



dca

Department for
Constitutional Affairs
Justice, rights and democracy

Increasing Diversity in the Judiciary

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: judicialdiversity@dca.gsi.gov.uk, or fax to: **020 7210 8283**. Thank you!

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

Comments:

This response is made on behalf of the United Kingdom Association of Women Judges (UKAWJ). We welcome the consultation paper. We sent the DCA a paper in August 2004, commenting on the DCA's discussion paper on increasing diversity. A copy of that paper is appended and we repeat the points made in it.

In this questionnaire we comment principally from the point of view of women.

Broadly, the consultation paper reflects an understanding of the issues. This response should be read in the light of the following points:

1.1. We emphasise the points made in our previous paper concerning what we suggest is a fundamental principle that all appointments, up to and including the High Court, are made following advertisement and application only and that there should be far less reliance on the consultation process.

1.2. A flexible entry system for fee-paid appointments should be introduced, so that candidates apply to sit on a fee-paid basis and are then allocated to the appropriate court or tribunal according to a candidate's ability and experience and to business needs. Once appointed, a fee-paid judge should be able to meet her sitting requirements in a combination of courts and/or tribunals. as appropriate. The approach should be to build on existing skills.

1.3. There should be formal appraisal of all fee-paid judges.

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

1.5. There should be greater consultation concerning the location and itinerary offered to a candidate.

1.6 There should be opportunity for greater movement between benches.

1.7. There should be opportunity for full-time judges to sit at other levels eg tribunal chairs as District Judges or Circuit Judges and vice versa as appropriate. This would enable judges to gain experience and confidence in other areas of work.

1.8. Apart from gender, ethnicity and disability, diversity of professional background and experience is also important, and would tend in itself to contribute to other types of diversity. If other, much-respected supreme courts can appoint former government lawyers, prosecutors, and academics as well as former practitioners, should not we do so also?

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

Comments: See answer number 1.

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

Comments: Yes.

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

Comments: In general terms, there is currently much information available to those who are interested. Greater publicity and advance warning of events would be helpful.

4.1 We doubt whether promulgation of information by e mail would make much difference, and question whether it would be cost effective to set up an e mailing system

4.2 Sending information to all lawyers at 7 years' PQE is unlikely to be effective. That is too early for most lawyers to consider applying for judicial appointment. At that stage, most wish to progress in their career as barrister or solicitor. Most, except perhaps mature entrants to the professions, do not begin to think about judicial career until a later stage. It is unlikely that suggesting the possibility of a judicial career to lawyers with only 7 years' PQE will cause that pattern to change.

4.3 We are reluctant to see any sector targeted. The appointment system should be entirely open and transparent, and with no suggestion that any one sector is being favoured over another.

4.4 We doubt whether a help line will assist. The information currently available is clear. Any applicant should be able to understand it.

4.5 It would assist if the work-shadowing scheme were more widely publicised. Further, we would welcome an expansion to include mentoring. Time must be made available to ensure that mentors are able to undertake the task diligently. It would be a waste, and probably counterproductive, if a mentor were too rushed to do the task well.

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

Comments: The importance of role models cannot be overemphasised. Full use should be made of judges who are disabled or from ethnic minority backgrounds or who are women in initiatives designed to attract applicants for judicial appointment.

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

Comments: No. See answer number 4.

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

Comments: Yes, such measures would no doubt raise awareness but would be unlikely to result in an increase in applicants from a more diverse background than is currently the case.

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

Comments: No

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

Comments: We suggest a single point of entry for all fee-paid appointments, with subsequent allocation to the appropriate bench. It follows that the statutory requirement should be 10 years for all full- and fee-paid appointments. If it is right, as we believe it to be, that advocacy is not an essential qualification for appointment, then consideration should be given to making the possession of professional qualification rather than the possession of rights of audience for 10 years the statutory minimum qualification.

Question 10. **If you support the retention of the current statutory requirements, do you consider the current time periods of seven and 10 years to be the right ones? If not, what alternative periods do you consider should be adopted?**

Comments: Subject to answer number 9, the appropriate period is 10 years for all.

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

Comments: See answer number 9.

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

Comments: See answer number 9.

Question 13. **Do you consider that the fee-paid sitting requirement is a factor which**

inhibits judicial diversity? If so, why?

Comments: No, to the contrary: fee-paid sitting is the best way for both candidates and DCA to learn whether a candidate has the temperament and aptitude for the work. This also enables a wider (and thus probably more diverse) range of potential candidates for full-time appointment to be considered.

Question 14. If you are a lawyer, does the fee-paid service requirement mean that you are unable to pursue a judicial career? If so, why?

Comments: We are aware that some, eg some solicitors, find it difficult to fulfil fee-paid sitting requirements. However, we would not advocate any relaxation of these requirements. To the contrary, we believe that fee-paid sitting is a necessary requirement for full-time appointment.

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

Comments: We deprecate those firms who seek to prohibit or discourage solicitors from sitting as fee-paid judges. Currently, there does not exist amongst solicitors the widespread expectation which exists at the Bar that practitioners will follow a career path which includes judicial appointment. The DCA could, and in our view should, seek to persuade solicitors, perhaps through the Law Society, not only that it is a public duty and one which firms should be willing to shoulder, but also that there are benefits to be gained eg the opportunities both to learn from the experiences of those who do sit as fee-paid judges and to procure that more senior solicitors move on to another career, thus making way for keen and younger practitioners.

It may assist if sitting time counted towards CPD.

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

Comments: No. To the contrary, the ability to sit on a fee-paid basis offers candidates who may be uncertain about their abilities or who are lacking in confidence (characteristics of those whom this exercise is seeking to encourage) the opportunity to test their skills and

gain confidence.

Question 17. If you consider that this policy is no longer necessary or appropriate, are you content that the approach outlined in paragraph 3.10 (i.e. that no direct appointments would be made other than as a result of success through an open competition) provides a sufficiently clear and open means of making direct appointments? If not, how else should direct appointments be made?

Comments: Not applicable.

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

Comments: Yes

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

Comments: We believe that the Law Society, possibly through the Association of Women Solicitors, already offers some assistance to those who are not in practice to remain up to date. It would be desirable if the Bar Council were to promote returning-to-work courses. There is scope for DCA to encourage those bodies to provide information to lawyers in that position about the possibilities of judicial appointment.

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

Comments: The best way to encourage applications from a more diverse range of lawyers is to introduce an appointment system which has the features set out in answer number 1 and is not tainted by the impression of an old-boy network.

Question 21. If you are a lawyer and are not currently practising, has any aspect of the current judicial system deterred you from seeking appointment?

Comments: Not applicable

Question 22. **What measures would assist you with being able to make an application for judicial appointment?**

Comments: Not applicable.

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

Comments: Not everyone who has stopped practising will want to return to practice or to seek appointment. But those who have stopped for family reasons and who have indicated an interest in returning in due course would be encouraged and assisted by a system which enabled them to have access to education, retraining and flexible working.

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

Comments: See answer number 23

Question 25. **If the fee-paid sitting requirement was removed, would a formal scheme be necessary?**

Comments: Not applicable.

Question 26. **Are there any other ways of opening up the appointments process which you think DCA should consider to encourage a more diverse range of applicants?**

Comments: See answer number 1

Question 27. **If you are a lawyer, would the existence of an intensive sittings scheme encourage you to consider pursuing judicial office? If so, why?**

Comments: We would encourage greater flexibility in the arrangement of fee-paid sittings, but these should always be over a sufficiently long period of time for the judge to grow into the job and for a fair and objective assessment as to suitability for full-time appointment to be made.

Question 28. **Would this be more or less beneficial than the other proposals for access to judicial appointments in this paper? If so, why?**

Comments:

Question 29. **If it would not encourage you to apply, why not?**

Comments:

Question 30. **What else might encourage you to apply for judicial office?**

Comments:

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

Comments: Yes. A formal process of assessment over a reasonable period of time is fairer than selection following a short interview (which cannot adequately test a candidate's competence or temperament) and is more likely to result in appointment of those best able to undertake the work. All who seek full-time appointment should be willing to undergo a process of objective assessment.

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

Comments: No. We are opposed to any proposal to use such agencies, principally because this would be perceived immediately to revert to the "tap on the shoulder" approach, which has done so much to undermine confidence in the appointment process. In any event, we consider that it is highly unlikely that any such agency would have, or could acquire, the necessary skill or knowledge to undertake the task. Appointment of judges should not be "privatised" in any sense.

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

Comments:

We consider that there should be less emphasis on automatic consultation. There is a difference between referees - those nominated people who know the candidate well and are asked to write freely while addressing the criteria and job specification- and consultees - a limited range of people, often senior judges, who are consulted to see whether there is reason not to appoint someone. Rather than automatic consultation, references should be taken up, in a focussed way, after successful assessment and interview. References should not be tied to formulaic questionnaires where a spurious sense of objectivity and consistency is conferred by putting numbers to indicate whether the specified qualities have been "demonstrated". Any consultees should be able only to state reasons, backed by evidence, why a person should not be appointed. There should be sufficient confidence in the process of assessment, interview and references that veto by an automatic consultee would be rare.

The experience of those who take part in the appointment process at District Judge level indicates that it is most helpful -we would say imperative- to have available not only the application form but also the result of appraisal and references. The application form alone is too limited - after all, some who are good at completing application forms may not be suitable for appointment, and the appraisal result and references assist redress the balance.

We consider that all fee-paid judges should be appraised and the result of appraisal taken into account as part of the appointment process, at every level up to and including the High Court.

We suggest that better guidance be given to full-time judges with respect to the preparation of references.

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

Comments: See answer number 33

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

Comments: .See answer number 33.

Question 36. If you disagree that consultation should continue to be part of the

appointments process, how else could DCA establish a candidate's track record and previous, proven experience?

Comments: See answer number 33.

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

Comments: Only after assessment, interview and the taking of references, and only in the limited circumstances set out in answer 33.

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

Comments: Yes.

Question 39. Do you consider that the appointments process would be improved by changing the constitution of panels, for example, so that they were chaired by the independent member or by the judicial member? If so, what would be the benefits?

Comments: No. The current composition is satisfactory.

Question 40. If there were to be a different chair person, do you think that there should be a continuing role for DCA involvement?

Comments: The DCA should remain involved.

Question 41. If so, what should be the role for DCA?

Comments: Not applicable.

Question 42. If you do not consider that the DCA official should remain on the panel, would you be content for panels to consist of only two members (e.g.

the lay member in the chair, supported by the judicial member)?

Comments: A panel of three is better than a panel of only two members.

Question 43. **If not, what other form of constitution would you suggest and why?**

Comments: Focussed references, as discussed in answer 33.

Question 44. **Do you consider that there are any more improvements which should be made to the judicial appointments processes before the Judicial Appointments Commission is established? If so, what?**

Comments: The current arrangements are inefficient. Candidates are given time estimates by which they will be told whether or not they will be called to interview or be offered appointment. Inevitably, those time limits are exceeded, sometimes by substantial periods. Candidates who have been told that they are appointable but who are not in fact appointed are then required to reapply in a subsequent competition. These factors make it extremely difficult for practitioners to plan their careers and to agree arrangements with chambers or firms. If appointment is offered, a candidate is then required to take up an appointment quickly, although until that point he or she is required to keep the prospect of appointment secret. Practitioners must be allowed time to make arrangements with their chambers or firms.

It is extremely difficult for a woman with family responsibilities to apply, for example, for a full-time job as District Judge on the basis that the job may be based anywhere in the country or to apply for appointment as a Circuit Judge on at least three circuits. It is simply not realistic to expect that most women with such responsibilities will be able to contemplate applying in those circumstances.

Question 45. **If you do consider that changes should be made, why do you think that it is important for this to be done prior to the setting up of the Judicial Appointments Commission?**

Comments: DCA should introduce more efficient procedures and to consult with successful candidates on the location of an appointment and itinerary, including limited days sitting.

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

Comments:

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

Comments:

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

Comments:

Question 49. **Do you consider that there are judicial working practices which have an adverse impact on judicial diversity? If so, what are they? What might be done to manage them?**

Comments: We consider that evening or weekend sitting (even if these could be arranged) would not help increase diversity. To the contrary: women would probably find this more difficult. Most women with family commitments would need to be with their families during the evenings and at weekends.

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

Comments: We consider that a formal scheme which allows for career breaks would assist women. Judicial appointment is likely to be more attractive to women if there were greater certainty about career breaks. In this context, we welcome the steps which are being taken promptly to introduce limited days' sitting.

Question 51. **Do you foresee any difficulties with implementing any of the options? If**

so, which ones and why?

Comments: We are confident that a constructive approach will be taken when balancing business needs and the needs of those who wish to sit for limited days or take a career break. It is likely that perceived difficulties will be quickly dispelled.

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

Comments: Yes. Women would benefit, for the reasons given in answer number 50.

Question 53. **If you are a judge, would you be in favour of any of these options? If so, which ones and why?**

Comments:

We support the establishment of a formal scheme for career breaks.

We do not support the introduction of evening or weekend sitting.

Question 54. **Are there any other flexible working arrangements which you would like the Department to consider?**

Comments: Although it may, in some very limited areas of work, be possible for a judge to deal with matters by telephone or e mail from home, we recognise that the scope for such working is a very small part of the whole. The rare possibilities for such methods of working are unlikely to affect a woman's decision to apply for judicial appointment.

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

Comments:

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

Comments:

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

Comments: We are not aware that this acts as any deterrent. We have concerns about removal of the rule and consider that it should not be abandoned without very careful consideration following widespread consultation.

Question 58. If you are a judge, how would you have viewed the option to return to practice when you were considering applying for appointment?

Comments: See answer number 58.

Question 59. Would you welcome now the opportunity to return to practice?

Comments: We are not aware of any member who would welcome such opportunity.

Question 60. If you are a lawyer, would the removal of the preclusion policy encourage you to apply for judicial office? If so, why?

Comments:

Question 61. If not, why not?

Comments:

Question 62. Do you have any concerns about the potential removal of this policy?

Comments: Yes. See answer number 57.

Question 63. Do you consider that there is a perception that lawyers must have followed a particular career path in order to be in contention for appointment to the High Court?

Comments: Yes.

Question 64. If so, do you consider that this might be one of the reasons why the senior judiciary is not more diverse? How might this issue be addressed?

Comments:

Yes

There is a strong preception that the process of appointment to the High Court is unfair and discriminatory, being dependent upon exposure to senior judges. Appointment to the High Court should be made only on application and following appraisal, interview and the provision of satisfactory references. The perception that only people with a particular career profile are suited to particular judicial posts - eg only the best advocates are qualified for the High Court bench - should be challenged.

Question 65. Are there other factors which inhibit diversity in senior judicial ranks that you consider need to be addressed?

Comments: See answers numbered 64 and 66.

Question 66. Do you consider that increased awareness of the availability of opportunities to progress from one rank to another would act as an incentive for individuals when deciding whether to seek judicial office?

Comments: Yes. Women are likely to be encouraged to apply if the system includes fair and clear provision for movement between benches. Many women would welcome the opportunity to develop skills at one level and to gain the confidence to apply to a higher level. The system itself needs to make better provision for movement between different ranks of the judiciary.

Question 67. If you are a judge, do you favour the establishment of a support structure to offer mentoring and career advice?

Comments: Yes. Women in particular are likely to find such support systems helpful. Women judges are very willing to participate, and ask only that time be made available to

enable them to fulfil such duties properly.

Question 68. If you are a lawyer, would the ability to progress through the judicial ranks and/or the availability of a support structure be a factor in encouraging you to apply for appointment?

Comments:

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

Comments:

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

Comments:

Question 71. In particular, what responsibilities do the legal professions and DCA have in addressing this issue?

Comments:

Question 72. Are there other problems or difficulties which impact on diversity and which you consider need to be addressed?

Comments:

Question 73. Do you think that the route of articulated clerkships, whereby attendance at university was not necessary to become a solicitor, should be reintroduced?

Comments: We consider that diversity will not be addressed by the return to a system of non-degree entry to either branch of the profession. It appears that women's entry to the professions was greatly assisted by the expansion of university places in the 1960s, coupled with the fact that conversion to graduate entry was much fairer than the family and old boy

network routes by which whereby people were previously recruited to articles and pupillage.

Question 74. What do you consider the respective branches of the profession should be doing to promote the possibility of judicial appointment as a career option for lawyers?

Comments: It would assist if the Law Society were to promote a positive view of fee-paid sitting.

Question 75. Which of these measures do you consider should be their priority?

Comments:

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

Comments: Yes.

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

Comments: It would be helpful to reach a better understanding of why women barristers and solicitors are not better represented at the more senior levels in the professions.

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

Comments: By continuing consultation. For our part, we remain willing to assist DCA in any way we can.

Question 79. What is your view of the proposals under option 1 (set out in more detail in the main body of the consultation paper), and how has your experience affected your view of the appointments process? If you have not pursued an application for a judicial appointment, please let us know if any of the above, in your view, were contributing factors.

Comments: We endorse the proposals set out in option 1, within the context of the answers to this questionnaire.

Question 80. If you disagree with any aspects of our analysis of the benefits of the three options we would be interested to hear from you. Please set out supporting reasons with your response.

Comments: Not applicable.

Question 81. If you disagree with our analysis above, we would be interested to hear from you. Please set out supporting reasons with your response.

Comments: Not applicable.

Question 82. As a member of the legal profession, what do you perceive to be the potential costs for all the options? Please set out supporting reasons with your comments.

Comments:

Question 83. We would be grateful for stakeholders' views on the above analysis of options 1, 2 and 3. How will factors in the appointment process or working practices specifically affect individuals on the basis of gender, ethnicity or disability?

Comments: Implementation of the proposals we have made with respect to an appointment system will result in greater diversity of applicants. Women will gain confidence in a system which is, and is perceived to be, fair and objective, which allows women to begin by undertaking work in areas in which they have skills and specialist knowledge, which allows flexibility in terms of limited days' sitting and career breaks, and which recognises the desirability of movement between benches, and includes an objective method of assessing candidates for promotion. As confidence in the process grows, so will there be an increase in the number of women applicants for judicial appointment.

Question 84. What do you consider the costs may be of releasing a partner or fee-earner to serve in judicial office? Do you regard this as a burden to

business, and if so, in what way?

Comments: