

The United Kingdom Association of Women Judges

Response to the DCA Discussion Paper June 2004“Increasing Judicial Diversity”

3 August 2004

1. This paper sets out the Association’s response to some aspects of the discussion paper, in particular addressing the experiences of women who are now judges. It makes certain observations and recommendations on how women may be encouraged to seek judicial office or advance a judicial career.

2. Annexed to this paper is the Association’s response, dated 4 November 2003, to the DCA Consultation Paper CP 10/03 July 2003 “Constitutional Reform: A new way of appointing Judges”. Annexed to that paper are (1) a brief summary of the aims, objectives and membership of the Association, and (2) a paper titled “Salaried Part Time Working”, dated 17 September 2003, prepared for the Association by the Right Honourable Lady Justice Hale DBE.

Consultation

3. The Association welcomes the fact that it was involved in the consultation exercise. It was invited to send representatives to each of the focus group meetings held in June 2003, but it was not possible for any representative to attend. Many Committee members expressed regret, but pointed out the fact that they are listed to sit many months ahead, and it is not possible for judges to take leave at short notice save in exceptional circumstances. One representative did, however, attend the conference following the publication of the consultation paper.

Format of the Response

4. The main part of the Association’s response is set out in Paragraphs 5 to 26 below. The response sets the problem in context, and makes a number of specific recommendations. Following these comments, the paper goes on to consider particular paragraphs of the discussion paper. Where no comment is made, this is because the Association has no particular view on an issue.

The Problems

5. There is no need to spend any time in justifying the need for diversity amongst the judiciary. The case on that issue has, it is hoped, already been won. The need, as the discussion paper recognises, is to identify practical strategies to ensure that such diversity can be achieved. The following paragraphs illustrate some of the difficulties that face women in their quest to reach the Bench at all levels.

The Background

6. The vast majority of successful candidates to the High Court Bench are drawn from the most successful members of the Bar. The majority of candidates to the Circuit Bench are drawn from practising members of the Bar. Yet the Bar is a profession in which is difficult for women to excel, and extremely difficult to excel if there are home commitments such as having and raising children or looking after elderly relatives, or

supporting a partner. A successful practice at the Bar, particularly in London, is not a job, it is a way of life. It involves being available, often at short notice, to take on an urgent matter, perhaps with travel away from home, working late in the evenings and at weekends. It involves uncertainty over which days are going to be committed, and holidays being forfeit for the sake of work. There is the uncertainty of being self-employed, with the consequential lack of employment rights. There are no regular hours, or days, or places of work. It is a job which is very self-reliant (rather than being team related) and involves selfless and selfish dedication. Any woman who is trying also to run a home and family will find this daunting, however much outside assistance she can use. Many talented women give up the Bar and many allow themselves to be “sidetracked” in chambers. This does not apply to all, of course, but the women who do manage to keep a high profile practice and run a home and family are exceptional, and they are few. Many women feel that the price paid is too high.

7. In addition to this, even if women do manage to keep a practice afloat, they do not have the time to become involved in the additional “networking” which goes on in the evenings or at weekends which can be so important in being “known” amongst the higher judiciary. The circuits and the Inns provide opportunities to rub shoulders with “the great and the good” in an informal way outside work hours, and is a predominantly male, middle class, white pastime.

8. So the Bar is not family friendly; cannot provide real opportunities for part-time work; and does not encourage work as part of a team (at which women excel). And yet it is almost the only source of High Court judges and of the majority of the Circuit Bench. It is little wonder that there are so few women at senior levels.

9. It is very interesting to note that our two most senior women Judges have not had a high profile career at the Bar. The President of the Family Division was appointed to the High Court from the District Bench. Dame Brenda Hale was an academic, and at the Law Commission before her appointment.

10. The Association does not consider that being a high-calibre advocate is a prerequisite of judicial appointment. There are good advocates who make poor judges; equally, there are many talented lawyers whose skills are not in advocacy but who have the potential to make good judges.

11. It is therefore imperative that the pool of candidates is much wider than at present, if diversity is to be achieved. This must be done in a systematic way, not in a way that pays lip-service to diversity. This involves serious trawls from the pool of talented solicitors, members of the employed Bar, academics, lawyers in law centres, and the existing judiciary.

12. The “trickle-up” effect of waiting for good candidates to reach the higher ranks of the Bar has not worked. It may be more successful in years to come, but it still excludes the huge numbers of talented and successful women lawyers who have chosen different career paths but would still make good judges. Amongst solicitors it is recognised that women are still grossly under-represented at partnership level. Care must be taken to include in the trawl all those who may be potential candidates, even if they have not reached the top of their own professions.

13. The report of the Commissioners’ review of the High Court 2003 competition gives rise to serious concern. Of the nine persons offered appointment in the period up to the

end of June 2004, five had been nominated and three of these had been nominated by the Lord Chancellor.

14. Knowledge of procedures of this sort (which lack transparency and which suggest that appointment is made of those who are known to the Lord Chancellor and senior judges) together with the fact that, generally, only the higher reaches of the Bar are appointed, serve to prevent women from even considering making an application to the High Court Bench. Urgent steps need to be taken to change the system presently in place, and the first and most obvious is to appoint only following advertisement and application.

The Appointment System

15. The Commissioners' review of the 2003 High Court competition makes it clear that the present appointment system cannot be allowed to continue. There is an over-emphasis on consultation at an early stage which dictates the sift for interview. That consultation process lacks transparency and fairness. Inevitably, existing judges choose those who are most like themselves, and favour the high profile Bar above all other lawyers. As the Commissioners conclude, consultation prior to sift is discriminatory, and excludes large numbers of potential candidates who are not visible and known to the existing judiciary.

16. Anecdotal evidence indicates that, in some cases, a local Circuit Judge has encouraged a District Judge to apply for appointment as Recorder or Circuit Judge but has then not supported the candidate during the consultation process. An opinion occasionally expressed is "once a District Judge, always a District Judge". An objective process is needed which does not permit such attitudes to influence appointments.

Gaining Experience of Judicial Office: Deputy High Court Judges, Recorders and Deputy District Judges

17. The Association strongly supports the opportunity for candidates to have experience of fee-paid sitting before considering a full-time judicial career. Indeed, it would say that it should be a pre-requisite to full-time appointment. However, there are a number of drawbacks to the present situation:-

(1) The feedback and monitoring of the fee-paid Bench is haphazard. All fee-paid judges should have proper and full appraisal and mentoring. There should be a formal feed-back system in place and regular, systematic reviews of all such appointments.

One of our members has commented that the only appraisal that seemed to be done was by the ushers

(2) One route to obtain a fee-paid judicial appointment is to become a Recorder. This is the route chosen by many barristers (although more solicitors are now applying). There are very few appointments to sit as a civil-only Recorder. It can be difficult to secure sittings as a civil Recorder unless one can offer the ability to undertake family work as well. There are more opportunities for those willing to sit in crime. For many who are appointed, this is their first time in the criminal courts. Having built up a good practice in civil or family work (often being specialists in a particular field) their first experience of sitting is in the full glare of the Crown Court in a jurisdiction with which they are not familiar. This is a daunting experience, and some

people are not prepared to expose themselves in this way. On the whole, women feel happy and comfortable doing work with which they are familiar and expert. Becoming a Recorder is huge task to take on. In addition to this, the system for analysing the performance of a Recorder appears haphazard (see above).

(3) The alternative route for many is to sit as a Deputy District Judge. This has traditionally been a route chosen by solicitors who have historically made up the vast body of the District Bench. It has the advantage of exercising family and civil jurisdictions. However, experience as a Deputy District Judge appears to be considered relevant only for full-time appointment to the District Bench, not to any other Bench. Until very recently, appointment to the District Bench has been the end of the judicial line, and many “high fliers” are not prepared to see their judicial careers as so limited. The District Bench does not have the respect and status of the Circuit Bench and above. Although there are some appointments amongst experienced District Judges to the Circuit Bench, the number of such appointments has been very small. With only very few exceptions, District Judges appointed to the Circuit Bench have also been Recorders. The result is that this route cannot be seen as a certain career choice for those who may aspire to the Circuit Bench or above, and therefore is not an obvious choice of fee-paid work for many practitioners.

(4) The system for appointing deputy High Court Judges-in practice an essential precursor to appointment to the High Court Bench-has been opaque and largely in the control of the Heads of Division. This system again excludes many good candidates from selection.

(5) Since fee-paid judicial sitting is generally a requirement for full-time appointment, the pool of candidates has already been narrowed down to deputy High Court judges, those people (in general) who are prepared to sit in crime as a Recorder, or deputy District Judges (who are then only considered for the District Bench). The Association believes that there should be a more flexible system for allowing fee-paid experience to be gained, so that practitioners can have the opportunity of sitting first in a jurisdiction with which they are familiar, before exposing them to different fields of law, practice and procedure. A radical change to the system of fee-paid sitting should be introduced to attract a wider range of candidates. It should be based on specialisations rather than on the level of judicial office contemplated.

Difficulties on Appointment

18. It is now recognised that part-time appointments can and should be made to the District Bench, and this is welcomed. Some District Judges sit part of a week. Some have additional leave. This allows for family commitments and has proved popular amongst women.

19. The lack of part-time working or flexible working arrangements at other levels is a serious drawback for women. Some women in practice have been able to negotiate with partners (solicitors) or with clerks (barristers) to have more flexible arrangements, but there are no such opportunities on the Circuit Bench. The Association refers to the annexed paper on part-time working. If part-time working is introduced, then, whilst recognising business needs, a balance should be struck to ensure that this is available for women with family commitments as well as to those already in post who seek to wind down towards retirement.

District Judges

20 There is no recognition given to speciality on appointment. District Judges who have spent many years in a particular field (for example insolvency, public children law) have no recognition of that fact on appointment.

21. There are still some difficulties with appointments being offered far from the candidates' home or with difficult journeys. It should be possible to devise a system whereby successful candidates are informed of the vacancies and invited to apply for a particular area. As a general rule, it is harder for women than for men to move house to a completely new area unless they are the sole or main breadwinner.

22. The District Bench is a more diverse Bench than the higher levels. People who have not been in practice at the Bar are more confident about applying for this bench, and that includes many women. If they are successful in post, use should be made of this wider pool of existing judges (from a wider range of backgrounds) to consider filling higher appointments.

Circuit Bench

23 Many new appointments are required to travel great distances. Candidates are given little choice about where their appointment is to be. There is a fear that if the itinerary offered is turned down, the offer may be withdrawn.

24. As with the District Bench, there is no opportunity to specialise, particularly in the early years. Many women are very hesitant about applying for a job which means that they cannot use their own expertise but requires them to work full time in an area of law that is unknown to them.

The High Court

25. The working practice of the High Court bench is not family-friendly. Long periods must be spent either on circuit or in London. There is very limited choice as to where one goes on circuit. The domestic customs on circuit are based on a lifestyle which few now follow.

26. While the Family and Chancery Divisions are specialist, the Queen's Bench judges are still expected to cover a very wide range of work, including the most serious crime, and to sit in the Court of Appeal Criminal Division, regardless of their previous experience. It is an approach which women, more than men, are likely to find daunting.

Response to Particular Paragraphs of the Consultation Paper.

Background: Paragraphs 1 -3

27. The Association entirely accepts and adopts the observations as to the high regard of the judiciary, their independence and the necessity for diversity. Providing that the word "merit" is taken to mean that the candidates must be capable, intellectually and temperamentally, of doing the job for which they are appointed, the Association agrees that these are vital criteria and must not be compromised. However, there is a suspicion that the word is sometimes used as a shorthand or disguise to mean "people like us", thus

stifling diversity. Some members find it insulting that whenever diversity is discussed, the issue of “merit” is always raised, as if it is impossible to find candidates for the Bench amongst women or ethnic minorities without putting “merit” at risk.

28. The merit argument also tends to overlook the fact that the judiciary should be regarded as a team. In building a team, one needs a range of skills, expertise and experience. Just as there is nothing wrong with picking judges with the right range of legal knowledge and experience, there is nothing wrong with selecting those who have the right range of backgrounds and life experiences (ie diversity) provided that in each case they are sufficiently “meritorious”.

The Problem: Paragraphs 6 & 7

29. The paper does not take account of the fact that the lower down the judicial hierarchy you look, the more women and ethnic minorities are to be found carrying out judicial offices very successfully. Broadly, one finds more on the District bench and at Tribunal level. A number of points can be drawn from this. First, the lower tiers draw their candidates from a far wider pool than the High Court Bench and even the Circuit Bench. Solicitors, barristers and those (particularly women) who have taken a career break can find successful appointment as a fee-paid and then full-time District Judge or Tribunal Chair. Secondly, women are prepared to believe that they may be appointed to a lower level of the judiciary but are convinced that they would not even be considered for the higher levels, and so do not apply. Thirdly, serious consideration should be given to better and more realistic promotion from the existing judiciary as an additional way of increasing the ranks of a more diverse judiciary; they have the huge advantage of a tried and tested track record.

Improvements: Paragraphs 8 -10

30. The Association welcomes the creation of a Judicial Appointments Commission. It is a matter of serious regret that this part of the present reforms is not being allowed to progress as a matter of urgency, but has become tied down in other matters incidental to this issue.

Outreach and Communication Strategies: Section 3

31. The strategies set out in Section 3 of the paper are all welcome. However, the Association considers that the problem is less that people do not consider the possibility of applying for judicial office, but rather that they consider (correctly) that they are unlikely to succeed because of the way that the present appointment system operates. As long as the appointment system is known to favour the tiny pool of candidates from which most present appointments are drawn, it is a pyrrhic victory to have alerted a wider pool of potential candidates. The work carried out in outreach strategies will be completely undermined at a stroke by the report that the majority of recent High Court candidates were appointed after a “tap on the shoulder”. This simply re-enforces the views established by the research set out at Paragraphs 10 and 11 of the discussion paper that there is a need to be known in the right circles before one can be considered for appointment. The Association therefore supports initiatives to reach a wide pool of potential candidates at various stages of their careers, but public confidence in the transparency of the appointment system is vital if this work is to be of any value.

32. The Association welcomes the judicial work-shadowing and out-reach schemes and other similar initiatives, and its members will endeavour to assist in any such projects

when requested to do so. Judges should be encouraged to become involved in such schemes, but the Department must be prepared to support judges financially by accepting that time spent on such initiatives is properly counted as sitting time.

Statutory Qualifications: Paragraph 30

33. There should be no restriction which limits appointment to those with advocacy qualifications eg by insistence on Higher Rights qualifications. Relevant statutory provisions should be repealed.

Fee-paid service: Paragraph 33

34. The Association strongly support the requirement for fee-paid service being a pre-requisite to full-time appointment. The requirements of the judiciary are not just academic and intellectual, there are also important requirements relating to temperament and “people skills”. The best way to find out suitability is by fee-paid service.

35. The Association would support the proposal that fee-paid service should attract CPD points. This may remove some of the difficulties faced by practitioners set out in the consultation paper.

36. There is a failure by the Department to recognise the difficulties faced by solicitors in practice in relation to fee-paid work. In smaller firms in particular, the solicitor will often not be paid by her/his firm for the day spent sitting, but will take the fee paid for the sitting. In larger firms, the practice is more likely to be for the solicitor to draw her share or be paid her salary and to credit the fee to the firm. Since the fee paid for the day is equivalent to perhaps no more than two or three hours’ chargeable hours for the firm, the firm is heavily subsidising the sitting. In some larger firms, becoming a fee-paid judge is considered an action of disloyalty to the firm. The DCA could provide assistance by writing to the senior partners of solicitors’ firms to explain formally the sitting requirements of a fee-paid judge, the remuneration and the public nature of the work. Some recognition should be given for the fact that the loss to the firm in financial terms is nowhere near compensated for in the remuneration paid, and that in effect the partnership is engaged in a public duty by supporting the solicitor.

Seeking judicial office when not in practice: Paragraphs 38 -41

37. The emphasis should be on the professions to encourage those who have left practice to keep up to date. Chambers and solicitors’ firms should have schemes to enable those who are on career breaks to keep up. Active consideration should be given to trying to involve such people in work opportunities (part-time, and/or home based) so that they do not feel ostracised and out of touch.

“Fast Track” Opportunities: Paragraphs 42-44

38. The Association does not see the benefit in a fast track system. Part of the problem with the present system is the lack of transparency, and the “leg up” given to various favoured candidates. All candidates should be appointed after advertisement and following a proper period of fee-paid sitting.

39. If certain candidates would benefit from being able to do “block” sittings, that should be encouraged.

Judicial Working Practices: Section 5

40. See general comments at the beginning of this paper.

Appraisal: Paragraph 47

41. This is a sensitive subject for many judges. Many are vehemently opposed to the idea. Others welcome it. Some are strongly of the view that if it is to be introduced, it must be introduced across the judicial board, and not just for some parts of the full-time judiciary. The Association recognises that, if there is to be greater career progression within judicial ranks, a formal appraisal system will be necessary. However, the way that the scheme is introduced and the use made of the information will need to be carefully considered. The Association strongly supports appraisal for all fee-paid judges, and urges a full and proper use to be made of the information gleaned to assist the both judge and her career prospects.

Returning to Professional Practice: Paragraph 49

42. The Association does not believe that this is a factor which puts people off applying for judicial appointment. Is there any evidence that this is a factor which influences the decision about whether to apply for appointment? The concern is that a judge will abuse his or her position in order to progress their post-judicial career. Without evidence, it is not clear that removing the ban on returning to professional practice will increase the diversity of the judiciary.

Career progression through Judicial Ranks: Paragraphs 51 and 52

43. The Association considers that there should be a much clearer career path for all judges at all levels, and believes that this will increase diversity.

44. The system for appointments should build in the expectation that some judges will move on, and reserve a certain proportion of “deputy” opportunities at the higher levels to enable this to happen.

45. Paragraph 51 sets out possible reasons why there is relatively little movement, but says that it is not clear why. Interestingly, it does not include as a reason the fact that individuals apply but are turned down. At present, District Judges are able to sit as Recorders (usually in crime only) but apart from this there is little opportunity for existing judges to gain experience in other jurisdictions. Much more flexibility in fee-paid working would assist judges considering advancement.

46. Any judge seeking career advancement has the difficulty in relation to references that they are not “visible” to other judges. Further, unless a judge has seen another judge’s work (eg by dealing with an appeal) a judge referee is able to make only limited and generalised comment on the performance of another judge. Such comment is unlikely to be of real assistance.

47. The Association would welcome the prospect of a support structure and a mentoring scheme

48. A work shadowing scheme aimed at the judiciary should also be encouraged, as could work-shops aimed at encouraging such progression.

Continued Input from Stakeholders: Section 7

49. The Association suggests that a formal procedure be introduced to monitor the progress of judges through the system. Such procedure should, for example, identify whether women are more or less likely than men to be promoted to the full-time Bench, how women progress through the ranks, and monitor the comparative drop-out rates for men and women. It is vital that a body be responsible for continuing audit of such matters. If this is not to be undertaken by an external body, it should be undertaken by the Department, and the results published regularly.

50. The Association is very pleased to have had the opportunity to respond to the consultation paper. In the event that a body is to be set up to respond to this paper, or to track and assess improvements, the Association would like to be represented on such a body if possible.

Conclusion

The pool of candidates for all appointments should be as wide as possible in order to encourage diversity.

There should be no appointments (full or fee-paid) without proper advertisement and interview.

There should be far less reliance on the consultation process. Focussed references should be sought, in a structured manner, after sift and interview, and not before.

A more flexible opportunity for fee-paid appointments should be offered, so that those with particular expertise can apply for that area of work.

Fee-paid experience should be speciality, not hierarchically, based.

Greater thought should be given to offering an appointment that uses a candidate's existing skills where resources and business needs allow.

There should be more movement between the Benches to encourage those who are uncertain of their abilities to apply to a lower Bench and then to progress if they have ability and aptitude.

There should be formal assessment of all fee-paid judges.

Only those who have sat on a fee-paid basis should be offered a full-time appointment.

Greater consultation should take place on the location and itinerary offered to a candidate.

All judges should have access to a mentor, if desired. Time must be made available for those who give the service.

UKAWJ
3 August 2004