Introduction

1. On 11 March 2014 the Diversity Steering Group (DSG) with representation from the Faculty of Advocates, Judicial Appointments Board for Scotland (JABS), Judicial Office, Judiciary and the Law Society, with observers from the Scottish Government held a conference at St Paul's and St George's Church Edinburgh to discuss judicial diversity. The Conference was titled, "Merit and Diversity – Compatible Aspirations in Judicial Appointments?"

2. The aims of the conference were to:

- discuss the issues arising from the statutory provision that selection of an individual to be recommended for appointment must be solely on merit;
- learn more about attitudes to judicial office and whether any barriers, real or perceived, need to be addressed to encourage people to apply;
- discuss how to encourage diversity in the range of individuals available for selection to be recommended for appointment to judicial office.

3. The Conference proved to be a very useful and interesting event, with attendees clearly engaged with the agenda. Since then the DSG has been carefully considering how to build on the findings of the Conference. This paper sets out what has happened since the conference - a period of progress and change. It also tries to address some of the misconceptions/myths raised at the breakout sessions and the future role and work of the DSG.

Conference outcome

4. Since the conference the Diversity Steering Group has reviewed its role and purpose. It has also considered what actions may be appropriate given the findings of the conference. Actions taken so far by the organisations represented on the Group have included:

Tackling barriers to appointments-

- Following the introduction of arrangements for part-time working by salaried sheriffs in 2011 several sheriffs have taken the opportunity to move to part-time working. With the introduction of the office of summary sheriff created by the Courts Reform (Scotland) Act 2014 it is hoped that some of the new appointments could be made on a part-time basis. This may encourage a more diverse applicant pool.

- Consideration is being given to regional recruitment, to provide applicants with more certainty where they will be likely to serve if appointed. This may go some way to alleviate the perceived problems with the residency requirement as candidates would know where the posts are when applying.

Improvements to the application process-

The Judicial Appointments Board for Scotland has further reviewed its application process in its continuing aim to render it more accessible and comprehensible to applicants, especially those unfamiliar with a competency based process and, most notably -

- Examples of competency based applications are to be put on the JABS website.
- The application form has been reviewed – to make it shorter and more concise.
- The references process has been reviewed so that there will no longer be a requirement for a personal referee. The reference form itself has also been changed. Referees will be encouraged to link the competencies required in the application form to the criteria for the post.
- Competency based seminars are planned for various professional groups in 2015.

Other measures to increase diversity undertaken by members of the DSG-

- DSG Members, Sheriff Mackie and Neil Stevenson have observed the JAC Diversity Forum.
- The objectives of the DSG have been reconsidered and revised.

The following two measures will be undertaken by JABS –

- An Outreach programme is being planned for 2015.
- Joint work by the Judicial Office and JABS to promote the role of Summary Sheriff prior to the launch of the appointment round in the summer of 2015 is under consideration.

Conference report

5. One of the issues which proved particularly challenging was how to accurately report discussions at the Conference, whilst preserving anonymity where appropriate. The DSG did not want to appear to be censoring certain points of view expressed at the Conference – even if based on hearsay or inaccurate or out-dated information. But equally the DSG did not want to give implied credence to the misconceptions by circulating them uncritically or out of context.

6. The DSG decided that the best approach would be to have a report prepared by a conference delegate who was not a member of the Group, not employed by any of the bodies on the DSG and whose independence could not be questioned. Muriel

Robison[1] was therefore asked to provide an independent report of the conference which would seek to faithfully cover all the main points of view expressed on the day. Her report is attached at **Annex A**.

7. As the report and feedback from the breakout sessions did (in good faith) incorporate some inaccuracies and misconceptions, the opportunity has been taken to address some of the more important of these, in order to provide a balanced view point. A commentary is attached at **Appendix A.**

8. The programme for the day included two keynote speeches from the Right Honourable Lord Carloway, the Lord Justice Clerk and Rabbi Baroness Julia Neuberger, as well as contributions from an expert panel consisting of Professor Neil Hutton, Chair in Criminal Justice at the University of Strathclyde, Shona Simon, President of the Employment Tribunal in Scotland and David Strang, QPM, Chief Inspector of Prisons. A full summary/transcript of their speeches is included in **Annex A.**

Feedback from Breakout Sessions

9. At the conference delegates had the opportunity to participate in breakout groups followed by a plenary debate on the issues raised.

Morning Breakout Sessions

10. In the morning breakout groups the delegates discussed perceptions and appointment criteria, when the following questions were considered:

- What are your general perceptions of the role of judicial office?
- What are your current perceptions of Scotland's judiciary?
- What would constitute merit?
- What attributes do you think should be considered in the application process?
- Do you think these are the factors that are currently taken account of in the decision making process or are other factors also given weighting when they shouldn't?

11. Muriel Robison's report at **Annex A** reports the full range of topics discussed. Several views expressed in the 7 morning groups revealed some misconceptions or mistaken assumptions the commentary at **Appendix A** seeks to correct these.

Afternoon Breakout Sessions

12. In the afternoon sessions, delegates discussed how to encourage diversity and create a "representative" judiciary, as well as the application process. The

[1] Muriel Robison is an Employment Judge with the Employment Tribunal Service. She is formerly Head of Commission Enforcement at the Equality and Human Rights Commission and Director of legal affairs, Scotland, at the Equal Opportunities Commission (EOC). She has published widely on equality and human rights, is an affiliate member of staff at University of Glasgow [lecturing on employment and discrimination law]. She is also a member of the Law Society's Equality and Diversity Committee.

questions which were considered were:

- Should widening diversity be encouraged within the judiciary?
- Is there any place for positive discrimination within the application process?
- How else could/should diversity be achieved?
- Is there anything about the application process that may be deterring individuals or particular groups from applying that you would change?
- What do you think of the residency requirement?
- Do you think a "representative" judiciary is important?

13. Again Muriel Robison's report provides a full record of the afternoon sessions. As with the morning sessions a number of conceptions or assumptions ought to be contextualised - see **Appendix A**.

Conclusion

14. Feedback from delegates was that the presentations from the speakers provided for some interesting discussion during the breakout sessions, where delegates were able to consider the issues raised and make suggestions in light of their own experiences. Many of these opinions and experiences have been captured in Muriel Robison's report and the DSG now hold valuable data on current attitudes to judicial office and the range of barriers, both real and perceived, which need to be addressed by all relevant stakeholders to encourage all who are qualified to apply.

15. You will see from this cover report and attached **Appendix A** that work to address some of these barriers has started and engagement with individuals and organisations with an interest in improving diversity in judicial appointments is being established. The DSG's focus is to promote diversity in the judiciary. As a collaborative Group with a refreshed purpose it is in a strong position to progress this agenda.

Diversity Steering Group
11 March 2015

Appendix A

Feedback from the morning session - delegates discussed perceptions and appointment criteria. The following are some of the comments gathered:-

- Over-emphasis on advocacy skills. Should be decision-making skills. ***The selection process tests all the stated competencies with no emphasis or additional weighting on advocacy skills. The Judicial Appointments Board was aware of this perception and had changed the criterion to "case presentation skills" to avoid any unintended suggestion that potential applicants who are not advocates or solicitor-advocates might not be favoured.***
- Currently look for senior counsel. ***The requirements for legal knowledge and experience are criteria which apply across the profession. The criteria for judicial office is published on the JABS website and in the Judiciary and Courts Act 2008.***
- Being a tribunal judge makes it difficult to climb the judicial ladder to Senator. ***Tribunal judges can apply if they meet the eligibility criteria for senator; Advocates of five years standing, Writers to the Signet of ten years standing who have passed the examination in civil law two years before taking up their seat on the bench, Sheriffs Principal and Sheriffs who have exercised their respective functions continuously for a period of at least five years, Solicitors who have had rights of audience before either the Court of Session or the High Court of Justiciary continuously for a period of not less than five years. If not then entry would be at shrieval level and in due course thereafter the opportunity to apply for senator. Criteria are statutory and are not set by JABS and tribunal judges who do not meet them cannot apply for appointment. Any changes to the criteria would be a matter for the Scottish Government – subject to the consent of the Scottish Parliament.***
- There were concerns expressed regarding a continuing perception that some appointments were made because of personal characteristics and positive discrimination rather than on the grounds of merit. ***There is no statutory equivalent in Scotland of the "tipping point" provision that allows the Judicial Appointments Commission to favour a candidate with protected characteristics under the Equality Act 2010 where two - or more – candidates are of equal merit. JABS does not operate a positive discrimination policy. All recommendations for appointments to judicial office in Scotland are made solely on merit.***

Feedback from the afternoon Session - delegates discussed how to encourage diversity and create a "representative" judiciary, as well as the application process. The following are some of the comments expressed:-

- Want outreach events/training especially in competency based interviewing. ***Work had already been done in these areas by DSG members before the Conference. For example, in 2012 the Law Society of Scotland introduced an online training package on competency based application processes – including interviews. JABS ran several targeted and very***

well attended outreach sessions in advance of the 2014 sheriff selection exercise.

- Should be more diverse selection panels. ***JABS always seeks to have a gender balance where possible on all selection panels.***
- The group in general agreed that the DSG might be remodelled in some respects, on the model of the English Diversity forum, mentioned by Lady Neuberger in her keynote address. ***The objectives of the DSG have been reconsidered and revised.***
- Have an example of a good application on the website. ***Being produced by JABS.***
- Referees: The group shared a concern around the use of referees in the application process. They commented that there seemed to be confusion amongst applicants about who would be suitable referees. Attendees wondered whether it would be acceptable for lay people to provide references. ***Lay persons have been able to provide personal references for over a decade***. ***However, as part of the Judicial Appointments Board's process improvement agenda the Board will no longer seek personal references for all future appointment rounds. It will continue to seek at least two legal references inviting referees to comment on certain specific cases or matters where they have had direct knowledge of the applicants work.***
- In addition to this, certain attendees commented that, often, people might be put off from applying because they feel that they do not know the 'right' people who could provide references. Here the implication was that potential candidates may feel that they have to move in particular social circles in order to apply. ***The Group understands from JABS that references are primarily sought to confirm evidence provided by candidates. They are taken into account as appropriate and are not the basis on which decisions of whom to recommend are made. See above re: legal references.***
- There were mixed views on the application form – with several people commenting about its size and complexity and suggesting that some questions should come out. However, another person commented that plenty of people appeared to be completing applications. ***JABS reviews the effectiveness of application forms after every exercise and modifies them in the light of feedback if appropriate.***
- Some of the current processes also need to be reconsidered: it is anachronistic and lacks credibility to have the Writers to the Signet route to acceptance for judicial office in the 21st century. ***The Group understands from JABS that in practice applications relying solely on being or having the qualification of Writers to the Signet are very few. Any changes to the eligibility criteria, for example the issue raised around the Writers to the Signet would be a matter for the Scottish Government – subject to the consent of the Scottish Parliament.***
- There is an underlying problem around the diversity of applicants and it may be that the heavy focus currently placed on litigation may restrict the level of interest and diversity of applicants. ***The Group understands from JABS that there is no disproportionate or special emphasis on a series of possible experience of the qualities required for judicial office.***

Annex A

"Merit and Diversity – Compatible Aspirations in Judicial appointment?"

Conference Report Summary

Introduction

Few would argue with the principle that appointments should be made on merit. And increasingly the importance of diversity of representation is recognised not only in employment but also on the boards of our companies and in public appointments more generally.

Arguably, these principles are as relevant to the system of judicial appointments as they are in other sectors. But there are those who are concerned about a potential tension between an obligation to appoint on merit and the requirement to promote diversity. When considering the composition of the judiciary in Scotland, an important question arises: are these two principles of merit and diversity compatible aspirations in judicial appointment?

To explore this question, the Diversity Steering Group, which is a collaborative group of organisations with a particular interest in the issue of diversity in the judiciary, held a conference on 11 March 2014 at St Paul's and St George's Church in Edinburgh.

The Diversity Steering Group's members are the Judicial Office for Scotland, the Faculty of Advocates, the Law Society of Scotland, and the Judicial Appointments Board for Scotland, with a member of the Judiciary, as well as an observer from Scottish Government, also sitting on the group.[2]

The seventy five delegates[3] from an invited list who attended the conference included representatives from most of the group's members. Other organisations with a stake in this topic sent delegates, including the Crown Office, the Sheriffs Association and Scottish Government. Representatives from the Tribunal Service, solicitors from private sector firms and academics also attended.

The aims of the conference were to:

- discuss the issues arising from the statutory provision that selection of an individual to be recommended for appointment must be solely on merit;
- learn more about attitudes to judicial office and whether any barriers, real or perceived, need to be addressed to encourage people to apply;

[2] Annex 4 – the role and functions of the Diversity Steering Group
[3] Annex 3 – list of delegates attending

- discuss how to encourage diversity in the range of individuals available for selection to be recommended for appointment to judicial office.

The programme for the day[4] included two keynote speeches from the Right Honourable Lord Carloway, the Lord Justice Clerk and Rabbi Baroness Julia Neuberger, as well as contributions from an expert panel consisting of Professor Neil Hutton, Chair in Criminal Justice at the University of Strathclyde, Shona Simon, President of the Employment Tribunal in Scotland and David Strang, QPM, Chief Inspector of Prisons[5].

The conference was opened by the Honourable Lady Stacey, Senator of the College of Justice, and judicial member of the Diversity Steering Group, who chaired the event.

Keynote Addresses

The Right Hon Lord Carloway, the Lord Justice Clerk, gave the opening keynote address. He explained that diversity is important because of its role in conferring legitimacy on the judiciary, and thus on the justice system and the wider law. What is important is not so much whether the bench is "diverse" but whether it is "legitimate" in the eyes of the public. Lord Carloway explained that there are two distinct senses in which judicial diversity might be described as serving the overriding need for judicial legitimacy. First, and most obviously, there is diversity of judicial membership. He described this as "quantitative diversity". Secondly, and more importantly in his view, there is diversity in judicial decision making, or what might be called "qualitative diversity". He stressed that the judicial appointments process should remain first and foremost a meritocracy, which is fundamental to the continuing excellence of the judiciary in Scotland. While judicial education on the social context and diversity awareness in judicial decision-making is important, the legitimacy of the judiciary depends on the qualitative diversity of its judicial decision making process, and viewed in that way, it is demonstrably clear that we do have a diverse judiciary in Scotland.

The event was also addressed by Rabbi Baroness Neuberger, who chaired the Advisory Panel on Judicial Diversity in England and Wales (the Panel), set up by the then Lord Chancellor, the honourable Jack Straw, MP, which reported in March 2010. In her speech she discussed the subsequent work of Judicial Appointments Commission (of England and Wales) (JAC) and Judicial Taskforce in taking forward the recommendations of the Panel[6]. She detailed positive developments in relation to groups traditionally underrepresented, including women, black and minority ethnic people, people with disabilities and solicitors appointed to judicial office. Many of the recommendations subsequently made by the Constitutional Committee have been achieved, including a duty on the Lord Chancellor and Lord Chief Justice to encourage diversity among the judiciary, secured through a hard won amendment to

[4] Annex 1 - Programme
[5] Annex 2 - speakers' profiles
[6] The Report of the Advisory Panel on Judicial Diversity 2010 is available at http://www.judiciary.gov.uk/publications/advisory-panel-recommendations

the Crime and Courts Bill. She stressed the value of the Diversity Forum which has been set up and the importance of government representation on that forum. On the importance of selecting on merit, she questioned the definition of merit, and discussed whether diversity could be viewed as an element of merit. She supported the use of the 'tipping' which allows the JAC to prefer one over the other for the purpose of increasing diversity where two candidates are of equal merit. With changes to the merit criteria, the introduction of appraisal, encouragements to apply, and judicial courses run by a judicial institute, and real determination, although the progress would be slow, the judiciary would become more diverse.

A full summary/transcript of their speeches is included in Part II of this conference report.

Panel session

In the afternoon, there was a panel session which included short inspiring presentations from Professor Neil Hutton, Shona Simon and David Strang.

Professor Hutton focussed on the definition of merit. It is not the qualities of merit in themselves which limit diversity but the way in which they are applied. Merit is not an objective measurement but the expression of value preferences. Merit could be redefined while still ensuring a high quality judiciary, but also encouraging more talented women to apply.

In Shona Simon's contribution, she concentrated on barriers in the progression of Tribunals' judiciary. Tribunal judiciary are much more likely to be solicitors than advocates and a high proportion are women. While Tribunals' judiciary can be deployed in the courts in England and Wales, that is not the case in Scotland, where the role of the tribunal judge is not viewed as a progression to higher judicial office. This results in many highly qualified and experienced judges being excluded from consideration.

David Strang discussed how to enhance the perceptions of fairness and justice in relation to appointments to the judiciary. Judges need to earn respect for their fairness and impartiality in order to maintain the legitimacy of the law. This is not helped if some sections of society feel justice "is done to them." There is a place for a more active role for judges in promoting a positive image of the administration of justice in the courts.

Breakout sessions

At the conference delegates had the opportunity to participate in breakout groups followed by a plenary debate on the issues raised. Prior to the conference, delegates were provided with a report reviewing the issues, based on previous research carried out by the Judicial Appointments Board in 2009 and the Law Society of Scotland in 2013, which delegates were encouraged to read prior to participating in these sessions[7].

[7] See MVA Consultancy (2013) Profile of the Profession 2013: Demographics and Work Patterns of Scottish Solicitors" (Law Society and Scotland) and MVA Consultancy (2009) Continuous Improvement – An Analysis of Scotland's Judicial Appointments Process, Judicial Appointments Board for Scotland.

Delegates were given the opportunity to air their views on the issues which were discussed at the conference in these breakout sessions. The themes for the morning session were perceptions of the role of judicial office and Scotland's judiciary and appointment criteria, when the following questions were considered:

- What are your general perceptions of the role of judicial office?
- What are your current perceptions of Scotland's judiciary?
- What would constitute merit?
- What attributes do you think should be considered in the application process?
- Do you think these are the factors that are currently taken account of in the decision making process or are other factors also given weighting when they shouldn't?

In the afternoon sessions, delegates discussed how to encourage diversity and create a "representative" judiciary, as well as the application process. The questions which were considered were:

- Should widening diversity be encouraged within the judiciary?
- Is there any place for positive discrimination within the application process?
- How else could/should diversity be achieved?
- Is there anything about the application process that may be deterring individuals or particular groups from applying that you would change?
- What do you think of the residency requirement?
- Do you think a "representative" judiciary is important?

In Part III of this conference report, the issues which were discussed at the break-out sessions are summarised around key themes.

Next steps: issues for further discussion

While there was no consensus view, examining these key themes, and taking account of all contributions and debate on the day, a number of pressing issues for further discussion emerged:

1. Changing perceptions about the role of the judicial officer holder and the appointments system

    - The bench should reflect society although not necessarily be representative of it
    - The perception of the "old boys network" must be tackled head on
    - While there have been developments, progress is too slow

2. Ensuring relevant criteria for appointment and building consensus on the meaning of merit

    - While merit should be the basis for appointment, we must build consensus on an inclusive definition of merit
    - An over-emphasis on litigation skills may miss talent, and artificially

narrow the pool of suitable candidates
- An awareness of the social context of judging is critical

3. Tackling barriers to appointment

    - Part-time and flexible working must be considered
    - There should be a shift away from all-Scotland appointments
    - Geographical, residency, transfer, travel and length of service requirements should be thoroughly tested to determine whether they continue to be objectively justifiable
    - Legislation should be amended if necessary to remove barriers

4. Introducing positive action measures

    - Schemes such as judicial mentoring or shadowing should be introduced
    - Tie-breaker or tipping points provisions should be used to address the problem of the under-representation of certain groups
    - Outreach events should raise awareness among under-represented groups

5. Other measures to increase diversity

    - A judiciary career path should be promoted
    - Promoting the judiciary as a career in schools and universities
    - A formal Diversity Forum, with representation from Government, should be tasked with facilitating progress
    - Guidance and training, both on the application process and to equip people for judicial appointment, should be developed
    - There should be complete transparency in the appointment process

It is clear that these issues arise at various points in the candidate's journey from the last years of school to applying to go on the bench. Yet of the range of organisations which might influence these issues, only the Judicial Appointments Board for Scotland (JABS), which makes recommendations to Government for appointment to judicial office, is under a statutory duty to select solely on merit[8] and at the same time to have regard to the need to encourage diversity in the range of individuals available to be recommended for judicial appointment[9]. If further progress is to be made it will be important to ensure that all individuals and organisations with influence at each milestone of the candidate journey take proactive responsibility for encouraging a broader range of candidates to apply.

Conclusion

The purpose of this conference was to consider the interplay between the need to select solely on merit and the desire to encourage diversity in the range of

[8] Section 12, Judiciary and Courts (Scotland) Act (JCSA)
[9] Section 14 JCSA

individuals available for selection to be recommended for appointment to judicial office.

The range of informative and thought provoking presentations served to enhance the quality of discussion during the breakout sessions, when delegates were able to consider the issues raised and make suggestions in light of their own experiences. These opinions and experiences have been captured in this report and the result is a rich collection of data on current attitudes to judicial office and the range of barriers, both real and perceived, which need to be addressed by all relevant stakeholders to encourage all who are qualified to apply.

This report provides a starting point for further discussion for individuals and organisations with an interest in improving diversity in judicial appointments and who might wish to influence further developments in this area.

Muriel Robison
June 2014

Annex 1- Conference Programme

Programme	
09.30-10.00	**Registration**
10.00-10.15	**Welcome from the Conference Chair - The Hon Lady Stacey (Valerie E. Stacey)** Senator of the College of Justice
10.15-10.45	**The Right Hon Lord Carloway (Colin John MacLean Sutherland)** Lord Justice Clerk
10.45-11.00	**Question & Answer**
11.00-11.20	**Morning break**
11.20-12.05	**Breakout session:** Perceptions of the role of judicial office and Scotland's judiciary. Appointment criteria.
12.05-12.35	**Rabbi Baroness Julia Neuberger DBE** Rabbi Baroness Neuberger is a crossbench peer and social commentator she writes and broadcasts regularly on a variety of social and religious issues.
12.35-12.50	**Question & Answer**
12.50-13.35	**Lunch**
13.35-14.20	**Panel session:** **Neil Hutton** – Professor in the Law School of Strathclyde University. **Shona Simon** – President, Employment Tribunals (Scotland). **David Strang** – Former Chief Constable of Lothian and Borders, now HM Chief Inspector of Prisons.
14.20-15.05	**Breakout session:** Encouraging Diversity. Application Process. A 'representative' – Judiciary.
15.05–15.20	**Afternoon break**
15.20-15.50	**Plenary**
15.50-16.00	**Closing remarks from the Chair- Lady Stacey**

Annex 2- Speaker Profiles

The Hon Lady Stacey (Valerie E. Stacey) - was appointed a Judge of the Supreme Courts in January 2009. Since 2012 she has been the Scottish judge appointed to sit in the Employment Appeal Tribunal in Edinburgh and London. A graduate of the University of Edinburgh, she was admitted to the Faculty of Advocates in 1987 and took silk in 1999. Between 1993 and 1996 Lady Stacey was an Advocate Depute. She was elected Vice Dean of the Faculty, serving from 2004 to 2007. She was a member of the Sentencing Commission for Scotland between 2003 and 2006, and of the Judicial Appointments Board for Scotland between 2005 and 2007.

The Right Hon Lord Carloway (Colin John MacLean Sutherland) - was appointed as Lord Justice Clerk in August 2012 having been appointed to the Second Division of the Inner House in August 2008. He has been a Court of Session Judge since February 2000.

Rabbi Baroness Julia Neuberger DBE was educated at Cambridge and Leo Baeck College. She served the South London Liberal Synagogue 1977-89, chaired Camden & Islington Community Health Services NHS Trust 1993–1997, was CEO of the King's Fund until 2004, Chancellor of the University of Ulster 1994-2000 and Bloomberg Professor of Divinity at Harvard University 2006. She was a Trustee of the Booker Prize Foundation, and a founding trustee of the Schwab Charitable Trust, in memory of her parents. Created a life peer in 2004 (Liberal Democrat, but now a Cross Bencher) she was Prime Minister Gordon Brown's Champion for Volunteering 2007-2009 and chaired One Housing Group and the Advisory Panel on Judicial Diversity for the Lord Chancellor 2009-2010. Rabbi Julia is a Trustee of the Van Leer Group Foundation and Van Leer Jerusalem Institute.

Last year she was appointed by the Care and Support Minister Norman Lamb to chair a Review of the Liverpool Care Pathway for Dying Patients, which was published in July 2013. Among her books is 'Not Dead Yet – a Manifesto for old age' (2008 Harper Collins), and 'Is that all there is?'(June 2011 Rider). Rabbi Julia is a social commentator and writes and broadcasts regularly on a variety of social and religious issues.

Professor Neil Hutton - joined Strathclyde University in 1990 and was appointed to a chair in Criminal Justice in 2001. From 2005-2009 he was Dean of the Faculty of Law, Arts and Social Sciences. He was a member of the team which designed a Sentencing Information System for the High Court between 1993 and 2002 and a member of the Sentencing Commission for Scotland between 2003 and 2006.

Ms Shona Simon - is President of Employment Tribunals (Scotland). Shona is a solicitor who was appointed as a part-time Employment Judge in 2000 before becoming a full-time judge in 2002. She was appointed as Vice-President of the Employment Tribunal in 2004 and President in 2009. She is joint author of Employment Tribunal Practice in Scotland (Simon and Taggart, W Green). While in practice Shona specialised in the area of discrimination law and was Equal Opportunities Development Adviser at the Scottish Parliament.

Mr David Strang QPM – was appointed HM Chief Inspector of Prisons for Scotland in June 2013. He was a Chief Officer in the police service in Scotland for fifteen years. Until April 2013, he was Chief Constable of Lothian and Borders Police, a post he held for six years. From 2001 to 2007 he was Chief Constable of Dumfries and Galloway Constabulary.

Annex 3 – Delegate List

First Name	Last Name	Company/Firm
Andrew Alexander	Alexander	LSS - Head of Access to Justice
Jill Bell	Bell	Sols - Anderson Strathern
Bruce Beveridge	Beveridge	LSS - President - Bruce Beveridge Consulting Limited
Mungo Bovey QC	Bovey	The Faculty of Advocates
Ailsa Carmichael QC	Carmichael	The Faculty of Advocates
Jill Clark	Clark	Scottish Government
Prof Andrew Coyle	Coyle	JABS
Ken Dalling	Dalling	sols-
Catriona Dalrymple	Dalrymple	Crown Office and Procurator Fiscal Service
Mrs Aileen Devanny	Devanny	Tribunals - HOP/PRHP
Chris Dickson	Dickson	Sols - Anderson Strathern
Lorna Drummond QC	Drummond	Diversity Steering Group
Colin Dunipace	Dunipace	sols - Dunipace
Catherine Dyer	Dyer	Crown Office and Procurator Fiscal Service
Mike Ewart	Ewart	JABS
Douglas Fairley QC	Fairley	The Faculty of Advocates
Dr Katie Farrell	Farrell	Glasgow University
Tracey Finnigan	Finnigan	Scottish Government
Mike Garden	Garden	Diversity Steering Group
Jordan Gray	Gray	Academia- Student Strathclyde University
David Harvie	Harvie	Crown Office and Procurator Fiscal Service
Catherine Hodgson	Hodgson	Scottish Government
Janet Hood	Hood	LSS -Janet Hood Consullting
Steve Humphreys	Humphreys	Diversity Steering Group
Neil Hutton	Hutton	Panel member
Lesley Irvine, Advocate	Irvine	The Faculty of Advocates
Lorna Jack	Jack	LSS - CEO
Louise Johnson	Johnson	other- Scottish Women's Aid
Mandy Kilpatrick	Kilpatrick	Judicial - NIJAC - CEO
Sheriff Gordon Liddle	Liddle	Judiciary - Sheriffs' Association
Kerry Love	Love	JABS
Sheriff Mackie	Mackie	Diversity Steering Group
Moira MacMillan	MacMillan	Academia -Glasgow Caledonian University
Jan Marshall	Marshall	Scottish Government
Tom Marshall	Marshall	Sols - Thompsons
Roy Martin QC	Martin	The Faculty of Advocates
Kay McCorquodale	McCorquodale	Diversity Steering Group
Val McEwan	McEwan	LSS - Comms
Elaine McGlone	McGlone	LSS - Equality and diversity
Kirsty McGowan	McGowan	Crown Office and Procurator Fiscal Service
Raymond McMenamin	McMenamin	Judiciary - Part-time Sheriffs' Assoc
Ruth McQuaid	McQuaid	Crown Office and Procurator Fiscal Service
Amanda Millar	Millar	sols - McCash & Hunter LLP

Alison Mitchell	Mitchell	JABS
Bernadette Monaghan	Monaghan	other- Children's Hearings Scotland
Lindsay Montgomery CBE	Montgomery	other -SLAB
Gerry Moynihan QC	Moynihan	The Faculty of Advocates
Charles Mullin	Mullin	LSS - Law Reform Committee
Brian Napier QC	Napier	The Faculty of Advocates
Peter Nicholson	Nicholson	LSS - The Journal
Professor Alan Paterson	Paterson	Academia - Strathclyde University Law School
Sheriff Colin W Pettigrew	Pettigrew	Judiciary - Sheriff's Association
Anna Poole QC	Poole	The Faculty of Advocates
Nigel Reeder	Reeder	Judicial Appointments Commission
Lindsey Reynolds	Reynolds	other - Equality and Human Rights Commission
Muriel Robison	Robison	Tribunals - Employment
Prof Nichola Rooney	Rooney	Judicial - NIJAC - Commissioner
Sir Muir Russell	Russell	JABS
John Scott	Scott	Sols - Capital Defence Lawyers
Shona Simon	Simon	Panel member
Marina Sinclair-Chin	Sinclair-Chin	LSS - Solicitor criminal legal aid co-ordinator
Lady Stacey	Stacey	Diversity Steering Group/ Chairing the conference
Chris Stephens	Stephens	Judicial Appointments Commission
David Stephenson, QC	Stephenson	The Faculty of Advocates
Neil Stevenson	Stevenson	Diversity Steering Group
David Strang	Strang	Panel member
Jill Sutherland	Sutherland	other - SEPA
Lee Thomson	Thomson	Academia- Student Strathclyde University
Mathew Thomson	Thomson	LSS - Solicitor civil legal aid co-ordinator
Linda Towers	Towers	Scottish Government - Parliament
Susan Walker	Walker	Tribunals - Employment
Sheriff Tom Welsh	Welsh	Judicial Institute for Scotland

DIVERSITY CONFERENCE 2014: "MERIT AND DIVERSITY – COMPATIBLE ASPIRATIONS IN JUDICIAL APPOINTMENTS?"

Part II: Content of Speeches

Keynote Address: The Right Honourable Lord Carloway, Lord Justice Clerk

The following is a transcript of the speech delivered by Lord Carloway

Introduction

Lord Carloway opened by posing a number of questions: "Am I a member of a "diverse judiciary"? What do we mean when we talk about diversity on the bench? What is a "diverse" judiciary? Does such a judiciary exists in Scotland? What role does the judiciary have to play in addressing these issues?". Lord Carloway explained that the answers to these questions were not as straightforward as may appear, and he went on to consider these questions in some detail throughout his address.

What does "diversity" mean to judges?

The term "diversity" simply denotes a difference or variation of some kind or another. Often, however, it will be used in connection with a drive to secure the broadest mix of characteristics amongst a group of people in order to achieve a fair representation of groups in society. Generally, it signifies the inclusion of both genders, and representatives from a range of social, racial and religious groups, and people from different cultural and political backgrounds. Where the relevant group is the judiciary, diversity may also denote differences in judicial philosophies and legal backgrounds.[10] Thus, we have the Judicial Appointments Board's Diversity Strategy, which seeks to encourage all eligible applicants to apply for judicial office regardless of gender, age, social or ethnic background, marital status and sexual orientation.[11]

Any concern about diversity should not be purely about its primary meaning. Fundamentally, diversity is important because of its role in conferring legitimacy on the judiciary, and thus on the justice system and the wider law. The bigger picture is not whether the bench is "diverse" but whether it is "legitimate" in the eyes of the public. When viewed in this way, the relatively modern language of diversity may be seen as an extension of the earliest principles of justice requiring to be in accord with prevailing societal values.

There are two distinct senses in which judicial diversity might be described as serving the overriding need for judicial legitimacy. First, and most obviously, there is diversity of judicial membership. This is what might be called "quantitative diversity". Secondly, and more importantly, there is diversity in judicial decision making, or what might be called "qualitative diversity". The importance of each aspect requires examination.

Diversity in Judicial Membership (qualitative diversity)

It is generally assumed that a diverse judiciary will be one that demonstrates personal diversity amongst its members. Thus, the aim is to achieve as great a diversity as

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[10] See, for example, T Etherton, *Liberty, the archetype and diversity: a philosophy of judging,* 2010 Public Law 727 at 743 and Lady Hale, *Making a difference? Why we need a more diverse judiciary,* (2005) 56 NILQ 281 at 291.

[11] Judicial Appointments Board for Scotland – Diversity Strategy: http://www.judicialappointmentsscotland.org.uk/Diversity_Strategy

possible amongst the body of judges in office from time to time. The bench, itself, should, it is argued, embody diversity in terms of the range of societal labels – whether gender, race, class, religion or otherwise – that may attach to each member judge.

In seeking to identify a "diverse" judiciary, one approach is to look instinctively at the composition of the bench and notice, as a starting point, the number of women as against men. Of the 32 Senators of the College of Justice (leaving aside temporary and retired judges), only 9 (as of this morning) are women – that is, just over 25%. Similarly, of the 141 sheriffs in office across Scotland, only 29 are women – that is, 21%. The word "only" in relation to the number of women is used deliberately but with some caution, as it carries with it the implication that the justice system is deficient by the simple fact of an apparent gender imbalance. A more attractive statistic, from the perspective of balance, is that of the 11 members of the Inner House[12], 4 are women.

It is likely to be misleading to rely on assumptions about the significance of equality in numbers. "Diversity" is not synonymous with "equality", even less so with gender equality specifically. Doubtless, equality has something to do with it, but care should be taken not to conflate or confuse the two concepts. It is more accurate to say that equality plays an important role in achieving diversity on the bench. The JABS Diversity Strategy demonstrates this, by promoting equality in the judicial application process in order, presumably, to secure diversity amongst those appointed. As the very existence of the strategy suggests, diversity is an end in itself, albeit it may ride to a degree on the coat tails of advancements in equal treatment.

It is the main purpose of this address to focus on diversity amongst those who have been successful in applying for judicial office. However, it is pertinent to consider the reality that diversity on the bench will be impossible to achieve in the absence of diversity in the legal profession, which is the only pool from which judicial office holders are, as yet, drawn.[13] It is not within the scope of this address to explore the entry routes or barriers to the legal profession generally; that is a separate, and complicated, matter. If the legal profession is insufficiently diverse to sustain a diverse judiciary in turn, that may be a matter more properly for consideration by the Universities, the Law Society and Faculty of Advocates, amongst others. Whatever else may be said for the need to promote diversity in the profession, it is a clear prerequisite of diversity amongst the judges of the future that there be diversity amongst intrants to legal study and qualification. For present purposes, it may be that all that can be assessed is whether the composition of the bench is reflective of the profession, such as it exists today; or rather, whether the appointments to the current bench reflect the nature of the profession, or at least those engaged in litigation, at the time those judges were appointed. There will be some delay, necessarily, before trends amongst entrants to the profession will be reflected in those eligible for judicial office, but over time there ought to be a significant correlation.

That having been said, a lack of diversity on the bench may be symptomatic of prejudice, discrimination or other barriers to judicial appointment potentially encountered by certain groups or individuals notwithstanding eligibility. There must be a firm guard set against any such unfairness in the judicial appointments process, and, for that reason alone, it may be important to monitor the characteristics of those who are successful in seeking appointment[14].

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[12] appeal court, 2 in each division.

[13] JABS Diversity Strategy *(supra)*, n 1.

[14] See, for example, the on-going monitoring and publication of diversity statistics after each judicial appointments round – most recently, the JABS Annual Report 2012/13, pp 7 – 10: http://www.judicialappointmentsscotland.org.uk/files/AR 2012-2013.pdf

Whilst a perception of diversity within the judiciary may be important, for reasons associated with fair access to judicial office, the identification of such a problem is not the purpose of a diverse judiciary. The purpose of promoting diversity in the judiciary in societal terms is, it must be emphasised, to maintain the *legitimacy* of the judiciary. At its simplest, the case for quantitative judicial diversity is that: "A judiciary which is visibly more reflective of society will enhance public confidence."[15] Crucially, the legitimacy of the judiciary cannot flow from a mere perception or appearance of diversity in judicial appointments alone.

The meaning of full judicial diversity based on a quantitative model is questionable. It has been suggested, perhaps rather obviously, that a fully diverse judiciary is one which "correlates exactly with societal make-up"[16]. Clearly, that is an impossible dream, and perhaps an undesirable nightmare. As Lord Sumption has been bold enough to point out, judges as a group will never be representative of the innumerable sub-groups comprising the public at large[17]. Given the exceptional standards of excellence, hard work and integrity demanded of our judges, especially at Court of Session and High Court level, that is hardly surprising and should not be seen as a criticism.

A notable attempt to achieve what might be dubbed "reasonable judicial diversity" can be seen in Northern Ireland, where the Judicial Appointments Commission is required to "secure, so far as it is reasonably practicable to do so, that appointments to listed judicial offices are such that those holding such offices are reflective of the community in Northern Ireland".[18] Such an approach has its obvious limitations, particularly for the range of litigants beyond the local community that must be served by the higher courts. The Northern Ireland approach is necessarily tempered by an overriding duty to make selections or recommendations for appointment "solely on the basis of merit"[19], a subject which will be returned to later. By contrast, there is force in Lord Sumption's argument that to focus on the need for different groups to be personally represented on the bench "treats appellate courts [at least] as a sort of congress of ambassadors" and may be "a travesty of the judge's role".[20] Furthermore, in the vast majority of cases in our system, a litigant or accused person will have his case dealt with by a single judge who will, in quantitive terms, inevitably be "undiverse". It is only in the few cases which are appealed that one may be afforded a diverse bench, at least in terms of gender.

Justice must be seen to be done. The benefits of "quantitative" diversity in this regard are clear. Court users must have confidence in the judgment of the courts, even if that is impossible to achieve in absolute terms with those disappointed by the judgment, verdict or sentence. The need for confidence requires that the public believe that the judiciary is not out of touch with the real world, or unrepresentative of large sections of society. This is vital if the courts, and by extension the law, are to retain legitimacy. The missing link, of course, is that justice must also, in fact, be done. A clear illustration is the diverse, but corrupt, judiciary, which does nothing to promote public confidence. A truly legitimate judiciary depends on the quality of judicial decision making, whatever the gender,

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[15] Report of the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, February 2010, p 4.

[16] S Wilson, *Judicial Diversity: Where Do we Go From Here?* (2013) 2 Cambridge Journal of International and Comparative Law 7 – 15.

[17] Lord Sumption *Home Truths about Judicial Diversity,* Bar Council Law Reform Lecture, 15 November 2012, pp 20 – 21.

[18] Justice (Northern Ireland) Act 2002, Sch 3, para 6, as amended by the Justice (Northern Ireland) Act 2009.

[19] *Ibid.*

[20] Lord Sumption *Home Truths about Judicial Diversity (supra),* p 21.

race, religion, or social or political background of the judge or judges involved in the particular case.

The limitations of "quantitative diversity" – prejudice and presumption

There are two major difficulties with the promotion of quantitative judicial diversity alone. First, and not insignificantly, such an approach necessarily undermines the standing of current judicial office holders; if the judiciary as a whole is perceived to be falling short of diversity targets. Where a positive strategy exists to promote increased diversity on the bench, it must be sensitive to the resulting inevitable inference that the existing bench is not wholly fit for purpose. It is a dangerous notion that litigants might begin to question the validity of any judicial decision that is perceived to have been made by an insufficiently diverse bench; such as one composed solely of traditionally white, middle-class, public school educated, male judges.

It is just conceivable that a particularly enterprising litigant may consider the prospects for development of the scope of an apparent bias argument in this regard. It may not be too great a leap to imagine litigants either calling for particular appellate benches to meet certain diversity thresholds – for example, that they must comprise both men and women judges[21] – or criticising a single judge as "undiverse".[22] In truth, such doomsday scenarios are unlikely to take hold, but they serve to illustrate the underlying point.

The position becomes more acute in the case of the selection of jurors. After all, it is not at all uncommon in Scotland for an accused from an ethnic minority background to be tried before an "all white" jury, even if the original assize did have a genuinely representative pool of potential jurors and would undoubtedly have had an identical number of men and women. The legislation[23] and the prevailing ethos, requires jurors to be selected at random from the list of assize.

The second difficulty with a solely quantitative assessment of diversity is that it is necessarily based on an expectation that certain types of judge will think or act in certain ways. In the context of the promotion of gender diversity on the bench, Lady Hale has observed that:

> "we should not *expect* women judges to 'make a difference' in the sense that they are likely to make different decisions from men. Women are as diverse as men in their characters and attitudes. We are all lawyers and judges first and men or women second. We all swear the same judicial oath…"[24].

To put those remarks in their proper context, Lady Hale concluded that having women judges does, in fact, make a difference.[25] Nonetheless, there is a certain tension between, on the one hand, the promotion of diversity in judicial appointments – in part, at least, to guard against prejudice in the appointments process – and on the other hand, the distortion inherent in any diversity strategy having as its intended effect the making of different types of decision by different types of judge.

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[21] See, for example, *Radmacher v Granatino* [2010] UKSC 42, Lady Hale at para 137: "…there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman."

[22] Lord Sumption *Home Truths about Judicial Diversity (supra),* p 19.

[23] Criminal Procedure (Scotland) Act 1995, section 88(2).

[24] Lady Hale, *Making a difference? Why we need a more diverse judiciary (supra)* at 286; cf Lady Hale: *Equality in the Judiciary*, 21 February 2013, p 19.

[25] *Ibid,* at 288.

It may be possible to show by empirical research that there are predictable features of the judgments of certain groups; for example that men and women may be shown to exercise judicial discretion in different gendered ways. Such evidence might not surprise the legal realists among us, although some of the research may be of limited value.[26] The results of a recent experiment in which a group of student lawyers analysed a number of written judgments in an attempt to discern those written by men and those written by women, suggested that it may be very difficult, if not impossible, to ascertain whether or to what extent the composition of the bench affects the nature of the judgments produced.[27] The students correctly identified the gender of the author-judge in only 46% of cases. It was conceded by those involved that the methodology of this particular experiment was flawed, and was likely to say more about the students' assumptions regarding the possible differences between male and female judges.[28]

It is important to notice, therefore, the distinction between acknowledgement of the results of empirical research, and the making of assumptions as to the different outlooks of particular judges. It is, inevitably, too bold an assertion to claim that all men, or women, or members of a particular group in society, judge in the same way as fellow members of the group. Taking the point further still, it should be recognised that the promotion of any perceived personal agendas of particular groups of judges is hardly a legitimate aim in the promotion of judicial diversity. There is, after all, a substantial difference between subjective decision-making based on a judge's personal beliefs, and objective decision-making informed by those beliefs.[29]

It is therefore desirable to broaden our horizons in relation to how we measure success in the promotion of judicial diversity. The attainment of a diverse judiciary should not be a solely quantitative exercise. Success cannot be measured by a mere tally of the relative numbers of men and women, or of ethnic, minority and other groups that may be represented on the bench from time to time. The aim should be to secure diversity *in* judging at all times.

What is required is a qualitative approach, which focusses on the underlying reasons why diversity is such an important concept in judicial functioning. What should be looked for is not diversity in judges' *credentials*, but diversity in judges' *decisions*. Furthermore, there should be no presumption that diversity in judicial membership guarantees diversity in judicial decision making. What then is meant by "qualitative judicial diversity" and what is its significance in judicial decision making?

Diversity in judicial decision making – or "qualitative diversity"

In order for the judiciary to be truly diverse, the process of judicial decision making must be consciously informed by "diversity awareness"; to borrow a phrase that perhaps has its own limitations. By diversity awareness, in this context, is meant an awareness of the diverse interests and values of those litigants who may come before the courts[30]. It should involve an awareness and recognition by the judge of his or her own outlook and those of fellow judges. It should, especially, take account of the potential impact of different judicial

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[26] Lord Sumption, *Home Truths about Judicial Diversity (supra)*, p 17.

[27] "The Neuberger Experiment", *New Law Journal*, 16 August 2013, p 13. The experiment is so-called as it followed the format of a "parlour game" suggested by Lord Neuberger in the course of a radio interview for BBC Radio 4's Law in Action in March 2013.

[28] "The Neuberger Experiment", *supra*, p 14.

[29] R Hunter, *An Account of Feminist Judging* in Feminist Judgments From Theory to Practice (eds R Hunter, C McGlynn, and E Rackley), Hart Publishing, 2010, pp 30 - 31.

[30] Statement of Principles of Judicial Ethics for the Scottish Judiciary, Revised May 2013, para 8.2 – available at http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialEthics2013.pdf.

philosophies in the process of judicial decision making, particularly at appellate level, and on the nature of judgments.

It has been argued by Lord Justice Etherton that judicial diversity:

> "…make[s] it more likely that the decision, and the reasoning which underpins it, will reflect the evolving values and institutions of the community, and that relevant arguments are not overlooked or brushed aside, and that insupportable preconceptions are challenged."[31]

Such an argument may be flawed, however, if it is seen as predicated on the need for diversity amongst the judges personally. As Lord Sumption observed, it "overstates the importance of personal as opposed to vicarious experience"[32]. The same principle may be extrapolated from gendered differences to differences across the whole spectrum of society, even including its criminal factions.[33] Whereas the existence of such a thing as a "fully diverse judiciary" is doubtful in the quantitative sense, recognition of judges of the full diversity of society is at least theoretically achievable in the qualitative sense of appropriately informed judicial decision making.

The quality of judicial decision making cannot be predicted or secured through a tick-box assessment of the diversity of personal backgrounds amongst judicial office holders. Furthermore, it should not be thought to depend on the presence of quantitative diversity on the bench, for the reasons already given.

It should not be forgotten that the judicial oath requires that all judges "will do right to *all manner of people* after the laws and usages of this Realm, without fear or favour, affection or ill-will" [34]. The oath applies irrespective of the quantitative diversity of the bench. It requires fairness and impartiality, and the absence of prejudice or bias on the part of all judges. It must also be implicit that, in order to comply, judges must inform themselves of the situation of all manner of people who come before them. Equally, they must be vigilant against the risk that prejudice or bias may result from ignorance of such matters, and seek to minimise such risks by exercising their judgment in a suitably informed manner.

What has been described elsewhere as the exercise of "informed impartiality"[35] captures the essence of what is required. Thus, "the blindfolded figure of *Justitia"* and hence "the image of the blind judge must be supplemented by the image of the informed judge". [36] It has been suggested that such an approach requires "introspectiveness, openness and empathy"[37] on the basis that litigants, whatever their background, are entitled to expect:

> "a judge who is aware of the influence of her own experience and perspectives, who is willing to act on different views and ideas and who has the capacity to truly hear and understand the perspectives of all those who come before her."[38]

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[31] T Etherton, *"Liberty, the Archetype and Diversity: A Philosophy of Judging", (supra)* at 746

[32] Lord Sumption, *Home Truths about Judicial Diversity (supra)*, p 19.

[33] *Ibid.*

[34] Judicial Independence, Judicial Office for Scotland: http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialIndependence_2.pdf

[35] McLachlin, CJ, *Judging: the Challenges of Diversity,* Judicial Studies Committee Inaugural Annual Lecture, 7 June 2012, p 6.

[36] *Ibid.*

[37] *Ibid*, p 11.

[38] *Ibid,* p 13.

Such desirable judicial qualities are not the preserve of a visibly diverse bench, whatever that might look like; we do not have relative standards of fairness and impartiality according to the composition of the particular bench.

The same absolute standard – to do right to all manner of people – applies to all judges, and the exercise of "informed impartiality", in particular, must be the cornerstone of a truly diverse judiciary.

Diversity and merit in judicial appointments

Lest the point where this analysis of diversity began be forgotten, there must be a return to the fundamental theme that the importance of judicial diversity lies in its contribution to the *legitimacy* of the judiciary overall. Judicial diversity – whether quantitative or qualitative – is not a *sufficient* condition of the legitimacy of judicial decisions. The legitimacy of judicial decisions extends beyond the mere absence of prejudice, actual or perceived, and depends on the technical quality of the legal knowledge, method and reasoning underlying the substantive judgment or verdict.

That being so, it is important that the judicial appointments process remains, first and foremost, a meritocracy. Whatever qualities are desirable of the judiciary as a whole, there must be no compromise in the merit of each judge standing alone. With compromise comes decline, in the quality of applicants for judicial office, in the quality of judges so appointed, and in the quality of our law insofar as it lies within the power of our courts. [39] For these reasons, the selection of our judges solely on the basis of individual merit, defined in terms of the technical abilities already mentioned, is fundamental to the continuing legitimacy and excellence of the judiciary in Scotland.[40] The courts will benefit more from a bench composed of intelligent, well-educated, experienced and, it must be particularly emphasised, hard working individuals, selected because of these merits, than it will from one where the appointment of the best available candidates has been distorted by additional extraneous considerations.

What role for the judiciary?

Has the judiciary a role to play in promoting diversity within its own ranks? In a sense, that question has already been answered. There is an important role for meaningful judicial education on diversity awareness in judicial decision making. At an introductory level, the production of the Equal Treatment Bench Book[41] aims to assist judges to ensure that all who come before the courts are dealt with in an understanding and sensitive manner, regardless of their personal backgrounds. Of more direct relevance to the judicial decision making process, there are obvious benefits in the compulsory training of newly appointed judges on social context, equal treatment and diversity issues, and in training on diversity as a priority for the continuing education of judges, including dedicated courses on "Judging in the Social Context: Equality and Diversity".[42]

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[39] See, for example, Lord Sumption, *Home Truths about Judicial Diversity (supra)*, p 22.

[40] I do not detract from the statements of "judicial qualities" promulgated by JABS in relation to particular judicial offices: http://www.judicialappointmentsscotland.org.uk/Guide to Appointment Process/Judicial Qualities.

[41] Equal Treatment Bench Book – Guidance for the Judiciary, reproduced by the Judicial Institute for Scotland in 2012, available at: http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookfinalNov.pdf

[42] Judicial Institute for Scotland Annual Report 2013, August 2013, available at: http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialInstituteforScotlandAnnualReport201213.pdf.

Through these significant, continuing and judge-led efforts to promote diversity awareness in judicial education, it may be hoped that the public, too, will be encouraged to look beyond visible diversity and to have confidence in the informed impartiality of our judges as professionals of the highest calibre, irrespective of their personal backgrounds.

Conclusion

In conclusion, it is important to think carefully about what is meant when the diversity of the judiciary is questioned.

The overriding concern must be to ensure the legitimacy of our judges in the eyes of all those served by the courts. In many cases, the quantitative diversity of the judiciary will go a long way to producing the desired public perception. Ultimately, however, the public's perception will be illusory unless it is backed up by the delivery of substantive justice. In practical terms, the legitimacy of the judiciary will depend on the qualitative diversity of its judicial decision making processes.

If our perceptions of judicial diversity are broadened in this way, it is demonstrably clear that we do, indeed, have a diverse judiciary in Scotland.

Address by Rabbi Baroness Julia Neuberger DBE

Introduction: The Advisory Panel on Judicial Diversity

Baroness Neuberger opened her address by referring to progress made since she chaired the Advisory Panel on Judicial Diversity (the Panel) which reported in March 2010. The Panel was established by the then Lord Chancellor, the Right Honourable Jack Straw MP, whose support for the project was particularly important.

The Panel put forward 53 key actions which it considered necessary to increase diversity in the judicial appointments system. All of the recommendations were accepted and the report got cross-party support. Having accepted the recommendations, the expectation was that it would take a programme spanning ten years or more for the recommendations to be fully implemented.

Fifteen of the recommendations were directed at the Judicial Appointments Commission [for England and Wales] (JAC). Twelve of these are being taken forward by the JAC, and remaining three have absorbed into JAC change programme.

Baroness Neuberger then went on to discuss progress of underrepresented groups appointments in judicial office.

The position of women

There has been a huge improvement since 2010, especially in relation to women. Between April and September 2013 more than half recommendations were for women. Among exercises which ended between April 2009 and September 2011, the overall proportion of recommended candidates increased substantially, and ranged between 38% and 42%. Among exercises which ended between October 2011 and March 2013 the proportion ranged between 48% and 49% and among exercises which ended between April and September of this year 52% of recommended candidates were women.

The high proportion of recommended candidates who are women from exercises between April and September of last year was however particularly driven by results from two non-legal exercises: Fee-paid Disability Member of the First tier Tribunal, Social Entitlement Chamber and Fee-paid Specialist Lay Member of the First-tier Tribunal, Health Education and Social Care Chamber (Mental Health). For these two exercises women made up 72% and 63% of recommendations respectively.

On women, more generally, Lord McNally drew the Constitution Committee's attention to the comments of "a very senior judge" who asked:

"whether I could guarantee that in 20 years' time, under the kind of reforms that the Lord Chancellor would have carried through, we would have greater diversity, and whether the senior judiciary would still have the same intellectual integrity, respect and international reputation that it does today. What he was basically saying was, 'If we have all these women in there, will all these things fall away?' I do not believe that they will."

The Constitution Committee stated that "We consider it our responsibility to refute any notion that those from under-represented groups make less worthy candidates than the stereotypical white male. Indeed, we believe that increasing the pool of talent available will lead to an increased number of meritorious candidates from which to select.

And as Lord Neuberger, then the Master of the Rolls, argued:

"If ... women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges."

The Lord Chief Justice in the Judicial Appointment Commission's Annual report for 2012/13 stated that, "One of my long held aspirations as Lord Chief Justice is coming to pass. Increasing numbers of women are applying and being selected on merit for judicial office at every level of the judiciary, to great public advantage. I hope that women and other underrepresented groups read these statistics and are encouraged to apply for the Bench. We need the best candidates for appointment. Anything else, such as sex, race, sexuality or socio-economic background, is irrelevant."

Candidates from a Black and Minority Ethnic background

10% of recommended candidates of all exercises between April and September were from a BAME background. This is in line with the results of past bulletins in which the proportion has varied between 8% and 15%. There was an increase in the proportion of recommended candidates from a BAME background across most legal posts between the creation of the JAC and 2012.

However, this trend is not apparent in the most recent results for legal posts. Looking at legal posts that ended between April and September of this year, 2% of recommended candidates came from a BAME background. In addition:

- 11% of JAC selections for fee-paid legal roles have been BAME candidates; the figure is 5% for salaried legal roles. Both figures are close to the percentages of BAME candidates within the profession eligible to apply for these roles.

- BAME candidates are continuing to apply in much higher proportions than their level in the eligible pool (10% for fee-paid legal roles; 6% for salaried ones).

- In tribunals, the proportion of BAME judges is identical to their level in the eligible pool (9%).

- Recommendations of BAME candidates for tribunal judge positions are in line with their proportion of the eligible pool.

- Across the full list of 17 exercises covered in the latest statistics, BAME candidates comprised 11% of those recommended as against 12% of those shortlisted (6% of those recommended, and 7% of those shortlisted, declined to state their ethnicity).

The Panel's review found that both women and people from BAME backgrounds were far keener on appraisal in the role, and the prospect of appraisal, than white men. Thus one way of encouraging more women and BAME people to apply is to offer appraisal on a regular basis, although it doesn't need to be gold-plated, leading to huge cost, which thus far the judiciary has insisted on. Rather, some court clerks, plus judges themselves working with their peers, could do this. Thanks to Lord Justice Carnwarth, the Tribunals have been very successful at this.

Solicitors

Solicitors make up more than half of tribunals judges (66%) and more than a third of courts judges (38%); overall 48% of judges. However, in the last three years, in particular, solicitor applications have fallen in both courts and tribunals exercises while at the same time the proportion of barristers applying has increased. This is affecting the proportion of solicitors being recommended.

In the summer of 2012 the then Law Society President John Wotton wrote to City firms inviting them to subscribe to a Commitment to the promotion of judicial appointments. 21 firms did so. Those firms were contacted in 2013 requesting evidence of that commitment in practice. The response has been very positive. Representatives from many of these firms have met with Chris Stephens, the Chairman of the Judicial Appointments Commission, and Lead Diversity and Community Relations HH Judge Gary Hickinbottom during the course of 2013.

The five leading London solicitors firms also came together in the Solicitors in Judicial Office Working Group, co-chaired by Baroness Neuberger, which made proposals for supporting appointment to judicial office.

Disability

5.4 per cent, that is 207, of JAC selections have been from self-declared disabled candidates. There is no data on the eligible pool of disabled candidates. In the latest official statistics, disabled candidates were successful in the only selection exercise that required legal qualifications and experience that was large enough to report on individually – fee-paid employment judge. They were 5% of those recommended and 6% of applicants.)

Diversity Duty

Although there is movement, more was needed. There was therefore an attempt to get a duty of diversity on the Lord Chancellor and Lord Chief Justice into Crime and Courts Bill last year.

That was not without its difficulties. For instance, in the debate on the Bill last year in the House of Lords, Lord Marks of Henley-on-Thames moved an amendment saying: 'our judges are widely respected nationally and internationally, for their fairness and impartiality, their integrity, honesty and incorruptibility, their intellectual rigour and their willingness to innovate in the development of our law. But we should not let our pride in the strengths of our judiciary beguile us into complacency about its weaknesses, because the reality is that for all its strengths, the judiciary is overwhelmingly too white, too male and too middle class to be representative of the society it serves. That leads to our judges being perceived as out of sympathy with contemporary Britain and overwhelmingly old-fashioned and out of touch, however far that may be from the truth in respect of individual judges.'

Lord Pannick, a distinguished barrister, followed, saying: 'The aim of achieving a more diverse judiciary does not mean reducing the standards for appointment. On the contrary, merit remains the criterion. The task... is to identify ways of bringing to the fore those highly skilled women and members of ethnic minorities who are in the legal profession.'

Baroness Neuberger contributed to the debate, arguing that: 'It is hugely important that the message is sent out widely that this is a statutory duty that applies not only to the Judicial Appointments Commission but much more widely. I particularly believe that we should also extend this to the Supreme Court.'

The government later accepted that amendment or its principle objective, as Lord McNally himself had shown huge devotion to the cause:

"Following the debate on this issue on Report, I agreed to discuss the matter further with the Lord Chancellor and Lord Chief Justice in order to reflect the strength of feeling expressed by the House. Amendment 8 is in response to that further consideration.

There is much agreement in the House about the importance of a diverse judiciary that more closely reflects our society. There is also agreement that strong leadership is needed to

bring about this change. Amendment 8 helps achieve that leadership by giving a clear declaration of the importance of the Lord Chancellor and the Lord Chief Justice promoting diversity. I commend to the House Amendment 8, relating to a diversity duty, and I thank the Constitution Committee and other noble Lords who made the case so strongly for an amendment of this sort".

Lord Pannick added: "My Lords, I, too, am very grateful to the Minister for bringing forward Amendment 8. It is important to underline that Amendment 8, and the personal obligation that it will place on the Lord Chancellor and the Lord Chief Justice, is not to question in any way the commitment and the work done in this field by the current Lord Chief Justice, Lord Judge, which has been considerable. Nor is it to suggest that appointments to the Bench should be made other than on merit. There are highly qualified women and members of ethnic minorities at the Bar, in solicitors' firms, in the CPS and in the government legal service, and every effort needs to be made to communicate the message that applications from them for judicial appointment would be especially welcomed".

Thus the duty of diversity on the Lord Chancellor and Lord Chief Justice to encourage diversity in appointments was secured.

Recommendations

The diversity duty was one of the recommendations made by the Constitution Committee which have been achieved, but there are others which have also been implemented:

- While appointment based on merit is vital and should continue, the Committee supports the application of section 159 of the Equalities Act 2010 to judicial appointments. This would allow the desire to encourage diversity to be a relevant factor where two candidates are found to be of equal merit.
- Opportunities for flexible working and the taking of career breaks within the judiciary should be made more widely available to encourage applications from women and others with caring responsibilities.
- There needs to be a greater commitment on the part of the Government, the judiciary and the legal professions to encourage applications for the judiciary from lawyers other than barristers. Being a good barrister is not necessarily the same thing as being a good judge. This has been achieved despite considerable opposition.
- While the Committee does not currently support the introduction of targets for the number of BAME and women judges, it says this should be looked at again in five years if significant progress has not been made.

The Panel had recommended benchmarking, and it is hoped will be implemented by the JAC through its increasingly powerful Diversity Forum, now that data is available and shared between all interested parties.

The Meaning of Merit

Turning to consider the definition of merit, could diversity be included as an aspect of merit?

The Constitution committee has stated : "The simple fact that an individual is from an under-represented group does not make him or her a more meritorious candidate than someone who is not. Diversity is not, in that simplistic sense, a part of merit. However, a suggestion made by some of our witnesses was that merit and diversity, whilst not identical, are related. Lord Justice Etherton argued that the courts must be sufficiently diverse in their expertise to be able to deal, as a body, with the work that comes before them; a candidate who can

"bring to bear on a difficult subject ... some additional qualities" may therefore be considered more meritorious."

This is key. It binds in Baronesss Hale's arguments about life experiences. What you bring to the party is not only the quality of your legal argument, but also your life experience, how you have been treated, who you socialise with, how you live.

This understanding of diversity as contributing to the overall effectiveness of a court may be particularly important in relation to appointments to the Supreme Court and Court of Appeal which sit in panels and where different perspectives are brought to bear by those hearing an appeal. Baroness Hale argued that:

"In disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity. I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates."

Lord Phillips described treating diversity as a part of merit as fudging the issue. Lord Carswell further distinguished between the two concepts:

"to call diversity an element of merit is incorrect in principle, but diversity has an important role to play in two ways. One, you need the skills, knowledge and experience that diverse members of society can contribute; ... The other is the public perception. ... if the public confidence requires an element of people other than the traditional type of person, then you have to look at that. But I do not think you call it merit. ... you might have A, B and C: you cannot call them equal, but they are all very appointable, though they have different qualities, but one fills a need for a particular skill. I did see that happen at one appointment because we had exactly this situation; we appointed A, because A filled a need that we had. So do take it into account, but do not call it merit."

The Constitution Committee agreed that diversity and merit are distinct concepts, but took the point regarding diversity in an appellate court.

Under the Court Reform Act, appointments to the courts and tribunals of England and Wales must be made "solely on merit" But who defines it? Is it purely the quality of argument? Or are there other things in judging, not necessarily part of what barristers and solicitors do every day, to be considered. Should the question be quality of judgment, for instance, rather than argument? What of quality of presence on the bench; or ways of dealing with people; or knowledge and experience? Is it always the case that someone who has, for example, been at the chancery bar, made a lot of money, is bright, likely to be male, probably white, and can argue brilliantly, will make the best judge? Is that merit? And are the best people to decide always fellow judges? We have decided as a nation they are not, but we have as yet failed to take into account some of these other qualities.

That is why those on the Panel were so delighted when the JAC under the chairmanship of Chris Stephens amended the criteria to include "An ability to understand and deal fairly" which is demonstrated by:

- An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs
- Commitment to justice, independence, public service and fair treatment
- Willingness to listen with patience and courtesy.

The use of the Tipping point

Both the Advisory Panel and the Government's consultation paper recommend that where two candidates are essentially indistinguishable, this tipping provision should be applied. Baroness Neuberger, as well as Lord Phillips, Lord Judge CJ, and Christopher Stephens were amongst those who doubted whether two candidates are ever truly equal. However, the Lord Chancellor and a number of the senior judiciary considered that the subjective nature of appointments meant that it was not "as rare as people think that you have candidates who are equally qualified" and therefore the use of s 159 could, in some cases, prove critical.

Leadership must come from both the Lord Chancellor who is responsible to Parliament for the appointments process and the Lord Chief Justice as head of the judiciary. They can take the responsibility of making it clear that this matters and people will be judged on it! Both individuals, along with the JAC, can make it clear to all those involved in the appointments process, whether as applicants or selectors, that improving diversity is taken seriously as an aim within government and the judiciary. The message that all those who meet the merit criterion are capable of becoming judges is one which should not be left to the JAC alone to make. Although a statutory duty is not necessary for this leadership to be given, now we've got it, it will help to ensure that all Lord Chancellors and Lord Chief Justices properly recognise and fulfil their roles in this regard.

The new Lord Chief Justice has taken this on board, and proposals to address the balance have included mentoring, work experience, help with referees and how forms are filled out, as well as interview practice.

The widespread support for the principle of flexible working has been met with some resistance within the judiciary. Lord McNally informed us that: "I hear judges say, 'Ah, but you can't have flexible judges, as that would totally disrupt the processes of the court.'" Lord Woolf and Lord Carswell, former Law Lords, both cautioned that part-time working would be difficult to accommodate within the senior judiciary: if some judges are unable to undertake prolonged trials that causes difficulties for the rest. Reassurances came from the Lord Chief Justice who said that:

"we should be able to organise the sitting patterns for female High Court judges or male High Court judges who have caring responsibilities, so that during, for example, half term they can be at home ... I think those sorts of very small changes, if we can broadcast it sufficiently to the women of quality, will help."

And the Constitution Committee, that:

"The concept of merit incorporates a range of different skills and qualities, in addition to the intellectual capacity necessary to become a judge. A number of our witnesses drew attention to the fact that merit is still regarded by many in the legal profession as equating to high quality advocacy; this naturally favours QCs, and it is QCs who are most likely to fit the white male stereotype. We consider that it is the capacity to be a good judge, not the capacity to be a good barrister, which is essential to merit. The two may overlap, but not necessarily. There are a number of lawyers with limited experience of advocacy who would make excellent judges."

Determining merit is not a wholly objective exercise; the various criteria will be weighed up differently according to the importance attached to each one by the individual selector. The perception that serving judges appoint in their own image is a persistent one which concerned many of our witnesses. Lord McNally drew attention to the danger of appointers looking to appoint "chaps like us" whilst Baroness Neuberger confessed: "We all have an inclination to appoint people who are like us. I certainly found as Chief Executive of the

King's Fund that an astonishingly large number of middle-class, white, rather bossy women were being appointed—I cannot think why that should be."

Baroness Hale argued that:

"In disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity. I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates."

Like the House of Lords Constitution Committee, Baroness Neuberger agrees that diversity and merit are distinct concepts. But what is merit? It is not just about marshalling of good quality arguments. It must be about judgment, hence it is really important to have sat as a judge part time. It must also be about presence and about dealing fairly which is partly innate but should partly be borne of experience.

So it is essential to include life experience when determining merit. There is thus an emphasis on public service, on doing things outside the narrow world of the law and judiciary are considerations within merit, they are qualities and experience which add to merit. It is not only about pure legal argument and indeed about flowering in advocacy roles, as the judge is not an advocate. And it is not only lawyers who can comment on, and understand, the qualities which make a good judge. There is an innate inclination to appoint in one's own image.

Diversity is not part of that description of merit. But if those characteristics were taken more seriously- and that's why it is so important that the JAC changed their merit criteria to include them - it is likely, or at least possible, that the judiciary would become more diverse as a result. That, plus appraisal, pre-selection tapping on shoulder to encourage to apply, training, judicial courses, with a judicial institute, and real determination. That might work…… but it will be slow. .

Panel Session

Contribution 1: Neil Hutton University of Strathclyde

Neil Hutton looked first at the staff compliment in the University of Strathclyde Law School where there has been significant progress since 1990, when of the 18 staff, 16 were men, four of whom were professors, with only two women. Now in 2014, of the 26 staff, 13 men, seven of whom are professors and of the 13 women, five are professors.

Professor Hutton went on to explain why diversity is necessary. In particular, he explained that gender discrimination should not prevent talented women from attaining the top jobs. Further, public confidence requires the judiciary to attend to contemporary values and attitudes and review traditional practices where necessary.

The fact that there is an element of value judgement in some judicial decision making means that judges should not be drawn from an excessively narrow section of society.

On the question of whether diversity affects sentencing, sentencing requires the exercise of judgement and the application of values. While there is no reason to suppose that values are determined by gender or ethnicity, a judiciary drawn from more diverse sections of the population is likely to demonstrate a wider range of values.

While talent and ability are important, how these are defined and operationalised in selection procedures favours a particular definition of merit. Professor Kate Malleson[43] concluded that the criteria set for judicial appointment are unavoidably linked to the qualities of the pool of candidates and to perceived qualities of existing judiciary. Professor Malleson argues this definition of merit will lead to appointments from a similar pool of barristers with a distinguished career record, who are disproportionately male.

JABS criteria for appointment

In relation to knowledge of the law, the criteria are as follows:

Knowledge of the Law

- A good working knowledge of the law of evidence
- A good working knowledge of the procedural law appropriate to the court in which office is sought
- A high level of knowledge of the substantive law in the area of the applicant's practice
- A well informed awareness of the areas of substantive law most commonly encountered in the court in which the applicant seeks office
- Good ability to acquire knowledge of the law in unfamiliar areas

Skills and Competence in the Interpretation and Application of the Law

- Good skills in the interpretation and analysis of case law and statute law

[43] For a list of Professor Malleson's publications, see http://www.law.qmul.ac.uk/staff/malleson.html

- Good skills in identifying and distinguishing issues of fact and law
- Good skills in applying the relevant law to relevant fact
- Good ability to interpret and apply the law in unfamiliar areas

General

- Court experience
- Advocacy skills

Turning to personal and judicial qualities, the JABS requirements are:

Intellectual capacity and powers of reasoning

- Ability to marshal and analyse facts and competing arguments
- Ability to reason logically
- Ability to reach firm conclusions
- Sound judgment
- Ability to exercise discretion appropriately

Personal characteristics

- Integrity
- Independence of mind and moral courage
- Fairness and impartiality
- Common-sense
- Understanding of people and society
- Responsible attitude and sound temperament
- Courteous and considerate
- Ability to command respect

Case management skills and efficiency

- Ability to manage cases efficiently and effectively
- Resolution, conscientiousness and diligence

Communication skills

- Good communication and listening skills
- Ability to communicate clearly with all court users

- Ability to write clear, concise, well-reasoned and legally sound judgments.

Measuring Merit: criteria

Do these criteria for measuring merit favour certain legal career patterns or is it the way in which these are implemented in the selection process? In the knowledge and skills category in particular some of the qualities seem to be associated with court experience, many are generic. On paper these qualities could be demonstrated by applicants from a range of legal careers? A bias in favour of court experience means that these qualities are more likely to be demonstrable by lawyers who have had a distinguished career at the bar and less likely to be demonstrable by those whose careers have been as solicitors in private practice with little court experience, academic lawyers other lawyers who might be considered part of the potential pool. However skills and competence, ability to acquire new legal knowledge, and high level of knowledge of a substantive area of law would appear to be demonstrable in any area of legal work.

JABS Survey 2009: Perceptions of the application process

Most respondents to the JABS Survey were uncertain about the extent to which certain factors would or should influence the outcome. There was a lack of clarity about the criteria that applicants need to meet. Respondents to the survey requested more detailed presentation of the qualifications and experience required and provision of the selection parameters and more precise demonstration of a career path.

Respondents to the JABS 2009 survey wanted greater transparency in relation to the criteria:

- Were some qualities more desirable and weighted more heavily than others?
- Is court experience essential, highly desirable, or not necessary if the candidate can demonstrate transferrable skills from a different area of work?
- Is knowledge of any substantive area of law acceptable or are some areas weighted more highly than others?
- What is required to demonstrate a “working knowledge” of the relevant law of evidence and procedure?
- Should prospective candidates for judicial office pursue a particular career path?

Transparency

Section 13(1) of the Judiciary and Courts (Scotland) Act 2008 states that only the judicial and legal members of the Board may take part in any assessment by the Board of an individual's knowledge of the law, or skills and competence in the interpretation and application of the law. Section 13(2) states that this “does not prevent a member of the Board from taking part in a decision of the Board as to whether to recommend an individual for appointment to a judicial office”.

But is it clear how section 13 of the Judiciary and Court (Scotland) Act works? Is there transparency about how are criteria measured and weighted by Board members?

While the JABS publish the qualities, no account is given how Board members reach their conclusions. And if Malleson is right, the Board may give court experience and relevant legal knowledge more weight than other qualities.

So can the process be made more transparent? Greater transparency would enable applicants to make more accurate assessments of their qualifications for the job and also to pursue career opportunities which would allow them to develop the desired skills and qualities. But there are significant challenges in making the judgements and evaluations of Board members more visible.

Alternative approaches

A “norm referencing” approach results in ranking candidates against each other by translating the evidence presented of qualities into numerical scores. Norm referencing is defined as, “intended to measure the achievement against others who have taken the same test”. The application process is not so much a test as the measurement of a set of qualities.

If applicants have followed different careers which have provided them with different opportunities to develop these qualities, then it could be argued that norm referencing is not appropriate.

An option which could be considered is criterion referencing, where applicants must demonstrate that they possess a defined set of qualities/skills. This creates a pool of qualified applicants. Selection from this pool can be based on the desire to develop a more diverse bench. But does this amount to affirmative action and not merit?

How to encourage diversity

In order to encourage diversity, it is necessary to change perceptions of the potential pool about appointment criteria. This could be done by ensuring greater transparency over how qualities are assessed and weighted; by a review by JABS of its procedures internally to increase diversity; or to consider a shift to a professional judiciary.

Conclusion

A more diverse judiciary is unlikely to emerge from existing arrangements or if it does it will take a long time. It is not the qualities of merit in themselves which limit diversity but the way in which they are applied. Merit and diversity are however not incompatible. Merit is not an objective measurement but the expression of value preferences. Redefining merit is not “dumbing down”. Although politically controversial and difficult, it is possible to define merit differently which would still ensure a high quality judiciary but also encourage more talented women to apply.

Contribution 2: Shona Simon, President of the Employment Tribunals

In her contribution, Shona Simon focussed on the role of the judicial career encompassing court and tribunal judges.

Barriers to appointment: the case of Ms XY

Shona Simon opened by setting out the criteria for appointment as a Senator of the College of Justice. The requirement is to be:

- A Sheriff Principal or a Sheriff who has exercised these functions continuously for a period of at least five years; or
- An Advocate of five years standing; or
- A Solicitor who has had rights of audience before either the Court of Session or the High Court of Justiciary continuously for a period of not less than five years; or
- A Writer to the Signet of ten years standing who has passed the examination in civil law two years before taking up your seat on the Bench.

Looking at the career of Ms XY, she has been a solicitor for 25 years with 15 years experience as a salaried employment judge (but she could equally be an immigration judge etc); She has managed and heard many complex, lengthy discrimination and equal pay cases; She has been highly trained in judicial skills, diversity awareness etc; She has an outstanding academic record, has kept herself up to date with legal developments in other areas of the law and has written several highly regarded textbooks.

With her experience, you might assume that Ms XY could consider applying to become a Court of Session Judge; or the Employment Appeal Tribunal Judge in Scotland; or the Scottish President of Tribunals (a post created by the Tribunals (Scotland) Bill).

However, under the current rules of appointment, she would not be eligible to apply for any of these posts, unless she opts to become a Sheriff and exercises that function continuously for at least 5 years or opts to become a Writer to the Signet and waits 10 years (and passes the examination in civil law two years before she is going to apply to become a Senator).

Diversity in the Tribunal Judiciary

This issue is important when considering the question of diversity in judicial appointments because the Tribunals' judiciary are much more likely to be solicitors than advocates. For example of the 20 salaried employment judges in Scotland, 18 were solicitors, 1 was a barrister in England and Wales and 1 was a solicitor advocate. Further, Tribunals' judiciary includes a high proportion of women. Of the salaried employment judges, 60% are women, 50% of the Asylum and Immigration judges are women, and 58% of the salaried Social Entitlement judges.

Developments in England and Wales

Under provisions of schedule 14 of the Crime and Courts Act 2013 (England and Wales), the President of Employment Tribunal (Scotland), could be deployed into the High Court in England and Wales in order to provide judicial assistance, as could Employment Tribunal

President in England and Wales and the Chamber Presidents of First Tier Tribunals. Under the same legislation Employment Judges (and First Tier judges) in Scotland can be deployed into the District Court in England and Wales. While it is unclear how this will work in practice, this provides the opportunity for tribunal judges to experience judging in court setting, where they are deemed to be qualified to sit.

A career path

The missed opportunities for drawing on a pool of experienced Tribunal judges and the absence of a judicial career path were recognised by Lady Hale during a BBC Radio 4 broadcast of Women's hour on 28 November 2013:

"We can do a lot by widening the pool of people we think qualify for a particular sort of legal job. The reason we have so few women in the higher judiciary is a combination of a legal profession divided between barristers and solicitors and the assumption that only the top barristers qualify for the top judicial jobs".....We need a proper means of progress within the judicial profession so that you could start as a tribunal judge and then move across in to the courts and come up through the courts....if you have the right sorts of qualities and the right sorts of skills."

Contribution 3: David Strang

David's Strang considered "How to enhance the perceptions of fairness and justice in relation to appointments to the Judiciary".

He offered some personal reflections, looking through the lens of criminal justice, given his background in policing and an inspector of prisons.

Defining merit

Is the current definition of merit sufficient for what we want judges to do?

The topic of judicial appointments is important, not just for the career path of lawyers, but much more for the world outside the criminal justice system. Perceptions of fairness and justice for the wider public are as important as the technical abilities of judges. A successful criminal justice system is an essential element of a civilised society. Public confidence in the criminal justice system is fundamental to its success. It is respect for the rule of law, of fairness and justice which lead to "legitimacy".

The criminal justice system needs to be respected and engender the trust of both the general public/media but specifically the participants in the Court process, including witnesses, accused and jurors.

What is the perception of the criminal justice system and courts?

Some attending court find it formal, austere, cold, remote and impersonal, rather than welcoming, warm and friendly. What does this tell us about those sitting in judgement?

It is accepted that a level of formality is necessary given there are serious consequences of the courts' decisions. But are all treated with respect and dignity? Do people feel part of the process? Is justice something that is done to them? For many, they feel it is a world they don't belong to.

In the JABS Survey on Judicial Appointments (2009), respondents made comments including "Old boy's network" "If your face doesn't fit" "Having the right social connections" "Hidden rules", suggesting a perception of their being an "in-crowd" leaving some feeling "outsiders". This parallels some people's experience of the courts and criminal justice system. Many people caught up in the Criminal Justice System do not feel part of the mainstream or establishment. They often feel outsiders – on the margins, without a voice, with little stake in society.

Their perception is that wherever discretion is exercised in the system, it is exercised against them, in contrast to the "in crowd" for whom it is exercised in their favour. One person's discretion is another's inconsistency and unfairness.

What do these perceptions mean for judicial appointments

So what might these perceptions mean for judicial appointments? There is not an easy answer. Clearly the bench cannot accurately reflect all of society's socio-economic backgrounds. But are there new ways that justice can be dispensed? In particular, might we redefine the role of the judge to emphasise the problem solving nature of decision making? Could we measure the effectiveness of court decisions in different ways? What

new parameters could we use to measure merit? Successful judges will better reflect the diversity of society, will engage more effectively with diverse perspectives and appear less remote and distant.

Perceptions are important. We need fairness and justice in the appointment of sheriffs and judges – because we need fairness and justice in the process of a successful criminal justice system.

Annex 4 – The role and function of the Diversity Steering Group

This conference was organised as part of the programme of work of the Diversity Steering Group. The DSG was established by Judicial Appointments Board for Scotland in June 2010. It is a collaborative group, operating under the auspices of the Judicial Appointments Board, with representatives from JABS, the Judiciary, the Faculty of Advocates and the Law Society of Scotland.

The current members are Lady Stacey representing the judiciary, Steve Humphreys from the Judicial Office, Neil Stevenson from the Law Society of Scotland, Lorna Drummond QC from the Faculty of Advocates, Sheriff Mackie from the Judicial Appointments Board for Scotland. Kay McCorquodale attends as an observer for the Scottish Government.

The remit of the Group is to:

- develop an agreed approach, in discussion with other parties, that will encourage diversity in the range of individuals available for selection to be recommended to appointment to judicial office

- Prioritise the recommendations of the Diversity Working Group‘s Final Report, allocate lead responsibilities and set timescales for delivery

- Identify other relevant strands of work that should be pursued

- Provide regular progress reports to JABS.

"Merit and Diversity – Compatible Aspirations in Judicial appointment?"

Part III: Key Themes emerging from group discussions

1. Perceptions about the role of the judicial office holder and the appointments system

The role of judicial office holder is considered attractive because it affords the opportunity to undertake a public service role which is intellectually challenging, offers financial security and a good pension, as well as career progression.

The down sides to the role include in particular the heavy workloads in a broad jurisdiction, high levels of responsibility, loss of autonomy and sense of isolation, all of which can lead to stress.

With regard to the composition of the judiciary, most delegates considered that diversity on the bench is important, but not at the expense of meritorious appointments. It is important that the bench should reflect society although not necessarily be representative of it.

There is however a view that those holding judicial office are still predominantly white, middle class men who attended public school and belong to an "old boys' network".

Paradoxically, some were of the view that this old boys' network is perpetuated by JABS, while there were others who expressed a lack of confidence in the system for appointments, based on concerns expressed regarding certain appointments. In particular, there was a belief among a number of delegates that some appointments at least are not based on merit but rather on personal characteristics. The focus of the profession is on the quality of decisions rather than on the personal characteristic of the judge. Some delegates were of the view that experience of dealing with a diverse range of people was more important than the perception of diversity of judicial office holders.

Others thought that diversity was necessary to achieve a more meritorious judiciary since the current system is excluding meritorious women and other groups.

It was generally accepted that the situation is changing, and that the JABS had contributed positively to that, but progress is too slow. Concerns were expressed that despite the number of women in the profession, there is still disproportionately few progressing to the most senior levels. If the judiciary is not adapting at the same pace as the rest of society then it will not be seen as reflective of the rest of society, and therefore will lack credibility.

Both the profession and the public must have confidence in the appointments system. It is important not to under-estimate the importance of the public perception of the justice system, and concerns were expressed about misrepresentations in the media of the profile of judges as "pale male and stale" and out of touch with contemporary society.

2. The contested meaning of merit and the criteria for appointment

There was a strong broad consensus that appointment should be exclusively on merit, and that only the best person for the role should be appointed. There was however much discussion not only about what merit is and how it is defined, but also how it can be properly assessed, tested and measured.

The criteria for appointment are crucial in ensuring the buy-in not only of the profession but also of the public. Given the variety of roles from senator to tribunal judge, criteria should vary depending on the judicial office.

It is important to ensure that the criteria are designed to identify and measure the important attributes of judicial office, which include fairness, integrity, impartiality, intellectual capacity and good listening skills.

A concern expressed by many delegates was that that the current focus is not on the correct skills. There was a clear view that the focus is on good advocacy and presentation skills, with an over-emphasis on litigation and priority given to those with court experience in the appointments process. That perception extended in one case to an impression that there was a requirement to be a member of the Faculty of Advocates in order to secure an appointment. The heavy focus currently placed on litigation may restrict the level of interest and diversity of applicants.

Many delegates expressed the view that best advocates do not necessarily make the best judges. While advocacy skills are relevant, the more important skills are listening skills, decision-making skills, written communication skills and good judgment. Case management skills are increasingly important in the judicial role, with efficient time management particularly important in certain jurisdictions. For this aspect of the role, decision-making skills are important. Also increasingly important is the ability to interpret legislation and contracts. These are transferable skills which should be taken into account.

Some consider it essential for public confidence that judges show an awareness of society and the social context. Criteria could include societal empathy and an understanding of the social context of judging. There was a discussion about including diverse life experience as a criterion for appointment, which, while not necessarily equate to a diverse bench, was likely to result in better performance and more effective decision making. Experience of dealing with people with protected characteristics was viewed by some as important (more than the perception of people being appointed to judicial office because they had protected characteristics). The ability to deal with unrepresented applicants is likely to be significant in the future, an experience gained by Tribunal judges in particular.

The value of previous judicial experience was recognised, with a number of delegates stating that those with previous experience of judging in some capacity tend to make better judicial office holders.

It was recognised that identifying the relevant criteria is important, but crucially there is a need to ensure that any criteria set could be objectively measured.

3. Barriers to appointment

Concerns were expressed about a number of barriers to appointment. The most commonly discussed barriers included:

- the absence of opportunities for part-time salaried or flexible judicial appointments presents a barrier for professional women increasingly having children later in life and for those with caring responsibilities for elderly parents. This is in contrast to other public sector roles, such as the Procurator Fiscal Service. While working 3 or 4 days per week may not be feasible, alternatives such as working 9 months out of 12 or term time working could be considered.
- The appointment of sheriffs on an all Scotland basis (while this did not necessarily match the reality in practice). It is unusual for a candidate to apply for a job when they would not know where they would be based initially.
- That is compounded by the understanding that sheriffs are initially appointed on a floating basis, which deter those who are not able to travel because of their personal circumstances.
- The practice of advertising shrieval posts in fixed locations internally in the first instance. It is understood that the posts which are advertised in central locations tend

to be filled by the pool of internal applicants. Central locations are coveted by internal applicants who are less likely to apply for posts in remote locations which means that external applicants are limited to these remote/rural postings which become vacant. This was described as a "convention" for new sheriffs to be placed in remote locations

- The residency requirement for shrieval appointments: the requirement to live within one hour of the sheriff court where they sit can deter candidates from applying. Misgivings were expressed about the rationale for this requirement for sheriffs to have a visibility within the sheriffdom, while at the same time being require not to become involved in local activities
- The travelling requirement for shrieval appointments: the requirement to travel can deter those with fixed daily commitments
- The transfer of sheriffs from one sheriffdom to another. Particular concerns were expressed about the Courts (Reform) Bill which is understood will allow appointees to be transferred at will. Concerns were expressed that this would be a deterrent to those from various groups who require certainty in their location.
- The difficulties or perceived difficulties of in-house lawyers making the move to judicial office was understood to be a barrier, with the potential to be indirectly discriminatory, particularly given the higher proportions of women working in-house. There is a lack of role models from that sector, and this is deterring some highly experienced in-house lawyers.
- The difficulty experienced by individuals in firms and particularly in-house lawyers to get the time off to perform these roles on a part-time ad hoc basis, which is understood to be a pre-requisite for a full-time appointment. This is particularly acute in the current financial climate.
- The perceived requirement to obtain references from members of the judiciary/High Court Judges which presents particular difficulties for those who are not involved in litigation, or who do not move in those social or professional circles which limits who they can approach. In-house lawyers in particular are less likely to be able to obtain references from members of the judiciary.
- The requirement to have a certain number of years' experience for certain posts or for extra curricular activities, which may favour male applicants
- The absolute ban on tribunal judges applying for certain posts
- the WS route to judicial office, which is considered anachronistic and lacking credibility
- Requirement for ten pieces of independent written work for applications for Court of Session positions can present difficulties for those not already undertaking judicial work, as in other sectors collaboration is the norm.
- Lack of experience of those in certain sectors of competing in a competency based interview process.

4. Proposals for overcoming barriers

It was proposed by one group that a robust analytical approach should be taken to identifying and overcoming barriers to appointment. The starting point should be an assumption that every lawyer can be a judge and then every barrier which reduces the pool should be tested to ensure that it is objectively justifiable. This would facilitate an objective assessment of barriers such as the requirement for certain qualifications for appointment, which cuts down the pool from the outset.

Other proposals for overcoming some of the barriers identified include:

- Further consideration should be given to the feasibility of part-time or flexible working, such as term time working.

- Consideration of a shift from an all-Scotland appointment to a fixed appointment or an appointment to an individual sheriffdom (which would provide greater certainty for applications but also reflects the reality , that there is not significant movement across the country)
- Offer additional money and relocation expenses to work in an unattractive area
- Consideration to making a call for certain amendments to statutes to remove unnecessary initial barriers, such as length of service, WS requirement etc
- Initial on-line critical reasoning test in the first round as used in other jurisdictions to facilitate anonymous applications
- Further training and guidance on competing in competency based interviews
- Undertake research (as is done in the civil service) on why people are leaving the profession (and thereby cutting back the pool of candidates)
- Consideration to be given to more efficient deployment of resources to operate a 24/7/365 criminal justice system which moves away from a five or six hour sitting day, five days each week (eg to move away from holding the week-end's custodies on a Monday morning in busy sheriff courts across the country).
- References from relevant managers should be given equal weight to references from members of the judiciary

5. Views on positive action measures

The view shared by a number of groups was that while increasing diversity in the legal profession will inevitably lead to an increase in diversity on the bench, progress is too slow.

A view expressed in most of the groups was that that quotas on the basis of protected characteristics devalues the place of the applicants who do succeed, and demoralises other candidates who are unsuccessful.

There was general agreement that there is no place for positive discrimination in the application process, although a view was expressed that positive discrimination exists at present, for example illustrated by the favouring of advocates for senior judicial appointments, and the JABS processes (that is competency based interviews) favour those with experience of such processes such as procurator fiscals.

There is considered to be a need to increase the pool of applicants without decreasing the quality of applications, and encouraging applicants with a realistic prospect of success.

Some of the measures proposed were:

- promoting positive role models to encourage prospective candidates.
- judicial mentoring or shadowing in court or introduction of specific scheme to shadow the current bench
- targeted outreach to encourage applicants to apply particularly among underrepresented groups by for example publicising training opportunities and making information available
- implementation by JABS of a policy of guaranteeing that applicants with certain characteristics, such as disability, would be put through the sift.
- Introducing a policy that places all applicants who are deemed suitable for appointment in a pool of qualified applicants selected on merit, with selection made from that group targeting under-represented groups.
- Using the tie-breaker provisions and introducing the approach of the Judicial Appointments Commission in England and Wales who use a tipping point mechanism, which sets a standard and identifies a band below and above that standard, with underrepresented groups falling within that range of sufficiently qualified applicants selected for appointment

- Raising awareness among young people to aspire to be a judge, through for example outreach events at schools and mock courts. The Bench is currently seen as remote and distant even to the legal profession and engagement with the public should be encouraged, and there would be no threat to their independence by this engagement.

6. Consideration of other measures

A number of other suggestions were put forward for changes to the appointments process, which included:

- Introduce a Diversity Forum, along the lines of the forum set up in England and Wales, based on the Diversity Steering Group, tasked with removing barriers to the judiciary. It is essential that the Government is involved in such a group in order to engender and facilitate change. This is particularly important given possible constitutional changes, in which the Diversity Forum could play a key role.
- Reintroduce a structured procedure for "soundings" or peer reviews, which are seen by some as preferable to references, especially where candidates were not able to obtain a reference from a member of the judiciary. A structured approach with a proper consultation process could be valuable in ensuring confidence in the appointment process.
- promoting a career judiciary path, starting as a tribunal judge. This would be more feasible with the introduction of a new judicial tier of summary sheriff. This may encourage younger applicants, although there must still be opportunities for senior members of the bar to enter at specialist sheriff level
- take advantage of the shift from a generalist to a specialist bench, which may be an opportunity to draw generalists from a wider pool than before or to recruit recognised specialists in particular practice areas to the specialist bench.
- Consider radical alternatives, looking at other systems such as the American system (where judges are elected) and continental models, where judicial office is a separate career from the legal profession. The emphasis is on the appointments process as a means of widening diversity, but this operates in the context of an old-fashioned view of a judicial career.
- training should be available to assist those in completing application forms
- Introduce an appraisal system to test competence against performance, as is done in some Tribunals
- Ensure diverse selection panels

7. The importance of training and guidance

It was recognised that people from every jurisdiction have gaps in their experience and that a training programme could be introduced to fill these gaps, both pre and post appointment.

It should be highlighted that JABS need not be looking for "the finished article", and recognised that judicial appointment is the beginning of the career of learning on the job.

One group suggested that an LLM in judicial studies could be introduced in Universities, as in some universities in the United States.

A number of groups stressed the need for training and support during the application process, on completion of the application form interview and how best to sell your skills.

There was a particular issue raised repeatedly which concerned the use by JABS of competency based interviewing. It was suggested that applicants from the public sector or perhaps large firms with HR departments were at an advantage because of their experience of that kind of approach.

While there is guidance from JABS, it was thought that this could be improved, and further guidance provided on completing the application form and how to deal with competency based interview questions. It was suggested that a model style application form could be put on the website.

Given that it is recognised that skills are transferable, a table of equivalent experience might be useful to show how skills might be demonstrated in different ways. Consideration could be given to introduction the practice from the JAC (England and Wales) whose application form has a question especially for explaining alternative, equivalent experience to the requirements.

Guidance could include guidance on who can be approached for references, and whether the references from lay people are taken into account

8. The need for transparency

There was a strong view that there must be complete transparency about the role of JABS in the appointment process, as well as the reasons for the decisions about appointments.

Failed applicants need to understand the process and why they have been unsuccessful. A view was expressed by some that there was a lack of understanding about what is required to satisfy the Board and that it was not known what weight is given by JABS to different criteria and how candidates are scored.

There is a lack of clarity about whether JABS provides feedback, and a perception that the absence of a system for providing feedback deters applicants from reapplying. There is a need to raise awareness that it is possible to obtain feedback and the form that any feedback from JABS takes. It was stated that the absence of an appropriate system for providing feedback deters applicants from reapplying as they do not know how they can improve on their application.

This could be overcome by introducing more comprehensive feedback for rejected applicants. Reference was made to the approach of the Tribunal Service, which operates competency based interviews, and which provides feedback to applicants who have not been successful. It was generally thought to be constructive, and there was an impression that the approach leads people to reapply at a later stage for other appointments

There is a need to raise awareness regarding the role of JABS as it is not generally understood that JABS determines whether applicants are meritorious and then recommends them to the Government for appointment and the final decision lies with the Government.