

Increasing Judicial Diversity: An Update

A report by JUSTICE



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EXECUTIVE SUMMARY

In 2017, JUSTICE published its report *Increasing Judicial Diversity*, which set out the case for judicial diversity and explored the structural barriers faced by women, visible BAME people and those from less advantaged socio-economic backgrounds in reaching the bench. This Update builds on that report. It assesses the progress that has been made since 2017, outlines critical remaining areas of concern and makes further recommendations for improving judicial diversity.

Like the original report, it focusses on the diversity of the senior courts in England and Wales (namely the Circuit Bench, High Court and Court of Appeal) and the UK Supreme Court and looks at the appointment of women, Black, Asian and Minority Ethnic (BAME) candidates, non-barrister candidates and those from a lower socio-economic background. In addition to the original report it also considers the disability and sexual orientation and gender identity.

This Update finds that despite the clear case for increased judicial diversity progress has remained slow:

- **Gender** has seen the most positive developments over the last two years, with noticeable gains in the proportion of women at the Circuit bench in particular. However, this progress is fragile and significant challenges remain.
- There has been a stagnation in the appointment of **BAME judges**. Whilst increased outreach efforts have seen an increase in BAME applicants this has not translated into appointments of BAME judges. The very low number of BAME judges in the senior judiciary poses an acute challenge to the credibility and legitimacy of the judiciary, representing a challenge for trust and confidence with minority communities.
- **Solicitors** continue to apply for senior judicial office in much lower numbers than their proportion of the estimated eligible pool and their relative success rates compared with barristers remain poor. In particular, solicitors struggle to get appointed to the two key feeder roles to senior appointment – Recorder and Deputy High Court Judge.

- The judiciary continues to be largely comprised of those from a higher **socio-economic background**. This is due to a relative lack of applications from individuals from lower socio-economic backgrounds. This in turn is likely to reflect the lack of socio-economic diversity in the pool from which judges are predominantly appointed, raising questions about the barriers individuals from lower socio-economic backgrounds face at entry to the profession, in particular the bar.
- There is a lack of quantitative data on **disability** in the senior judiciary. However, through qualitative data collection we were struck by the inaccessibility of the legal profession to disabled people and the severe practical difficulties of sitting as a judge faced by those with disabilities.
- To the extent that data on **sexual orientation** exists, it seems to indicate that LGB candidates applying for judicial office stand an equal chance of appointment. This view was reflected by sitting gay judges that we spoke to. However, most of these judges were white men and we do not have enough evidence to draw conclusions on how sexual orientation may intersect with other diversity characteristics. We were also unable to gather any evidence with respect to the appointment of Trans judges.

We find that a number of our more minor recommendations from our 2017 report have been adopted. We welcome these changes and make a number of further recommendations which build on the work the JAC and judiciary have already been doing in respect of feedback, mentoring and support and outreach.

However, the key structural recommendations of our original report have not been adopted and we believe that without the following significant structural and cultural changes any progress with respect to judicial diversity will remain marginal:

- The current system continues to lack any real **accountability**. We reiterate the recommendations made in our original report for “targets with teeth” and a Senior Selections Committee for appointments to the Court of Appeal, Heads of Division and the Supreme Court to address this issue.
- We find that the de facto career path into the senior judiciary remains via the fee-paid roles of Recorder and Deputy High Court Judge. We restate the case

for the establishment of **an internal judicial career path** where judges can begin their career in the more diverse Tribunals or District Judges.

- We stress the importance of **leadership and culture** in increasing diversity. Any substantial and sustained improvement in the diversity of our judiciary will require the judicial leadership to prioritise and commit to a cultural change, whereby judicial diversity is seen as fundamental to the quality of judging, rather than tangential.
- We question how **merit** is defined and assessed within the current system of appointments and are concerned that it is too often used as an unconscious proxy for the characteristics, qualities and experience of the current cohort of judges. We welcome the JACs recent efforts to better understand and define merit, however we call for continued efforts to tackle affinity bias and urge further efforts to be made to ensure that the appointments process tests for judicial potential and not prior advocacy experience.

I. INTRODUCTION

- 1.1. In April 2017, JUSTICE published *Increasing Judicial Diversity*. In that report, a Working Party of our members warned that without active attention to the diversity deficit in our senior judiciary, our courts would continue to be dominated by white, privately educated men who had practised at the independent Bar. We noted a looming crisis of judicial morale and of judicial recruitment, suggesting that this might present an opportunity for quality candidates from non-traditional backgrounds to join the bench in numbers that might begin to rebalance the demographics of the judiciary.
- 1.2. At the time of our report, judicial diversity was big news. Lady Hale was the only woman serving on the Supreme Court (and the only woman ever to have done so); Lord Justice Hickinbottom was then the only sitting former solicitor in the High Court or above; there had never been a Black, Asian or Minority Ethnic (BAME) judge appointed to any court higher than the High Court and there had only ever been one woman serve, many years earlier, as a Head of Division in the courts of England and Wales.
- 1.3. Since then, all of these high-level indicators of diversity have improved; Lady Black and Lady Arden now sit on the Supreme Court, the number of solicitors ever to have sat in the High Court has doubled (to eight); Sir Rabinder Singh became the first BAME Court of Appeal judge; and Dame Victoria Sharp is now President of the Queen's Bench Division. These developments are all significant and are to be applauded.
- 1.4. However, the picture painted by these headlines belies the fact that over the last two and a half years, most appointments to our senior courts have continued much as before. While the chance of appointment appears to have improved for white women at the Bar, the current small numbers of female judges overall, combined with likely retirements or voluntary resignations in the years to come, means that progress is fragile and, particularly at the senior levels, the risk of regression is high. Furthermore, the data demonstrates that progress with respect to ethnicity, disability, professional and social background has barely begun.
- 1.5. This tenuous progress reflects the limited change of approach to judicial diversity since 2017. Whilst we are pleased that some of the more minor

recommendations in our original report have been implemented¹ we continue to call for the adoption of the principal recommendations from our 2017 report, which are summarised below. We are concerned about the failure to address the key structural challenge around accountability for diversity. In addition, as highlighted in paragraph 5.2 of this Update, we urge that the leadership prioritise and commit to the cultural change necessary to achieve meaningful and sustainable progress on judicial diversity. As noted in the original report, our judicial leaders have a critical role in setting the cultural tone and in accepting their organisational and personal responsibility to improve diversity. All judges in leadership positions need to prioritise and commit to the cultural change necessary to change the demographics of our judiciary in a meaningful and sustainable way.

Scope

- 1.6. This Update builds on our 2017 report, which should be read alongside it. It includes comprehensive data analysis of the progress that has been made since 2017, outlines critical remaining areas of concern and makes further recommendations for improving judicial diversity. Like the original report, it focusses on the diversity of the senior courts in England and Wales (namely the Circuit Bench, High Court and Court of Appeal) and the UK Supreme Court. It also looks at the appointment of women, BAME candidates, non-barrister candidates and those from a lower socio-economic background. Unlike the earlier report, it also considers the impact of disability, sexual orientation and gender identity.
- 1.7. The Introduction frames the issue and our approach to the Update, outlining the methodology adopted. Chapter One reviews the diversity of the current cohort of judges and appointments made since 2017, coming to conclusions on the data for diversity indicators. Chapter Two uses our analysis of the data to track paths into the judiciary for different legal professions and considers the extent to which an internal career path is emerging. Chapter Three considers the implementation of recommendations from our previous report. Chapter Four outlines outstanding issues of critical concern in achieving a diverse judiciary and makes further recommendations.

¹ See paras 4.1-4.29

Why diversity matters

- 1.8. As we set out in *Increasing Judicial Diversity*, the case for judicial diversity and why it was important is a matter of legitimacy, quality and fairness.² However, given the fragility of progress made since 2017 and decreased urgency with which the issue of diversity is approached, we believe it is important to restate what is at stake should we fail to affect real change.
- 1.9. Achieving diversity is vital to ensure the legitimacy of the judiciary in the eyes of the public, and especially the trust of court users. The absence of judges from certain groups threatens to erode the public's confidence in the judiciary. As Lady Hale explained:
- People should be able to feel that the courts of their country are 'their' courts, there to serve the whole community, rather than the interests of a narrow and privileged elite. They should not feel that one small section of society is dictating to the rest. These days, we cannot take the respect of the public for granted; it must be and be seen to be earned.*³
- 1.10. Additionally, the Lammy Review into outcomes for BAME individuals in the criminal justice system cites the gulf between the backgrounds of defendants and judges as a fundamental source of mistrust in the system among BAME

² Lady Hale, Dame Heather Hallett, Lord Neuberger, Sir Terence Etherton and Lord Burnett, to name but a few: See, Lady Hale, *Women in the Judiciary*, The Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society, June 2014, p.4, available at <https://www.supremecourt.uk/docs/speech-140627.pdf>; Dame Heather Hallett DBE, *Independence under threat?*, Bentham Association Presidential Address, March 2012, available online at https://www.ucl.ac.uk/laws/sites/laws/files/hallett_12.pdf; Lord Neuberger, *The Role of the Supreme Court Seven Years On – Lessons Learnt*; Sir Terence Etherton, *Challenges facing the judiciary in the next Parliament*, UCL Conference at the Institute for Government, June 2015, available online at <https://www.judiciary.uk/wp-content/uploads/2015/06/speech-by-sir-etherton-challenges-facing-the-judiciary-in-next-parliament.pdf>; Lord Burnett, *A changing judiciary in a modern age*, *Courts and Tribunals Judiciary*, February 2019, available online at <https://www.judiciary.uk/announcements/speech-by-the-lord-chief-justice-a-changing-judiciary-in-a-modern-age/>

³ Lady Hale, *Judges, Power and Accountability: Constitutional Implications of Judicial Selection* speech at Constitutional Law Summer School Belfast, August 2017, p.4, available online at: <https://www.supremecourt.uk/docs/speech-170811.pdf>.

communities.⁴ A judiciary that markedly fails to reflect the ethnic, gender and social composition of the nation poses a serious constitutional challenge.⁵

- 1.11. Increasing the diversity of our judiciary (including ‘cognitive diversity’⁶) is also about improving the quality of judgments. A large body of evidence confirms that different but complementary perspectives are better for collective decision-making than homogenous ones.⁷ This is critical when judges sit in panels, but is valuable also to judges sitting alone, who benefit from the wisdom of their colleagues whether through personal contact or reading their decisions. In the commercial world, numerous wide-ranging studies demonstrate the direct correlation between increased gender and ethnic diversity in senior decision making and increased profitability and performance.⁸
- 1.12. The task of judging is difficult and demanding, and the range of cases in which judgments must be made is extremely broad. The quality of those judgments will be vastly improved as a result of the different perspectives brought to decision-making by those with different characteristics and life experiences. We have taken evidence from several judges who have lamented the absence of judicial colleagues from different social and ethnic backgrounds, with whom

⁴ D Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, (2017), p.37.

⁵ A. Paterson & C. Paterson, *Guarding the Guardians?, towards an independent, accountable and senior judiciary*, (Centre Forum, 2015), p.37.

⁶ Cognitive diversity is the inclusion of people who think differently or process information differently, specifically looking at problem-solving and how individuals think about and engage with new, uncertain, and complex situations.

⁷ I. Bohnet, *What Works*, (Harvard University Press, 2016), Chapter 11, pp.229-30; J. Surowiecki, *The Wisdom of Crowds*, (Anchor, 2005), Chapter 2. See also: D.L. Rhode, *Lawyers As Leaders*, (Oxford University Press, 2015), p.47: famously, some American presidents surround themselves with a “team of rivals” to avoid the “perils of insular thinking” (including Presidents Lincoln and Obama); The Rt. Hon. Sir Terence Etherton, *Liberty, the archetype and diversity: a philosophy of judging*, Public Law, 2010, p.11.

⁸ See, for example, V. Hunt et al, *Why diversity matters*, McKinsey & Company, January 2018, available online at <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>; Credit Suisse Research Institute, *Gender Diversity and Corporate Performance*, 2012, available online at <https://www.credit-suisse.com/about-us-news/en/articles/media-releases/42035-201207.html>

they can discuss particular aspects of a case before them. The narrow demographic of the existing judiciary inevitably leads to a narrowing of experience and knowledge. Ensuring a diverse range of perspectives requires looking beyond appointments primarily from the independent Bar and recruiting individuals with diverse professional backgrounds – solicitors, Chartered Legal Executives, academics and government and in-house lawyers. Not only do these pools tend to be more diverse in terms of ethnicity, gender and social background, but their different training and practical experience will also result in valuable cognitive diversity.

- 1.13. The consequence of not recruiting from a wide enough pool is necessarily that the institution is not benefiting from the best available talent. As Lord Neuberger has asked: “why are 80 per cent or 90 per cent 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.”⁹ The same is, of course, true in relation to other characteristics.¹⁰
- 1.14. Finally, changing the make-up of our courts is vital to ensure fairness.¹¹ It is important that structural and hidden barriers to appointment are removed and that our judges are selected through fair selection processes that do not inadvertently disadvantage or advantage certain demographic groups. Significant overrepresentation of a certain group calls into question the objectivity of the current system and its ability to recruit varied talent. Talented individuals need to be given effective opportunities to demonstrate their abilities and realise their potential. The very existence of a more diverse judiciary will serve to encourage a broader range of applicants for future judicial appointment.

⁹ House of Lords Select Committee on the Constitution, Oral evidence, 16 November 2011, Qu 251, cited in E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, (Routledge Cavendish, 2012), p.193.

¹⁰ Helen Mountfield has recently noted “on the assumption that legal aptitude is broadly equally distributed between men and women, between people of different racial groups and different social backgrounds, we are obviously missing out if we end up only with a particular sub-set of them.” See: *Judicial Diversity: Speech for Canadian Judges*, Queen’s College Cambridge, 2 July 2019, page 24.

¹¹ C. Thomas, *Judicial Diversity in the UK and Other Jurisdictions, A Review of Research, Policies and Practices*, The Commission for Judicial Appointments, November 2005, available online at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_diversity_in_the_uk_and_other_jurisdictions.pdf

Summary of 2017 Report

1.15. Despite the clear case for increased judicial diversity, progress has remained slow. In our original report we explored the structural barriers faced by women, visible BAME people and those from less advantaged socio-economic backgrounds in reaching the bench. The report called for systemic changes to increase accountability and improve recruitment processes and proposed more inclusive routes to the senior bench. However the key recommendations have yet to be implemented. We continue to stand by the findings of the original report and urge the adoption of its recommendations, in order to ensure that real progress is made.

1.16. The key findings and recommendations of that report were as follows:

- given that diversity improves the quality of decision making and legitimacy of the judiciary, **the ability to contribute to a diverse judiciary should be taken into account in the assessment of ‘merit’**;
- a fragmented, uncoordinated approach to judicial appointments has led to a series of non-diverse appointments and “buck passing”. The Working Party therefore proposed a new model of accountability centred on creating a permanent **‘Senior Selections Committee’** dedicated to senior appointments and introducing **‘targets with teeth’**, i.e. publicly stated targets for selection bodies, with monitoring and reporting on progress to the Justice Select Committee;
- selectors are influenced by stereotypes and preconceptions when assessing what the best applicants ‘should’ look, sound and act like; there is an unacknowledged preference to recruit people like oneself. To proactively appoint more diversely, the Working Party recommended introducing **‘appointable pools’** – the creation of a pool of individuals deemed to have met the high standard of appointability for a particular court. Candidates would then be selected from the pool to fill vacancies when they arose, with candidates from under-represented groups being given priority; and
- diversity in the judiciary will not be improved if diverse candidates do not apply for judicial office. The Working Party therefore proposed specific

processes to open up routes to the bench for diverse candidates. In particular, it recognised the need to create a genuine **career path** to enable talented judges to enjoy a real prospect of moving up to senior appointments and measures to make the senior judiciary more attractive for non-traditional candidates, including **more appealing working conditions**.

- 1.17. In follow up discussions, we encountered considerable objections to our key recommendation of “targets with teeth”, which was misunderstood as a call for quotas.¹² They are not the same thing. Quotas *require* the appointment of candidates with particular characteristics. The targets we proposed would be a publicly expressed intention to recruit a particular number of judges with certain characteristics who meet the required standard, with an obligation to report and to explain continued efforts to be made to meet the target should it not be reached.¹³ We stand by this recommendation, without which we believe insufficient priority is placed on diverse appointments.
- 1.18. In addition to these recommendations, and in light of our analysis of the progress (or lack thereof) that has been made since 2017, in Chapter Four we make a number of further recommendations to help increase judicial diversity.

Methods and approach

- 1.19. This Update presents combined analyses of:
- a. **official statistics and reports** relating to judicial diversity since 2017, specifically: data published by the Judicial Office on the sitting cohort of judges; data on the selection and appointment of judges published by the

¹² As noted in our earlier report, while some members of our Working Party believe the time for quotas has come, this is currently a minority view. That said, should much more time pass without meaningful and sustained change in the demographic composition of our judiciary, our 2017 report recognized that the case for quotas may become overwhelming.

¹³ This approach was endorsed by the Lammy Review, see: D Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, (2017). In evidence to the Justice Committee, David Lammy MP later indicated that he wish he’d proposed quotas.

- Judicial Appointments Commission (JAC);¹⁴ and data published by the professions and regulators on the potential ‘pool’; and
- b. **data collected independently by JUSTICE**¹⁵ on the background and characteristics of sitting judges in the Court of Appeal¹⁶ and Supreme Court, and High Court,¹⁷ Circuit Bench, section 9(4) Deputy High Court¹⁸ and Recorder appointments since 2017.^{19 20}

1.20. In addition to these quantitative analyses we also carried out **qualitative evidence gathering** which involved interviewing and corresponding with over 50 individuals and organisations, including the JAC, Judicial Office, the professional regulators (SRA and BSB), professional organisations (the Law Society and the Bar Council), members of the judiciary and the legal profession, academics, and others. With the members of our Working Party, these individuals provided us with a comprehensive qualitative assessment of judicial diversity.

¹⁴ For the senior appointments made in 2017 and 2018, we have access to the full collected data set, which includes information on applicants. This is not the case for the appointments announced in the summer of 2019, as the full data will not be released until 2020. Accordingly, while for some appointments we can comment on the candidates’ pool, for the most recent appointments our information is partial.

¹⁵ As seen in further detail in the Appendix, data were obtained from official directories, mainly the Judiciary’s ‘Announcements’ page which publishes appointments of judges to courts and tribunals. For judges appointed to the High Court and Court of Appeal, there were usually photographed biographies in addition to the appointment announcements which formed a reliable data source

¹⁶ Our analysis is based on the Court of Appeal to July 2019. Since this time, five new judges (including one woman) have been appointed and three judges (including one woman) have retired. These developments are not captured in our data analysis in this Update, though they would have an adverse effect on gender balance and would be neutral on ethnicity and professional background. Based on the information on the designated webpage for biographies of Court of Appeal justices: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/coa-biogs/>

¹⁷ For some of the appointees, further details could be found in designated High Court webpages, by division; for example, for biographies of Chancery Division Judges, see here: <https://www.judiciary.uk/subject/chancery-division-judges/>

¹⁸ See paras 2.9-2.10 on section 9(4) appointments

¹⁹ We expanded our outlook to include Recorders and Deputy High Court Judges, because it is crucial that appointments to these feeder roles are also diverse if the senior judiciary of the future is to be diverse.

²⁰ For the purpose of this report, we separated out salaried appointments to the Circuit bench and above, and fee-paid appointments, specifically s. 9.4 Deputy High Court Judge and Recorder; we were able to undertake a more detailed analysis of the former than the latter.

- 1.21. In addition to the key diversity indicators of gender, ethnicity, professional background, socio-economic background, disability and sexual orientation we also looked at age of appointment, previous judicial roles, number of years in practice, mode of employment in the current judicial role (fee-paid or salaried) and for previous roles (fee-paid or salaried), in order to assist our analysis of the existence of a ‘judicial career path’.
- 1.22. We have also in this Update sought to highlight the possible links, or intersections, between diversity characteristics that cannot be viewed in isolation from each other.²¹ Examining the intersections between characteristics was not always straightforward – or indeed possible at all – as this is not currently included in the official publications regarding judicial diversity. However, to the extent possible, our independent data analyses refer to intersections between variables and their possible implications for diversity.²²

²¹ For a similar approach to ‘diversity’ and the need to analyse the success of ethnic minorities and women in gaining judicial appointment in a wider context of background characteristics, see also: Thomas, Cheryl. ‘*Judicial Diversity and the Appointment of Deputy District Judges.*’ (2006).

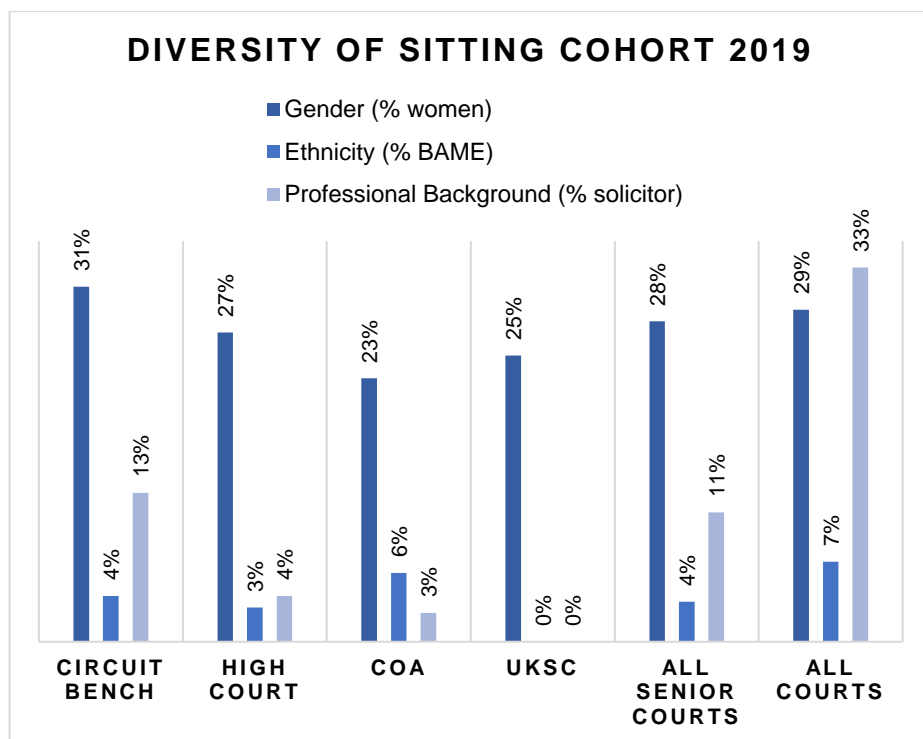
²² We do not aim to establish which background characteristics have the greatest impact on success rates of judicial applicants or promotion of sitting judges as this cannot be done in the confines of this report’s scope and methodology. The statistical analysis in this report is mainly descriptive, and inferential statistics to examine the relationship between two variables. The importance of having a comprehensive framework for assessing judicial diversity and diversity in the appointment process was discussed in previous publications (see, for example, Thomas, note 21 above, p.150) and intersectionality analysis is key as part of such comprehensive approach. Also see: Blackwell, Michael (2017) *Starting out on a judicial career: gender diversity and the appointment*

of Recorders, Circuit Judges and Deputy High Court Judges 1996—2016. Journal of Law and Society, 44 (4). pp. 586-619, pp 33-35. As is noted below, data remains a challenge for assessing diversity trends. Most notably, there is inconsistent information available on the eligible pool.

II. ASSESSMENT OF TRENDS IN DIVERSITY OVER 2017-2019

2.1. In this Chapter we examine the changes to the diversity of the judiciary since the publication of our original report. We look at each of the following diversity characteristics in turn: gender; race and ethnicity; professional background; socio-economic background; disability; and sexual orientation and gender identity.

Figure 1. Summary of diversity in the senior courts as at 2019 (Gender, ethnicity and professional background)²³



²³ Source: Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019', July 2019, (Table 1.1: Primary appointment of Judges in Courts in England and Wales, by gender, ethnicity, professional background, age and payment type, as at 1 April 2019) available online at <https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>.

Gender

Table 1. The proportion of women in senior courts (2017-2019)²⁴

	2017²⁵		2018²⁶		2019²⁷	
	N	%	N	%	N	%
Supreme Court	1 ²⁸	8.3%	3	25%	3	25%
Court of Appeal	9	23.7%	9	24% ²⁹	9	23%
High Court	21	22%	23	24%	26	27%
Circuit Bench	172	27%	192	29%	210	31%

²⁴ These data are based on the official judicial diversity statistics published on the judiciary's website annually. Caution should be exercised when reading the figures regarding 'all senior courts' given the differences in eligibility, pool, selection methods and panels, etc.

²⁵ Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2017', July 2017, (Table 1.1: Primary appointment of Judges in Courts in England and Wales, by gender, ethnicity, professional background, age and payment type, as at 1 April 2017) available online at <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2017/>

²⁶ Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2018', July 2018, (Table 1.1: Primary appointment of Judges in Courts in England and Wales, by gender, ethnicity, professional background, age and payment type, as at 1 April 2018) available online at <https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf>

²⁷ Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019', July 2019, (Table 1.1: Primary appointment of Judges in Courts in England and Wales, by gender, ethnicity, professional background, age and payment type, as at 1 April 2019) available online at <https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>

²⁸ As of April 2017, when the statistics were published, there was only one woman justice in the Supreme Court (Lady Hale). The second woman was not appointed to the Supreme Court until October 2017.

²⁹ Note the total number of judges in the Court of Appeal dropped from 39 to 38, hence the difference in the % despite there being only 1 more woman appointed to this level.

All senior courts	203	26%	227	28% ³⁰	248	30.3%
All courts (exc. Tribunals)	890	28%	875	29%	1,013	32%

The sitting cohort in 2019

2.2. Overall, in 2019 the proportion of women judges in courts increased to 32% (compared with 46% in the tribunals). As with other minorities, the representation of women in judicial office declines with the seniority of the court. However, the proportion of women in senior courts has increased by four per cent (to 30%) since 2017.

JAC exercises (2017/18 – 2018/19)

Table 2. Summary of main figures regarding women in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

	Eligible Pool	Applicants	Shortlisted	Appointed	Women: Men RRI³¹

³⁰ The total number of judges in the senior courts as at April 2018 was 804; see Judicial Diversity Statistics 2018 (n 26 above).

³¹ Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2018 to 31 March 2019', June 2019, p.12, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2018-19.pdf; Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018', June 2018, p.19, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf. The Relative Rate Index (RRI) is a statistical approach to compare the relative differences in rates of appointment between two groups. It provides a means of measuring levels of disparity in appointment rates across different time periods. An RRI value of 1 indicates no disparity (i.e. the two groups are appointed at the same rate); an RRI greater than 1 indicates that the group of interest (women, BAME candidates etc.) are more likely to be appointed than the baseline group; and RRI of less than 1 indicates that the group of interest was less likely to be appointed. The JAC does not consider an RRI that falls within the range of 0.8 to 1.25 to indicate disparity; however values outside this range indicate the presences of an adverse impact. JAC, *Definitions and Measurement: Background*

High Court					
2017-18	45%	29%	27%	29%	1.04
2018-19	46%	33%	52%	56%	2.58
Circuit Bench					
2017-18	34%	36%	35%	35%	0.97
2018-19	35%	39%	43%	51%	1.63
All legal exercises³²					
2017-18	-	43%	40%	40%	0.88
2018-19	-	50%	45%	44%	0.81

2.3. The picture for appointments of women to the Circuit bench and High Court since 2017 is generally positive. In the exercises held in 2017-2018, women were recommended for appointment broadly in line with the proportion of women applicants. In 2018-2019, they were recommended for appointment above their proportion of applicants.

2.4. However, in the case of both Circuit Bench and High Court appointments, the rise in the proportion of women appointees in 2018-2019 is a function of fewer overall appointments. In respect of the Circuit bench there were actually two fewer women appointed than in the previous year. In respect of the High Court, in 2018-2019, 51 candidates applied for 25 vacancies, only 10 of which were filled, five of whom were women (50%).³³ The fragility of progress made by

to the Judicial Selection and Recommendation of Appointment Statistics Bulletin, pp 12-13. https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-definitionsandmeasurement-2016-17.pdf. We have used the RRI to compare outcomes for BAME relative to white, solicitors relative to barristers and disabled relative to non-disabled.

³² The number of applicants who identified as women of the total number of applicants was 47%; however when calculated only against the total number of applicants who declared their gender (excluding 240 unknowns) the proportion of women is 49.7% which the JAC would round up to 50%

³³ See Judicial Appointments Commission, 'JAC Official Statistics: Statistics tables 2018-19', Table 3, available online at

women is demonstrated by the picture emerging from the gender balance of the High Court judges who started sitting in October 2019; of the 16 announcements to date only five (31%) are women.³⁴

- 2.5. It is also important to note that in the case of the High Court, where women represented 45-46% of the eligible pool, substantially smaller proportions of women applied than their representation in the pool.

Age and experience at appointment

- 2.6. Our own data collection indicates that there are encouraging developments with respect to the age at which women are appointed to the Circuit bench and High Court, and, for Circuit judges, their years of experience at the time of appointment.³⁵ In the 2017-18 and 2018-2019 rounds, women were appointed younger and with less experience than male candidates, which offers the chance to more swiftly correct historic under-representation on the bench.
- 2.7. For the Circuit bench appointments between 2017 and 2019, on average, women were four years younger than men at the time of their appointment³⁶ and it took men three years longer (from qualification) to be appointed.³⁷ Women were also significantly less likely to be QCs than men appointed during the same time frame.³⁸
- 2.8. For the High Court while there was no statistically significant difference between men and women in terms of years of post-qualification experience, women were appointed to the High Court [on average] three years younger

<https://www.judicialappointments.gov.uk/jac-official-statistics>. We note that one of the appointees did not declare their gender, hence the discrepancy between our calculation of 50% and the JAC's figure displayed in the table (56%).

³⁴ At the time of publication, in mid-January 2020, there have been 16 announcements for 17 new High Court judges, who started sitting from October 2019. We know that there were 64 applicants, but do not know the demographic break down of the group.

³⁵ Our own analysis also shows that on average women were appointed as Recorders with three years fewer post qualification experience than male Recorders in 2018-2019.

³⁶ 49.3 years of age for women as opposed to 53.4 years of age for men.

³⁷ 29.4 years for men, and 26.3 years for women

³⁸ Only three of the 22 (13%) QCs appointed to this role were women.

than men. They were also appointed faster than men, when examining the number of years elapsed from their previous appointment to appointment to the High Court.

Fee paid roles – Recorder and s. 9(4) Deputy High Court Judge

- 2.9. As set out in the next Chapter, the most common route onto the Circuit bench and High Court is through fee-paid roles as a Recorder or as a Deputy High Court Judge, respectively. If the senior judiciary of the future is to be diverse, it is important that appointments to these feeder roles are also diverse. In the sitting cohort 21% of Recorders and 25% of Deputy High Court Judges are women.³⁹
- 2.10. In recent years, particular store has been put on the appointment of more diverse Deputies via s. 9(4) of the Senior Courts Act 1981. Section 9(4) is open to candidates without prior sitting experience and is explicitly intended to be a route for more diverse candidates to enter the judiciary. Since 2016 s.9(4) Deputies have been appointed for a single four-year fixed term, with the expectation that an application for a salaried appointment would be made during this time. As noted below, many of the most recent High Court appointments have been via this route.⁴⁰ However, the gender make-up of recent s.9(4) appointments is less than encouraging. In 2018, 32 appointments were made under s.9(4), only 9 of whom (28%) were women.⁴¹ In the most

³⁹ See Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019', July 2019, available online at <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>

⁴⁰ Deputy High Court Judges can also be appointed via s. 9(1) of the Senior Courts Act 1981. Authorisation to sit under s. 9(1) is limited to serving judges, namely Circuit judges; Recorders; or tribunal judges who are (a) Chamber President, or a Deputy Chamber President, of a chamber of the Upper Tribunal or of a chamber of the First-tier Tribunal, (b) judge of the Upper Tribunal by virtue of appointment under paragraph 1(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007 (TCEA), (c) transferred-in judge of the Upper Tribunal (see Section 31(2) of the TCEA), (d) deputy judge of the Upper Tribunal (whether under paragraph 7 of Schedule 3 to, or Section 31(2) of, the TCEA), or (e) President of Employment Tribunals (England and Wales) or the President of Employment Tribunals (Scotland). First Tier Tribunal Judges can only be appointed under section 9(1) if they are a Chamber President or Deputy Chamber President.

⁴¹ 58 women applied for the position, see: Judicial Selection and Recommendations for Appointment Statistics, England and Wales, 1 April 2018 to 31 March 2019, Table 4 (Deputy High Court Judge)

recent competition,⁴² only four women were recommended for immediate appointment out of the 24 Deputies appointed (17%).⁴³

- 2.11. The 2017-2018 Recorder exercise saw 150 appointments. Though women were estimated at 45% of the eligible pool, only 40% of applicants were women and only 32% of those recommended for immediate appointment were women.⁴⁴ The 2018-2019 Recorder exercise saw a reduction in the proportion of women appointed, with just 43 women among the 159 appointments (27%).

The Court of Appeal

- 2.12. The picture of appointments to the Court of Appeal is mixed and disappointing. In July 2017, seven new judges were appointed, only one of whom was a woman. In July 2018, three out of seven appointees were women, however in July 2019, of the five judges appointed only one was a woman. Therefore, over three appointment rounds that saw the elevation of 19 judges to the Court of Appeal, only five were women (26%). The recent and upcoming retirement of a number of Lady Justices of Appeal will have a further negative impact on the number of women in the sitting cohort.⁴⁵
- 2.13. Nevertheless, and as observed in our analysis of Circuit bench and High Court appointments, our independent analysis shows that women at the Court of Appeal were appointed younger and after spending less time in their previous judicial roles. While on average men were appointed when they were 60 years

⁴² *Deputy High Court Judges 2019*, Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/deputy-high-court-judges-2019>

⁴³ We will not know how many women applied for this position, nor their portion of the eligible pool, until the statistics are released later in 2020.

⁴⁴ Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018', June 2018, p.16, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf.

⁴⁵ There are currently eight Lady Justices of Appeal; see: 'Senior Judiciary', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/>

old and after 8.2 years in their previous judicial role, women were on average 58 years old, having spent 6.5 years in their previous role.⁴⁶

- 2.14. It is worth noting that the vacancy announcements for the Court of Appeal did not require prior sitting experience in the High Court, although all the judges appointed were promoted from the High Court.
- 2.15. With the Court of Appeal serving as the default pool for English and Welsh appointments to the Supreme Court (only two Justices ever having been appointed without serving first in the Court of Appeal), the low number of women serving on this court limits the pool of potential women to be appointed to the UK's highest court.

The Supreme Court

- 2.16. As already noted, Lady Hale was joined by two other women Justices in the Supreme Court, meeting JUSTICE's 2017 target of three women on the Supreme Court by 2019. That said, the 2019 appointment round of three new Justices – including one to replace Lady Hale – saw no women appointed. From January 2020, the Supreme Court will be back down to two women Justices. In 2022, when Lady Arden leaves the Court, there is a risk of further regression in numbers. Our Working Party's target of four female Justices by the end of 2022 will be impossible to meet, even if Lady Arden and Lord Justice Lloyd Jones are both replaced by women. The next two vacancies – to replace Lords Kerr and Hodge – will likely arise in 2023.
- 2.17. Like the Court of Appeal, the Supreme Court vacancy announcements over the last three years have not been limited to those already sitting in the courts immediately below. In 2017 and 2018 all appointments were from the Court of Appeal. Though the summer of 2019 saw an appointment from outside the Court of Appeal, this appointment will not assist the gender balance of the Court.⁴⁷

⁴⁶ The differences between men and women were statistically significant for both variables.

⁴⁷ We recognise, of course, that the eligible pool will vary depending on the exercise and that it is not the entire profession that is eligible to apply to the Supreme Court.

*Notes on the pool*⁴⁸

- 2.18.** Data on the two major pools for senior judicial appointments, the solicitors' profession and the Bar, are collected by their respective regulators. It is worth remembering that there are currently 149,005 practising solicitors⁴⁹ and only around 16,600 practising barristers⁵⁰ – meaning that solicitors outnumber barristers 9 to 1. The two professions vary in their composition and in the barriers and incentives that members face when considering a judicial career.
- 2.19.** There are high levels of attrition of women from the Bar. The 2018 BSB data shows that whilst half of all pupils are women, women constitute 37.4% of those practising at the Bar overall⁵¹ and just 15.8% of Queens Counsel (QCs). This is an issue for gender diversity in the judiciary, given that currently a high proportion of judges in senior courts are drawn from the upper echelons of the independent Bar.
- 2.20.** Whilst the solicitors' profession is more diverse than the bar in terms of gender, the statistics also demonstrate an issue with attrition. 59% of solicitors in firms are women, however women comprise only 33% of partners, a figure that drops to 29% in very large firms.^{52 53}

⁴⁸ Obviously each judicial exercise requires certain and varied number of years of post-qualification experience to be eligible for appointment, meaning that the profession as a whole does not represent the profession. The *Notes on the pool* section represents a broad sense of the pool.

⁴⁹ 'Population of solicitors in England and Wales', Solicitors Regulation Authority, available online at https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/population_solicitors/

⁵⁰ 'Statistics on practising barristers', Bar Standard Board, available online at <https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/practising-barristers.html>

⁵¹ Bar Standards Board, *Diversity at the Bar 2018*, February 2019, available at <https://www.barstandardsboard.org.uk/uploads/assets/db991bde-ddbc-4869-81838f74a1c1cd69/diversityatthebar2018.pdf>

⁵² 'How diverse are law firms?', Solicitors Regulation Authority, available online at <https://www.sra.org.uk/sra/equality-diversity/key-findings/law-firms-2017/>.

⁵³ 'Very large firms' refers to firms with 50 or more partners.

- 2.21. The SRA's 2017 diversity analysis⁵⁴ concluded that the prospects of becoming a partner are higher for white males than for any other group across all types of firms. It noted that BAME women are particularly disadvantaged in progressing in the profession.⁵⁵

Conclusions in respect of gender

- 2.22. Of all diversity characteristics, gender has seen the most positive developments over the last two years, with noticeable gains in the proportion of women at the Circuit bench particularly. However significant challenges remain.
- 2.23. First, women are not applying to the High Court in line with their proportion of the eligible pool. There needs to be serious investigation into why this is the case.
- 2.24. The Senior Salaries Review Body report cites women candidates' reservations about the inflexibility of judicial sitting, lack of certainty about the location of their sitting and the demands of going on circuit.⁵⁶ We have received similar evidence in preparing this Update. Our 2017 report explained the reluctance of women who have navigated successful careers in the law to make a jump into the unknown of the judiciary. Our earlier recommendations on possible return to practice would go some way to addressing their unease.⁵⁷ It should be noted that for some women the fact that the High Court remains overwhelmingly male itself acts a disincentive.

⁵⁴ The SRA's diversity tool presents aggregated findings from law firms, however it does not cover in-house solicitors, GLS and CPS solicitors.

⁵⁵ Dr Sundeeep Aulakh et al, *Mapping advantages and disadvantages: Diversity in the legal profession in England and Wales, Final Report for the Solicitors Regulation Authority*, 2017, available online at <https://www.sra.org.uk/globalassets/documents/sra/research/diversity-legal-profession.pdf?version=4a1ac7>. We understand that BAME women represent just 1% of QCs.

⁵⁶ Review Body on Senior Salaries, *Supplement to the Fortieth Annual Report on Senior Salaries 2018, Report No. 90: Major Review of the Judicial Salary Structure*, October 2018, available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751903/Supp_to_the_SSRB_Fortieth_Annual_Report_2018_Major_Review_of_the_Judicial_Salary_Structure.pdf

⁵⁷ JUSTICE, *Increasing Judicial Diversity* (2017), available online at <https://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>, p.70.

- 2.25. Second, the relative success of women in High Court competitions does not appear to be widely appreciated by women in the pool. The fact that women are being appointed younger and more quickly than men should spur greater confidence in applications. We recommend that more be done to highlight the success rates of women applicants to the High Court, and the steady increase in the overall proportion of women in the judiciary.
- 2.26. Third, it is important to recognise the continued fragility of the numbers of women in the senior judiciary. While percentages may be up, the overall number of women judges remains low. This is a problem in and of itself. Too few women judges are involved in, and are seen to be involved in, deciding cases and in developing the common law. It also presents a problem for the pipeline into the highest courts. Given appointments to the Court of Appeal and Supreme Court tend to see the promotion of existing judges, the low number of women on the High Court represents a significant challenge for changing the gender mix of the Court of Appeal and ultimately the Supreme Court of the future. Without an adequate pool of women candidates gaining suitable experience and being able to prove themselves worthy of higher appointment, the most senior courts will continue to be dominated by men. In this regard, we reiterate our earlier recommendation that diverse Court of Appeal and Supreme Court appointments be made from outside the serving judiciary.
- 2.27. Finally, it is worth noting that we do not have adequate data on how gender intersects with other key characteristics such as ethnicity and professional background to be able to come to any conclusions as to how, for example, black women or women solicitors fare in judicial appointments processes. To the extent to which this data exists, the picture is not very encouraging.⁵⁸

⁵⁸ See: 'How diverse are law firms?', Solicitors Regulation Authority, available online at <https://www.sra.org.uk/sra/equality-diversity/key-findings/law-firms-2017/>.

Race and ethnicity

Sitting cohort (2019)

Table 3. The proportion of BAME judges in senior courts (2017-2019)^{59 60}

	2017		2018		2019	
	N	%	N	%	N	%
Supreme Court	0	-	0	-	0	-
Court of Appeal	0	-	2	7% ⁶¹	2	6%
			*JUSTICE calculation: 3.5% (1) ⁶²		*JUSTICE calculation: 2.5% (1) ^{63 64}	

⁵⁹ This is the percentage of BAME of those judges who declared ethnicity.

⁶⁰ There is a serious problem with data in respect of protected characteristics. Data collected on ethnicity is broadly classified, so for example the percentage of “Asian/Asian British” may include a variety of ethnicities. The inclusion of white ethnic minorities can be problematic: official BAME figures can be confusing on the number of visible BAME judges. For example, in the Court of Appeal in 2018 7% are listed as “BAME” (1 “Asian/Asian British” and 1 “other ethnic group”), but in fact only 1 justice in the Court of Appeal (3.5%) was not white. JUSTICE surmises that the “other” BAME justice is from a white ethnic minority group. This approach to diversity monitoring contrasts with that of the QC Selection Panel: their website provides the percentage of “applicants who declared an ethnic origin other than white”, see Report by the Queen’s Counsel Selection Panel to the Lord Chancellor On The Process For The Selection And Appointment of Queen’s Counsels 2018, 2018, p. 20, available online at <http://www.qcappointments.org/wp-content/uploads/2018/12/Report-of-the-QC-Selection-Panel-for-England-and-Wales-2018.pdf>.

⁶¹ The official statistics count 2 BAME judges in the Court of Appeal: 1 – ‘Asian or Asian British’, and 1- ‘other ethnic group’. The declaration rate for this category in CoA is 79% which is quite low, and the proportion of BAME judges is calculated of the total number of judges who declared their ethnicity, not of the total Court of Appeal judges (<https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf>, p.5). However, JUSTICE examination found only one visibly verifiable BAME judge for this court (Lord Justice Singh).

⁶² This calculation is a percentage of the total Court of Appeal judges.

⁶³ Lord Justice Singh is still the only visibly verifiable BAME justice in the Court of Appeal.

⁶⁴ This calculation is a percentage of the total Court of Appeal judges.

High Court	2	2% ⁶⁵	3	3% ⁶⁶	3	3%
Circuit Bench	24	3.8%	24	4% ⁶⁷	24	4%
All senior courts	28	4%	29	3.6%	29	3.5%
All courts (exc. Tribunals)	173	7%	171	7% ⁶⁸	205	7%

2.28. The proportion of sitting BAME judges in the courts remains low: 7% among those judges who declared ethnicity (compared with 11% in the tribunals). This figure is even lower when looking just at senior courts and is significantly lower than the proportion of BAME people who applied for judicial positions in these courts in the past few years, as well as their proportion in the legal profession (see below).

2.29. Since our last report, one visibly BAME judge, Lord Justice Singh, has been elevated to the Court of Appeal – he is the first BAME person ever to serve at that level. Whilst the official statistics count two BAME judges in the Court of Appeal, JUSTICE examination has found that Lord Justice Singh is the only visibly BAME judge on the Court of Appeal. This puts the proportion of BAME Court of Appeal judges at 3.5% for 2018 and 2.5% for 2019.⁶⁹ There are no BAME Heads of Division in the Court of England and Wales nor have

⁶⁵ The total BAME number that year was 4, of which 2 were Asian or Asian British, and 2 were ‘other ethnic group’. The official statistics then count them as 5% of all High Court judges. JUSTICE however counts them as 2 (2%) for the same reason mentioned above in note 60.

⁶⁶ The distribution in the High Court is 2 Asian, 1 other

⁶⁷ Courts and Tribunals Judiciary, ‘Judicial Diversity Statistics 2018’, July 2018, p.6, available online at <https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf>

⁶⁸ Note that if the number of reported BAME judges is calculated of the total number of judges in courts (2978) the percentage of BAME drops to 5.7%.

⁶⁹ This calculation is a percentage of the total Court of Appeal judges.

there ever been. There are no BAME judges on the Supreme Court nor have there ever been.

Analysis of BAME in appointment exercises for senior courts

Table 4. Summary of main figures regarding BAME in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

	eligible pool	applicants	shortlisted	appointment	BAME: White RRI
<u>High Court</u>					
2017-18	14%	13%	5%	6%	0.43
2018-19	15%	15%	10%	0%	-
<u>Circuit Bench</u>					
2017-18	8%	14%	10%	5%	0.35
2018-19	8%	18%	13%	3%	0.71
<u>All legal exercises</u>					
2017-18	-	19%	12%	9%	0.40
2018-19	-	21%	13%	11%	0.45

2.30. The official data reveals that while BAME candidates are applying to the Circuit bench and High Court in similar or greater proportion than the percentage of BAME lawyers in the eligible pool, they are not being appointed. The last few years have seen a decline in the number of BAME judges appointed to the Circuit bench, from 5% in 2017-18 to 3% in 2018-19. In the 2018-2019 High Court round, though 15% of applicants were BAME, none

were appointed. Of the 16 High Court judges who started sitting in October 2019 and have so far been announced, one appointee is BAME.⁷⁰

- 2.31. Across the two years reviewed, the JAC RRI analyses suggest that for the Circuit and High Court judge exercises (as well as all legal exercises) BAME applicants were statistically less likely than white applicants to be recommended for appointment as a proportion of those who applied.⁷¹
- 2.32. Appointments of BAME candidates to the key feeder roles are also rare. In the 2019 Recorder exercises, of 159 appointments we were able to verify the ethnicity of 137 appointees; of these 11 (7%) were BAME.⁷² This compares favourably with the 5% of Recorder appointees from 2018 who are BAME.⁷³ In the 2018 s.9(4) Deputy High Court Judge competition, one of the 32 Deputies appointed was BAME.⁷⁴ In 2019, there were no BAME Deputies among the 24 appointments.⁷⁵
- 2.33. Given the very low numbers of BAME appointees, it was not possible to conduct inferential statistics on the intersections of ethnicity with other variables.

Notes on the pool

⁷⁰ 'High Court Judge Appointments', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/announcements/high-court-judge-appointments-4/>

⁷¹ Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2018 to 31 March 2019', June 2019, p.14, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2018-19.pdf

⁷² This is based on JUSTICE's own analysis. The demographics of the candidates for this exercise will not be available until the JAC's 2020 report.

⁷³ This is based on JUSTICE's own analysis.

⁷⁴ 'Deputy High Court Judges 2018', Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/deputy-high-court-judges-2018>

⁷⁵ 'Deputy High Court Judges 2019', Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/deputy-high-court-judges-2019>

- 2.34.** In 2018, 16.3% of pupils were BAME, however the overall percentage of BAME barristers was 13% and only 7.8% of QCs.⁷⁶ The disparity between the total percentages of BAME pupils, barristers and QCs suggests a challenge of progression for BAME barristers.⁷⁷
- 2.35.** Among solicitors in firms, 21% of lawyers in firms are BAME, which compares favourably with the proportion of BAME people in the general population (14%). Similarly, 20% of partners are BAME.⁷⁸ Recent Law Society data on solicitors with practising certificates shows a lower proportion, around 17% BAME individuals.⁷⁹

Conclusions with respect to race and ethnicity

- 2.36.** The Working Party is particularly troubled by the stagnation in the appointment of BAME judges since our last report. The very low number of BAME judges in the senior judiciary poses an acute challenge to the credibility and legitimacy of the judiciary, representing a challenge for trust and confidence with minority communities. This is critical in the criminal courts – the focus of David Lammy’s report – but is equally important in the ‘constitutional’ courts of the High Court and above. We have several areas of particular concern.
- 2.37.** First, and most importantly, BAME candidates overwhelmingly fail in selection exercises to be appointed to the senior judiciary. The reasons for this remain unclear.

⁷⁶ Bar Standards Board, *Diversity at the Bar 2018*, February 2019, p.10, available online at <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf>

⁷⁷ Ibid, pp.3-4. For an analysis on the relationship between ethnicity and success of applicants to the Pupillage Gateway, see: Professor Martin Chalkley, ‘Report on the Differential Attainment of Applicants through the Pupillage Gateway’, February 2018, available online at https://www.barcouncil.org.uk/media/645951/differential_attainment_-_analysis_of_gateway_data_professor_martin_chalkley_march_2018.pdf

⁷⁸ ‘How diverse are law firms?’, Solicitors Regulation Authority, available online at <https://www.sra.org.uk/sra/equality-diversity/key-findings/law-firms-2017/>

⁷⁹ The Law Society, ‘Annual Statistics Report 2018’, (2019) available online at <https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2018/>

- 2.38. An external review of four JAC exercises conducted by the Work Psychology Group (WPG), found that BAME candidates in the Deputy High Court judge exercise failed disproportionately at the sift stage, though it could not account for why.⁸⁰

Work Psychology Group report

In 2018 Work Psychology Group (WPG) was commissioned by the JAC to undertake an external review of shortlisting processes for four recent or ongoing large exercises, namely: Deputy District Judge, Fee Paid Judges of the First Tier Tribunal, Deputy High Court Judge and Recorder. For our purposes the most interesting exercises were the latter two. The WPG collected and evaluated data on selection exercises which used either a telephone assessment or qualifying test (or a combination of both) as shortlisting tools, with successful candidates progressing to the selection day.

The WPG reported back with findings and recommendations in July 2018.⁸¹ Its Summary Report provides valuable insight into the way in which the different elements of appointment processes impact on different groups.

In reviewing the psychometric evaluation for the Deputy High Court Judge exercises, the WPG found: no adverse impact based on gender across all shortlisting stages nor any adverse impact regarding disability at sift or a telephone assessment, though the sample was too small to evaluate the selection day. It did however find an adverse impact for BAME candidates at the sift stage but not at the Telephone Assessment or on selection day; and an adverse impact for solicitors across the sift and Telephone Assessment, with too small a sample to investigate the impacts on selection day.

The report also found that the shortlisting format continues to benefit those with certain legal experience, and that there is a strong focus on assessing some competencies over others.

⁸⁰ Working Psychology Group, 'Review of JAC Shortlisting Tools – Summary Report & Conclusions', July 2018, p.5, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/research-shortlisting-tools-report-2018.pdf.

⁸¹ Ibid.

- 2.39. In 2018 JAC statisticians began a ‘deep dive’ statistical analysis of candidate progression, designed to help us to better understand the progression of certain target groups, including BAME candidates, through selection exercises. The exercise uses logistical regression to control for a range of factors such as professional background, age and pre-qualification experience. However, the Judicial Diversity Forum have noted the volatility of the data and agreed to consider the analysis further once a larger and more stable dataset is available.
- 2.40. The last two years have seen concerted and laudable outreach efforts from the JAC and the judiciary to lawyers from ethnic minorities. These appear to have been successful in that application rates from BAME candidates have been high, sometimes higher than their share of the eligible pool. However, they have not resulted in BAME judges being appointed. In the course of our work, it has been suggested that the outreach activities have attracted candidates who are, for some reason, unsuitable or unready for judicial appointment. Others have intimated that the appointments processes themselves contain biases against BAME candidates. It is obviously critical and urgent to understand why BAME individuals are not being appointed, and for outreach and appointment processes to be amended accordingly.
- 2.41. Second, since our last report the JAC statistics on ethnicity have included statistical reference to the ‘working age population’ as a contextual comparator to explain the low numbers of BAME judges appointed to the senior judiciary. For the reasons set out in the box on page 24, we reject the introduction of the ‘working age population’ analysis. We do not think that it is necessary nor helpful. Instead it acts to minimise the seriousness of the failure to appoint BAME candidates and detracts from the JAC’s ‘deep dive’ efforts to uncover the reasons for lack of success. We urge the JAC and senior judiciary to abandon use of this approach.
- 2.42. Third, with only three BAME judges on the High Court and one in the Court of Appeal, there is little possibility of an ethnically diverse Court of Appeal or Supreme Court anytime soon. Again, we recommend efforts to recruit talented BAME jurists to these courts from outside the sitting judiciary.

- 2.43. Fourth, the very small numbers of BAME judges means that a meaningful analysis of the way in which ethnicity intersects with other factors such as gender, socio-economic background or age, is not possible. This undermines our ability to properly understand the full experience of BAME candidates and how they might progress.
- 2.44. Finally, we are concerned about the data collection with respect to BAME candidates and judges. As noted in our earlier report, we are uncomfortable with the statistical classification of ‘BAME’, a broad category that tends to homogenise all people of colour.⁸² The use of such a broad term can also give a distorted picture of the ethnic and racial mix of the judiciary. For example, in the High Court and Court of Appeal, all four of the serving BAME judges are of Asian origin; none is of Afro-Caribbean origin. Dame Linda Dobbs – appointed before the establishment of the JAC – is the only judge of Afro-Caribbean origin ever to have served in a salaried role on the High Court or above. There has never been a black male High Court judge. While the appointment statistics for ‘BAME’ judges are poor, they are even worse for ‘black’ judges. In the course of our work, we have been assured that there is a pipeline of future Asian-origin judges, alongside recognition that there is no such pipeline of black judges. This needs to be explored and addressed as a matter of priority.
- 2.45. There is also a problem with sitting judges declining to declare their ethnicity. In the Court of Appeal, for example, seven justices (18%) did not provide any ethnicity data. For the critical feeder route of Deputy High Court Judge, 29% declined. Without reliable, comprehensive data on ethnicity, the ability to measure progress will be undermined. It is important to ensure that those responding to demographic surveys fully understand both the nature of the data sought to be captured and why the collection of such data is of critical importance.⁸³

⁸² We note that the official Judicial Diversity statistics use the term BAME, but also provide a breakdown to ethnicity categories: Asian or Asian British; Black or Black British; Mixed Ethnicity and Other Ethnic Group.

⁸³ We are also concerned about the way in which ethnicity data is captured. Currently candidates for judicial office and sitting judges are asked to self-identify as ‘BAME’. The process can lead to unusual results, with ‘minority ethnic’ being used by some judges to describe a religious affiliation. For example, one judge told us that, though they are White British, they declared themselves to be BAME

The Parole Board recently launched a recruitment campaign to improve the diversity of its members and to bring a greater range of perspectives and experience to its decision making.⁸⁴ The Board acknowledged the disparity between BAME Parole Board members and the prison population from a BAME background, and recognised the importance of the Parole Board as a public facing body to reflect the community it serves – following the Lammy Review. The Board used several strategies to reach out to people from all backgrounds, including: hosting outreach events; promoting the campaign online and on social media; and improving its partnerships. Through raising awareness of the issue, attracting greater interest in roles from those who have a BAME background and encouraging high calibre applicants to apply, the Parole Board achieved an increase in diversity; it tripled the number of BAME Parole Board members and increased its overall percentage of BAME members from under 5% to 13%. We acknowledge, of course, the differences in eligibility and recruitment between the judicial role and the parole board role, which impacts upon the ability to improve diversity over a short period of time. However, the Parole Board's commitment to meaningful action to correct the demographics of its membership is highly commendable.

Working Age Population

Over the last two years both the JAC and the judiciary's diversity statistics have referenced the demographics of the 'working age population' when trying to contextualise the findings regarding judicial diversity for ethnicity (albeit with some moderation of approach in the most recent publications (2018-2019)). The position put forward is that the proportion of the working age population who are BAME generally decreases with age. As most judges are over 40 (and half over 60) a low proportion of BAME judges is to be expected, particularly at senior levels.

However, in our view it is odd to use the percentage of BAME individuals in the working age population as a comparator for the proportion of BAME judges. Despite difficulties with estimating the actual eligible pool (we appreciate that not everyone who meets the minimum eligibility requirements will in fact have the suitable experience, skills or desire for a role), the proportion of BAME

because they are Jewish. They gave examples of colleague who had done the same the past. This can have the effect of overstating the number of BAME judges as the term is understood by the public.

⁸⁴ Martin Jones, 'The Parole Board is implementing Lammy', *Russell Webster*, September 2019, available online at <http://www.russellwebster.com/martinjones6/>

lawyers still provides a much better comparator than the working age population as this is the potential pool of people from whom the judiciary is actually drawn. The proportion of BAME lawyers in fact exceeds the proportion of BAME individuals in the general population.⁸⁵ Furthermore, for no other diversity characteristic (for example disability) is the working age population used as a comparator.⁸⁶

In addition, if the argument held true one would expect that the proportion of BAME younger judges would reflect the greater proportion of BAME individuals in the younger working age population. However, in all age categories, BAME judicial representation is lower than that of the equivalent category in the working age population, in particular in the under 40s category.⁸⁷

Our recommendation to use the legal professions, possibly with reference to age distribution within the professions, as a more valid denominator, stands.

⁸⁵ In 2018, nearly 17% of solicitors with practising certificates were BAME while the proportion of BAME barristers at the Bar was 13%. See: The Law Society, *Trends in the solicitors' profession Annual Statistics Report 2018*, 2019, available online at <https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2018/>; Bar Standards Board, *Diversity at the Bar 2018*, February 2019, pp.3-4, available online at <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf>. The most recent Census in 2011 highlights that in England and Wales, 86 per cent of the population were white British. Asian ethnic groups made up 7.5% of the population; Black ethnic groups 3.3%; Mixed/Multiple ethnic groups 2.2%; and Other ethnic groups 1.0%. See: <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest>

⁸⁶ Whilst the JAC refer to the general population in respect of disability they strongly caution the use of statistics given the unlikely correlation to the eligible pool for judicial appointment

⁸⁷ Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019', July 2019, p.8, available online at <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>. Among those aged 40-49, BAME representation was lower among court judges than in the general population (10% compared to 16%), whilst amongst court judges aged under 40 BAME representation was much lower than the general population figure of 20%, but this age group accounts for only 4% of court judges and there are further limitations to this comparison. (ibid, p.8)

Professional background

Sitting cohort 2019

Table 5. Proportion of judges from solicitor background in senior courts (2017-2019)

	2017		2018		2019	
	N	%	N	%	N	%
Supreme Court	0	-	0	-	0	-
Court of Appeal	1	3%	1	2.7%	1	2.5%
High Court	0	0%	2	2% ⁸⁸	4	4%
Circuit Bench	70	11%	83	12.6%	88	13%
All senior courts	71	9%	86 (804)	10.7%	93 (818)	11.3%
All courts (exc. Tribunals)	1,063	34%	1,003	33.7%	1,052	32.7%

2.47. As the table highlights, roughly 33% of all judges in England and Wales are from a non-barrister background, including a handful of Chartered Legal Executives,⁸⁹ though mostly solicitors. While the majority (63%) of tribunal judges are solicitors, this percentage drops sharply when looking at solicitor judges in the courts, and even further in the senior courts.⁹⁰

2.48. Since our 2017 report, four judges who spent most of their careers practising as solicitors have been appointed to the High Court. The two solicitor appointments in 2017-2018 were both appointed directly from salaried tribunal

⁸⁸ This figure does not capture the most recent appointments to High Court announced from July 2018, which were not included in the official statistics published in 2018.

⁸⁹ Chartered Legal Executives are only eligible to apply for a limited number of exercises: CILEx fellows cannot be appointed any higher than District Judge in the court system; and no higher than the First-tier Tribunal in the tribunal system. Given this Update's focus on the senior judiciary, CILEx are rarely referred to. See: 'Chartered Legal Executives as Judges', CILEx, available online at https://www.cilex.org.uk/about_cilex/about-cilex-lawyers/why-be-a-cilex-lawyer/cilex-judges.

⁹⁰ In its November 2017 follow up report the House of Lords Select Committee on Constitution Affairs acknowledged the low success rates for applicants from a non-barrister background. See Select Committee on the Constitution '*Judicial Appointments: follow-up*' (published 2 November 2017), available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/32/32.pdf>

roles, meaning that they were ‘invisible’ in the official statistics as approached at the time. From 2019, the JAC statistics have also captured ‘ever solicitor’ candidates. The two appointments in 2018-2019 were of solicitors directly from practice.⁹¹

- 2.49. While we now have more solicitors in the High Court than at any other time, since 2014 the overall numbers of non-barrister judges have decreased by 3% overall and are down 5% for tribunals.⁹² This decline is due in part to the high proportion of judges from solicitor background who leave the judiciary. In 2018/19, there was a greater proportion of non-barristers leaving the courts’ judiciary (39%) than those joining (32%). This trend is in contrast with the positive retention figures for women and BAME judges.⁹³ We are unaware of any explanation for why non-barrister judges would leave the judiciary and how this might be correlated with different leaving patterns of other groups. This requires examination.

⁹¹ Though we note that both of the individuals appointed had fee-paid experience: Sir Edward Murray and Dame Sarah Falk were both recruited directly from their law firms, where they were consultants while undertaking fee paid sitting, as a Recorder and UT judge respectively.

⁹² Courts and Tribunals Judiciary, ‘Judicial Diversity Statistics 2019’, July 2019, (Figure 13), available online at <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>

⁹³ Ibid, p.14

Analysis of exercises for senior courts – applicants, success rates and legal exercises

Table 6. Summary of main figures regarding solicitors in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

Year	eligible pool	applicants	shortlisted	appointment	Solicitor: Barrister RRI
<u>High Court</u>					
2017-18	89%	10%	5%	0%	n/a
2018-19	88%	21%	24%	22%	0.56
<u>Circuit Bench</u>					
2017-18	n/a	13%	5%	1%	0.08
2018-19	n/a	13%	11%	11%	0.71
<u>All legal exercises</u>					
2017-18	n/a	36%	25%	21%	0.48
2018-19	n/a	55%	45%	41%	0.50

Overall

2.50. The total number of recommendations for solicitors in all legal exercise in 2018-2019 significantly improved on the previous year. However even in

2018-2019, although barristers comprised 31% of applicants, they constituted 59% of appointees, therefore they were appointed at significantly higher rates than solicitors.⁹⁴

Circuit bench and High Court

- 2.51.** In respect of the Circuit bench and High Court, we are encouraged that in 2018-2019, the recommendations for solicitors were roughly in line with their application rates. However, we remain concerned that their application numbers as a proportion of the estimated pool remain low⁹⁵ and the relative success rates compared with barristers remain poor. We are also concerned that 2018-19 may be an anomalous year due to what we know so far regarding the 2019-2020 High Court appointments. Whilst we don't yet know the number or proportion of solicitors who applied, of the 16 new High Court judges for 2019-2020 (one announcement remaining), all so far are barristers.⁹⁶
- 2.52.** In JUSTICE's own analysis of the Circuit bench appointments (2017-2019), intersecting professional background with age and experience reveals a statistically significant difference between solicitors and barristers in terms of their age at the time of appointment, with solicitors 3.5 years older than barristers upon appointment.⁹⁷
- 2.53.** There was also a statistically significant difference between barristers and solicitors in terms of the total number of judicial roles that they had held before being appointed to the Circuit bench, with solicitors tending to hold more previous roles. Of a total of 87 judges who had only had one judicial role prior to appointment, only five were solicitors or of a mixed professional background (6%), while 94% were barristers.

⁹⁴ The equivalent RRI for 'ever solicitor: ever barrister' was only slightly better, but at 0.55 still indicates significantly higher recommendation rates for barristers.

⁹⁵ For the High Court. We note that the JAC has been unable to estimate the eligible pool of solicitors for the Circuit bench.

⁹⁶ 'High Court Judges 2019', Judicial Appointments Commission, <https://www.judicialappointments.gov.uk/high-court-judges-2019>; it will not be known until the release of the annual statistics exactly how many solicitors applied.

⁹⁷ This might help to explain why former solicitors left the judiciary in higher numbers, i.e. they reached retirement age more quickly than former barristers.

- 2.54. In terms of intersections between professional background and gender for the Circuit bench there were no statistically significant findings, however our analysis found only 16 female solicitors appointed to the Circuit bench in this time frame, compared with 48 female barristers and three judges with a mixed professional background.
- 2.55. In the past, the only aspect of professional background captured by the statistics was the legal role immediately before appointment. Accordingly, if a judge had practised as a solicitor for 20 years and then spent five years as a salaried tribunal judge, the fact that they had trained and worked as a solicitor was lost. From the 2019 statistics, the JAC has started publishing whether a candidate was ‘ever’ a solicitor, in addition to capturing the most recent role.
- 2.56. Our Working Party welcomes the collection and publication of more fulsome data on professional background. There is, however, a wariness that the ‘ever solicitor’ category will be used to overstate solicitor representation on the bench. For example, the RRI for High Court appointees in 2018-2019 increased from 0.56 for solicitors to 0.98 when looking at ‘ever solicitor’ – indicating near parity with barristers in appointment rates.⁹⁸ However, due to the small number of applicants and appointees this shift is due to the inclusion of one (out of ten) ‘ever solicitors’ – Dame Justine Thornton – who qualified as a barrister before spending nine years at a law firm, returning to the Bar for 13 years before appointment. The other appointees comprised two solicitors and seven barristers.⁹⁹

Recorders and Deputy High Court Judges

- 2.57. Solicitors continue to struggle to get appointed to the two key feeder roles to senior appointment. Our analysis of the 2017-2018 Recorder exercise reveals that solicitors represented 28% of applicants and 4% of those recommended for appointment. The proportion of solicitors appointed in the 2018-2019

⁹⁸ Judicial Appointments Commission, ‘JAC Official Statistics: Statistics tables 2018–19’ (Table 3: High Court Judge) available online at <https://www.judicialappointments.gov.uk/jac-official-statistics>

⁹⁹ ‘High Court Judges 2018’, Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/high-court-judges-2018>

Recorder exercise increased to 7%, indicating a slight improvement above a very poor baseline.

- 2.58. In 2018 just 10% of the s. 9(4) Deputy High Court judges appointed were solicitors.¹⁰⁰ The most recent competition¹⁰¹ involved 24 appointments, including six solicitors (25%). This is an encouraging result though it is concerning that all six were white male partners in big City law firms. Our analysis of both 2019 exercises indicates that solicitor appointees display less gender diversity than the existing solicitor pool.

Court of Appeal and Supreme Court

- 2.59. Since our last report, one former solicitor was appointed to the Court of Appeal, only the second former solicitor to be appointed to the Court and the only one currently sitting at this level.¹⁰² Typifying the convoluted route of solicitors into the senior courts, Sir Gary Hickinbottom held ten judicial roles – fee-paid and salaried, in tribunals and courts – and three leadership positions prior to joining the Court of Appeal.¹⁰³
- 2.60. Of the nine English and Welsh judges appointed to the Supreme Court since our last report, none have been solicitors or ‘ever solicitors’.

Conclusions on professional background

- 2.61. Since 1972, JUSTICE has urged the appointment of solicitors to the higher courts of England and Wales. Not only do solicitors offer different experiences and perspectives to the role of judging – cognitive diversity – as a profession,

¹⁰⁰ ‘Deputy High Court Judges 2019’, Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/deputy-high-court-judges-2019>; Deputy High Court Judges 2018, Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/deputy-high-court-judges-2018>

¹⁰¹ Announced November 2019

¹⁰² The first was Lawrence Collins, Lord Collins of Mapesbury. He sat in the Court of Appeal between 2007-2009, at which point he succeeded Lord Hoffman in the House of Lords (as it then was).

¹⁰³ ‘Biographies of the Court of Appeal judges’, Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/coa-biogs/>

solicitors represent a significantly more diverse pool in terms of gender, ethnicity and social background than the Bar. To recruit the best possible – and most diverse – judges, it is important that the whole profession becomes the pool for the judiciary.

- 2.62. First, it is important to understand where solicitors drop out of the appointment processes and why. We note the WPG’s finding that there is a statistically significant adverse impact on solicitors in paper sifts and telephone interviews.¹⁰⁴ Given that these are the first two sifting tools for the Deputy High Court Judge process, it is hardly surprising that solicitors have fared so poorly in efforts to be appointed to this critical feeder role. We await the JAC’s ‘deep dive’ analysis for a more detailed picture.
- 2.63. Second, solicitors are not applying for higher judicial office in anything like their proportion of the eligible pool. The judiciary, JAC and Law Society have made continued efforts to encourage and support applications from solicitors (more below). These initiatives are important but in our view are too general in approach. As recommended in our 2017 report, we strongly urge targeted outreach, including the use of head hunters to identify and pursue applications from strong solicitor candidates. This should be supported by intensive mentoring for solicitor candidates, akin to the insight and encouragement that is naturally available to barrister candidates within Chambers.
- 2.64. Third, we are concerned that in competitions for the two gateway roles to the senior judiciary, barrister success rates far outstrip those of solicitors sometimes by a factor of ten or more. This requires serious investigation. It means that the vast majority of solicitors appointed to the Circuit bench and High Court must pursue a considerably more circuitous and risky route to the bench, as outlined in the next chapter.
- 2.65. In its November 2017 follow up report¹⁰⁵ the House of Lords Select Committee on Constitutional Affairs acknowledged the low success rates for applicants

¹⁰⁴ Working Psychology Group, ‘Review of JAC Shortlisting Tools – Summary Report & Conclusions’, July 2018, p.5, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/research-shortlisting-tools-report-2018.pdf.

¹⁰⁵ Select Committee on the Constitution, ‘Judicial Appointments: follow-up’ (2 November 2017), available online at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/32/32.pdf>

from a non-barrister background. The report reviewed common perceptions amongst lawyers and a certain legal culture that affects the potential pool. For example, the low success rate was dissuading solicitors from applying for the judiciary, whilst “the Bar remained the traditional route into the judiciary in the eyes of much of the legal profession”. Also, it found that solicitors who openly pursued judicial aspirations could end up being marginalised within their firm. As for government lawyers, the report acknowledged these lawyers are an important potential source of recruits to the judiciary (in part because of their ethnically diverse workforce).

- 2.66. We note that poor appointment rates of fee-paid judges among solicitors is often attributed to the unwillingness of firms to allow solicitors to sit part time. The evidence submitted to us suggests that this is less and less the case. Moreover, the data does not support the explanation. For some exercises, solicitors have applied in large numbers and still failed disproportionately. In the 2017-18 Recorder exercise mentioned above, for example, 618 solicitors applied, presumably on an understanding that their firm would support them. Of the 618, only six were appointed.¹⁰⁶ Barristers were nine times more likely to be appointed.
- 2.67. The statistically poor performance of solicitor candidates in appointment exercises demands exploration of how their skills and experiences are assessed in the process. This is explored in more detail in Chapter Five.
- 2.68. Finally, as we previously recommended the pool from which judges are drawn should be widened to include academics. Many excellent women lawyers are attracted by the working culture and flexibility offered by academia. However, current eligibility criteria present a serious obstacle to this group.¹⁰⁷ In our

¹⁰⁶ Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018’, June 2018, (Table 5 (Recorder)) available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf

¹⁰⁷ To be eligible for the Court of Appeal, candidates must have at least seven years post-qualification experience; for the Supreme Court the minimum is 15 years. The problem is that many (extremely eminent) legal academics have either never qualified to practise in the first place, or have done so after having been academics for a long period of time, meaning they do not have the required number of years’ experience after qualification. For the Court of Appeal eligibility requirements, see Court of appeal judges, available at <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/%20coa-judges/>. For Supreme Court eligibility requirements, see

previous report, we recommended that to enable access to this pool the requirement of post-professional qualification experience in the law should be removed for judicial appointments to the Court of Appeal and Supreme Court.¹⁰⁸ We proposed that alternative qualification requirements be introduced, stipulating, for example, that candidates must either be qualified to practise or must have undertaken a PhD in law or equivalent. Including academics as a possible source of candidates will increase the possibilities of a more diverse judiciary.¹⁰⁹ We note that courts in other common law jurisdictions, such as Australia and Canada, routinely appoint academics as senior judges.¹¹⁰

Socio-economic background

2.69. Socio-economic background is not a protected characteristic; but an increasing body of research highlights that it has a stronger effect on access and progression to many elite professions compared to gender and ethnic group.¹¹¹

Data collection

‘Procedure for Appointing a Justice of the Supreme Court of the United Kingdom’, available at: <https://www.supremecourt.uk/about/appointments-of-justices.html>.

¹⁰⁸ JUSTICE, *Increasing Judicial Diversity* (2017), available online at <https://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>, p.39.

¹⁰⁹ We acknowledge that women and other minorities are unrepresented at the senior end of academia too. However, academics are a more diverse pool so there is the potential for more diverse appointments.

¹¹⁰ Sir Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity: Accelerating Change*, 2014, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/news/accelerating_change_finalrev_0.pdf, p.64.

¹¹¹ The Bridge Group, ‘Socio-economic Background and Early Career Progression in the Law’, September 2018, available online at <https://static1.squarespace.com/static/5c18e090b40b9d6b43b093d8/t/5cd180d73cfb160001436429/1557233888333/03+Research+2018+Progression+law.pdf>; Social Mobility and Child Poverty Commission, ‘A qualitative evaluation of non-educational barriers to the elite professions’, June 2015, available online at https://dera.ioe.ac.uk/23163/1/A_qualitative_evaluation_of_non-educational_barriers_to_the_elite_professions.pdf; The BBC, ‘Reflecting the socio-economic diversity of the UK within the BBC workforce: A report on Career Progression and Culture at the BBC’, 2018, available online at <http://downloads.bbc.co.uk/diversity/pdf/socio-economic-diversity.pdf>

2.70. Since our last report, the JAC has started collecting and publishing data on the social background of those who apply and are appointed to judicial office.¹¹² This is a welcome development. At present the Judicial Office does not publish social mobility data for sitting judges. However, we understand that they have begun to collect this data and will start to publish it from 2020, which we also welcome.

2.71. The approach to data collection in respect of socio-economic background is less established than other diversity characteristics. Many bodies – including the JAC and the Bar Standards Board – use two measurements: the type of secondary school the person attended,¹¹³ and whether they were the first in their family to attend university (assuming they went to university). We understand that the Judicial Office is using these indicators as well. However, recent research published by the Bridge Group and adopted by the Cabinet Office finds that the most effective indicator of social background is parental occupation at the age of 14.¹¹⁴ While the JAC and Judicial Office are to be commended for collecting schooling information, they could provide a more accurate and complete picture of socio-economic background if they followed best practice and also gathered information on parental occupation or whether the judges’ parents received income support. This would allow for a proper assessment of social mobility.¹¹⁵

¹¹² Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018’, June 2018, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf. Some of the challenges we acknowledge we face with drawing any firm conclusions on social background include the fact that there is a general absence of data from poor response rates by the professions and the judiciary, and also that the JAC has only just begun to collect data itself.

¹¹³ The JAC continues to categorise the answers to the question on the type of school people attend as a binary “state school” or “private school.” This limited classification fails to account for, for example: highly selective state grammar schools; pupils eligible for free school meals who attended a private school on a full scholarship; and individuals with lower social mobility who attended UK private schools as a benefit of their parents’ employment (for example, children of service personnel serving overseas).

¹¹⁴ The Bridge Group, ‘Socio-Economic Diversity in the Fast Stream’, (2016) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497341/BG_REPORT_FINAL_PUBLISH_TO_RM_1_.pdf

¹¹⁵ The JAC continues to categorise the answers to the question on the type of school people attend as a binary “state school” or “private school.” This limited classification fails to account for, for example: highly selective state grammar schools; pupils eligible for free school meals who attended a private

Sitting cohort

- 2.72. Although there are no official statistics for sitting judges, over the years it has become well known that most senior judges were privately educated. The Sutton Trust report from 2016 found that 74% of senior judges attended private schools.^{116 117} As a comparison, only 7% of the general population in this country attended private schools, when including sixth form entrants. The Sutton Trust also found that 71% of senior judges attended Oxbridge. Whilst Oxbridge attendance is not a perfect proxy for socio-economic background, those from a higher socio-economic background constitute a disproportionate number of Oxbridge graduates.¹¹⁸ Further, the report found that ‘over half (52%) of senior judges took the same pathway from independent school to Oxbridge and then into the judiciary’.¹¹⁹
- 2.73. In the absence of official statistics about the social backgrounds of sitting judges, JUSTICE collected data on the social background of senior judges to the extent that it was feasible. Unfortunately, no such data was available for Circuit Bench appointees, though we managed to gather data for all appointees to the High Court over 2017 to 2019 and for all sitting justices at the Court of Appeal and the Supreme Court. We were able to collect data on the university attended and the type of secondary school broken down by both fee paying and state school, and selective (i.e. fee paying or grammar school) or comprehensive.

school on a full scholarship; and individuals with lower social mobility who attended UK private schools as a benefit of their parents’ employment (for example, children of service personnel serving overseas).

¹¹⁶ P. Kirby, *Leading People 2016, The educational backgrounds of the UK professional elite*, The Sutton Trust, 2016, p.30 (https://www.suttontrust.com/wp-content/uploads/2016/02/Leading-People_Feb16-1.pdf).

¹¹⁷ In this report ‘senior judge’ refers to High Court Justices and Lord and Lady Justices of Appeal

¹¹⁸ P. Kirby, *Leading People 2016, The educational backgrounds of the UK professional elite*, The Sutton Trust, 2016, available online at https://www.suttontrust.com/wp-content/uploads/2020/01/Leading-People_Feb16.pdf.

¹¹⁹ The Sutton Trust, ‘Elitist Britain 2019’, June 2019, available online at <https://www.suttontrust.com/wp-content/uploads/2019/12/Elitist-Britain-2019.pdf>, p.5

Figure 2. Social mobility data for judges in senior courts – based on JUSTICE data collection and analysis

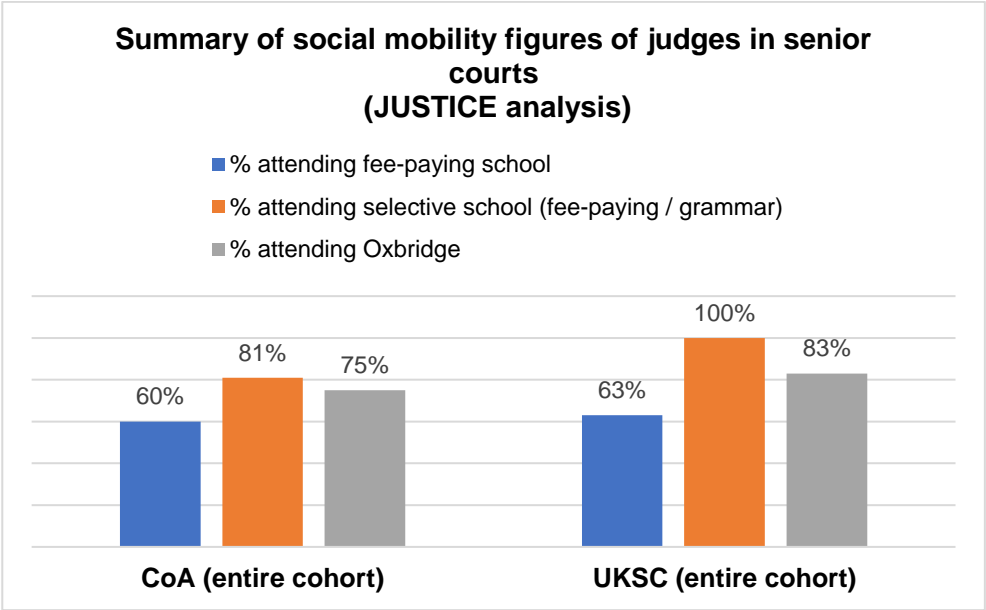
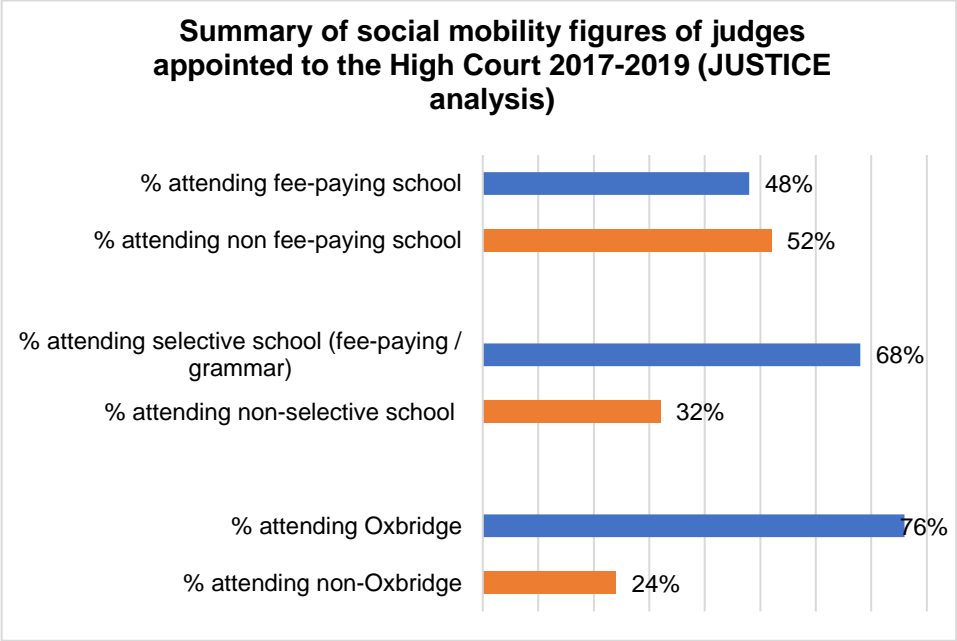


Figure 3. Social mobility data for judges appointed to the High Court – based on JUSTICE data collection and analysis



2.74. Consistent with the work of the Sutton Trust, JUSTICE’s analysis of the education background of the most senior judges shows that a disproportionate number attended a fee-paying school. Further, it shows that the vast majority attended a selective (fee paying or grammar) school, and that most judges attended Oxford or Cambridge.¹²⁰

Analysis of exercises for senior courts – applicants, success rates and legal exercises

Table 7. Summary of main figures regarding socio-economic background (% of state school educated amongst applicants, shortlisted and recommended for

¹²⁰ Please see para 2.78 below, which states that nearly half of half of appointees to the Circuit Bench and High Court in 2017-2019 attended a fee-paying school, and 76% of those appointed studied at Oxford or Cambridge.

appointment) in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

Year	applicants¹²¹	shortlisted	appointment
<u>High Court</u>			
2017-18	56%	52%	47%
2018-19	58%	40%	22%
<u>Circuit Bench</u>			
2017-18	66%	67%	73%
2018-19	69%	61%	59%
<u>All legal exercises</u>			
2017-18	67%	64%	63%
2018-19	72%	71%	69%

Table 8. Summary of main figures regarding social mobility (% of neither parent attended university amongst applicants, shortlisted and recommended for appointment) in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

Year	applicants¹²²	shortlisted	appointment
<u>High Court</u>			
2017-18	56%	55%	47%
2018-19	55%	35%	22%

¹²¹ Data on social mobility in the eligible pool was not available.

¹²² Data on social mobility in the eligible pool was not available.

<u>Circuit Bench</u>			
2017-18	65%	66%	62%
2018-19	68%	66%	68%
<u>All legal exercises</u>			
2017-18	61%	60%	59%
2018-19	62%	57%	56%

- 2.75.** Whilst overall in legal exercises in 2018-19 almost 70% of appointees had attended a state school, in the senior courts the trend is opposite; 67% of High Court appointees and nearly 40% of Circuit appointees in 2018-2019 attended a fee-paying school. JUSTICE's own data shows that the proportion of judges attending fee paying schools increases with the level of seniority of courts.
- 2.76.** In the case of the Circuit bench across both years, around 65-70% of applicants met the measures for social mobility – state school educated and neither parent attended university. They were then shortlisted and appointed in similar (albeit lower) percentages.
- 2.77.** While the numbers were small, the picture is less encouraging for the High Court. Though around 55% of applicants met the social mobility measures, in 2017-2018, they were shortlisted roughly in proportion, but then appointed at 47% under both measures. In 2018-2019, there was a drop off in shortlisting of such candidates, and only 22% were appointed under both measures. Obviously in 2018-2019, only 10 appointments were made in total, but those who were privately educated, with university educated parents were significantly more likely to be successful.
- 2.78.** JUSTICE's own analysis shows that nearly half of appointees to the Circuit Bench and High Court in 2017-2019 attended a fee-paying school, and 68% attended a selective school. Moreover, 76% of those appointed studied at

Oxford or Cambridge. This is precisely the same percentage of Oxbridge judges in the judiciary as noted in JUSTICE's report in 1972.¹²³

- 2.79. While not captured in the table above, the appointments to the Court of Appeal announced in the summer of the 2019 reinforce this pattern, with at least four of the five appointees attending Oxbridge and two of the five judges attended the same independent boys' school.¹²⁴
- 2.80. Of the three new Supreme Court Justices announced in 2019, two attended independent boys' schools, the other a grammar school. All studied at Oxbridge and at Harvard Law School.¹²⁵

Notes on the pool

- 2.81. Even compared to other professions, the law is dominated by privately educated people.¹²⁶ While the Bar has a particularly low response rate to questions about social mobility,¹²⁷ of those who responded a disproportionate number (33%) had attended an independent secondary school in the UK. This was in line with the figure for UK-resident students on the Bar Professional Training Course (32%). Regarding university attendance, when excluding non-responses, 44% of barristers reported being the first in their family to attend university.

¹²³ JUSTICE, *The Judiciary: The Report of a Justice Sub-Committee*, (1972), para. 44, available online at <https://justice.org.uk/wp-content/uploads/2015/01/TheJudiciary.pdf>

¹²⁴ 'Biographies of the five newly appointed Court of Appeal Judges 2019', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/publications/biographies-of-the-five-newly-appointed-court-of-appeal-judges-2019/>

¹²⁵ 'Appointments to the Supreme Court: 24 July 2019,' GOV.UK, available online at <https://www.gov.uk/government/news/appointments-to-the-supreme-court-24-july-2019>

¹²⁶ P. Kirby, *Leading People 2016*, The educational backgrounds of the UK professional elite, The Sutton Trust, 2016, p.4, available online at https://www.suttontrust.com/wp-content/uploads/2016/02/Leading-People_Feb16.pdf

¹²⁷ Only 46% response rate to the BSB; Bar Standards Board, *Diversity at the Bar 2018*, February 2019, p.19, available online at <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf>

- 2.82. For Queens Counsel, the Sutton Trust estimates that nearly 71% of leading QCs attended a private school,¹²⁸ which is higher than the 54% recorded by the BSB.¹²⁹
- 2.83. In respect of solicitors, 68% of UK educated solicitors at partner level or equivalent attended state schools,¹³⁰ indicating that solicitors represent a more diverse pool than the bar in respect of socio-economic background (albeit a disproportionate number of partners still attended private school in relation to the proportion of the population who do so).

Conclusions on socio-economic background

- 2.84. The data overwhelmingly shows that lawyers who have attended private schools and Oxbridge are more likely to find their way into the senior judiciary than those who attended state school and other universities. Whilst as noted above in paragraph 2.71, these metrics on their own are not exact – or best practice proxies – for socio-economic background, they give a strong indication that the judiciary is comprised disproportionately of individuals from higher socio-economic backgrounds. There is insufficient information to be able to gauge how or why this is the case.
- 2.85. As far back as 1972, JUSTICE recognised that the narrow social background of the judiciary meant that the life experiences of judges were often far removed from those of the people appearing before them in court, whose conduct and evidence they were evaluating. It recognised that ‘[w]ith few exceptions judges have not had the opportunity to acquire first-hand knowledge of the problems of poverty or of the different pressures, loyalties and social values that operate in strata of society other than their own.’¹³¹ These observations resonate and may well be more acute today. It must be the case that the narrow social background of the senior judiciary affects the way in

¹²⁸ P. Kirby, *Leading People 2016, The educational backgrounds of the UK professional elite*, The Sutton Trust, 2016, available online at https://www.suttontrust.com/wp-content/uploads/2020/01/Leading-People_Feb16.pdf.

¹²⁹ Bar Standards Board, *Diversity at the Bar 2018*, February 2019, p.19.

¹³⁰ P. Kirby, *Leading People 2016, The educational backgrounds of the UK professional elite*, The Sutton Trust, 2016, p.4, available online at https://www.suttontrust.com/wp-content/uploads/2016/02/Leading-People_Feb16.pdf

¹³¹ JUSTICE, *The Judiciary: The Report of a Justice Sub-Committee*, 1972, para 47.

which defendants, witnesses and other parties' experiences are understood and adjudicated in court, as well as the public perception of the judiciary.

- 2.86. As with other diversity characteristics, it cannot be the case that the best judicial talent is found uniquely amongst those who attended private schools and Oxbridge. A recruitment system that appoints candidates from these groups is therefore missing out on some of the best available talent.
- 2.87. It appears that part of the issue is a relative lack of applications from individuals from lower socio-economic backgrounds. This may be because a judiciary that is known to be overwhelmingly privately schooled and Oxbridge educated naturally deters candidates who do not fit that mould from applying as they feel that the system is stacked against them and/or it is not an environment that they wish to join.
- 2.88. During evidence gathering, we have heard numerous stories from state-educated, non-Oxbridge judges who have felt their dearth of 'social capital' in the workplace, for example, fellow judges discussing unusual traditions at their universities. Obviously, attending these universities is not a prerequisite for appointment nor for being a good judge, but it can act to isolate judges from different social backgrounds. This can foster self-doubt about their suitability for judicial office and their chances of promotion. We have taken evidence from fee-paid judges who are disinclined to apply for salaried appointment because they are concerned that they won't 'fit in'. We also recognise that individuals are likely to have developed coping mechanisms to deal with this type of dominant culture, including adapting to it, over years of working as lawyers. However, this evidence raises the question of whether increasing such diversity is about helping those from minority socio-economic backgrounds to 'fit in' better, or whether we should be more vigilant about defining and then practising what it takes to advance (or should take to advance) in the judiciary. We believe the focus should be on the latter and we urge the judiciary to reflect upon how its culture can become more welcoming and inclusive of people from different backgrounds.
- 2.89. In addition, the relative lack of applications for senior judicial office from those from lower socio-economic backgrounds is likely to reflect the lack of socio-economic diversity in the pool from which judges are predominantly appointed. This raises questions about the barriers that individuals from lower

socio-economic backgrounds face much earlier on in their careers, both at entry to the bar and career progression there. We interviewed a number of judges from a lower socio-economic background who received funding for high school, university and/or their professional qualification exams through local authority and other scholarship schemes. Many of these initiatives no longer exist and the Bar Professional Training Course is still prohibitively expensive for many individuals (even with scholarships available). These judges expressed concern that the current cohorts of barristers are therefore less socially diverse as a result. The new Bar school programme appears to offer greater flexibility and a more accessible approach to qualifying as a barrister and may go some way to addressing these concerns. This overhaul of barrister training will require careful monitoring. It is our hope these changes to entry to the Bar will act to increase accessibility of the profession.

2.90. Some solicitor firms pay for trainees' Legal Practice Course (and where necessary Graduate Diploma in Law) as well as providing money towards living costs. It is therefore no surprise that solicitors are more socio-economically diverse than barristers. However, as explained above, the senior judiciary continues to be drawn predominantly from the Bar, and the solicitor firms also have an issue with retention of those from lower socio-economic backgrounds.¹³²

2.91. In addition to low application numbers, the data indicates that candidates from lower socio-economic backgrounds are not being appointed in the same proportions in which they apply. The difference is particularly stark for the High Court. This indicates that there is something in the application process which is prejudicing those from lower socio-economic backgrounds, and this should be investigated further.

¹³² See Bridge Group, 'Socio-economic Background and Early Career Progression in the Law', September 2018, available online at <https://static1.squarespace.com/static/5c18e090b40b9d6b43b093d8/t/5cd180d73cfb160001436429/1557233888333/03+Research+2018+Progression+law.pdf>. The Bridge Group's report noted that while solicitors from lower socio-economic backgrounds are recruited into firms as trainees, they have disproportionately high rates of attrition. The potential effect of socio-economic-background on the retention and career progression of trainees means that as solicitors become more experienced (and thus move into eligibility for judicial appointments) there will be fewer of them from a lower socio-economic background. However, it must be noted that the Group's report does not show that individuals are leaving the profession entirely, only that they are leaving the firms they trained and qualified with. It may be possible that such individuals are still able to apply as if they had remained.

- 2.92. Socio-economic background often intersects with other demographics such as ethnicity and professional background (as discussed above). It is therefore important to look at intersectionality to get a fuller understanding of the role that socio-economic background plays in the recruitment and progression of judges. The JAC and judiciary should start to collect and publish this information.

Disability

- 2.93. Our 2017 report did not include disability as a separate area of enquiry. Upon publication we regretted this decision and were keen to remedy this in the Update.

Sitting cohort

- 2.93. Currently the Judicial Office does not publish data on disability of sitting judges. Its website notes that ‘[d]isability information is not currently presented as it is not possible to differentiate between those without a disability and non-respondents. Disability information is collected on a non-mandatory basis by self-declaration, representing the perception of the individuals themselves. Disability information may change over time, an individual’s diversity information is only taken at point of entry unless they contact the relevant HR staff to update their disability information should their status change’.¹³³
- 2.94. While it is true that disability can be more fluid than other diversity characteristics this should not inhibit the collection of data on a regular basis. We urge the judiciary to collect disability data on the sitting cohort of judges.

Analysis of exercises for senior courts – applicants, success rates and legal exercises

¹³³ Lord Chief Justice, *Guide to Judicial Diversity Statistics*, 11 July 2019, available online at <https://www.judiciary.uk/wp-content/uploads/2019/07/Guide-to-Judicial-Diversity-Statistics.pdf>, p.4 (s. 4.(d))

Table 9. Summary of main figures regarding disability in Circuit judge, High Court judge and all legal exercises: 2017-18 and 2018-19 compared

Year	applicants ¹³⁴	shortlisted	appointment	RRI Disabled: Non disabled
<u>High Court</u>				
2017-18	5%	2%	0%	
2018-19	4%	0%	0%	
<u>Circuit Bench</u>				
2017-18	7%	4%	5%	
2018-19	6%	3%	0%	
<u>All legal exercises</u>				
2017-18	7%	6%	7%	1.03
2018-19	8%	7%	6%	0.70

2.95. The JAC collects disability data for legal and non-legal exercises, though declaration rates are low and the eligible pool of disabled candidates is unable to be identified. Across all exercises application, short listing and appointment rates are consistent at around 7%. The overall numbers of disabled applicants were high due to the inclusion of an exercise in 2017-2018 for fee-paid Disability Members of the First Tier Tribunal, for which just over 40% of applicants declared a disability, with a broadly similar rate of appointment. In addition, in 2018 for the key feeder role of Recorder 6% of applicants declared a disability, with 7% of appointees having a disability.

¹³⁴ Data on social mobility in the eligible pool was not available.

- 2.96. However, for senior appointments, it seems that fewer disabled candidates apply and they are infrequently appointed when they do. For the High Court and 2018-2019 Circuit bench exercises no disabled candidates were appointed despite between four and six per cent of applicants having a disability.

Notes on the pool

- 2.97. Data from the SRA indicates that 3% of solicitors, and 3% of partners of firms declare a disability.¹³⁵ The BSB statistics indicate that 3% of all barristers are disabled, though only 1% of Silks.¹³⁶ The response rates among barristers to questions about disability are low.¹³⁷ Additionally, across the board, there are low declaration rates to questions about disability.¹³⁸
- 2.98. The JAC has included reference to the last census, which suggests that 13.8% of the population has a disability that limits their functioning between ‘a little’ and ‘a lot’. The JAC does strongly caution the use of the statistics given the unlikely correlation to the eligible pool figures for judicial appointment.

Conclusions on disability

- 2.99. Our efforts to include analysis of disability as a characteristic in this Update have been hampered by inadequate data. Independent collection of data about disability is impossible given the multitude and great variations of disabilities; some obvious, many not. We have been unable to collect any quantitative data

¹³⁵ Solicitors Regulation Authority, *Diversity in the profession*, 29 October 2019, available online at <https://www.sra.org.uk/risk/outlook/priority-risks/diversity/>

¹³⁶ Bar Standards Board, *Diversity at the Bar 2018*, February 2019, available online at <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf> pp.13-14

¹³⁷ We understand that, in 2017, 13% of students attending university or college reported having at least one disability. See, *Beyond the bare minimum: Are universities and colleges doing enough for disabled students?*, Office for Students, available online at <https://www.officeforstudents.org.uk/publications/beyond-the-bare-minimum-are-universities-and-colleges-doing-enough-for-disabled-students/>

¹³⁸ The Bar Standards Board reported a response rate of 49% to questions about disability in 2018, see Bar Standards Board, *Diversity at the Bar 2018*, February 2019, available online at <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf> p. 13

on the sitting cohort, nor on those appointed to the senior courts over the last two years.

2.100. We have, however, sought to collect qualitative data from several organisations and individuals who were able to share their experience of disability in the legal professions and in the judiciary.¹³⁹ The main themes that emerged from this evidence were as follows.

2.101. First, we have been struck by the inaccessibility of the legal profession to disabled people. This fundamentally undermines achievement of a representative judiciary. Many people with disabilities, who have secured the educational qualifications required to practice, struggle to secure pupillages and tenancy or training contracts.¹⁴⁰ Disabled lawyers report feeling ‘invisible’, saying that their views were rarely sought and that they often felt that their disability created unease for others in the profession. We took consistent evidence that to succeed disabled lawyers needed to be particularly tough and thick skinned. The Bar particularly, we were told, can be an unforgiving place if one is ill or perceived to be ill or disabled. Those lawyers who do succeed speak of particularly supportive managers in firms and clerks in Chambers. They highlight that the challenges of securing good work and receiving adjustments from courts lessen with increasing seniority.

2.102. Lawyers with court-based practices are particularly tested. We took substantial evidence on the failure of judges to make reasonable adjustments required for disabled barristers appearing before them. We were told that the Equal Treatment Bench Book is adequate but widely ignored. In the extreme, we heard of instances where some barristers who use wheelchairs were admonished for failing to stand up for the judge; more common were ‘micro aggressions’ from the bench about pace of argument, fluency of communication and other matters directly related to the barristers’ impairment. A number of disabled barristers observed that such treatment meant that they would not consider a future on the bench. Even where buildings are accessible,

¹³⁹ We have, for example, taken evidence from the Lawyers with Disabilities Division (LDD). The Lawyers with Disabilities Division (previously called the Group for Solicitors with Disabilities) was established 30 years ago by Sire John Wall, the first visually impaired judge to sit in the High Court in recent times. The LDD supports mainly solicitors and trainees seeking to progress in the legal sector.

¹⁴⁰ Our evidence from the Lawyers with Disabilities Division indicates an overall positive trend in the solicitor profession; there appears to be a greater willingness among firms to offer training contracts to disabled graduates, however this is very much dependent on the firm.

lawyers told us of frequently arriving in court to be told that the lift wasn't working, resulting in lawyers being carried upstairs in some instances.

2.103. Second, we took evidence from disabled judges – fee-paid and salaried – who did not find the appointment processes themselves to be particularly onerous. They have, however, found sitting itself to be fraught with difficulty. These judges reported struggling to secure reasonable adjustments for their disabilities. We were repeatedly told that the inaccessibility of many court buildings to wheel-chair users means that physically disabled judges are unable to do their work. We took evidence from disabled fee-paid judges who had to change jurisdiction because the courts in their jurisdiction of choice were not accessible.¹⁴¹ Based on these experiences disabled judges in fee-paid roles indicated that they would not apply for salaried judicial posts.¹⁴²

2.104. Finally, there are very low declaration rates of disability.¹⁴³ Researchers at Cardiff University¹⁴⁴ shared concern that under-reporting was the result of fears of discrimination. We took evidence that suggested that people who disclosed mental health problems, for example, felt less confident about their future in the profession. One individual shared with us their experience of how not declaring a disability in applications increased their chances of being invited for an interview. Our evidence also highlighted concerns among the legal profession relating to potential additional costs of employing a person with a disability. There is a lack of awareness of schemes that might reimburse such costs.

¹⁴¹ We took evidence that the exception in the court estate is the Supreme Court, which was designed in consultation with disability academics from Cardiff University and is resultantly the 'Rolls Royce' of accessibility. We also took evidence of how retrenchment in the court estate has disproportionately affected disabled lawyers and judges. For example, the abolition of court canteens, is of little consequence to people who can walk to a local café for a coffee, but presents significantly more challenges for disabled people.

¹⁴² We have also heard stories from the Lawyers with Disabilities Division of lifts breaking down at court, or there being no lifts at all, as well as issues with the availability of disabled parking, resulting in individuals receiving parking tickets.

¹⁴³ In contrast, we understand that in 2017, 13 per cent of students attending university or college reported having at least one disability. See, 'Beyond the bare minimum: Are universities and colleges doing enough for disabled students?', Office for Students, available online at <https://www.officeforstudents.org.uk/publications/beyond-the-bare-minimum-are-universities-and-colleges-doing-enough-for-disabled-students/>

¹⁴⁴ 'LEGALLY DISABLED? Career experiences of disabled people in the legal profession', Legally Disabled, available online at <http://legallydisabled.com/>

2.105. The Working Party recommends a detailed examination of the particular challenges for disabled students in accessing the legal professions and monitoring of their progression within it. Based on the evidence we received, there is also a need for more concerted judicial training on disability and reasonable adjustments for disabled practitioners and judges.

2.106. We recognise the work of the Lawyers with Disabilities Division, which supports mainly solicitors and trainees seeking to progress in the legal sector. The LDD organises specialised events and training to help people with disabilities secure work placements and training contracts, and to assist with career advancement. Additionally, the group aims to raise awareness among employers about making the legal profession more accessible.

Sexual orientation and gender identity

2.107. In the 2017 report we did not look at the appointment of Lesbian, Gay, Bisexual or Transgender¹⁴⁵ (LGBT+) judges. This was, in part, because there are a number of openly gay senior judges and we were repeatedly assured that sexual orientation wasn't an issue in appointments or career progression. There was also a dearth of data. For the Update, we have reviewed all of the relevant data and gathered qualitative evidence on the appointment of LGBT+ judges.

The sitting cohort

2.108. The official judicial diversity statistics do not provide information about sexual orientation or gender identity of the sitting cohort. However, we understand that information on sexual orientation will be collected and published from 2020, which we welcome.

Performance in appointments processes

2.109. Diversity data on sexual orientation was included for the first time in the JAC's Official Statistics published in June 2014. Because the JAC does not include

¹⁴⁵ Reference to transgender refers to any person who does not identify or exclusively identify with their gender assigned at birth. Its use in this report is intended to be inclusive of all trans, non-binary and gender-diverse identities.

LGBT people as one of the four target groups of unrepresented people in the judiciary, there is not the same granularity of detail on such appointments. For example, the most recent JAC statistics groups sexual orientation data across all exercises, legal and non-legal. Data is not collected on gender identity.

2.110. In terms of appointment rates, the JAC bulletin of April 2019 summarises:

*In total across all exercises combined, 6% of applicants, 5% of shortlisted candidates and 6% of those recommended for appointment identified themselves to be gay, lesbian or bisexual. 88% of candidates declared their sexual orientation. When considering rates of recommendation, 21% of gay, lesbian and bisexual applicants were recommended for appointment, compared to 20% for heterosexual candidates.*¹⁴⁶

2.111. It would therefore appear that success rates for LGB candidates are generally in line with application rates. However, we would like to see the data broken down by exercise where possible in order to determine whether this is the case for all exercises.

Notes on the pool

2.112. There is also a challenge around data on the pool. The Solicitors Regulation Authority (SRA) has collected data on sexual orientation since 2012. Its most recent diversity update reports that 3% of solicitors identify as LGB (not T) and around 1% identified as ‘other’. Since 2017 the SRA has separated out Trans lawyers, and found that 2% of lawyers report to be Trans. Jointly, the figures add up to around 6% of lawyers. However, the SRA caveats that the accuracy of these numbers is affected by the high number of those choosing not to divulge their details (response rate 87%).

2.113. The Bar Standard Board reports 6.8% LGBT barristers at the Bar (this figure excludes non respondents); but there are very low response rates, with only 43.1% of barristers providing information (including Prefer Not To Say). When calculated against the total number of respondents (including non-

¹⁴⁶ Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2018 to 31 March 2019’, June 2019, p.34, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2018-19.pdf

respondents) the proportion drops to 3% of people at the Bar identifying as LGBT.

2.114. It is worth noting by comparison that the most recent data from the Office of National Statistics have 2% of the UK population identifying as LGB¹⁴⁷ although other organisations estimate the number to be higher (5-7%).¹⁴⁸

Conclusions on sexual orientation and gender identity

2.115. To the extent that sexual orientation data exists, it seems to support the anecdotal view that LGB candidates applying for judicial office stand an equal chance of appointment. The overall percentage of applicants in judicial exercises is roughly in line with the reported proportion of LGB candidates in the estimated potential pool, and upon application they are recommended for appointment in the same proportion as they apply. Obviously care must be taken given the low response rates for the pool and the failure to separate out legal and non-legal exercises. The inadequacies in data collection therefore prevent us from being able to make any conclusions with respect to this group.

2.116. The openly gay lawyers we interviewed noted that though they often had to deal with micro-aggressions about sexuality in the workplace, they did not feel that their sexual orientation impeded promotion. We were told that it was ‘not an issue’ by sitting gay judges. However, most of the gay judges we spoke to were white men. It may well be that when sexual orientation intersects with other underrepresented characteristics it becomes more of an issue. Without the intersectionality data we are unable to draw any conclusions in this regard.

2.117. In the absence of statistical information, we attempted qualitative evidence gathering with respect to the appointment of Trans judges. This proved a difficult and ultimately fruitless line of inquiry. With increasing awareness and acceptance of non-binary and transgender identities, we expect this issue to become more acute in the near future. We urge the collection of more detailed

¹⁴⁷ ‘Sexual orientation, UK: 2017’, Office for National Statistics <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2017>

¹⁴⁸ ‘Student Frequently Asked Questions (FAQs)’, Stonewall, <https://www.stonewall.org.uk/help-advice/student-frequently-asked-questions-faqs>

data to capture the progression of Trans lawyers in the professions and judiciary.

III. PATHWAYS TO THE JUDICIARY

- 3.1. For the overwhelming majority of senior judges, the judiciary remains a second career following successful practice as a Silk at the independent Bar. Since 1972, JUSTICE has been proposing the establishment of other routes into senior judicial office, where judges can begin their judicial career in the tribunals or as a District Judge, being promoted through judicial roles of increasing seniority into the High Court and beyond. This was a key recommendation of our 2017 report.
- 3.2. As demonstrated above, the courts and tribunals overall are significantly more diverse than the senior courts. Solicitor judges sit mostly in entry-level positions of District Judge and in the First Tier Tribunal; there are also more women and BAME judges in these lower positions.¹⁴⁹ The judiciary itself could, and should, be serving as a major pool for senior appointments.
- 3.3. This would require a cultural change within the judiciary, and an adjustment of mindset among those appointing senior judges. We are encouraged that the judicial leadership is keen to explore judicial career paths and are pleased to note that the Judicial College has also committed to supporting activities around flexible career paths for judges.¹⁵⁰
- 3.4. To understand the current routes into the judiciary and to gauge the extent of an internal career path, JUSTICE has tracked the routes to the Circuit bench and High Court over 2017-2019.

Route to the Circuit bench 2017-2019

- 3.5. There were 163 Circuit judges appointed over this time.¹⁵¹ On average, judges were nearly 52 years old when appointed; the youngest at 37, the oldest at 66.

¹⁴⁹ Lord Chief Justice of England and Wales, *Judicial Diversity Statistics 2019*, available online at <https://www.judiciary.uk/wp-content/uploads/2019/07/Judicial-Diversity-Statistics-2019.pdf>

¹⁵⁰ Judicial College, 'Strategy of the Judicial College: 2018-2020', p.4 available online at <https://www.judiciary.uk/wp-content/uploads/2017/12/judicial-college-strategy-2018-2020.pdf>

¹⁵¹ Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018', June 2018, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf; Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2018 to 31 March 2019', June 2019, available online at

On average, it took appointees 28 years from the time they had been admitted as solicitors or called to the Bar. On average, they were appointed to the Circuit Bench seven years after their last appointment to another judicial role.

- 3.6. The most commonly held role of Circuit bench appointees prior to appointment was that of Recorder (59%). As Recorders sit as fee-paid Circuit judges, it follows that this is the most common route onto the Circuit Bench. District Judge (salaried or fee paid) was the second most commonly held role prior to appointment (29%), with only 5% of appointments made directly from the Tribunals.
- 3.7. However, our analysis in Chapter One reveals that only 21% of the current cohort of Recorders are women, with many fewer BAME and solicitor Recorders. All three groups have struggled to be appointed in Recorder exercises since 2017, therefore as the most direct pathway to the Circuit bench, it is not facilitating greater diversity.
- 3.8. Our analysis shows that barristers were significantly more likely than solicitors to sit as Recorders prior to appointment (75% of those who were Recorders prior to appointment were barristers). They were also statistically more likely to have been in a fee-paid role and to have held only one other judicial role prior to appointment. 94% of those in this category were barristers. This includes the three judges appointed straight from practice who were all barristers.
- 3.9. By comparison, solicitors were more likely to have held a salaried position before appointment – accounting for the majority of those who were District and Deputy District Judges prior to appointment – and to have held more than one previous judicial role.
- 3.10. The data therefore paints a picture of two distinct routes to the Circuit bench. Barristers stay in practice, sit fee-paid as a Recorder and rarely require other sitting experience. Solicitors tend to leave practice for a salaried role as a District Judge, with a number having earlier held fee-paid roles, either as a Deputy District Judge or – less commonly – in a First Tier Tribunal.

Route to the High Court 2017-2019

- 3.11. We analysed the two High Court appointment rounds for 2017-2018 and 2018-2019. As not all announcements had been made at the time of writing, this analysis does not cover the 2019-2020 appointments.
- 3.12. Over 2017-2019, 29 High Court judges were appointed; four were solicitors and 25 were barristers, all of whom were QCs. On average, High Court appointees had 30 years in practice at the time of appointment, the youngest was 46 years old, the eldest 66. On average, it took appointees 3.7 years from the time of their last judicial appointment to be appointed to the High Court.
- 3.13. On average, the appointees had held two judicial roles prior to appointment, most holding a fee-paid position at the time of their appointment to the High Court (79%) of whom over 90% were barristers. Only four judges were appointed to the High Court from a salaried position, two of whom were solicitors.
- 3.14. The most common route into the High Court was sitting as a Deputy High Court Judge, with 19 (or 71% of) appointees holding this role at the time of appointment. This demonstrates the importance of the position of Deputy High Court judge as a feeder for the High Court, a role which allows candidates to gain sitting experience in the court to which they are applying. Again, as outlined in Chapter One, the current cohort of Deputies is lacking in diversity and recent rounds have done little to change the demographics. We note that of the 19 Deputies appointed to the High Court only one was a solicitor. It is critical that efforts be made to increase the diversity of this pool.
- 3.15. There was some degree of tribunal experience amongst the appointees (24% had had tribunal experience at some stage) and three applicants were appointed directly from a tribunal to the High Court, two of them solicitors. However, these judges were elevated from the Upper Tribunal, which is concerning given the limited progression from the First Tier Tribunal to the Upper Tribunal.¹⁵²
- 3.16. Of the 19 appointees who were Deputy High Court Judges prior to appointment, 10 were appointed under s 9(4) of the Senior Courts Act 1981 and

¹⁵² See '*A route through the tribunals*' section below.

nine were authorised to sit under s 9(1) of the same Act.¹⁵³ The data therefore suggests something of an ‘internal’ career path, with a good number of s.9(1) Deputies appointed to the High Court in recent years. To pursue this route – which involves a JAC exercise – candidates need to be already sitting as a judge in one of a number of fee-paid or salaried judicial positions.¹⁵⁴ Unfortunately, the outcomes and details of s.9(1) exercises are not made public so we have been unable to analyse the demographics of the sitting cohort nor the success rates of different applicant groups. This seems like a lost opportunity.

- 3.17. We note that for the most recent High Court exercise, the previous application process was replaced by application through a letter and CV. This was introduced in response to low levels of engagement from the Bar in the 2018-2019 round, which saw only 52 applications for 25 vacancies. While the final cohort of appointees has yet to be announced, we do know that there were 68 applications, suggesting a more attractive process for those applying. Whether this will result in a more diverse group of appointees remains to be seen. However, all evidence points to formal application forms being considerably more likely to result in diverse appointments than a CV and covering letter.¹⁵⁵ It is important that efforts to encourage and ease the burden of application for candidates do not adversely impact on the diversity of those ultimately appointed. The impact of this change must be monitored.

The *de facto* judicial career path; a new path?

- 3.18. We are heartened that there appears to be appetite from the senior judiciary and the JAC in exploring how an internal career path might work, though we appreciate that it is not straightforward. Given the existing demographics, it is important to recognise that an internal career path would likely serve to

¹⁵³ Authorisation to sit as a Deputy High Court judge under s. 9(1) is restricted to Circuit judges; Recorders; and tribunal judges who are (a) Chamber President, or a Deputy Chamber President, of a chamber of the Upper Tribunal or of a chamber of the First-tier Tribunal, (b) judge of the Upper Tribunal by virtue of appointment under paragraph 1(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007 (TCEA), (c) transferred-in judge of the Upper Tribunal (see Section 31(2) of the TCEA), (d) deputy judge of the Upper Tribunal (whether under paragraph 7 of Schedule 3 to, or Section 31(2) of, the TCEA), or (e) President of Employment Tribunals (England and Wales) or the President of Employment Tribunals (Scotland). For First Tier Tribunal Judges to be appointed under s. 9(1) they must be a Chamber President or Deputy Chamber President.

¹⁵⁴ See note 153 above for a list of gateway positions.

¹⁵⁵ See for example, ‘Inclusive Recruitment: Optimise your Candidate Pool’, Include-Empower.com, <https://cultureplusconsulting.com/2019/06/11/inclusive-recruitment/>

shepherd non-traditional candidates, the biggest group of them solicitors, into the senior courts.

- 3.19.** While there is now a clear intention to recruit senior judges from beyond the Bar, the two roles by which most aspirant judges gain the sitting experience ('the flying hours') to be appointed to the senior judiciary – Recorder and Deputy High Court Judge – have not changed.
- 3.20.** Arranging to sit as a Recorder or as a Deputy High Court judge is straightforward for most barristers. However different working patterns and obligations to clients of solicitors mean that it will rarely be possible for them.¹⁵⁶ This – in addition to the published success rates – is arguably why solicitors gravitate towards the lower fee-paid judiciary, where they can sit for a day at a time. Other solicitors opt to leave practice altogether to take an entry-level salaried judicial position, with the expectation that they will be able to be promoted to higher office.¹⁵⁷ The statistics indicate that this is a poorly founded expectation.
- 3.21.** There is a tension at play. On the one hand the JAC merit criteria appear to require candidates to demonstrate judge-craft skills – how to control parties and proceedings, deciding actions by findings of facts and evaluating law, being able to deliver judgments with confidence, etc. Aspirant senior judges must have the requisite 'flying hours' as a Recorder or Deputy High Court Judge to demonstrate these. And yet those judges who are salaried in lower courts, developing these skills through full-time sitting – albeit often with lower value

¹⁵⁶ A solicitor's duty to their client often includes being available for frequent and immediate communication, whereas a barrister's engagement is more controllable as set-piece interactions for specific intervals. This means that most solicitors are unable to take themselves away for weeks at a time as is required to sit as a Recorder or a Deputy High Court judge.

¹⁵⁷ Sir Edward Murray and Dame Sarah Falk were both recruited directly from their law firms, where they were consultants while undertaking fee-paid sitting, as a Recorder and UT judge respectively. 'Edward Murray', Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/case-study/edward-murray-recorder-crime>; 'Mrs Justice Sarah Falk,' Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/commissioner/mrs-justice-sarah-falk-judicial>. Dame Clare Moulder and Sir Peter Lane left practice for salaried roles in the tribunals. 'Mrs Justice Moulder', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/publications/mrs-justice-moulder/>; 'High Court Judge Appointment (Queen's Bench Division): Lane', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/announcements/high-court-judge-appointment-queens-bench-division-lane/>.

claims or different rights at stake – are far less likely to progress to higher judicial office. It is important to understand why experience gained in this capacity does not translate into greater success in senior exercises.

A route through the tribunals

- 3.22. The tribunals represent a large pool for senior appointments – both those serving in salaried roles and those gaining experience through fee-paid sitting. The nature of the work varies considerably from chamber to chamber, with judging at the First Tier in some chambers involving more questions of law, others more questions of fact. Upper Tribunal judges deal exclusively with matters of law, many in cases similar to those considered by High Court judges.
- 3.23. The Working Party has taken evidence from judges in entry-level positions, who have struggled to secure promotion from tribunal roles. The sheer numbers of First Tier Tribunal judges mean that promotion is only realistic for a minority. While an organogram might indicate otherwise, the expert nature of the work of the Upper Tribunal means that it does not provide a natural route of advancement for most First Tier Tribunal judges.
- 3.24. The data suggests that there is limited value in fee-paid sitting in the First Tier Tribunal for those who seek higher appointment; a minority of senior judges have been elevated through this route.
- 3.25. It has been repeatedly suggested to us that salaried appointment in the First Tier Tribunal can function as a ‘trap’ for aspirant senior judges, who apply expecting it to serve as a first step and then go nowhere. Unable to return to practice, they find themselves stuck doing entry-level work which remains of a certain type and then is not valued for the purpose of advancement. When they apply for new roles, their years of tribunal work means that they are further away in time from their experience in practice, which may have been assessed as being of greater value for the purpose of higher judicial appointment.
- 3.26. We received evidence suggesting that, in the limited number of cases where it does happen, promotion to the Upper Tribunal is achieved despite sitting experience in the First Tier Tribunal rather than because of it. Indeed, we were told that the only real ‘promotion’ within the tribunals is from fee-paid to salaried judge, within the same jurisdiction.

- 3.27. Upper Tribunal judges – with a few noted exceptions – are rarely promoted into the higher courts’ judiciary. More of such appointments would evidence an internal career path. Given that Upper Tribunal judges deal exclusively in matters of law the Working Party is concerned by the failure of their upward mobility.
- 3.28. We are concerned about how tribunal sitting is understood and valued in appointments exercises. The functional separation between the courts and tribunals judiciary means that most courts judges have little or no experience of the tribunals or the kinds of work undertaken by tribunal judges.
- 3.29. We have taken considerable evidence that Upper Tribunal judges’ experience has been discounted by judicial selectors as involving ‘no law’, with candidates left to explain – unsuccessfully – that theirs is an appellate jurisdiction based entirely on points of law. There also appears to be an unspoken hierarchy in perception of tribunal work, with some tribunals viewed by judicial selectors as providing more ‘law-heavy’ and serious judicial experience, with others more likely to be discounted as ‘heavily social work’, devoid of legal challenge and therefore of any prestige.
- 3.30. A meaningful career path from the tribunals to the courts’ judiciary will require the two working more closely together, ideally with tribunal judges sitting on courts selection exercises and vice versa.
- 3.31. As in the courts, a career path will also require talent spotting and the active provision of professional opportunities for those judges who are thought to have potential. We appreciate that there is a tension at play here. We have taken evidence that once a judge has been appointed and deployed to a particular jurisdiction, the leadership judge within that jurisdiction may be reluctant to lose them from their cohort. However, if the tribunals are to attract quality judges, the real possibility of promotion is imperative. This requires cultural change.
- 3.32. We welcome recent initiatives for cross-ticketing of First Tier Tribunal judges into other tribunals and into the Court of Protection, which offer the chance for extension and skills development. We are, however, concerned that the way in which some of these opportunities have been framed – requiring sitting in the original jurisdiction, as well as the second jurisdiction – inadvertently limits the opportunities to barristers who have more flexibility in their working arrangements than solicitors. While it is technically possible to

secure a release, most judges take the conditions at face value and solicitors in particular will see this as a disincentive to apply for cross ticketing.

- 3.33. For the same reason, across the judiciary, we recommend that each level of judge should be authorised to sit at the level above and also across the divide that exists between the Courts and the Tribunals judiciary.¹⁵⁸ Much as High Court judges can sit in the Court of Appeal Criminal Division from time-to-time; a District Judge (Magistrates) would be authorised to sit as a Circuit judge (Criminal); and a District Judge (Family) would be able to step up to the Family Circuit bench etc.¹⁵⁹

¹⁵⁸ For example, a Deputy District Judge being authorised to sit as an Upper Tribunal Judge or a First Tier Tribunal Judge authorised to sit as a Circuit Judge

¹⁵⁹ We note that this might require amendment to primary legislation.

IV. FOLLOW UP ON 2017 RECOMMENDATIONS

- 4.1. As noted in paragraph 1.5, the key structural recommendations of our original report, aimed at addressing accountability and fundamental concerns about the pipeline for appointments, have not been adopted. We are pleased however, with progress in respect of a number of our secondary recommendations. Specifically:

Feedback and ‘near miss’ candidates

- 4.2. We have been encouraged by markedly improved feedback for ‘near miss’ candidates. Such bespoke feedback gives candidates a clear sense of where their application is strong, which examples worked/did not work, and how their performance could be improved. It is not just that the feedback is objectively helpful, but the fact of the feedback itself provides encouragement for reapplication. That said, while the JAC has shared with us that enhanced feedback is offered to ‘near miss’ candidates, the candidates receiving the feedback are not actually told that they came close to appointment. This seems like a lost opportunity. Such additional information would provide a much-needed boost for candidates and would likely increase the chances of reapplication. This, we hope, would encourage reapplication from those underrepresented groups who may be especially deterred by failure, and who may be relying on non-standard evidence of competencies.
- 4.3. Though recognising the resource implications, we recommend that feedback is further strengthened by sharing the following greater detail with failed candidates.

For failure to progress through the qualifying test:

- Showing candidates their marked qualifying test, rather than simply giving them access to the (much more generic, and therefore less useful) Feedback Report. The fact that the Feedback Reports are published several months after test scripts are submitted, and with no copies permitted to be retained by the candidates, compounds the difficulty for candidates to derive worthwhile guidance as to how their test script could have been improved;
- Telling them their actual score, and/or
- Showing them a model answer for that qualifying test, rather than the generic Feedback Report.

For failure to progress beyond the paper sift:

- Showing candidates not only what examples they gave which were considered not to satisfy the competencies,¹⁶⁰ but to say why in sufficient detail for candidates to understand whether and how to select better examples, and
- Giving anonymised examples of evidence from successful applicants in that competition, that were considered to meet the competencies. This would be especially beneficial for candidates with non-traditional practice experience.

4.4. We further propose that the JAC should consider introducing a passporting scheme. This would allow candidates who had 'passed' an early stage in the selection process for a competition to bypass that same stage if they entered the same competition within a reasonable period afterwards and would go some way to encouraging unsuccessful applicants to try again. We are aware of instances where sometimes a candidate will not progress in the same way in the next competition even if their submission for that stage is identical to what it was last time.

4.5. We recognise the difficulty where the stage through which a candidate has progressed in an earlier competition is a qualifying test: on the one hand the content of the qualifying test for the next competition is bound to be different, however the fact that the candidate progressed beyond the first qualifying test shows that he or she has satisfied the competencies once. As such, it would be reasonable to treat that as evidence satisfying the competencies a second time; and by-passing the qualifying test would be a reasonable dispensation. In terms of how this dispensation might operate, we would suggest the following controls:

- i. Applying it only to the very next competition after the one previously 'passed'; and

¹⁶⁰ We note that the JAC recently updated the competency framework. The current framework consists of five competencies, and a sixth only for some posts, namely 'Leadership'. The previous 'Communicating Effectively' competency was amalgamated with 'Working and Interacting with Others' into a new 'Working and Communicating with Others' competency. See 'Completing your self-assessment', Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/completing-your-self-assessment>.

- ii. Applying it only where the qualifying test was comfortably 'passed', e.g. the candidate's score was higher than the lowest quartile of scores above the 'pass mark'.

Outreach to new candidate pools and mentoring

- 4.6. The Working Party is impressed by the renewed public outreach efforts by both the Judicial Office and the JAC.¹⁶¹ Building on the earlier Diversity Support Initiative, relevant developments include the Judicial Work Shadowing Scheme, High Court and Deputy High Court support programmes, pre-application seminars for first time applicants and judges seeking promotion and a number of roundtables of senior judges with under-represented groups. The new Judicial Mentoring Scheme is aimed at certain underrepresented groups in the judiciary (women, BAME candidates and those who attended a non-fee-paying school/were the first in their family to attend university) and includes pre application workshops for participants. We have been pleased by efforts to provide sponsorship and mentoring of judges in the lower-ranks of the judiciary.
- 4.7. The initiative in which most store is placed is the Pre Application Judicial Education Programme (PAJE), which is a joint initiative of the JAC and the Ministry of Justice led by the Judicial Diversity Forum.¹⁶² It offers promise in familiarising potential candidates from under-represented groups with the realities of life on the bench and providing guidance on the challenges presented in the application process.¹⁶³
- 4.8. We recognise the value and ongoing work of the Diversity and Community Relations (DCR) Judges, who increase public awareness of the judiciary through

¹⁶¹ All information in this section can be found in the Judicial Diversity Committee of the Judges' Council 'Report on Progress April 2017 – March 2018; Action Plan April 2018 – March 2019' (published June 2018) available online at <https://www.judiciary.uk/wp-content/uploads/2018/06/judicial-diversity-committee-of-the-judges-council-annual-report-2018.pdf>, unless otherwise stated.

¹⁶² 'Pre-Application Judicial Education Programme (PAJE)' Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/pre-application-judicial-education-programme-paje/>

¹⁶³ Whilst we are unable to evaluate the impact of PAJE at this stage (e.g. on the number of applicants from the total participants of PAJE) we are hopeful that it would have a positive effect on application, and more importantly – success rates – of applicants from prioritised groups.

outreach.¹⁶⁴ DCR judges aim to encourage legal professionals from minority and under-represented groups to consider applying for a judicial appointment and support the Lord Chief Justice in his statutory duty to increase diversity in the judiciary.

4.9. The Judicial Diversity Committee of the Judges' Council is also involved in judicial outreach initiatives and administers a range of diversity schemes. Its most recent report¹⁶⁵ outlines an Action Plan for the period April 2019 – March 2020 which includes: encouraging a broad range of applicants from diverse personal and professional backgrounds and supporting them to apply for a judicial appointment; and developing strategies to enable career development and progression of underrepresented groups within the judiciary.

4.10. We welcome all of these efforts to strengthen the knowledge and skills base of candidates. We have, however, been unable to uncover information about the success of such schemes. The Work Psychology Group's latest report was supportive of such schemes, while noting that there were no statistically significant differences in outcomes for Deputy High Court judge exercises based on participation in the Judicial Work Shadowing Scheme.¹⁶⁶ It is obviously important that these schemes are regularly monitored and evaluated, with a view to demonstrating their worth as an investment both for candidates and for the system and that they are adjusted if they prove not to make any difference.

4.11. The Working Party is strongly of the view that more bespoke mentoring and support should be offered to non-traditional candidates, including solicitors. Barristers with judicial aspirations have access to role models, possible mentors and advisers from within their own Chambers. In the course of our evidence gathering, we have learned of numerous senior judges who are personally

¹⁶⁴ 'Diversity and Community Relations Judiciary', Courts and Tribunals Judiciary, available online at <https://www.judiciary.uk/you-and-the-judiciary/judiciary-within-the-community/diversity-and-community-relations-judiciary/>

¹⁶⁵ Judicial Diversity Committee of the Judges' Council, 'Annual Report 2019', available online at <https://www.judiciary.uk/wp-content/uploads/2019/08/Judicial-Committee-Annual-Report-2019-20-7-6-19.-v5.pdf>

¹⁶⁶ Working Psychology Group, 'Review of JAC Shortlisting Tools – Summary Report & Conclusions', July 2018, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/research-shortlisting-tools-report-2018.pdf.

invested in directly supporting individuals at the Bar – including from minority groups – whom they consider good candidates for the bench, with encouragement, advice and support. While this is fantastic, as it is limited to barristers who judges know through Chambers or come across in court, it serves to further strengthen the existing pool. Senior solicitor judges – often supported by the best efforts of the Law Society – are also exhaustively speaking at events and encouraging applications from solicitor candidates, though the huge numbers and spread of solicitors makes this much more challenging. Extended formal and targeted mentoring of candidates from diverse backgrounds judged as having potential could see the appointment of more diverse candidates.

- 4.12. It is also worth noting that there are several consultancies – which include former JAC commissioners and panel members – who advise candidates on their applications, for a fee. We are not in a position to evaluate how useful these consultants are, but in that they offer insights into processes and ‘right answers’ it is concerning that they would only be available to candidates of means.

Appointing candidates from the Crown Prosecution Service (CPS) and Government Legal Department (GLD)

- 4.13. In our original report we recommended the exploration of the CPS and GLD as diverse pools for judicial appointments; they have higher percentages of senior women and BAME lawyers than much of the rest of the legal profession. We are pleased by the JAC’s outreach to the CPS and are encouraged by the appointment of six Crown Prosecutors as Recorders in the most recent Recorder exercise (2019). Of these six, three were appointed to the Family jurisdiction and one to the Civil jurisdiction. Two were appointed as Recorders in Crime, though both had to resign from the CPS in order to take up the appointment.
- 4.14. While it is encouraging that the skills of a prosecutor appear to have been valued in the selection processes, Crown Prosecutors pay a high price to secure fee-paid sitting experience in their chosen jurisdiction. We reiterate our 2017 recommendation that in appropriate cases the *de facto* requirement that Circuit judges have sat as Recorders be removed for experienced Crown Prosecutors. To this end we were encouraged by the 2017 appointment of Graham Reeds QC directly to the Circuit bench without any previous judicial experience.
- 4.15. We maintain that the GLD can be an important potential source of recruits to the judiciary. We are pleased by outreach events targeting government

lawyers and we note that a small number of government lawyers have been appointed as Deputy High Court Judge and to the Upper Tribunal.¹⁶⁷

Ensure ethnic, gender and social diversity on selection panels.

- 4.16. We applaud the progress made by the JAC in increasing the diversity of lay panel members. As of April 2019, 67% of lay panel members are women, 9% are BAME and 14% have a disability.¹⁶⁸ We do not have a similar breakdown for the diversity of judicial members, who are selected by the judiciary rather than the JAC.
- 4.17. Relatedly, we welcome the diverse composition of the JAC Advisory Group that reviews selection materials to ensure that the content is not inadvertently advantageous to candidates from a particular background. They are provided with a guide on quality assurance of selection materials and are introduced to JAC selection processes. We understand that test materials go through a series of quality assurance processes, including review by the JAC Diversity team and by the JAC Advisory Group, as well as dry runs with mock candidates. All exercises have an Assigned Commissioner for oversight purposes, the progression of target groups is monitored and interviews are observed. We have reservations about whether lay people – even lay people from diverse backgrounds – can provide the expert scrutiny required to identify and address inherent bias in materials and processes. In our view, given the high failure rates of particular groups, the processes need independent, specialist review and analysis.
- 4.18. We endorse the JAC appointing the Work Psychology Group to assess its processes, which has provided valuable insight into progression of various groups through different stages of selection, albeit for a limited number of exercises. Given the need to understand where and why minorities drop out during selection processes, such expert analysis is critical. We are eager for the results of the ‘deep dive’ into the reasons for the disproportionate failure of minority groups in JAC exercises. We urge that this be undertaken in an open, independent and speedy manner.

¹⁶⁷ For example, Lesley Smith, who was appointed to the Upper Tribunal, and Rowena Collins Rice, who was appointed as a Deputy High Court Judge.

¹⁶⁸ ‘Judicial Appointments Commission (JAC) Diversity Update April 2019’, 2019, available online at <https://www.judicialappointments.gov.uk/sites/default/files/sync/news-documents/jac-diversity-update-april-2019.pdf>

Apply the “equal merit provision” at sift and shortlist stages.

4.19. Over the last two years, the equal merit provision (EMP) has failed to live up to its promise as a diversity-enhancing tool; it was used three times in 2017-2018 (and in each case on the basis of gender)¹⁶⁹ and not once in 2018-2019.¹⁷⁰ Our 2017 report recommended extending the adoption of the EMP to earlier stages of the selection process.

4.20. We are pleased that in June 2019 the JAC extended the use of the EMP to shortlisting as well as final decision-making stages of all appointment processes, which greatly expands its potential to increase diversity.¹⁷¹

Introduce evidence-based training for selectors and judges.

4.21. We are pleased by the JAC’s focus on the training of panel members. We understand that there is both general and exercise-specific training of lay and judicial panel members that is mandatory and delivered in person by an experienced trainer. The training includes information on the selection process or the exercise, and on fair selection principles and approaches (including about unconscious bias, transferable evidence, consistency in scoring and interview skills). The JAC has recently introduced a new appraisal process where the performance of lay members is formally reviewed every 18 months; which supplements ‘peer review’ after each exercise led by Quality Assurance Managers.

4.22. We welcome this monitoring and evaluation, though urge that it be extended to gauging whether these processes may be increasing delivery of more diverse appointments.

¹⁶⁹ Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2017 to 31 March 2018’, June 2018, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2017-18.pdf

¹⁷⁰ Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment: Official Statistics, 1 April 2018 to 31 March 2019’, June 2019, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/official_statistics/statistics-bulletin-jac-2018-19.pdf

¹⁷¹ ‘JAC extends the use of equal merit provision to shortlisting to support diversity’, Judicial Appointments Commission, available online at <https://www.judicialappointments.gov.uk/news/jac-extends-use-equal-merit-provision-shortlisting-support-diversity>

Data collection

- 4.23. We recommended improved data collection and transparency and are pleased that the JAC is now collecting and publishing social mobility statistics. As noted above, the JAC has also introduced enhanced information on the professional background of appointees. While these are positive developments, there is still much more data that is required to develop a full understanding of those people applying and being appointed to judicial office, including the need to capture more intersectional data (See Annex). We have welcomed the introduction by the JAC to the Ministry of Justice's Statistics team, currently reviewing the approach to appointment statistics.

Increasing the desirability of judicial roles

- 4.24. We also made recommendations aimed at working conditions of judges, with a view to increasing the attractiveness of the job; a concern that was reinforced with the evidence gathering for this Update. We are pleased that concerns around judicial pay and pensions have, at least in part, been addressed.
- 4.25. We recommended making flexible working the default position for all appointments. The observations in our report were reflected in that of the Senior Salaries Review Body (SSRB) in October 2018.¹⁷² This confirmed that a perceived lack of flexibility in judicial work discourages applications, particularly from women, with more than half of the women interviewed raising the concern (compared with around a quarter of the men).¹⁷³ Respondents noted that there were few part-time salaried judicial positions, and were concerned also about being allocated to a location that was inconvenient for their domestic responsibilities.¹⁷⁴
- 4.26. The SSRB reported mixed responses about High Court judges having to go on Circuit, noting 'several respondents considering an application to the High

¹⁷² Review Body on Senior Salaries, *Supplement to the Fortieth Annual Report on Senior Salaries 2018, Report No. 90: Major Review of the Judicial Salary Structure*, October 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751903/Supp_to_the_SSRB_Fortieth_Annual_Report_2018_Major_Review_of_the_Judicial_Salary_Structure.pdf

¹⁷³ Ibid, pp.60-61

¹⁷⁴ Ibid

Court were confident that their personal circumstances would be recognised and that they would be able to secure their preferred deployment on circuit (or no deployment) if or when appointed to the High Court. Others were rather unsure, and some questioned whether there was any structure in place to guarantee or safeguard any deployment arrangement they would make upon appointment.’¹⁷⁵ The SSRB urged the judicial leadership to do more both to communicate what has been done to accommodate flexible working and to consider developing these opportunities.¹⁷⁶

4.27. In response, the Government committed to introduce a revised part-time working policy for salaried judges and to continue to work closely with the judiciary and relevant agencies to raise awareness of flexible working opportunities.¹⁷⁷ The Government noted that while salaried part-time working is available to all salaried judicial office holders (with a few exceptions due to statutory provisions), it has not been widely taken up, particularly in the courts.¹⁷⁸

4.28. We are delighted that the JAC has supported flexible working, unless there are good and specific reasons that it is not practicable.¹⁷⁹ Similarly the judiciary notes that “salaried positions... are increasingly open to part-time and flexible working as well.”¹⁸⁰ To develop confidence in this possibility it is important that more judges are appointed on a flexible basis. There has been modest progress towards this, with our independent analysis finding that nine Circuit judges – most of them women – were appointed on a salaried part-time working basis over 2017-2019. We recommend that all advertisements make clear that flexible working is possible.

¹⁷⁵ Ibid

¹⁷⁶ The SSRB report found a gap between the perceived availability of flexible working by potential applicants and its feasibility in reality.

¹⁷⁷ Ministry of Justice, *Government Response to Report No. 90 by the Senior Salaries Review Body: Major Review of the Judicial Salary Structure*, June 2019, p.4 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806480/government-response-ssrb-june-2019.PDF

¹⁷⁸ Ibid, p.17

¹⁷⁹ ‘Judicial Appointments Commission (JAC) Diversity Update April 2019’, 2019, available online at <https://www.judicialappointments.gov.uk/sites/default/files/sync/news-documents/jac-diversity-update-april-2019.pdf>

¹⁸⁰ ‘Becoming a judge’, Courts and Tribunal Judiciary, available online at <https://www.judiciary.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/>

4.29. On whether High Court judges are required to go on Circuit, the Judicial Office noted there are times when judges need to sit outside London and stay away for the night. We were told that “in cases where this causes personal difficulties, arrangements can be made with the appropriate Head of Division subject to business needs.”¹⁸¹ Obviously, the qualification of ‘business needs’ will offer little comfort to those seeking to balance a judicial career and with family responsibilities.

¹⁸¹ Email from Michael Olley, Head of HR Policy and Diversity for the Judiciary; 14 November 2019

V. OUTSTANDING KEY ISSUES AND CONCERNS

Culture and leadership

- 5.1. In the original report, the Working Party noted the importance of leadership and culture in increasing diversity.¹⁸² Upon reflection, we think that this important factor requires greater emphasis and elaboration.
- 5.2. All cross-sectoral research shows that leadership at both the most senior levels and the ‘upper middle’ levels (i.e. those making the individual decisions about who gets ahead and how), is foundational in framing and changing the organisational culture needed to drive diversity. And this cultural change needs to be embedded. It is critical that those in leadership positions prioritise and commit to the cultural change necessary to transform the demographics of our judiciary in a meaningful and sustainable way. At present, judicial diversity is still seen as tangential to quality in judging rather than fundamental to it. This must change if there is to be substantial and sustained improvement in the diversity of our judiciary. As noted in our earlier report, the Working Party believes that diversity is integral, not contradictory or secondary, to merit.¹⁸³
- 5.3. At the senior levels of the judiciary there needs, first, to be genuine recognition and understanding of why a lack of diversity is problematic, the scale of the problem and of its severity. The Working Party is deeply concerned by efforts to explain away homogeneity, or to suggest that ‘things have never been better’ and by the continued but misplaced insistence that significant change is just around the corner. Peter Taylor made the same assurances as Lord Chief Justice in 1992, when giving the Dimpleby Lecture: “The present imbalance between male and female, white and black, in the judiciary is obvious... I have no doubt that the balance will be redressed in the next few years... Within 5 years I will expect to see a substantial number of appointments from both these groups. This is not just a pious hope, it will be monitored.” Almost 30 years later, while

¹⁸² See para 2.16; para 3.37(c)

¹⁸³ JUSTICE, *Increasing Judicial Diversity* (2017), available online at <https://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>, p.10. See also C. Thomas, *Judicial Diversity in the UK and Other Jurisdictions, A Review of Research, Policies and Practices*, The Commission for Judicial Appointments, November 2005, p.55, available online at [https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial diversity in the uk and other jurisdictions.pdf](https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial%20diversity%20in%20the%20uk%20and%20other%20jurisdictions.pdf); J Resnick, “On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges” *Southern California Law Review* 1987 (1988) 61.

it is true that there are more women and BAME people on the Bench now than then, the pace of change has been unacceptably slow and the overall numbers of women, BAME and other ‘non-traditional’ judges remain far too low.

5.4. There therefore needs to be a public acknowledgement of the scale of the problem and its impact on the quality of justice. There needs to be a real commitment to change, backed up by action and practical steps rather than words. And the steps taken need to be monitored continuously in order to ensure and maintain progress. Unwritten rules and hidden barriers, such as the lack of access to fractional or flexible working, or a lack of clarity as regards the location of advertised vacant appointments, must be removed. A meaningful judicial career path needs to be established, allowing judges in both lower courts and tribunals to prove themselves worthy of senior appointment. To the extent that the senior judiciary is regarded as a ‘second career’, greater attention must be paid to the pipeline and to ensuring that recruitment to the key feeder roles – especially Recorder and Deputy High Court Judge – facilitates diversity rather than maintains the status quo. This commitment to change needs to include a much greater willingness to make diverse appointments from non-traditional pools, including appointing Court of Appeal and Supreme Court judges from outside the serving judiciary. In this context, we are pleased by the recent appointment of an academic barrister directly into the Supreme Court, though we also note that the making of appointments from non-traditional pools was said to be likely to increase diversity at the senior levels of the judiciary. We regret that so far that has not occurred.¹⁸⁴

5.5. This all requires the judiciary urgently to adopt diversity as a pillar of its culture, with every judge understanding and acknowledging its importance, and making efforts to increase inclusion. Embedding diversity into the culture means championing a vision which recognises that in order to fairly administer and deliver justice, the bench must better reflect the population it serves. Judges need greater support to understand and challenge their own biases, not only in appointments processes but also in the execution of their judicial roles. Our judicial leaders have a critical role in setting the cultural tone and in accepting their organisational and personal responsibility for driving diversity.

‘Merit’?

¹⁸⁴ ‘Professor Andrew Burrows appointed to the Supreme Court’, available online at <https://www.law.ox.ac.uk/news/2019-07-24-professor-andrew-burrows-appointed-supreme-court>

Promoting diversity and appointing on the basis of merit are mutually reinforcing because the wider the pool the greater the availability of talent, the greater the competition for places and the greater the quality of appointments.

Lord Burnett of Maldon, Lord Chief Justice of England and Wales¹⁸⁵

- 5.6. As the Working Party took evidence for this Update, we kept returning to the fundamental challenges of how merit is defined and how it is assessed.
- 5.7. The JAC has a statutory duty to appoint judges on ‘merit’.¹⁸⁶ Like the judiciary and the JAC, the Working Party is committed to seeing the best possible candidates appointed to the judiciary and promoted within it. However, without an agreed description of what ‘merit’ looks like, we are concerned that it is too often used as unconscious proxy for replicating the characteristics, qualities and experience of the current cohort of judges.
- 5.8. The difficulties presented by defining ‘merit’ appear to be recognised by the JAC, and we welcome their recent efforts to better understand and define merit.¹⁸⁷ We are encouraged by the commitment of the JAC to conduct a ‘deep dive’ analysis on the progression of target groups through the selection exercises, though it is important that this be independently verified, and the results are made public regardless of how uncomfortable the conclusions might be.

Tackling affinity bias

- 5.9. As explored in our 2017 Report, behavioural science reveals that we are all inclined towards and feel comfortable with those who bear similarity to us. It is natural that judges involved in selection exercises bring an affinity bias to the task of assessing merit.¹⁸⁸ As Lady Hale has said ‘it would not be impossible to

¹⁸⁵ *A changing judiciary in a modern age*, 11 February 2019, p.1, available online at <https://www.judiciary.uk/wp-content/uploads/2019/02/mt-treasurers-lecture-final-for-publishing.pdf>

¹⁸⁶ Constitutional Reform Act 2005, section 63.

¹⁸⁷ For example, the use of competency frameworks, see para 5.15 below.

¹⁸⁸ S. Johnson, D. Heckman & E. Chan, *If There’s Only One Woman in Your Candidate Pool, There’s Statistically No Chance She’ll Be Hired*, Harvard Business Review, April 2016, available online at <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired>, report of a study by the University of Colorado: “It’s well known that people

speculate that it is always much easier to perceive merit in people who are like you than it is to discern the merit of those who are a bit different'.¹⁸⁹

- 5.10. We are pleased that the training that judicial and lay panel members receive includes unconscious bias training. The JAC should ensure that such training accords with current best practice methods and that sufficient time in the training programme is provided for this.

Demonstrating ability

- 5.11. The JAC approaches to selection have changed over time. Whereas there used to be a focus on testing candidates' knowledge of the law, a broader range of competence is now assessed.¹⁹⁰ This is welcome, though we note the WPG conclusions that the shortlisting format continues to benefit those with certain legal experience¹⁹¹ and that there is a strong focus on assessing some competencies over others.¹⁹²
- 5.12. Significantly, the WPG report noted a particular challenge in the design of selection materials of identifying and selecting individuals who can do the job in the future, that is candidates who have potential, rather than selecting only those who have already demonstrated that they can do the job, that is based on experience.
- 5.13. The Working Party has been assured that the appointments processes in no way a gauge for 'advocacy' experience. However, we have received overwhelming anecdotal evidence that advocacy plays a part in selection exercises. This comes not only from candidates – both solicitors and barristers – but also from those who have had a role in the evaluation of competency-

have a bias in favor of preserving the status quo; change is uncomfortable. So because 95% of CEOs are white men, the status quo bias can lead board members to unconsciously prefer to hire more white men for leadership roles.”

¹⁸⁹ Lady Hale ‘disappointed’ at lack of female judge, October 2013, available online at <https://www.bbc.co.uk/news/uk-24370177>

¹⁹⁰ Working Psychology Group, ‘Review of JAC Shortlisting Tools – Summary Report & Conclusions’, July 2018, para 2.11, available online at https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/research-shortlisting-tools-report-2018.pdf.

¹⁹¹ Ibid, para 2.13.1

¹⁹² Ibid, para 2.13.2

based exercises. Solicitor candidates report that exercises are, in their view, framed in such a way that an experienced advocate would be more comfortable and more capable in executing the task. There was a time when JAC competitions involved role plays involving courtroom scenarios. We are pleased that there has been a move away from such exercises. However, scenarios which are ‘court-like’ continue to place barrister candidates at a significant advantage over solicitor candidates, especially those with a non-contentious practice.

5.14. While we await the results of the ‘deep dive’ in respect of professional background, solicitor candidates plainly fail in much higher numbers than barrister candidates and this cannot be a function of intelligence, judgement or abilities.

5.15. The fundamental challenge for the appointment of solicitor candidates to the senior judiciary is that the JAC exercises are a competition. It is not enough for solicitor candidates to meet competencies, to be appointed they must be assessed as outperforming barristers applying for the same roles. From time to time, the JAC publishes competency matrices for exercises. These provide would-be candidates with an indication of the kind of experience, outside of advocacy, that might satisfy various competencies. But even if solicitors satisfy the competencies, they must still give stronger examples than barristers to progress. It is unclear whether a solicitor’s experience, for example in a complicated transaction, would ever be preferred to the experience of a barrister appearing in the Supreme Court or Court of Appeal. It is in part because of this we believe that solicitors are appointed in such small numbers to the Circuit and High Court benches.

5.16. It is important that the assessment of ‘merit’ is framed with less particularity, allowing for candidates with a broader range of skills and experiences to demonstrate their abilities. We recommend that the JAC invest in a longitudinal study of these appointments, to find common denominators which might suggest what sort of solicitors might be likely to be appointed (e.g. from what practice areas, from which sector, with what sitting experience etc.). This would provide the JAC with insights into the paths of solicitors, and also success stories to encourage applications from solicitors.

Recruiting for potential

- 5.17. In 2017 we recommended recruiting for potential rather than for prior experience, particularly for fee paid appointments. We welcome the recommendations in the Work Psychology Group's report, proposing expanded use of Situation Judgement Testing to this end. We are pleased that the JAC is taking forward the WPG recommendations
- 5.18. The WPG report observes that current processes assess knowledge and the ability of a candidate to meet competencies based on experience. Situational judgement testing assesses skills and operates to reveal the strengths of candidates, focusing on motivations, qualities and potential. It recommends adopting a Situational Judgement Test as an element of the qualifying test to address this, allowing judgement to be demonstrated through different courses of action, rather than making a final decision about the single best thing to do.¹⁹³
- 5.19. In its potential to broaden the scope of candidates able to satisfy the competencies, the Working Party endorses this recommendation with one caveat. A true situational judgement test involves the presentation of a hypothetical scenario to the candidate, who is then asked 'what would you do...?'. This tests judicial instinct which, arguably, is as likely to be found in a candidate having no court room experience as it is in an advocate.
- 5.20. However, currently, the appointments processes also include a second kind of situational judgment question, which begins with 'tell us about a time when you...'. In our view this type of question is much more likely to skew the decision in favour of the candidate whose background and experience is similar to that of panel members. While the non-barrister candidate may be able to come up with an example, it is unlikely to be assessed as being better than the advocate's example. These questions are a proxy for experience questions.
- 5.21. If the JAC and judiciary are committed to recruiting for potential rather than prior experience it is important that there is training made available for judges who may not have spent much time in court, for example transactional solicitors. This will allow them to 'catch-up' on procedural and other aspects of judging that they will not have come across in their practice.¹⁹⁴

¹⁹³ Ibid, para 2.22

¹⁹⁴ As far as solicitors are considered, it is noticeable from the data reviewed by JUSTICE for this report, and from an examination of the biographies of recently appointed DHCJs, that solicitors who were successfully appointed are likely to have had previous fee-paid experience. For some roles, it emerges from the figures that to be appointed, solicitors would have served in more judicial roles than

VI. CONCLUSION

We welcome the changes that the JAC have made since the publication of our original report and the adoption of some of our more minor recommendations. However, despite these changes, the senior judiciary remains predominantly made up of white, male, able bodied and privately educated barristers. Whilst there has been some improvement in respect of gender, it is fragile and there has been negligible improvement in respect of other underrepresented groups. The picture is likely to be worse for individuals that belong to more than one of these underrepresented groups and further data collection and research on intersectionality is required.

As we enter the 2020s we are extremely concerned that the legitimacy of the judiciary is imperilled by its homogeneity. Representing one of the three pillars of our democracy, they adjudicate on matters of the gravest constitutional significance. They can take away people's liberty, their children, their homes and their rights. That this power is currently held by such an unrepresentative cohort of judges – however meritorious – is a matter for acute public concern.

The current approach to judicial diversity is clearly not working. As we have seen over the past two years, further programmes and initiatives within the current structures and framework are only likely to produce marginal improvements in diversity; large scale structural and cultural changes are therefore required to affect any meaningful improvement in judicial diversity. We believe that cultural change led by the judicial leadership is urgently required to embed diversity into judicial culture. Alongside this a system of proper accountability is required to ensure that the commitment to change is backed up by practical steps and, importantly, results. We therefore continue to call for the introduction of targets “with teeth” and the creation of a permanent “Senior Selection Committee” dedicated to appointments to the Court of Appeal, Heads of Division and UK Supreme Court, as set out in our original report.

barrister candidates. This highlights that there is currently no significant thinking about recruitment for potential, at least for solicitors.

VII. FURTHER RECOMMENDATIONS

	Issue	Recommendation
	Low success rates of solicitors and BAME candidates	<p>a) Better feedback should be provided for unsuccessful candidates.</p> <p>For failure to progress through the qualifying test, we would suggest:</p> <ul style="list-style-type: none"> i. Showing candidates their marked qualifying test rather than simply giving them access to the more generic Feedback Report; ii. Telling candidates their actual score; or iii. Showing candidates a model answer for that particular qualifying test rather than just the generic Feedback Report. <p>For failure to progress beyond a paper sift, we would suggest:</p> <ul style="list-style-type: none"> i. Showing candidates not only the examples they gave that were considered not to satisfy the competencies, but say why; and ii. Giving anonymised examples of evidence from successful applicants in that competition that were considered to satisfy the competencies. <p>We also propose providing anonymised examples of non-advocacy examples that have been accepted as strong evidence of the competencies in the past, as well as publishing anonymised answers from solicitors who have been successful in particular exercises.</p> <p>b) The JAC should consider introducing a passporting scheme. This would allow candidates who had 'passed' an early stage in the selection process for a competition to bypass that same stage if they entered the same competition within a reasonable period afterwards.</p>

		c) The JAC should conduct an in-depth expert review of their appointment processes, looking beyond ‘best practice’ to focussing on the reasons for differential attainment by differential groups.
		d) To improve panel composition and training: <ul style="list-style-type: none"> i. The Judicial Office should seek to ensure diversity of judicial panel members, as well as those that assist with drafting materials and the sift. ii. The JAC should consider increasing numbers of women, BAME and solicitor lay panel members, with a view to balancing out the likely lack of diversity in judicial panel members.
		e) The judiciary and professional bodies should be actively engaged in talent spotting of suitable women, solicitors and BAME lawyers, providing them with specific guidance and mentoring on building the requisite experience for an application.
		f) The JAC and senior judiciary should stop using the ‘working age population’ as a contextual comparator and opt for the more suitable comparator of the pool of legal professionals.
	BAME	a) Efforts need to be made to recruit talented BAME jurists to the High Court and the Court of Appeal from outside the sitting judiciary.
	Low application rates from solicitors	a) More needs to be done to highlight senior appointments of solicitors to the High Court and Circuit bench from 2017–2019.
		b) The reasons why solicitors are not succeeding in the exercises needs to be thoroughly investigated, as failure rates are likely to deter potential solicitor candidates.
		c) The judiciary and relevant agencies (for example, the Solicitor Judges’ Division of The Law Society) should raise awareness of the possibility

		of a judicial path for solicitors – within firms and within individuals themselves.
		d) The JAC and SRA should be asked to conduct a joint study/survey to investigate solicitors' perceptions about the judicial appointments system, including the likelihood of considering a judicial career, to identify barriers and incentives to considering a judicial career.
		e) There also needs to be a detailed examination into why success rates for solicitors plummet the higher the level of appointment.
	Insufficient application rates from women	a) All advertisements should make clear that flexible working is possible.
		b) High Court advertisements should make clear that judges appointed will not be required to go on circuit.
		c) More needs to be done to highlight the success rates of senior women applicants and steady increase in the overall proportion of women in the judiciary
		d) Court of Appeal and Supreme Court appointments should be made from outside the serving judiciary.
		e) The reasons why women are not applying in line with their proportion of the eligible pool needs to be investigated.
5.	Socio-economic background	a) The application process, which appears to prejudice those from lower socio-economic backgrounds, should be investigated further.
6.	Disability	a) There needs to be more concerted judicial training on disability and reasonable accommodation for disabled practitioners.
		b) The particular challenges for disabled students in accessing the legal professions need to be

		<p>examined and students' progression within the profession needs to be monitored.</p> <p>c) There needs to be proper collection and publication of disability statistics of sitting judges.</p>
7.	Selection / Appointments processes	<p>a) There needs to be further standardization of scoring and more specific assessor training, for all panel members.</p> <p>b) The CPS, in-house lawyers and academics should be explored as diverse pools for judicial appointments.</p> <p>c) We agree with the Work Psychology Group's report that use of Situation Judgement Testing needs to be expanded.</p>
8.	Lack of judicial career path	<p>a) Comprehensive data needs to be collected about the professional progression of judges over time: career paths of current judges, and what roles they took prior to appointment to senior courts. We appreciate this may require a longitudinal outlook that would examine career progression over multiple points in time, and therefore may not provide findings immediately. However, such examination would provide invaluable insights on judicial career tracks and their possible interrelations with judicial diversity 'trends'.</p> <p>b) There needs to be better administration of cross-deployment – for example, the number of sitting days when cross-deployed to court should count towards tribunal sitting days.</p> <p>c) Tribunal and courts judges should be allowed to sit in a court or tribunal one level higher than their ordinary role.</p>
9.	Data-collection and transparency	<p>a) There needs to be collection and publication of intersectionality of diversity characteristics to provide a comprehensive picture of diversity, and improve the identification of barriers to representation and progression.</p>

		b) The judiciary's website should clearly present names and biographies of sitting judges organised by jurisdiction. ¹⁹⁵
		c) The JAC and the judiciary should provide a joint picture of the selection process and outcomes from exercise to appointment, when not barred by confidentiality concerns.
		d) The judiciary should consider adding (or bringing back) information about religious group and belief for sitting judges (assuming it is already collected as part of the diversity monitoring process). This may assist with more accurate ethnicity data collection.
		e) Eligible pool data should be available for all legal exercises.
		f) Social mobility data should be provided for sitting judges.
		g) Diversity data on the composition of appointing and selection panels including ad-hoc panels (including professional background) needs to be published.
		h) Efforts need to be made to ensure that those responding to demographic surveys fully understand the nature of the data sought to be captured.

¹⁹⁵ While the names of High Court and Circuit Judges are displayed on the judiciary's website, biographies are only available for Lord and Lady Justices of Appeal and Supreme Court Justices. A few select High Court judges have biographies but not all of them.

VIII. ACKNOWLEDGEMENTS

To better understand the statistics, in November 2018 JUSTICE recruited Dr Yael Levy Ariel to analyze the official data and collect additional data on senior appointments since our last report. This Update is based, in part, on her work and data analyses which examine a broad range of diversity characteristics, including the possible intersections between them, allowing a more comprehensive understanding of those appointed to senior judicial roles since 2017. I am very grateful to Yael for her work. I would also like to thank JUSTICE Lawyer Stephanie Needleman and Senior Legal Fellow Natalie O’Connell for their assistance in preparing this report.

This Update has been overseen by our original Working Party – minus its chair Nathalie Lieven QC, who now sits on the High Court. My huge thanks to them and to everyone who has generously shared their insights and experience of the processes with us. Our thanks also to the judiciary, the Judicial Office and the Judicial Appointments Commission for their willingness to engage in the elaboration of this report. It is important to note that none of these key actors believes that the status quo is acceptable; our shared challenge is what should be done about it.

We took evidence from a wide range of stakeholders, institutional and individuals. As many of those individuals from whom we took evidence asked to remain anonymous, we have decided to only name organisations consulted. Our thanks to:

The Bar Council

Bar Standards Board

Black Solicitors Network

The Bridge Group

Chartered Institute of Legal Executives (CILEx)

Disability Research on Independent Living & Learning (DRILL)

Her Majesty’s Courts and Tribunals Service (HMCTS)

Judicial Diversity Initiative

Lawyers with Disabilities Division – The Law Society

The Law Society of England and Wales

Norton Rose LLP

Queen Mary University of London

Solicitors Regulation Authority

University of Birmingham

University of Cardiff

University of Kent

The University of Sheffield

Andrea Coomber

Andrea Coomber, 29 January 2020



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