

2 Developments

- 2.1** The judicial appointments process has been subject to scrutiny and recommendations for change from several sources over the last year. The incorporation of the European Convention on Human Rights into UK law from 2 October 2000 has also had an impact on the consideration of the procedures for appointment. This chapter summarises the main areas where developments have affected the appointments system and describes the changes that have been made or are planned to be made.

The Peach Report

- 2.2** As mentioned in last year's Report, the Lord Chancellor asked Sir Leonard Peach, a former Commissioner for Public Appointments, to conduct an independent scrutiny into the assessment and selection systems for all judicial and Queen's Counsel appointments. Sir Leonard's terms of reference were:

To provide a report to the Lord Chancellor on the operation of the appointments procedures in relation to all judicial appointments and Queen's Counsel and in particular to advise on:

- The appropriateness and effectiveness of a) the criteria and b) the procedures for selecting the best candidates;
- The extent to which candidates are assessed objectively against the criteria for appointment;
- The existence of safeguards in the procedures against discrimination on the grounds of race or gender.

- 2.3** Sir Leonard was also asked to make recommendations, as appropriate, to the Lord Chancellor for further developments in the judicial appointments and Queen's Counsel selection procedures. The scrutiny covered all professional judicial appointments and concentrated on how the appointments are made rather than by whom.

- 2.4** Sir Leonard was well placed to conduct the scrutiny. He has extensive experience in the personnel and selection field. He was given open access to all parts of the process, including the individual personal records of applicants. He observed sifts and interviews. He also consulted widely among

the judiciary, the legal profession, officials in the Lord Chancellor's Department and equal opportunities groups. Sir Leonard submitted his report to the Lord Chancellor on 3 December 1999. He said his impression of the work of the Judicial Group was one of thoroughness, competence and professionalism and he found that the procedures and their execution were as good as any he had seen in the public sector. A summary of Sir Leonard's recommendations is at Annex C.

- 2.5** The Lord Chancellor has welcomed Sir Leonard's report and recommendations and he has put in place a programme to carry these forward. A new team has been established within the Judicial Group to implement the recommendations. The Lord Chancellor promised to act quickly on the central recommendation of appointing a Judicial Appointments Commissioner and a number of Deputy Commissioners. The Commission, as suggested by Sir Leonard, will not advise on the appointments to be made but will pursue an independent oversight of the system. The Commission will publish an annual report which is expected to be published with this Report.
- 2.6** The Lord Chancellor intends to take forward together the recommendations that a pilot one-day assessment centre should be produced and that psychometric and competences tests should be commissioned. He appreciates that implementing these recommendations will require considerable effort and that it is unlikely that currently available assessment packages will be suitable. The assessment centre, as envisaged by the Lord Chancellor, will have to be tailor-made for judicial appointments and therefore there will be a considerable amount of work over the next year or so to set up such a pilot.
- 2.7** The application and consultation forms have been amended as suggested and together with the revised criteria for appointment (see paragraph 2.19 and Annex A), have been used in competitions since April 2000. As mentioned in Chapter 1 (paragraphs 1.35 and 1.36) Sir Leonard placed importance on appraisal and self appraisal schemes which are to be taken forward. The other recommendations, which include improvements to succession planning for High Court Judges and above, and improved reserve listing to meet requirements more quickly, particularly for tribunals, have been or will be implemented in the coming months and details will be given in the next Annual Report. Details of the Lord Chancellor's action on the recommendations for Queen's Counsel appointments are given in Chapter 4. Sir Leonard's full report – 'An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales' – is available on our website at www.open.gov.uk/lcd – see 'Judges and QCs'.
- 2.8** Following Sir Leonard's report and in the light of his recommendation for a Commissioner some people have raised again the question of whether there should be an independent commission for judicial appointments with wider responsibilities than those proposed for the Commissioner. The Lord Chancellor has said that he retains an open mind as to whether further reforms, such as an independent commission, may be shown to be required in the future, but that claims for more

radical change might be premature since the appointments system has recently been investigated and endorsed, subject to changes that are to be implemented.

The Joint Working Party on Equal Opportunities in Judicial Appointments and Silk

- 2.9** The Joint Working Party was established, following suggestions from members of the Bar, in the summer of 1997. It consists of representatives of The Bar Council, The Law Society, The African, Caribbean and Asian Lawyers' Group, The Society of Asian Lawyers, The Society of Black Lawyers, The Association of Women Barristers and The Association of Women Solicitors. The Lord Chancellor agreed to Judicial Group officials providing the secretariat.
- 2.10** The aims of the Working Party when it was set up were to consider and propose action to increase the number of applications for judicial appointment and silk from women and black and Asian lawyers with the appropriate seniority and relevant experience; to consider and propose possible changes to the judicial appointments and silk procedures for further consideration by the Lord Chancellor; and (where appropriate) to advise and assist in the implementation of action.
- 2.11** The Working Party's report was submitted to the Lord Chancellor in September 1999. He thanked the members for their work and expressed the hope that the Working Party would be able to continue to work with his officials on the further development of judicial appointments and silk procedures. A summary of the Working Party's recommendations is at Annex D. The Lord Chancellor considered those recommendations alongside those of Sir Leonard Peach and responded in full to the Working Party in March.
- 2.12** Of the 42 recommendations, the Lord Chancellor rejected only three, 3, 16 and 21. Number 3 was rejected because the Lord Chancellor regards part-time service as a normal pre-requisite for full-time service (see paragraph 1.7). He believes that as the qualities of a good judge can be different from those of a good advocate or solicitor a period of part-time service before full-time appointment is beneficial for the individual and the public. Having the question about income on the application form serves as a rough guide to the nature, extent and activity of an applicant's practice in the context of other information given in the form about the work the applicant undertakes. It does not of itself affect the outcome of an application but does have the advantage of being measurable and for that reason the Lord Chancellor did not want to remove the question from the form (recommendation 16). As appointments to most judicial posts are already made following a time-limited competition the Lord Chancellor does not see how the process could be shortened appreciably (recommendation 21).
- 2.13** Recommendations 18, 22 to 25, 27 to 31, 36 and 41 are all being taken forward with the implementation of the Peach report. The remaining recommendations have either already been implemented or require no further action (6 to 11, 17, 32 and 40); accepted, at least in principle

(19 and 34); accepted in part (35, 37 to 39 and 42); or are under further consideration (1, 2, 4, 5, 12 to 15, 20, 26 and 33).

Part-time judiciary and the European Convention on Human Rights

2.14 In November 1999 the High Court of Justiciary in Scotland found in the case of Starrs v. Procurator Fiscal, Linlithgow that the Lord Advocate, as a member of the Scottish Executive, had acted in a way which was incompatible with the rights of the accused to a fair trial by an independent and impartial tribunal under Article 6 of the European Convention on Human Rights (ECHR). The essence of the judgment was that Scottish temporary sheriffs were insufficiently independent of the Executive for the purposes of Article 6 of the ECHR because they had insufficient security of tenure. Although the judgment did not imply that any part-time judge had acted improperly, it found that it was important for the arrangements relating to judicial terms and conditions not only to be fair but also to be seen to be so.

2.15 Following that judgment the Lord Chancellor undertook to review the terms of service of part-time judicial office holders in England and Wales. The principal results of that review which affected some 10,000 appointments made by the Lord Chancellor were announced on 12 April 2000. For all part-time appointments in the ordinary courts in England and Wales – that is deputy High Court Judges, deputy Circuit Judges, Recorders, Deputy District Judges, Deputy Masters and Registrars of the Supreme Court, Deputy District Judges (Magistrates’ Courts) (formerly Acting Stipendiary Magistrates) and retired Lords of Appeal in Ordinary, Lords Justices of Appeal and High Court Judges – and the part-time judiciary who sit on tribunals or as adjudicators which fall within the scope of Article 6 and who have some form of time limited appointment, the following arrangements now generally apply:

- part-time appointments will be for a period of not less than 5 years, subject to the relevant upper age limit;
- where appointments are renewable this will normally be done automatically, except on limited and specified grounds;
- removal from office will likewise be only on limited and specific grounds;
- wherever it is administratively possible, the offer of a minimum number of sitting days will be guaranteed;
- subject to statutory provision, the specified grounds for non-renewal will generally be:
 - a. misbehaviour
 - b. incapacity

- c. persistent failure to comply with sitting requirements (without good reason)
- d. failure to comply with training requirements
- e. sustained failure to observe the standards reasonably expected from a holder of such office
- f. part of a reduction in numbers because of changes in operational requirements
- g. part of a structural change to enable recruitment of new appointees.

2.16 The grounds for removal will generally be as at a to e above and decisions not to renew or to remove on grounds a to e above will be taken by the Lord Chancellor only with the concurrence of the Lord Chief Justice and following an investigation conducted by a judge nominated by him. Decisions not to renew on grounds f and g above will be on a “first in first out” principle and the decision to use such grounds and the extent to which they will be used will be decided by the Lord Chancellor with the concurrence of the Lord Chief Justice.

2.17 When announcing these changes the Lord Chancellor said that in real terms he believed that our judges and tribunal members already enjoy significant security of tenure. The changes had been made to put beyond reasonable doubt the safeguards guaranteeing their independence.

2.18 When these changes were made the Lord Chancellor also decided that no useful purpose was served by retaining the separate offices of Assistant Recorder and Recorder. All serving Assistant Recorders have therefore been appointed, or are in the process of being appointed, as Recorders and all future appointments will be made direct to Recordership through open competition.

A review of the criteria for appointment

2.19 The core criteria for all judicial appointments were first drawn up during 1994, following consultation with the judiciary and the Court Service and public consultation.

2.20 The Joint Working Party on Equal Opportunities in Judicial Appointments and Silk recommended some changes to the criteria statements. The Joint Working Party said that to test the suitability for selection and appointment the criteria had to be measurable and bias free. Sir Leonard Peach supported that in his report. The suggestions for change were considered during a recent review of the criteria and, after consultation with the senior judiciary, the new criteria were adopted in April 2000. An example of the revised criteria with definitions is at Annex A. The example shows the criteria necessary for appointment to Circuit Judge. These can be compared with the old criteria for Circuit Judges given at Annex A in the 1998/99 Annual Report. The criteria for other judicial offices are similar. The criteria statements for all appointments now state clearly that advocacy is not an essential requirement for appointment to judicial office.

Research into the factors why women and ethnic minority practitioners do not apply for judicial appointments

- 2.21** Dr. Kate Malleon of the London School of Economics and Dr. Fareeda Banda of the School of Oriental and African Studies were commissioned by the Lord Chancellor's Department in 1998 to undertake research into the factors which affect the decisions of barristers and solicitors, and in particular women and ethnic minority practitioners, about whether to apply for judicial appointment and silk.
- 2.22** Using statistics from the 1998/99 Annual Report, the researchers showed that women barristers and solicitors under applied as a proportion of their numbers in the pool of potential applicants for Assistant Recorder and silk appointments. For Deputy District Judges women solicitors were under represented in relation to the potential applicants but the proportion of women barrister applicants was in line with the proportion with the normal level of seniority to apply. Women had a higher success rate than men for Deputy District Judge and silk appointments and a similar success rate for Assistant Recordship. The figures for ethnic minority applicants showed that barristers over applied in proportion to their numbers for silk and Assistant Recordship but under applied for Deputy District Judge posts. Solicitors over applied in relation to their numbers for Assistant Recorder and District Judge appointments. For both barristers and solicitors, in relation to their numbers, ethnic minority applicants were more successful in achieving silk than those of a non-ethnic minority origin but less successful in relation to Assistant Recorder and Deputy District Judge appointments.
- 2.23** To try to determine why these different application rates occur the researchers sent 320 questionnaires to barristers and solicitors who had been qualified for 15-22 years. The samples were drawn from the following groups: ethnic minority female barristers; ethnic minority male barristers; white female barristers; white male barristers; white female solicitors; and white male solicitors. The researchers were unable to survey ethnic minority solicitors as The Law Society was unable to provide a list due to their concerns about data protection. 136 questionnaires were returned and 52 interviews were held. Respondents were asked about their reasons for applying, or not, for judicial office and silk and what could be done to encourage applications from candidates in their ethnic and gender group (white, male barristers were asked what could be done to encourage applications from well-qualified candidates). Of the 75 respondents to the survey who had applied for judicial office 68% were successful or were awaiting the outcome of their applications.
- 2.24** A wide range of factors was described: many of those asked had no interest in becoming judges; others said their practices did not allow time for judicial work (the first steps in judicial work are usually part-time appointments) and others felt they had insufficient litigation experience. The most common reason for not applying for silk was that respondents did not feel their practices

justified QC status. Women barristers and solicitors also cited family commitments as reasons for not applying. Some responses showed a lack of knowledge or misconceptions of how the appointments system is operated.

- 2.25** Many respondents expressed the view that the quality of judges appointed was often high and had improved in recent years. There was also widespread approval for the changes which had been introduced in recent years such as the advertising of vacancies and the production of job descriptions and selection criteria. However, several concerns were also raised. Some respondents believed that their chances of appointment depended on their chambers or firm. Especially at the Bar there were concerns about the dominance of a small group of chambers. This was linked with criticisms of the consultation process and a fear that there was a need to network and socialise in the right circles to get known.
- 2.26** Many of these comments reflect the way the Bar operates and were about the quality of the work that different chambers receive. The research relied heavily on comments made in the interviews and on the respondents' perceptions of the system, but the report did not evaluate the legitimacy of those perceptions nor analyse the extent to which they might be based on a false understanding of how the system works. The Lord Chancellor is concerned about these critical perceptions of the process but they reinforce the improvements that have already been made and the action taken to provide information about how the system works. Some of the perceptions do not appear to take into account the fact that the assessments are made against the criteria for appointment, that large numbers of judges and members of the profession are consulted and that candidates are able to nominate additional consultees who are not part of the general consultation process. For competitions to many appointments in the tribunals (of which there are many) there is no 'automatic' consultation process as there is for appointments to, for example, Recordship, so the process relies only on comments from people identified by the candidate. Neither was there any indication in these comments that candidates were aware that due account is taken in the selection process of the fact that some candidates will not receive as many comments as others. As has been mentioned earlier, candidates for judicial office are now asked to name more 'referees' on their application forms than ever before. This should increase the number of assessments received on those candidates who are less well known to the general consultees. In the 2000/2001 competition for Recordship, candidates who appear to meet the criteria but receive few comments are to be automatically invited for interview.
- 2.27** Another theme to emerge from the research is that in the view of some respondents good advocates do not necessarily make good judges. The Lord Chancellor has made it clear, and it is explicit now in the criteria for appointment, that the qualities sought in a judge are not the same as those sought in an advocate.

- 2.28** Other respondents cited family commitments and the balance with work as reasons for not applying for judicial office and suggestions were made for more family friendly policies. In contrast, some respondents cited compatibility of judicial office with family responsibilities as a reason for applying. Action has been taken to take account of career breaks by introducing, as was mentioned in last year's Report, block sittings for certain part-time appointments so that those who have taken a career break are able to 'catch up' with those who have not. Part-time sittings are arranged in consultation with the individual so as to take account of their other commitments and the first permanent part-time District Judge has been appointed under the new arrangements referred to at paragraph 1.30 above. The Lord Chancellor is to consider whether there are any other family friendly policies that are viable.
- 2.29** Some respondents believed women are more likely than men to lack confidence in their abilities and therefore need more encouragement. This was sometimes linked to the requirement that Assistant Recorders (now Recorders) usually sit in crime which was also seen as a deterrent to applications. As explained earlier (paragraph 1.31) the Lord Chancellor and his officials take every available opportunity to encourage women and ethnic minority lawyers to apply for appointment and to encourage participation in the work shadowing scheme (paragraph 1.38). In the Lord Chancellor's view, civil practitioners of high quality should have no difficulty, after training, in sitting in crime.
- 2.30** Another concern expressed by some respondents was that to seek feedback after an unsuccessful application might be detrimental to an individual's future prospects. As previously mentioned (paragraph 1.26) nothing could be further from the truth.
- 2.31** Some respondents supported the introduction of "some form of judicial appointments commission". It is not clear how many did so spontaneously, but the report says "although relatively few raised the issue ...in the questionnaires, when asked what they thought ...in interview almost all approved of the idea". The report does not discuss this proposal in detail, as it was not the subject of this research. The report does not explain how such a development would make any substantive difference to the operation of the system or the outcomes and gives no detail, apart from suggested membership of the commission, as to how a commission would work and exactly what its role would be. The Lord Chancellor has already decided to establish a Commission for Judicial Appointments as recommended by Sir Leonard Peach (paragraph 2.5) to provide ongoing, independent monitoring of the appointments process and to provide Ombudsman arrangements for disappointed candidates. The Lord Chancellor has not ruled out further reform but he prefers for the present to proceed with and evaluate the implementation of the Peach report recommendations.