor General on advice of the federal Cabinet. The Canadian Judicial Council has responsibility for investigating the conduct of judges and may recommend their removal.

Australia introduced reforms in 2008 aimed at enhancing the transparency of the appointments process which included measures that brought the system more into line with that operating in the UK. The Cabinet must still approve the Attorney General's recommendation with the decision ultimately taken by the Governor General. A Parliamentary review of the new system in 2009 found no need for an independent body to oversee the process, but did not rule the possibility of one at some point in the future.

Annex 1 - Listed judicial office holders under the remit of the NIJAC

Court Appointments	Other appointments
Judge of the High Court	Chief Social Security Commissioner for Northern Ireland
Temporary judge of the High Court under section 7(3) of the Judicature (Northern Ireland) Act 1978 (c 23)	Social Security Commissioner for Northern Ireland
County court judge	Deputy Social Security Commissioner for Northern Ireland
Deputy county court judge	Chief Child Support Commissioner for Northern Ireland
Resident magistrate	Child Support Commissioner for Northern Ireland
Deputy resident magistrate	Deputy Child Support Commissioner for Northern Ireland
Coroner	President of appeal tribunals (within the meaning of Chapter 1 of Part 2 of the Social Security (Northern Ireland) Order 1998
Deputy coroner	Member of the panel of persons to act as members of such appeal tribunals
Statutory officer (within the meaning of section 70(1) of the Judicature (Northern Ireland) Act 1978)	Member of the panel of persons who may serve as chairmen of the Care Tribunal established by Article 44 of the Health and Personal Social Services (Quality, Improvements and Regulation) (Northern Ireland) Order 2003
Deputy for a statutory officer under section 74 of that Act	President of the Industrial Tribunals and the Fair Employment Tribunal
Temporary additional statutory officer under that section	Acting President of the Industrial Tribunals and the Fair Employment Tribunal under Article 82(6) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 12))
	Vice-President of the Industrial Tribunals and the Fair Employment Tribunal
	Acting Vice-President of the Industrial Tribunals and the Fair Employment Tribunal under Article 82(6) of the Fair Employment and Treatment (Northern Ireland) Order 1998
	Member of the panel of chairmen of the Industrial Tribunals
	Member of the panel of chairmen of the Fair Employment Tribunal
	President of the Lands Tribunal for Northern Ireland
	Deputy President of the Lands Tribunal for Northern Ireland under section 3(1) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 (c 29 (NI))
	Other member of the Lands Tribunal for Northern Ireland
	Temporary member of the Lands Tribunal for Northern Ireland under section 3(2) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964
	President of the Special Educational Needs and Disability Tribunal for Northern Ireland
	Member of the panel of persons who may serve as chairman of that Tribunal
	Member of the tribunal established under section 91 of the Northern Ireland Act 1998 (c 47)
	Member of the Mental Health Review Tribunal for Northern Ireland

Court Appointments	Other appointments
	Lay magistrate Member of the panel of persons who may serve as chairmen of a tribunal established for the purposes of the Deregulation (Model Appeal Provisions) Order (Northern Ireland) 1997 (SR1997/269) Chairman of a Tribunal appointed under paragraph 1(1)(a) of Schedule 3 to the Misuse of Drugs Act 1971 in its application to Northern Ireland Member of a Tribunal appointed under paragraph 2(1) of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland President or Deputy President of Pensions Appeal Tribunals appointed under paragraph 2B of the Schedule to the Pensions Appeal Tribunals Act 1943 in its application to Northern Ireland Chairman of the Plant Varieties and Seeds Tribunal for the purpose of proceedings brought before it in Northern Ireland Member of the panel of persons to act as chairmen of Reinstatement Committees sitting in Northern Ireland (appointed under paragraph 2(1)(a) of Schedule 2 to the Reserve Forces (Safeguard of Employment) Act 1985) President of the Northern Ireland Valuation Tribunal Member of the Northern Ireland Valuation Tribunal President or other member of the Charity Tribunal for Northern Ireland Adjudicator appointed under Article 7(1)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002 Chairman appointed under Article 7(2)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002 Adjudicator appointed under Article 29 of the Traffic Management (Northern Ireland) Order 2005 Chairman of an Appeal Tribunal for the purposes of the Adoption (Northern Ireland) Order 1987

Annex 2 Steps in the appointments process for judicial office in Northern Ireland

Jurisdiction	Responsible body	Process
Northern Ireland	Northern Ireland Judicial Appointments Commission	Advertisement - All vacancies for judicial appointment will be publicly advertised. Advertisements also appear on this website and other relevant websites Application - Application forms are available from the Commission and all applicants will be required to lodge completed application and monitoring forms by a given date and time Eligibility Sift - Upon receipt of a completed application form, the Commission checks if each applicant meets the eligibility requirements for the advertised judicial office. Applicant checks for Good Character - Failure to disclose information which subsequently comes to light as a result of the pre-recommendation for appointment enquiries will be likely to disqualify the applicant from recommendation for appointment. Consultation - Views and opinions about the qualities and work of applicants are sought from consultees whose written comments are passed to the Selection Committee to assess. There are two types of consultees, those nominated by the applicant (nominated consultees) and (where appropriate) automatic consultees. Lay /Other- Two consultees one of whom should a current or previous employer (if applicable) and one occupational or non-occupational. This will vary depending on level and category appointment. Short listing The Selection Committee will consider the information in the application form, consultee comments and particularly the self-assessment form to decide which applicants best demonstrate that they fulfil the required competences and criteria for appointment and should be invited to attend interview.

Jurisdiction	Responsible body	Process
		Prior to short listing the Selection Committee set a benchmark for short listing on a competition by competition basis against the judicial selection framework for appointment. Those applicants who achieve the pre-determined benchmark are short listed. Interview and Assessment process At interview and assessment process, Selection Committee members will ask questions to assess the extent to which an applicant demonstrates the published judicial selection framework for appointment. Applicants should also expect to be asked questions intended to elicit evidence that they are suitable for appointment and need to be able to demonstrate their ability to apply fundamental principles to the post they have applied for under the judicial selection framework advertised for the judicial office. The Commission may supplement the interview and assessment process with other methods of assessment, such as case study, role play, presentation, etc where appropriate. Unsuccessful applicants may request feedback, which will generally be provided by the Chairman of the Selection Committee. Following Short listing: written feedback is available upon request. Following the interview and assessment process: both written and a supplementary feedback discussion are available upon request. The aim of both the written feedback and the feedback discussion are to provide applicants with constructive feedback which will assist them when considering any future applications for judicial appointment. Recommendation to the Lord Chancellor The Commission considers all the information gathered on applicants and selects applicant(s) to be recommended to the Lord Chancellor. NIJAC recommends to the Lord Chancellor one applicant for each judicial vacancy.

Footnotes:

1 NIJAC Information leaflet
2 As above
3 Office of the Commissioner for Federal Judicial Affairs http://www.fja.gc.ca/fja-cmf/role-eng.html

Research and Information Service
Briefing Paper

Paper 61/12 15 March 2012 NIAR 202-12

Fiona O'Connell

Supplementary Briefing: Appointments to the Court of Appeal

1 Introduction

This paper has been prepared for the Committee for Justice's review of the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009. The Committee for Justice has requested further information on the process of appointments to the Court of Appeal in England and Wales, and how it differs from the process in Northern Ireland.

2 Appointments to the Court of Appeal in England and Wales

There are statutory requirements in England and Wales on recommendations for appointments to the Court of Appeal. These requirements are set out in sections 76-84 of the Constitutional Reform Act 2005. The legislation requires the Lord Chancellor to make a recommendation to fill any vacancy in the Court of Appeal.[1] The Lord Chancellor may make a request to the Judicial Appointments Commission to make a recommendation; however before making such a request, the Lord Chancellor must consult with the Lord Chief Justice.[2] The Judicial Appointments Commission determines the process it will follow in making a selection.[3] On receiving the request from the Lord Chancellor, the Commission must convene a panel to determine and apply the selection process and to make a selection.[4] The Constitutional Reform Act 2005 also makes provision for the composition of the membership of the selection panel convened by the Commission. The panel must include four members which include:[5]

- The Lord Chief Justice or his nominee who is chairman of the panel;
- A Head of Division or Lord Justice of Appeal designated by the Lord Chief Justice;
- The Chairman of the Judicial Appointments Commission or his nominee;
- A lay member of the Judicial Appointments Commission nominated by the third member.

The legislation requires that on any vote of the panel, the chairman of the panel has an additional, casting vote in the event of a tie.[6] The panel must subsequently submit a report to the Lord Chancellor, stating who has been selected and any other information required by the Lord Chancellor.[7] The Lord Chancellor can accept the selection, reject it or ask the Commission to reconsider.[8] However the power of the Lord Chancellor to reject a selection is only exercisable on the grounds that the Lord Chancellor is of the view that the selected person is not suitable for the office in question.[9] The power of the Lord Chancellor to ask the panel to reconsider its selection is exercisable only on the grounds that the Lord Chancellor is of the opinion that the selected candidate is not suitable for the office concerned or there is evidence that the selected person is not the best candidate on merit.[10]

A joint note on the Court of Appeal Selection Process has been agreed by Judicial Appointments Commission (JAC) and Judicial Executive Board (JEB). The note sets out the

1 Sec 77 of the Constitutional Reform Act 2005
2 Section 78 of the Constitutional Reform Act 2005
3 http://jac.judiciary.gov.uk/about-jac/142.htm
4 Section 79 of the Constitutional Reform Act 2005
5 Section 80 of the Constitutional Reform Act 2005
6 Section 80 (13) of the Constitutional Reform Act 2005
7 Section 81 of the Constitutional Reform Act 2005
8 Section 82 of the Constitutional Reform Act 2005
9 Section 83 (1) of the Constitutional Reform Act 2005
10 Section 83 (2) of the Constitutional Reform Act 2005

approaches and principles the JAC and JEB commend each selection panel to consider during the selection procedure.[11] This is contained in **Annex A** of this paper.

3 Appointments to the Court of Appeal in Northern Ireland

In Northern Ireland, there are no similar statutory provisions to those in the Constitutional Reform Act 2005 setting out the processes to be followed for the appointments of Justices of Appeal. The Northern Ireland Act 2009 provides that appointments of Justices of Appeal in Northern Ireland are made by the Queen on recommendation made by the Prime Minister. Before making the recommendation on appointment, the Prime Minister must consult with the Lord Chief Justice (or if that office is vacant or the Lord Chief Justice is not available, the Senior Lord Justice of Appeal who is available) and the Northern Ireland Judicial Appointments Commission (NIJAC).[12]

4 Conclusion

It will be seen that:

In England and Wales, the Constitutional Reform Act sets out more detail on the process for appointing Court of Appeal judges.

In England and Wales, it is the Lord Chancellor who makes the final recommendation rather than the Prime Minister

In England and Wales, the Judicial Appointments Commission makes a selection for recommendation; in Northern Ireland the legal duty is only for the Prime Minister to consult with the Lord Chief Justice and NIJAC.

11 Process for Appointments to the Court of Appeal, available at http://jac.judiciary.gov.uk/static/documents/Process_for_Appointments_to_the_Court_of_Appeal.pdf

12 Schedule 2 of the Northern Ireland Act 2009

Annex A: Practice Note Process for Appointments to the Court of Appeal in England and Wales[13]

Process for Appointments to the Court of Appeal

Statutory requirements

Recommendations for appointment to the Court of Appeal are made in accordance with section 76 of the Constitutional Reform Act 2005 (the Act). Key aspects of this are set out below:

- Parliament specifies that the Lord Chancellor asks the Judicial Appointments Commission (JAC) to convene a selection panel for appointment
- The composition of that panel is also specified in the Act
- The panel must consist of four members:
  - The first member and panel chair is the Lord Chief Justice, or his nominee (who must be a Head of Division or a Lord Justice of Appeal)
  - The second member is a Head of Division or Lord Justice of Appeal designated by the Lord Chief Justice
  - The third member is the Chairman of the JAC, or nominee
  - The fourth member is a lay member of the JAC designated by the third member
- The panel determines the selection process to be followed, applies it and makes a selection
- On any vote by the panel, the chairman of the panel has an additional casting vote in the event of a tie
- The panel then advises the Lord Chancellor of the candidate it has selected
- Under the terms of the statutory process the Lord Chancellor will then accept the selection, or reject it, or require the panel to reconsider the selection

Purpose of this note

As required by the Act, it is for each panel to decide the selection process that shall apply to fill a particular vacancy. This note sets out some approaches and principles that the JAC and the Judicial Executive Board (JEB) commend each selection panel to consider applying in order to identify the candidate that they propose to recommend for appointment.

Selection procedure

1. The Eligible Pool

Although statute allows the panel to consider the appointment of suitably qualified persons other than High Court Judges, to date the pool of candidates for appointment to the Court of Appeal (CA) has been limited to serving High Court Judges.

The JAC has a statutory duty to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'. This duty falls upon a selection panel for a senior appointment, as a committee of the Commission, just as it falls upon the Commission as a whole. The JAC carries out this duty vigorously, with the enthusiastic support of the Lord Chief Justice and JEB.

The judges of the High Court should normally form the pool for appointments to the Court of Appeal, for the following reasons:

1. The nature of the work of the CA - The role of the CA is to a significant extent to conduct an examination of the trial process. For this purpose it is

13 http://jac.judiciary.gov.uk/static/documents/Process_for_Appointments_to_the_Court_of_Appeal.pdf

essential for the members of the CA to have practical experience as a trial judge.

2. The need to encourage the highest quality candidates for the High Court – It is of critical importance to maintain the standards of the High Court bench. It is therefore important that the best candidates accept the responsibilities of a High Court Judge and do not simply wait to be appointed directly to the CA.

Although panels will no doubt from time to time consider whether this should continue to be the case; the best route to a more diverse Court of Appeal is through a more diverse High Court.

2. Selection Process

Each panel will consider using the following selection process:

- **The nature of the post –** The JEB will make it clear to the panel, the scope of the expertise required. This will include such matters as: specialist legal expertise, leadership and potential for appointment to the Supreme Court. The JEB's decision will be based on historic trends and future projections.

- **All serving High Court Judges will be deemed to have applied for a CoA vacancy** unless they have specifically informed the LCJ that they do not wish to be considered. This approach is to be taken to ensure that all suitably qualified High Court Judges may be considered regardless of seniority.

- **Criteria for appointment to the Court of Appeal**

  1. Outstanding success as a High Court Judge. In particular outstanding intellectual capacity and legal acumen; with the ability to demonstrate, at the highest level, the other characteristics to be expected of a High Court judge as set out in Annex A. *[Not attached here – it is the JAC's High Court set of Qualities and Abilities.]* .

  2. A breadth of experience allowing the candidate to adapt easily to the work of the CA; as for example with an ability to: deal effectively with unfamiliar areas of law; work collaboratively; deal fairly with both counsel and litigants in person.

  3. The requirements of specialist expertise and /or experience as identified by the JEB.

- **The Master of the Rolls[1] will write to members of the CoA on behalf of the selection panel seeking views as to the most suitable candidates for appointment**

  Members of the Court of Appeal will be invited to supply evidence on the suitability of High Court Judges for appointment to the CA. Comments will be supported by relevant evidence. In particular members of the Court of Appeal will

be invited to identify judgments and any other relevant material (such as summings up, articles and the like) which the panel may consider as part of the assessment process. In some circumstances, the panel may judge that others well placed to supply references should also be approached. Their names will be agreed at the beginning of the selection process.

- **The Master of the Rolls' Office, with the assistance of the JAC as appropriate, will prepare materials for consideration by panel members. These will include:**

  i) A table summarising the evidence received from members of the CA and any others providing reference material.

  ii) Copies of the full evidence submitted.

  iii) CVs, copies of judgments and any other relevant evidence, for appropriately short listed candidates.

  iv) The panel will specifically consult the Heads of Division in such a manner as appears appropriate.

  v) The panel may decide to interview short listed candidates.

3. Conflict of Interest Declarations

Panel members will formally declare and record knowledge of candidates known personally and professionally to the panel secretariat in advance of considering the applications; and identify any conflicts of interest in line with the JAC policy. This will ensure complete transparency of connections and allow panel members to be informed by that knowledge when weighing contributions.

4. Good Character

Subsequent to the decision to select and prior to advising the Lord Chancellor of the candidate(s) the panel has selected, the JAC will carry out character checks in line with those conducted on all JAC recommended candidates. For full time judicial post holders this will be with the Office for Judicial Complaints. Additional checks, for example with the professional bodies, may be carried out if appropriate for particular candidates.

5. Confidentiality

Procedures put in place will ensure the confidentiality and security of assessment material and decision making.

6. Secretariat Support

Secretariat support will be provided by the JAC, assisted by the MR's Private Office as appropriate.

Research and Information Service
Research Paper

Paper 60/12 15 March 2012 NIAR 175-12

Fiona O'Connell & Ray McCaffrey

Judicial Appointments in Germany and the United States

This paper provides information for the Committee for Justice on judicial appointments in Germany and the United States

Key Points

- The models of judicial appointment in the US and Germany are subject to political involvement at various levels.
- These models are interlinked with other elements of the legal system and traditions of these countries.
- The models include
- Germany:
  - Role of Minister of Justice in appointments in the states
  - Electoral committees comprised of judicial members and political representatives for example in Germany (state level);
  - Electoral Committee at Federal level comprised of political representatives of the Federal and Lander Parliaments;
  - At Constitutional Court level, judges are elected by the upper and lower chamber of Parliament
- United States
  - Presidential appointment with advice and consent of the senate (Federal level)
  - Commission based appointments, also known as merit selection; usually involving an election at some point;
  - Judicial elections;
  - Gubernatorial appointment (appointed by the Governor); this is similar to the Federal system.
  - Legislative appointment or election

Executive Summary

Germany

- Germany has a career judiciary, judges join the judiciary early in their working life and spend their career working in it;
- Although the judicial appointments process begins with an application, there are regional variations in recruitment procedures;
- There is political involvement in appointments procedures however there is some judicial involvement in the appointments process either through judicial electoral committees or advisory bodies;
- The Minister of Justice makes decision on promotions: in Lander, judicial electoral committees are involved in making recommendations and at federal level, the Prasidialrat which is composed of judicial members provides advice.
- Promotion opportunities can be limited in Germany. Judges can seek secondment opportunities in other areas for example as court clerks in higher courts or in Ministries of Justice;
- Legislation requires that the removal of a judge from judicial office without consent is made by a judicial decision. There is also special provision for removal of Constitutional judges for acting against the constitutional order.

United States

- There is both a federal and state court system in the United States;
- All federal judges are appointed by the President with the advice and consent of the Senate. These judges hold office during good behaviour;
- No two state court systems are exactly alike;
- Most state court judges are not appointed for life but are either elected or appointed for a certain number of years;
- There are five basic methods for selecting judges at the state level: merit selection, non-partisan election (party affiliation not designated on the ballot paper), partisan election (party affiliation listed on the ballot paper), gubernatorial appointment and legislative appointment/election;
- At federal level, judges can be removed in Congressional impeachment proceedings. A variety of removal systems are used at state level, including impeachment, legislative address, judicial conduct commissions and recall elections.

Contents

1 Introduction

This research paper has been prepared to inform the Committee for Justice's inquiry on Judicial Appointments. The Committee is tasked with reviewing the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009. The review is required by Section 29C of the Northern Ireland Act 1998 as amended by Schedule 6 of the Northern Ireland Act 2009 and as set out in Standing Order 49A of the Northern Ireland Assembly.

The paper provides information on the process of judicial appointments, promotions and removal from judicial office in Germany and the United States. It should be noted that these appointment systems are rooted in the traditions of these countries and are often interlinked with wider parts of the system (eg the law examination system and notion of a judicial career in Germany; the strong emphasis on direct democracy in some US states).

2 Judicial Appointments in Germany

In Germany, appointments and decisions on promotions are made by the executive; however there is some involvement of the judiciary through participation in judicial electoral committees and advisory bodies.[1] It should be noted that in the 1950s that there was some debate regarding the locus of decision making in relation to judges, particularly promotions to higher positions. The judiciary wanted to remove political interference from the process. However the legislature rejected this approach due to concerns that that judiciary would become a self- perpetuating elite profession that would be excessively insulated from the democratic concerns of the democratic authorities. Although there is democratic accountability, this does not mean there is political interference.[2] According to a commentator, there are checks and balances that prevent one- sided political appointments including the expectation that the Minister will act on the basis of professional evaluations by judges. Furthermore there is the safeguard of judicial review.[3]

2.1 The Court System in Germany

Before considering issues of how judicial appointments are made in Germany, this section provides information on the court system in Germany.

Germany is a federal state and judicial authority is shared between the Federation (Bund) and the sixteen "Lander" which are states and provinces.[4] Judicial power is exercised by:[5]

- The Federal Constitutional Court (Bundesverfassungsgericht);
- The five federal courts which are courts of last instance and generally only hear appeals on points of law. They include:
  - the Federal Court of Justice in Karlsruhe (civil and criminal cases);
  - the Federal Labour Court in Erfurt (labour cases);

1 J Bell (2006) Judiciaries within Europe, Cambridge University Press, United Kingdom, 17

2 C Guarnieri "Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self Government" Legal Studies [2004]Vol 24, 175

3

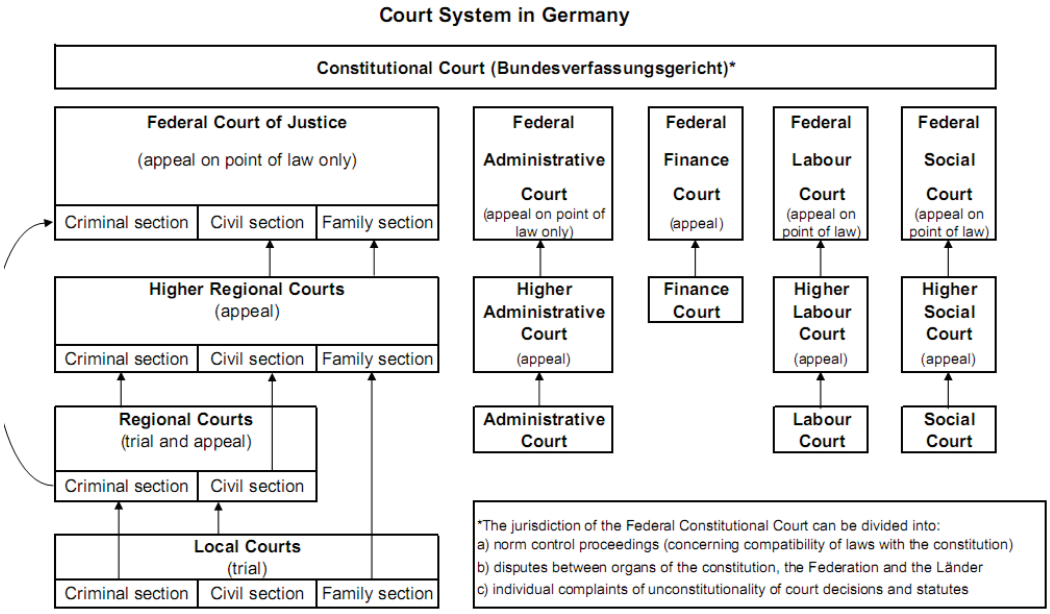
4 J Riedel, "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain"p 69

5 Ibid, Pg 70: See also J Bell (2006) "Judiciaries within Europe", Cambridge University Press, 110

- the Federal Administrative Court in Leipzig (Administrative Cases);
- the Federal Social Court in Kassel (social security and social welfare cases); and
- the Federal Finance Court in Munich (Tax cases).

■ Ordinary (civil and criminal) courts, administrative courts, tax courts, labour courts and social courts and are the responsibility of the Lander.

The diagram below sets out the structure of the court system.[6]



The management of the judiciary is split between the judges themselves and political authorities.[7] For the most part, the Lander have responsibility for the management of the judiciary; the Land Ministry of Justice organises the recruitment, examinations and the number of posts available (this role is discharged by the Federal Minister of Justice in relation to the federal courts).[8] The political and administrative authorities have considerable influence over the organisation of the courts.[9]

2.2 Judicial appointments in Germany

2.2.1 Qualifications and Entry to the Judiciary

Germany has a career judiciary; that is to say judges join the judicial hierarchy early in their working life and spend their career within it.[10] The academic study of law is based on two "State Examinations". To become a lawyer, one must take the First State Examination after 8 semesters of legal study. Successful candidates are given traineeships funded by the state. Students can then take the Second Stage examination and on the basis of rankings from the exams, students will apply for posts in a particular Land. According to academic research only 10% of trainees become judges.[11] Judges who are recruited will spend three years

6 http://www.coe.int/t/dghl/cooperation/cepej/profiles/CourtSystemGermany.pdf

7 J Bell (2006) "Judiciaries within Europe", Cambridge University Press, 112

8 Ibid

9 Ibid

10 J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 71

11 John Bell "Judicial Appointments: Some European Experience" 4 October 2003, 8

on probation and the German Judiciary Act enables probationary judges to be dismissed relatively easily within the first two years.[12]

There are other routes into the judiciary. In particular it is possible for prosecutors, civil servants and professors to apply to become judges. For instance civil servants may apply to join the social law courts where they might have relevant expertise.[13]

2.2.2 Recruitment and appointments in ordinary courts

A judge will usually begin their career at a court of first instance in the employment of one of the Lander, therefore the Lander administrations has responsibility for organising recruitment.[14] Within the Lander the Ministry of Justice usually organises this process, however in some of the Lander appointments for the social and labour courts come within the scope of the Ministry of Labour and Social Affairs.[15]

Although there are regional variations, the process generally starts with an application by the candidate. In most of the Lander, applicants will appear before a recruitment commission and present their application. These commissions vote on the application; this vote is then considered by the appointing authority who may be the Minister of Justice or the president of a court. Where these commissions do not exist it is the appointing authority who will make the decision usually on the basis of the written documentation and an interview.[16] The exact procedure followed differs between the Lander and indeed from court to court. Unsuccessful candidates can in theory apply for a judicial review of the decision.[17]

12 J Bell (2006) "Judiciaries within Europe", Cambridge University Press, 115

13 John Bell "Judicial Appointments: Some European Experience" 4 October 2003, 8

14 J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Careers of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain" Research Institute on Judicial Systems and National Research Council, 71

15 Ibid.

16 J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 80

17 Ibid,84

The table below **(Table 1)** sets out the recruitment process as summarised by one research report.

Table 1: Recruitment Procedures for Judicial Appointments[18]

Lander	Recruitment Procedure
Baden- Wurttemburg	The decision is reached on the basis of documents supplied by the candidate, the result of a final exam including all assessments during the two years practical training and an interview with the head of the Personnel Department of the Ministry
Bayern	The decision is reached on the basis of documents supplied by the candidate, the result of a final exam and an interview with the head of the Personnel Department of the Court
Berlin	Extensive interviews are conducted by the president of the regional Higher Court and the court's head of personnel department. The court then reports on these interviews to the Ministry of Justice which passes the proposal to the Judicial Electoral Committee.
Brandenburg	Extensive interviews are conducted by the president of the regional Higher Court and the court's head of personnel department. The court then reports on these interviews to the Ministry of Justice which then passes the proposal to the Judicial Electoral Committee.
Bremen	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam and interviews. An electoral Committee is also involved.
Hamburg	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam and interviews. An electoral Committee is also involved.
Hessen	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam. An electoral Committee is also involved.
Mecklenburg-Vorpommern	The decision is reached on the basis of documents supplied by the candidate and the result of the final exam.
Niedersachsen	The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and an extensive interview in the Ministry of Justice.

18 Ibid, 80-84

Lander	Recruitment Procedure
Nordrhein –Westfalen	All higher regional courts in Nordrhein- Westfalen have commissions which usually consist of the president of the higher regional court usually where the vacancy has to be filled and the person responsible for equality matters. However proceedings differs in courts: Dusseldorf- recruitment is based on interviews, role play and group discussion Cologne- candidates give a speech, undertake a working test where they are given 10 files and are interviewed. Hamm- has the most elaborate system and takes a full working day. Candidates participate in a group discussion and assess in writing their situation during the group discussion, undertake interviews and a working test. Each member of the committee individually assesses the performance of candidates. The individual assessments are presented to the commission; the results of the working test are considered by a judge and presented to the commission: the commission will made a decision based on the candidates performance throughout the day
Rheinland-Pfalz	The decision is reached on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews with the Presidents of the higher court and head of the personnel department in the Ministry of Justice. Results are considered satisfactory therefore assessment centres are not used
Saarland	The decision is based on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews with the Secretary of State in the Ministry of Justice , the head of the personnel department of the Ministry and representatives of the staff council
Sachsen	The decision is based on the basis of documents supplied by the candidate, the result of the final exam and extensive interviews
Sachsen-Anhalt	The decision is based on the basis of documents supplied by the candidate and the result of the final exam.
Schleswig- Holstein	The decision is based on the basis of documents supplied by the candidate and the result of the final exam. An electoral committee is also involved
Thuringen	The decision is based on the basis of documents supplied by the candidate, the result of the final exam including the assessments during practical training and an extensive interviews

Judicial Electoral Committees

In eight Lander 'judicial electoral committees' are involved in the process.[19] They are elected by a parliamentary vote, sometimes on the basis of nominations by representatives of legal professionals; they are chaired by a Minister and may include legal professionals as well as parliamentarians.[20] Membership varies between 11 and 15 members. Where they exist, their concurrence is required for a recruitment decision.[21]

19 Ibid, 71

20 Ibid, 78

21 Ibid, 78

Table 2 below sets out information as summarised in a research paper on the membership of the judicial electoral committees in where they have been established.

Table 2: Membership of Judicial Electoral Committees[22]

Lander	Membership
Baden- Wurttemburg	**15 members**,6 members of the Land Parliament 6 Judges (Permanent Members),2 Judges of the jurisdiction concerned,1 Lawyer, Chairperson: Minister (No voting right)
Berlin	**12 Members**,6 Members of the Land Parliament (Senat),5 Judges,1 Lawyer, Chairperson: Minister
Brandenburg	**12 Members**,8 Members of the Land Parliament,2 Judges,1 Judge of the jurisdiction concerned,1 Lawyer, Chairperson: Minister (No voting right)
Bremen	**11 Members** 5 Members of the Land Parliament (Burgerschaft),3 Ministers: Minister of Justice and 2 other Ministers,3 Judges Chairperson: Minister competent for the court concerned
Hamburg	**15 members,**6 Members of the Land Parliament (Burgerschaft),3 Ministers (Minister of Justice and 2 other Ministers),3 Judges,2 Lawyers, Chairperson: Minister appointed by The Land Parliament
Hessen	**13 Members**,7 Members commissioned by the Land Parliament,5 Judges,1 President of the Bar Chairperson: Minister of Justice (No voting right)
Schleswig-Holstein	**12 Members**,8 Members of the Land Parliament,2 Judges (permanent members),1 Judge of the jurisdiction concerned,1 Lawyer Chairperson: Minister of Justice (No voting right) However where there is recruitment for social or labour courts there are 4 more members of the Land Parliament, 1 representative of employers and 1 representative of employees.
Thuringen- Committee only involved in appointments for life or promotions, not in cases of first recruitment.	**12 members**, 8 members of the Land Parliament, 3 Judges, 1 president of the Bar, Chairperson: Minister of Justice (No voting right)

2.2.3 Appointment of Federal Court Judges

The election of judges to the highest federal courts is the responsibility of federal authorities; the Federal electoral committee and relevant Minister are jointly responsible for making the decision. The Federal electoral committee comprises of the 16 Lander Ministers of Justice and 16 members of the Federal Parliament. The Federal Minister concerned acts as a non-voting chair of the sessions. There is no formal recruitment process as exists at the beginning of a judicial career; rather each individual member of the Committee has the right to present candidates. The judiciary can participate through a body representing judges known as the presidential council or Prasidialrat. This council gives an advisory opinion

22 Ibid, 78 and 79

on the personality and aptitude of the candidates.[23] Each court system has a Prasidialrat composed of the president of the court and other judges, at least half of whom are elected.[24]

2.2.4 Appointment of Constitutional Court Judges

The Federal Constitutional Court (the Bundesverfassungsgerichtshof) has 16 judges which sit in two divisions or senates. Half of these judges are elected by the upper chamber of Parliament (the Bundesrat) and half by the lower chamber (the Bundestag). Constitutional Court judges are judges or professors qualified for judicial office. The Federal Minister of Justice draws up two lists of eligible candidates, one consisting of judges from the highest federal courts and the second consisting of persons suggested by the parties in the Federal Parliament or the various Lander governments.[25] Constitutional Court judges are appointed for a fixed term of 12 years so there is no career; judges and professors return to their old posts.[26]

The methods used to appoint Constitutional Court judges differ between the two chambers of Parliament. The Bundestag relies on a parliamentary committee of 12 members comprised of members of parties represented in the chamber. The committee deliberates in private on files concerning the candidate and makes its decisions by means of a two-thirds majority vote. The Bundesrat formally elects candidates in plenary session, on the basis of preparatory work done by a committee made up of Ministers of Justice of the different Lander.[27]

2.3 Career Path and Promotions

While the judiciary is a career, it is not possible for every or even most judges to be promoted to the highest levels.[28] To compensate for the limited promotion opportunities, judicial salaries rise automatically for lower grade judges until the judge reaches the age of 49.[29]

There is no minimum age requirement for promotion to higher judicial office.[30] The judicial career commences with appointment as a junior judge, followed by a promotion for life at a court of first instance. There are possibilities for promotion above this:

- **First level of promotion**- judge in the higher regional court or judge in the regional court presiding over a panel or senior judge in the local court;
- **Second level of promotion-**judge in the higher regional court presiding over a panel or judge or vice-president of a regional court;
- **Higher Levels of Promotion-**Presidents of regional and higher regional courts[31]

Judges may apply for vacant posts when these are advertised. The decision is made by the Minister of Justice, though in many of the Lander this is preceded by a recommendation of a

23 J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 86.

24 John Bell "Judicial Appointments: Some European Experiences" October 2003,8

25 Ibid,9

26 Ibid

27 JBell (2006) "Judiciaries within Europe", 159

28 Ibid 120

29 Ibid,121

30 J Riedel"Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 101

31 J Riedel"Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 99

judicial selection committee, on which sit representatives of the judges and the legislature.[32] The Lander have introduced a requirement for at least the first level of promotion to undertake a "trial period" in the higher regional court which is used to assess a judge's suitability for higher judicial office.[33]

There are possibilities for judges to gain experience outside of their normal judicial assignment. Some judges may seek secondment as a court clerk in one of the Federal Supreme Courts or Constitutional Court. Other judges may seek a secondment in the Lander or Federal Ministries of Justice.[34]

At federal level, the judicial selection committee (see above) does not advise on promotions, however there is advice from the Prasidialrat (see above).[35]

Compulsory retirement for judges is 65 years both in the federal judiciary and for judges of the Lander. On retirement, the majority of judges will have reached at least the first level of promotion.[36]

2.4 Removal of Judges

Article 30 of the German Judiciary Act specifies that a judge for life can only be removed from office without his own written consent in a number of specified circumstances including: in judicial impeachment proceedings; in formal disciplinary proceedings; in the interests of the administration of justice and on changes being made in the organisation of the courts.[37] The legislation requires that discharge from office on the first three grounds can only be ordered by a judicial decision. [38] These decisions are made by the Judicial Service Court and proceedings can be lengthy as medical evidence is required. The Judicial Service Court may suspend a judge from office pending dismissal proceedings by an order known as an interlocutory order.[39] However dismissal of a judge is rare.[40]

In relation to federal judges, there is a specific chamber at the Federal Court of Justice that makes final decisions on disciplinary proceedings, transfer of judges, dismissals and retirements due to ill health.[41]

There is a special provision in the Constitution which provides for removal of federal judges: if a federal judge breaches the constitutional order then the Bundestag may by a 2/3 majority request the Federal Constitutional Court to transfer, retire or dismiss the judge (Article 98).

32 JBell (2006) "Judiciaries within Europe", 120

33 J Riedel"Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 101

34 J Bell (2003) "Judicial Appointments: Some European Experiences", 8: J Bell (2006) "Judiciaries within Europe", 120, 121. 123

35 Ibid, 8

36 J Riedel "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany" in G Di Federico "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy , the Netherlands and Spain" 95.

37 Art 30 (1) of the German Judiciary Act http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html

38 Article 30 (2) of the German Judiciary Act

39 Riedel, 111

40 J Bell (2006) Judiciaries within Europe. 124

41 A Seibert- Fohr "Constitutional Guarantees of Judicial Independence in Germany http://www.mpil.de/shared/data/pdf/constguarantjudindep_germany.pdf

2.5 Judicial Diversity

The numbers of women who have become judges has significantly increased in recent years. In 1970 6% of the judiciary were women. In 2002, just over 30% of the judiciary were women.[42] However research has highlighted that there are difficulties for women in gaining promotion as candidates would have to seek trial periods of secondment which can be far from home and consequently many women do not consider promotion.[43] Ethnic minority judges are a rarity in the judiciary in Germany as there is a minimum condition for those who hold judicial office to be a German national.[44]

3 The court system in the United States

This section provides information on the court system in the United States. It contains an overview of the federal and state court structures; it then highlights the various methods used for judicial selection at both levels of the judicial system; a final section notes the methods for removal of judges at federal and state levels.

3.1 Overview of the federal and state court structures

Federal courts

There are two types of federal courts. The first type are known as Article 3 courts by virtue that they derive their power from Article 3 of the United States Constitution. These courts include:

- the U.S. District Courts
- the U.S. Circuit Courts of Appeal
- the U.S. Supreme Court
- the U.S. Court of Claims
- the U.S. Court of International Trade45

All judges of Article III courts are appointed by the President of the United States with the advice and consent of the Senate. These judges hold office during good behaviour. The Constitution does not require that federal judges have law degrees, although, as a practical matter in the modern era, this is considered to be a minimum requirement[46].

The second type of federal court is those established by Congress:

- magistrate courts
- bankruptcy courts
- the U.S. Court of Military Appeals
- the U.S. Tax Court
- the U.S. Court of Veterans' Appeals

The U.S. Court of Military Appeals, U.S. Tax Court and U.S. Court of Veterans' Appeals are called Article I or legislative courts. The judges of these courts are also appointed by the

42 J Bell (2006) Judiciaries in Europe, 118

43 Ibid at 120

44 Ibid.

45 The Court of Claims and Court of International Trade are deemed ‘special’ courts because they are not courts of general jurisdiction.

46 American Constitution Society, ‘Path to the Federal Bench’, May 2011

President with the advice and consent of the Senate but hold office for a set number of years, usually about 15[47].

US District Courts

There are 94 U.S. District Courts in the United States. Every state has at least one district court, and some large states, such as California, have as many as four. Each district court has between 2 and 28 judges. The U.S. District Courts are trial courts, or courts of original jurisdiction. This means that most federal cases begin here. U.S. District Courts hear both civil and criminal cases[48].

U.S. Circuit Courts of Appeal

There are 13 U.S. Circuit Courts of Appeal in the United States. These courts are divided into 12 regional circuits and sit in various cities throughout the country. The U.S. Court of Appeals for the Federal Circuit (the 13th Court) sits in Washington[49].

U.S. Supreme Court

The Supreme Court of the United States is the highest court in the land. It is made up of nine judges, known as justices, and is presided over by the Chief Justice. Parties who are not satisfied with the decision of a U.S. Circuit Court of Appeal (or, in rare cases, of a U.S. District Court) or a state supreme court can petition the U.S. Supreme Court to hear their case. This is done mainly by a legal procedure known as a Petition for a Writ of Certiorari. The Court decides whether to accept such cases[50].

State courts

Although no two state court systems are exactly alike, there are sufficient similarities to draw broad comparisons. Most state court systems are made up of:

- two sets of trial courts: trial courts of limited jurisdiction (probate, family, traffic etc.) and trial courts of general jurisdiction (main-level trial courts)
- intermediate appellate courts (in many, but not all, states)
- highest state courts (called by various names)

Unlike federal judges, most state judges are not appointed for life but are either elected or appointed (or a combination of both) for a certain number of years[51].

47 http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.asx

48 As above

49 http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx

50 As above

51 http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.asx

The following table provides an overview of the federal and state court systems.

Table 3: Overview of federal and state courts systems[52]

Federal Court System	State Court system
Structure	
Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts	The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts.
Congress has used this power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.	States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc
Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.	Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals
A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.	Parties have the option to ask the highest state court to hear the case.
	Only certain cases are eligible for review by the U.S. Supreme Court.
Selection of judges	
The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behaviour, typically, for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehaviour.	State court judges are selected in a variety of ways, including election appointment for a given number of year appointment for life combinations of these methods, e.g., appointment followed by election.
Types of cases heard	

52 http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx

• Cases that deal with the constitutionality of a law; • Cases involving the laws and treaties of the U.S.; • Ambassadors and public ministers; • Disputes between two or more states; • Admiralty law, and • Bankruptcy	• Most criminal cases, probate (involving wills and estates), • Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc. State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.
Article I Courts	
Congress has created several Article I or legislative courts that do not have full judicial power. Judicial power is the authority to be the final decider in all questions of Constitutional law, all questions of federal law and to hear claims at the core of habeas corpus issues. • Article I courts are U.S. Court of Veterans' Appeals, the U.S. Court of Military Appeals, and the U.S. Tax Court.	N/A

3.2 Selection of Judges

Judicial nominations and confirmations at the federal level

Article 2, section 2 of the United States Constitution gives the President the power to appoint judges to the Supreme Court:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments[53].

Therefore "Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate, as stated in the Constitution. The names of potential nominees are often recommended by senators or sometimes by members of the House who are of the President's political party. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee. Article III of the Constitution states that these judicial officers are appointed for a life term"[54].

Role of Home State Senators in the selection of lower Federal Court Judges

There is a long-standing custom that Senators of the President's party play the primary role in selecting candidates for the President to nominate to federal district court judgeships in their states[55]. They may also influence the choice of candidate for federal circuit court judgeships associated with their states. If the Senators are not members of the President's party they

53 http://www.usconstitution.net/const.html#Article3

54 http://www.uscourts.gov/Common/FAQS.aspx

55 http://www.fas.org/sgp/crs/misc/RL34405.pdf

may still communicate their views about candidates under consideration for judgeships in their states:

By custom, when neither of a state's Senators is of the President's party, the primary role in recommending candidates for district court judgeships is assumed by officials in the state who are of the President's party. Historically, in the absence of a Senator of the President's party, the state official or officials who most frequently have exercised the judicial "patronage" function have been the most senior member, or one of the most senior members, of the party's House of Representatives delegation, the House party delegation as a whole, the governor, or state party officials[56].

Criteria used by the President to select candidates

Research carried out on behalf of the US Congress addressed the issue of the criteria used by Presidents to appoint federal judges. The following is a summary of the paper:

In recent decades, various Presidents have issued guidelines or made public statements regarding the qualification standards that their judicial nominees must meet. Virtually every President has emphasized the importance of a nominee meeting high professional standards and having the ability to be impartial as a judge. At the same time, each President has underscored that judicial nominees must conform with the basic values or ideals that the President believes are inherent in the Constitution, as well as with the President's views of what a judge's fundamental role and priorities should be in the US's constitutional system.

A President may state the importance of a judiciary reflecting gender and ethnic balance. A Senator will probably take such statements into account when putting forward a candidate.

The starting point for any nomination will usually be that the candidate is suitably qualified in respect of his or her professional qualifications and integrity, reflected in the "custom to appoint lawyers who have distinguished themselves professionally – or at least not to appoint those obviously without merit. Therefore, a candidate can usually expect to be evaluated by a local or state bar association or an informal or formal panel of lawyers. Once recommended to the White House, the candidate can expect to be subject to further rigorous scrutiny, including an exhaustive examination of their legal qualifications by the American Bar Association's Standing Committee on the Federal Judiciary[57]. This Committee "believes that a prospective nominee to the federal bench ordinarily should have at least 12 years' experience in the practice of law"[58].

In recent years, debate has arisen about the extent to which home state Senators should have a role in determining successful candidates for judicial positions:

- Do Presidential Administrations engage seriously with home state Senators?
- Should home state Senators always have the opportunity to offer their opinion on a judicial candidate before he or she is appointed?
- How differently should Administrations treat the views of home state Senators, depending on their party affiliation?
- Should the Policy of the Judiciary Committee Allow a Home State Senator to Block Committee Consideration of a Judicial Nominee?

56 As above

57 http://www.fas.org/sgp/crs/misc/RL34405.pdf

58 American Bar Association Standing Committee on the Federal Judiciary: What it is and how it works: http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf

Senate Committee on the Judiciary

The website of the Committee provides an overview of the appointments process for 'Article 3' courts (those courts defined in Article 3 of the US Constitution):

- Judicial nominations for all Article III courts that are sent to the Senate for consideration by the President are referred to the Senate Judiciary Committee. These include nominations for the U.S. Supreme Court, the U.S. Courts of Appeals, U.S. District Courts, and the Court of International Trade
- Pursuant to the Constitution, nominations for the Supreme Court, Courts of Appeals and District Courts are made by the President and confirmed by the Senate
- Potential nominees are sometimes identified and recommended by members of Congress. Nominees confirmed by the Senate are appointed for lifetime terms
- After a nomination is received by the Senate and referred to the Judiciary Committee, the Committee typically conducts a confirmation hearing for each nominee. Before a hearing can be scheduled in the Committee, however, nominees are expected to complete a comprehensive questionnaire
- The American Bar Association's Standing Committee on the Federal Judiciary also provides an evaluation of the professional qualifications of a judicial nominee. These ratings provide an evaluation of a nominee's integrity, professional competence and judicial temperament. They are not an evaluation of a nominee's philosophy or ideology
- During a hearing, judicial nominees engage in a question and answer session with members of the Judiciary Committee. After the hearing, Committee members may send written follow-up questions to the nominee. After the completion of any follow-up questions, a nomination can then be listed for Committee consideration during an Executive Business Meeting
- Should the Committee order a nomination reported, the nomination is placed on the Senate's Executive Calendar where it would await consideration by the full Senate. If a majority of the Senate votes in favour of a nomination, the President is notified of the Senate's action, and the nomination is confirmed

The President can also make what are known as 'recess appointments', "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session[59]."

The Senate usually confirms Presidential appointees to the Supreme Court:

> *Since the appointment of the first Justices in 1789, the Senate has confirmed 123 Supreme Court nominations out of 159 received. Of the 36 nominations which were not confirmed, 11 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate. Six of the unconfirmed nominations, however, involved individuals who subsequently were re-nominated and confirmed[60].*

The contemporary Senate's inclination to proceed more slowly with Supreme Court nominations has been due at least in part to several developments:

> *Starting with the "Warren Court" in the 1950s (under then-Chief Justice Earl Warren), the Supreme Court became an ongoing focal point of controversy, as it handed down a succession of rulings ushering in profound changes in American society and politics. By the late 1960s, the perceived potency of the Court as a catalyst for change underscored*

59 Article 2, Section 2, Clause 3 of the United States Constitution

60 http://www.fas.org/sgp/crs/misc/RL31989.pdf

to many Senators, especially those on the Judiciary Committee, the importance of closely evaluating the attitudes and values of persons nominated to serve on the Court.

A general trend among Senate committees, beginning in the 1970s and 1980s, was to intensify their scrutiny of presidential nominations and to augment their investigative staffs for this purpose. Thorough and unhurried examination was regarded as especially justified in the case of Supreme Court nominations. Accordingly, close scrutiny by the Senate Judiciary Committee became the norm, even if a nominee were highly distinguished and untouched by controversy.

Many, if not most, of the nominees in recent decades proved to be controversial because of questions raised concerning their backgrounds, qualifications, or ideological orientation.

It has become increasingly common for Presidents to state the philosophical or ideological values that they look for in a Supreme Court nominee—a practice which may immediately raise concerns about the nominee on the part of Senators who do not share the President's philosophical preferences or vision for the Court[61].

The creation of new judgeships at the federal level

Court of appeals and district court judgeships are created by legislation that must be enacted by Congress. The Judicial Conference (through its Judicial Resources Committee) surveys the judgeship needs of the courts every other year. A threshold for the number of weighted filings per judgeship is the key factor in determining when an additional judgeship will be requested. Other factors may include geography, number of senior judges, and mix of cases. The Judicial Conference presents its judgeship recommendations to Congress.

Appointment of chief judges

A judge is not nominated or appointed to the position of chief judge (except for the Chief Justice of the United States); they assume the position based on seniority. The same criteria exists for circuit and district chiefs. The chief judge is the judge in regular active service who is senior in commission of those judges who are (1) 64 years of age or under; (2) have served for one year or more as a judge; and (3) have not previously served as chief judge[62].

Selection of judges at state level

According to the Institute for the Advancement of the American Legal System (University of Denver) there are five basic methods that states use to select judges and "no two states use exactly the same selection method". Furthermore, "In many states more than one method of selection is used – for judges at different levels of the court system and even among judges serving at the same level. And when the same method is used, there are still variations in how the process works in practice". The five methods can be summarised as follows[63]:

- **Commission-based appointment (also known as 'merit selection', the 'Missouri Plan', or the 'Nonpartisan Court Plan'):** process by which judicial applicants are evaluated by a nominating commission, which then sends the names of the best qualified candidates to the Governor. The Governor appoints one of the nominees submitted by the commission. A judge appointed using this method will at some point be subject to a referendum asking voters whether they want him or her to continue.
- **Contested election**: an election in which multiple candidates may seek the same judicial position. Voters cast ballots for judicial candidates as they do for other public officials

61 As above

62 http://www.uscourts.gov/Common/FAQS.aspx

63 http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf

- **Non-partisan election**: an election in which a judicial candidate's party affiliation, if any, is not designated on the ballot
- **Partisan election**: an election in which candidates run for a judicial position with the official endorsement of a political party. The candidate's party affiliation is listed on the ballot.

- **Gubernatorial appointment**: the process by which a judge is appointed by the Governor (without a judicial nominating commission). The appointment may require confirmation by the legislature or an executive council
- **Legislative appointment/election**: the process by which judges are nominated and appointed or elected by legislative vote only

Merit selection (The Missouri Plan)

The Nonpartisan Selection of Judges Court Plan (the Missouri Plan) was adopted by Missouri in 1940 to overcome the control of judicial selection by political machines and party bosses. It has served as a model for the thirty-four other states that use merit selection to fill some or all judicial vacancies[64]. The Plan:

> involves the creation of a nominating commission that screens judicial candidates and submits to the appointing authority (such as the governor) a limited number of names of individuals considered to be qualified. The appointing authority chooses from the list, and any one so chosen assumes the judgeship for a probationary period. After this period the judge stands for popular election for a much longer term, not competing against other candidates but basing his candidacy on previous judgments. Under the Missouri Plan, voters decide whether or not to retain the judge in office[65].

There are five basic steps in the appointive process:

- Advertising the judicial vacancy
- Receiving applications by interested candidates
- Vetting and interviewing prospective candidates by the nominating Commission
- Formulating a shortlist of recommended names to the Governor
- Nomination by the Governor of a person from the list to fill the vacancy[66]

However, there is no uniformity within this approach:

- in some states, every applicant is entitled to an interview whereas in other states only those applicants who are likely to make it to the final shortlist are called
- in some states, the Governor's choice is final. In others, the legislature must consent to the appointment[67]

Who chooses the Commissioners?

Commissioners are usually chosen by "panels of public officials, attorneys, and private citizens. The panels may include the governor, the attorney general, judges of the state's highest court, bar association officers, private citizens, and in some instances, members of the state legislature"…Currently "two-thirds of the states and the District of Columbia select some or all of their judges under the merit system"[68].

64 http://www.judicialselection.us/judicial_selection/index.cfm?state=MO

65 http://www.britannica.com/EBchecked/topic/385765/Missouri-Plan

66 http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf

67 As above

68 http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf

The following are some advantages and disadvantages of merit selection[69]:

Advantages

- lawyers who sit on merit selection panels are better equipped to assess the qualifications of judges than voters because they know more about the law
- judges are not reliant on the executive, legislature or the public to keep their job
- judges do not have to compromise themselves by running for election and seeking campaign contributions

Disadvantages

- lawyers are not representative of the public, and the judges they select will reflect the preferences of lawyers rather than the public. There is a belief that as lawyers are generally more liberal than the wider public, this will be reflected in their judicial selections
- merit selection panels may nominate friends or colleagues over people they know to be more qualified

Elections

Previous research has found that:

> *Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns[70].*

Advantages and disadvantages of judicial elections

There is a growing consensus among legal academics and the majority of the judiciary that judicial elections are damaging to the concept of judicial independence: "The United States is almost the only nation in the world that selects judges at any level by popular election"71. Nevertheless, polling suggests that citizens in the states that use elections are reluctant to change to a different system.

As of 2010:

- 32 states use contested elections (either partisan or non-partisan) to pick judges for at least some level of their courts
- 21 states elect all judges
- 25 additional states use the merit selection system
- A handful of states have adopted some form of the federal system, whereby judges are selected by the Governor and are subject to a confirmation hearing in the state senate
- In two states, Virginia and South Carolina, the legislature selects the judiciary[72]

Sandra Day O'Connor, former Supreme Court Justice, has called for the abolition of judicial elections as "elected judges are susceptible to influence by political or ideological constituencies"[73]. The counter argument to this is that elections bring a level of transparency to the process that merit selection systems do not. A specialist in judicial politics has commented: "(the American system) obviously (has) excesses in terms of politicization and

69 Inside ALEC, Journal of the American Legislative Exchange Council, March 2011

70 http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/$file/JudIndep.pdf

71 Trends in Judicial Selection in the States, McGeorge Law Review, Vol 42, 2010

72 As above

73 http://www.nytimes.com/2010/05/23/opinion/23oconnor.html

the campaign finance system…but these other systems are also problematic. There's greater transparency in the American system". It was also argued that the selection of appointed judges can be influenced by political considerations and cronyism that are hidden from public view[74].

Other advantages of judicial elections include:

- **Democratic accountability**: when judicial elections are used to select judges, they are likely to exercise their discretion in accordance with the preferences of the majority of the public
- **Performance accountability**: corrupt and incompetent judges can be more easily removed through elections
- **Independence from other branches of government**: elected judges are not beholden to the Governor or legislature. This enhances their ability to check and balance the executive and legislature[75]

Cost

Reports have shown that spending on state high court elections has more than doubled, from $83.3 million in 1990-1999 to $206.9 million in 2000-2009[76].

3.3 Removal of Judges

Federal Judges

Federal judges are typically appointed for life and hold office during good behavior but they can be removed by congressional impeachment proceedings.

Removal of State Judges

According to the American Judicature Society:

A number of methods have been established to remove state judges. Removal methods available in a specific state are typically set forth in the state's constitution. Most states employ some form of removal that involves the state's highest court and the state's judicial conduct organization. Other methods include impeachment, legislative address, and recall election[77].

The methods can be summarised as follows[78]:

Impeachment

Nearly all fifty states have constitutional provisions for removal of state judges by impeachment. In most states, the impeachment procedure begins with the House of Representatives voting on whether a judge should be impeached. If the impeachment measure passes in the House, it then goes to the state Senate for a trial and the Senate will vote on whether to convict. Grounds for impeachment often include terms such as "malfeasance," "misfeasance," "gross misconduct," "gross immorality," "high crimes," "habitual intemperance," and "maladministration."

Legislative Address

Another method of removal is the bill of address, which allows the legislature, often with the governor's consent, to vote for a judge's removal. Approximately sixteen states have

74 http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=2&_r=2

75 Inside ALEC, Journal of the American Legislative Exchange Council, March 2011

76 http://www.justiceatstake.org/newsroom/press_releases.cfm/report_interest_groups_dominate_judicialelection_spending?show=news&newsID=11949

77 http://www.ajs.org/ethics/eth_impeachement.asp

78 As above

provisions for legislative address. Legislative address is a remnant of colonial times when, in English law, kings had the power to "address" judges from office with the consent of Parliament. Most states, when drafting their constitutions, discarded the bill of address and incorporated some form of the impeachment process. Unlike narrow impeachment provisions, legislative address is quite broad and allows a judge to be removed by the legislature for nearly any reason, including laziness or illness.

Recall Election

A few states allow for judges to be removed from office by recall election. Judges may be subject to recall for serious offenses, which may or may not be specified in recall provisions. The two-part process is initiated by a recall petition signed by voters and presented to election officials. If the required number of signatures is obtained and any challenges to the recall petition are unsuccessful, a date is set for a recall election and the judge is removed if a majority of voters vote for recall.

Judicial Conduct Commissions

To bridge the gaps left by impeachment and legislative address provisions, judicial conduct commissions have been created by state constitutions, court rules, or statutes. First established in California in 1960, judicial conduct commissions are now a part of every state's judicial disciplinary process. Commission members include judges, lawyers, and lay members. A confidential investigation by a judicial conduct commission is generally initiated by the filing of a complaint by a member of the public.

If a formal statement of charges is filed by a commission, a hearing (open to the public in most states) is held and members of the commission vote on whether the evidence supports the allegations in the complaint. Sanctions may be imposed on the judge and may include reprimand, admonishment, censure, fine, suspension, involuntary retirement, or removal. Depending on the state, the commission either makes a recommendation to the supreme court as to the appropriate sanction or imposes a sanction the judge can ask the supreme court to review.

3.4 Judicial diversity at state level

In 2010 the Brennan Centre for Justice at the New York University School of Law carried out a study looking at judicial diversity at state level. It focused on racial and gender diversity in the state court system across 10 states[79]. The report found that:

- White males were over-represented on state appellate benches by almost two-to-one
- Almost every other demographic group was under-represented compared to their share of the population
- There were still fewer female than male judges, despite the fact that the majority of law students were female
- Both the elective and appointive systems were producing similarly poor outcomes in terms of diversity

4 Conclusions

This paper provides information in the process of judicial appointments, promotions and removals in Germany and the United States. Both are federal states but have different

79 http://www.brennancenter.org/content/resource/diversity_report/ Arizona, Colorado, Florida, Maryland, Missouri, New Hampshire, New Mexico, Rhode Island, Tennessee and Utah. The states were chosen to reflect different demographics and various legal environments.

approaches to the appointment of judges. In Germany, the majority of judges are career judges who join the judiciary early in their career and spend their entire working life in it. Somebody who has completed the Second State Examination in Law can apply to become a judge. The decision on appointment is made by an executive Minister; in about half the Lander there are judicial selection committees that also participate in the decision on recruitment. There are different procedures in place for the selection of judges; judges on the federal constitutional court are elected by the members of the Federal Parliament.

Members of the career judiciary can apply for a promotion when a suitable vacancy is advertised. The decision on promotion is made by the relevant Executive Minister, though there is often provision for a judicial selection committee to make a recommendation to the Minister. Decisions on discipline and removal are tightly regulated and any decision on discipline and removal is made by a judicial body.

In the United States, there are two types of courts: Federal and State courts. Federal court judges are appointed by the President of the United States with the advice and consent of the senate. There is great variation as to how state court judges are appointed. In many states some form of election is used. In other states, there are merit appointments based on the work of a nominating commission;. Some states use a version of the federal appointments system, while there are a couple of states in which the legislature elects the judges.

Federal judges are appointed for life subject to the possibility of Congressional impeachment for misbehaviour. The vast majority of state judges are not appointed for life, but for a term. There are different methods in the states for removing judges from office. These include: impeachment proceedings, recall elections, legislative address and judicial conduct commissions.

Appendix 5

Other Papers

Background paper on the Review of Judicial Appointments in Northern Ireland

Background Paper

In Northern Ireland, the judicial appointments process is administered by the independent Northern Ireland Judicial Appointments Commission (NIJAC). NIJAC is a recommending body in respect of Crown appointments and an appointing body in respect of non-Crown appointments.

NIJAC recruits for a varied range of judicial appointments – legal and lay/ordinary posts and posts which require other experience outside the legal profession – i.e. land valuation, medical, finance, human resources and health and social care. Since 2005, NIJAC has recommended 234 people for judicial appointment across 43 recruitment campaigns. NIJAC has also overseen 507 judicial appointment renewals.

The Lord Chief Justice is responsible for the removal of judges in Northern Ireland. Removal of a listed judicial office holder requires a recommendation for removal to have been made by a tribunal drawn from the Northern Ireland Judicial Appointments Commission's membership and convened by the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman (NIJAO). The most senior judges can only be removed by the Queen after an address of both Houses of Parliament.

Northern Ireland Judicial Appointments Commission (NIJAC)

The Review of Criminal Justice in 2000 recommended the establishment of a judicial appointments commission for Northern Ireland which would have responsibility for 'organising and overseeing….. Judicial appointments from the level of High Court judge downwards'. The Justice (Northern Ireland) Act 2002 gave effect to this and other recommendations of the Review of Criminal Justice. The Act also amended the law relating to the judiciary and courts in Northern Ireland including provision for the removal of judges, changes to eligibility criteria, a new oath and provisions to make the Lord Chief Justice head of the judiciary in Northern Ireland.

The Northern Ireland Judicial Appointments Commission (NIJAC) was established in June 2005 as an independent executive Non Departmental Public Body and has a statutory duty to ensure that appointments to judicial office are based solely on merit.

The Northern Ireland Act 2009 extended NIJAC's statutory duties and NIJAC is a recommending body in respect of Crown appointments and also an appointing body in respect of non-Crown appointments.

The 2002 and 2004 Justice (Northern Ireland) Acts set out NIJAC's key statutory responsibilities:

- To conduct the appointments process and to select and recommend for appointment in respect of all listed judicial appointments up to, and including, High Court Judge
- To recommend individuals solely on the basis of merit
- To engage in a programme of action to secure, so far as is reasonably practicable to do so, that recommendations for appointments to judicial office are reflective of the community in Northern Ireland
- To engage in a programme of action to secure, as far as is reasonably practicable to do so, that a range of persons reflective of the community in Northern Ireland area viable for consideration by the Commission whenever it is required to recommend a person for appointment to a listed juridical office.
- To publish an annual report setting out the activities and accounts for the period.

The Northern Ireland Act 2009 also increased NIJAC's responsibilities to include:

- An appointing body in respect of non-crown appointments (rather than just making a recommendation for appointments).
- Agreeing with the Department of Justice the maximum number of persons who may hold a judicial office at any one time;
- Agreeing legislative change governing the maximum number of judicial offices;
- Deciding elements of terms and conditions for certain judicial offices;
- Supporting the Department of Justice in judicial succession planning; and
- Providing Commissioners to participate in 'removal tribunals' convened by the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman.

Office of the First Minister and Deputy First Minister

The Office of the First Minister and Deputy First Minister (OFMDFM) does not have any role in the judicial appointments process, rather has a role to oversee NIJAC's governance and finance. This is at variance with the Review of Criminal Justice in 2000 which recommended that following the devolution of policing and justice, political responsibility and accountability for the judicial appointments process should lie with OFMDFM.

Assembly Research Paper: Judicial Appointments in Northern Ireland

Details of the legislative context for judicial appointments and the processes in the rest of the UK and Republic of Ireland are contained in the briefing paper from Assembly Research and Information Service - 'Judicial Appointments in Northern Ireland' (a copy is at appendix 4). This paper also lists the judicial office holders under the remit of the NIJAC and the steps in the appointments process.

Schedules 2 to 5 of the Northern Ireland Act 2009 - Summary of Amendments

The Northern Ireland Act 2009 made amendments to the process of judicial appointments and removals as set out in the Judicature (Northern Ireland) Act 1978 and the Justice (Northern Ireland) Act 2002 (as amended by the Justice (Northern Ireland) Act 2004) giving the Northern Ireland Judicial Appointments Commission ("NIJAC") additional responsibilities. Section 29C of the Northern Ireland Act 1998 ("the 1998 Act") states that standing orders shall require one of the committees established by virtue of section 29 or the committee established by virtue of section 29A of the 1998 Act to review the operation of the amendments made by Schedules 2-5 to the Northern Ireland Act 2009. Standing Order 49A provides that the Committee for Justice shall review these amendments, report on its review by 30th April 2012 and include in its report any recommendations it has for changes to the way in which judicial office holders are appointed and removed.

The amendments are summarised below:

Schedule 2

- Substitutes sections 12 to 12C for sections 12 and 12B of the Judicature (Northern Ireland) Act 1978. New section 12 makes provision for the appointment of the Lord Chief Justice and Lords Justice of Appeal by the Queen on the recommendation of the Prime Minister. The Prime Minister must consult the current Lord Chief Justice (or if that office is vacant or the Lord Chief Justice is not available, the senior Lord Justice of Appeal who is available) and NIJAC before making a recommendation.
- New section 12A makes provision for the appointment of High Court judges by the Queen.
- New section 12B deals with tenure of office of the Lord Chief Justice. The Queen may remove the Lord Chief Justice following an address of both Houses of Parliament. A motion for such an address may be made in the House of Commons only by the Prime Minister and in the House of Lords only by the Lord Chancellor, or, if the Lord Chancellor is not a member of that House, only by another Minister of the Crown at the Lord Chancellor's request. There are certain conditions which must be met before a motion can be moved. A motion can only be moved if a tribunal convened by the Prime Minister (after consulting the Lord Chancellor) and including a lay member of NIJAC, has recommended the removal from office on grounds of misbehaviour. No motion can be moved unless a copy of the tribunal's report is laid before Parliament.
- New section 12C provides for the removal of Lords Justices of Appeal and also High Court judges appointed before section 7 of the 2002 Act (removal from listed judicial offices) came into force. The Queen may remove Lords Justices of Appeal and certain High Court judges following an address of both Houses of Parliament. A motion for an address may be made in the House of Commons only by the Prime Minister and in the House of Lords only by the Lord Chancellor or, if the Lord Chancellor is not a member of that House, only by another Minister of the Crown at the Lord Chancellor's request. No such motion may be made unless a Tribunal convened either by the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman has recommended that the office holder be removed on grounds of misbehaviour and the Lord Chancellor and the Prime Minister have consulted with the Lord Chief Justice or have been advised by the Lord Chief Justice to accept the recommendation. Pursuant to section 7 of the Justice (NI) Act 2002 the power to remove or suspend a person holding a listed judicial office is now exercisable by the Lord Chief Justice.
- New section 12 C also deals with the constitution of the tribunal.

Schedule 3

- Schedule 3 makes amendments to the Justice (Northern Ireland) Act 2002 amending the appointment and removal provisions. Section 5 and Schedule 3 of the Justice (NI) Act 2002 had originally prospectively transferred responsibility from the Lord Chancellor to the First and deputy First Ministers, acting jointly, for the appointment of persons and for recommending persons to the Queen for appointment as listed judicial office holders.
- Paragraphs 3 and 13 to Schedule 3 (of the Northern Ireland Act 2009) substitute a new Schedule 3 for Schedule 3 of the Justice (NI) Act 2002. Part 1 of new Schedule 3 sets out the process for appointment of those listed judicial office holders appointed by the Queen. Part 2 of new Schedule 3 sets out the appointment process for listed judicial office holders appointed by NIJAC. New Schedule 3 also provides that selection of a person to be appointed or recommended for appointment, to a listed judicial office must be solely on the basis of merit. The Queen's power to appoint a person to a listed judicial office is exercisable on the recommendation of the Lord Chancellor. NIJAC is responsible for selecting a person for recommendation for appointment and must notify the Lord Chancellor a person is selected. The Lord Chancellor must, as soon as is reasonably practicable, recommend the selected person for the office. NIJAC select and make

recommendations for Crown appointments to the Queen via the Lord Chancellor, up to and including High Court Judge. It is also an appointing body, selecting and appointing persons to non- Crown listed judicial offices. *Previously, the Justice (Northern Ireland) Act 2002 provided that the power to add or omit listed judicial offices or alter their description was exercisable by the First Minister and deputy First Minister. Section 1 and Schedule 1 of the Justice (Northern Ireland) Act 2004 amended the Justice (Northern Ireland) Act 2002, transferring these functions from the First Minister and deputy First Minister to the Lord Chancellor.*

- The substituted new Schedule 3 of the Justice (Northern Ireland) Act 2002 also provides that NIJAC must at all times engage in a programme of action to ensure that so far as it is reasonably practicable judicial appointments are reflective of the community in Northern Ireland and that a range of persons reflective of the community are available for consideration by NIJAC when selecting a person or recommending for appointment.
- Part 1 and Part 2 of the new Schedule 3 no longer include a provision for the Lord Chancellor to ask NIJAC to reconsider their selection. *Previously, the Justice (Northern Ireland) Act 2002 provided that when NIJAC made a selection for the Lord Chancellor to consider, he could ask NIJAC to review its choice.*
- Provides that the power to remove a person from a listed judicial office (or suspend a person from office pending a decision whether to remove him) is exercisable by the Lord Chief Justice upon recommendation by a specially convened tribunal. *Previously this power was prospectively provided under the Justice (NI) Act 2002 to the First Minister and deputy First Minister, acting only on the basis of a tribunal recommendation and only on agreement of the Lord Chief Justice.* The Lord Chief Justice has discretion not to remove or suspend someone even if a recommendation has been made but must notify the person, the tribunal and, if the tribunal was convened by the Northern Ireland Judicial Appointments Ombudsman, the Ombudsman of the reasons for not removing or suspending the person.
- Makes provision in respect of tribunals for considering removal.
- Provides that NIJAC must agree with the Department of Justice (DoJ) the maximum number of persons who may hold a listed judicial office at any one time. With the agreement of DoJ, NIJAC may revise this determination.

Schedule 4

- Transfers the powers to appoint certain judicial office holders from the Lord Chancellor to NIJAC (including tribunals) and to agree with DoJ the terms and conditions of appointment for certain office holders and provision about the payment of fees and allowances to office holders.

Schedule 5

- Consequential amendments and transitional provisions relating to appointments, removals and investigation of complaints of maladministration initiated before the Northern Ireland Act 2009 came into operation.

Department of Justice Response to Ministry of Justice Consultation

FROM THE OFFICE OF THE JUSTICE MINISTER

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Your ref:
Our ref: COR/2117/2011

Paul Givan MLA
Chairman of the Justice Committee
Northern Ireland Assembly
Parliament Buildings
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BT4 3XX

13 February 2012

Dear Paul

CONSULTATION: 'APPOINTMENTS AND DIVERSITY- A JUDICIARY FOR THE 21ST CENTURY'

As you may be aware, the Ministry of Justice has issued a consultation on judicial appointments and diversity in England and Wales and appointments to the United Kingdom Supreme Court. I have responded to that consultation today, and write to share my response with you.

I will, of course, keep you apprised of developments.

Yours

DAVID FORD MLA
Minister of Justice

FROM THE OFFICE OF THE JUSTICE MINISTER

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Your ref:
Our ref: COR/2117/2011

The Right Honourable
Kenneth Clarke QC MP
Lord Chancellor and Secretary of
State for Justice
102 Petty France
London
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10 February 2012

Dear Kenneth

Thank you for your letter of 18 November 2011 sharing the consultation on proposals regarding judicial appointments and diversity in England and Wales and appointments to the United Kingdom Supreme Court.

I understand that your Department has also submitted these proposals as evidence to the House of Lords Select Committee on the Constitution, which is currently undertaking a review of judicial appointments arrangements in the United Kingdom.

As you may be aware, judicial appointments policy in Northern Ireland does not fall within my remit. Responsibility for the appointment of the majority of judicial office holders in Northern Ireland is a matter for the Northern Ireland Judicial Appointments Commission.

Building a fair, just and safer community

FROM THE OFFICE OF THE JUSTICE MINISTER

Department of
Justice
www.dojni.gov.uk

As you know, you retain a limited role in recommending a small number of those selected by the Commission for appointment by Her Majesty the Queen. The Prime Minister also makes the recommendation to the Queen with regard to the appointment of the most senior judicial officer holders in Northern Ireland, following consultation with the Lord Chief Justice and the Commission.

The Commission's responsibility for appointments extends to ensuring diversity amongst appointees and the range of persons available for selection and the Commission is also represented on the Selection Commission for the United Kingdom Supreme Court.

I understand that the consultation has already been shared with the Commission, the Lord Chief Justice of Northern Ireland and the First Minister and deputy First Minister, given that they have an interest in the matters on which you are consulting in England and Wales.

As part of the arrangements put in place to give effect to the devolution of responsibility for justice to the Northern Ireland Assembly, it was agreed that the appointment processes applicable in this jurisdiction would be reviewed by 1 May 2012. That review, which I understand is to commence shortly, is to be led by the Assembly Justice Committee, which may also have an interest in your consultation proposals.

You will wish to be aware that there may also be some potential for read across to this jurisdiction insofar as your proposals relate to terms and conditions of appointment (for example, the extension of part-time working to High Court Judges and restricting fee-paid appointments to three five year renewable terms), as comparisons may be drawn with equivalent office holders in this jurisdiction. As a result, it is possible that

FROM THE OFFICE OF THE JUSTICE MINISTER

Department of
Justice
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your proposals could have implications for both those Northern Ireland office holders whose terms and conditions of appointment are excepted (and, therefore, a matter for you), as well as for those whose terms and conditions are devolved (and, therefore, a matter for NIJAC with the agreement of my Department).

I am aware that our officials already engage regularly on matters of mutual interest and overlapping responsibility and that work is ongoing to agree a Memorandum of Understanding to support this work. We will wish to be assured that that liaison and co-operation continues so that the outworking of proposals in England and Wales and any read across for this jurisdiction can be properly assessed. The Lord Chief Justice of Northern Ireland also has an interest given his responsibilities for judicial deployment.

I am copying this letter to the First Minister and deputy First Minister, and to the Lord Chief Justice of Northern Ireland, in his capacity of head of the Northern Ireland Judiciary and also as Chair of the Commission.

A copy also goes to the Chair of the Justice Committee of the Northern Ireland Assembly, Paul Givan MLA.

DAVID FORD MLA
Minister of Justice

Correspondence from Chairman of AERC to Chairman of Committee for Justice

Northern Ireland Assembly

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Belfast
BT4 3XX

COMMITTEE FOR
22 JUN 2011
JUSTICE

Our Ref: C007 /11

22 June 2011

Dear Paul,

Review of Judicial Appointments

Thank you for meeting with me on Tuesday 21 June 2011in Parliament Buildings to discuss which committee should review and report on the arrangements for the appointment and removal of judicial office holders by 30 April 2012. Standing Order 59 (4A) currently provides that this work should be undertaken by the Assembly and Executive Review Committee.

During discussion we noted that the previous Assembly and Executive Review Committee had agreed with the previous Chairperson of the Committee for Justice that the Committee for Justice would be best placed to carry out this work. Having noted this, we also agreed that it would be more appropriate if this work was carried out by the Committee for Justice.

In light of this decision I will write to the Chairperson of the Committee on Procedures to request that Standing Orders be appropriately amended to provide for the Committee for Justice, and not the Assembly and Executive Review Committee, to undertake this review. I will forward you a copy of the correspondence to the Committee on Procedures in due course.

Yours sincerely,

Mr Stephen Moutray MLA
Chairperson
Assembly and Executive Review Committee

Assembly & Executive Review Committee, Room 375, Parliament Buildings, Ballymiscaw, Stormont, Belfast BT4 3XX Telephone: 028 90521928

Correspondence from AERC to Chair on Procedures - Standing Orders 59 4A

Ms Sue Ramsay
Chairperson
Committee on Procedures
Room 430
Parliament Buildings
Ballymiscaw
Stormont Estate
Belfast
BT4 3XX

Our Ref: C006 /11
28 June 2011

Dear Sue

Please be advised that in accordance with Standing Order 64A, a meeting between the Chairperson of the Assembly and Executive Review Committee and the Chairperson of the Committee for Justice took place in Parliament Buildings on Tuesday 21 June 201.

At the meeting it was formally agreed that the Committee for Justice, rather than the Assembly and Executive Review Committee, would review the appointments of Judicial official holders and report on its review by 30 April 2011 as specified in Standing Order 59 (4A).

I would be grateful if you could arrange for Standing Order 59 (4A) to be amended to reflect this change.

Yours sincerely,

Mr Pat Sheehan MLA

Deputy Chairperson
Assembly and Executive Review Committee

CC Mr Paul Givan MLA, Chairperson to the Committee for Justice

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