



Northern Ireland  
Assembly

**Committee for Justice**

# **OFFICIAL REPORT (Hansard)**

**Review of Judicial Appointments**

**8 March 2012**

# NORTHERN IRELAND ASSEMBLY

## Committee for Justice

### Review of Judicial Appointments

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**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

**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.

**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.

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.

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.

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.

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.

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.

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.

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.

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

**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?

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

**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?

**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.

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.

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.

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.

**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.

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

**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."*

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."?

**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.

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.

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.

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.

**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.

**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.

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.

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.

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

**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.

**The Chairperson:** OK.

**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?

**Sir Declan Morgan:** Yes.

**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?

**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.

**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?

**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.

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.

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 —

**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?

**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.

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

**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.

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

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

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

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."*

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

**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.

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

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

**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.

**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.

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

**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?

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

**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.

**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.

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."*

Did the commission take that on board?

**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.

**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"*.

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."*

Is that a recommendation that you took into consideration?

**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.

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



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

**Mr A Maginness:** Yes.

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

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

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

**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."*

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?

**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.

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.

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.

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.

**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.

**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.

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.

**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."*

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.

**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."*

I take some comfort from those comments.

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

**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.

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

**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?

**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.

**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.

**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.

**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.

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

**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.

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

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

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

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

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

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

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

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

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

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

**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.

**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.

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

**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.

**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?

**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.

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.

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.

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

**Sir Declan Morgan:** I agree.

**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.

**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.

**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?

**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.

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

**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.

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

**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.

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.

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

**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.

**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."*

Are you dominated? *[Laughter.]*

**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.

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.

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.

**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?

**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.

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

**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.

**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.

**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.]*

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

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

**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. On 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?

**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.

**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?

**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.

**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.

**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.

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

**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.

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.

**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.

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

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.

**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?

**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.

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

**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.

**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.

**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.]*

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