



Applications by Women for Silk and Judicial Office in Northern Ireland

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School of Law
University of Ulster

A Report Commissioned by the
Commissioner for Judicial Appointments for Northern Ireland

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COMMISSIONER FOR JUDICIAL APPOINTMENTS FOR NORTHERN IRELAND

John Simpson OBE

Foreword

In the Audit Report on judicial appointments and the methods used for the award of Silk, published in 2003, there was a recommendation that research should be commissioned on the 'factors which affect the decisions of barristers and solicitors, and in particular women, on whether to apply for judicial appointments' [Paragraph 5.5.16]. A similar recommendation to research why more women were not applying for Silk was also included [Paragraph 9.10.9].

In May 2004 Dermot Feenan, from the School of Law at the University of Ulster, was commissioned to initiate this work. He has conducted a broad-ranging review including a number of first hand assessments of the experience of lawyers working in different parts of the legal system.

This is an important path breaking exercise on topics which are of considerable interest to the evolution of improved appointment and selection techniques. The recommendations made by Mr Feenan are now being made available for wider consultation and debate. The objective, as a result, should be enhanced confidence in the aspiration to appoint on merit. This should be ensured by selection procedures that are as objective as possible and free from any unintended disadvantage to eligible and competent candidates.

The recommendations made by Mr Feenan are pertinent and now fall to the relevant bodies, including the newly established Judicial Appointments Commission, for further refinement and possible implementation.

In his report Mr Feenan acknowledges the contribution of many people to the completion of this research. I also add my thanks to all of those who have taken part in this process and add a particular acknowledgement of the dedication, insight and analytical skill shown by Dermot in bringing this project to a successful conclusion.

JOHN SIMPSON

Commissioner for Judicial Appointments for Northern Ireland

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Disclaimer

Whilst this report was commissioned by the Commissioner for Judicial Appointments for Northern Ireland, and co-funded by the Commissioner for Judicial Appointments for Northern Ireland and the Northern Ireland Court Service, the views within are those of the author and do not necessarily reflect the views of the Commissioner or the Northern Ireland Court Service.

Author

Dermot Feenan is a lecturer in the School of Law, University of Ulster, where he teaches gender, sexuality and the law, medical law, and contract law. He was co-ordinator and principal author of the report to the Northern Ireland Human Rights Commission *Enhancing the Rights of Lesbian, Gay and Bisexual People in Northern Ireland* (2001).

Executive Summary

A. The Remit

- This research examines the proportion of women applying for judicial office and Silk (QC status) in Northern Ireland, and makes recommendations in order to address the under-representation of women in Silk and judicial office (Section 1.0).
- The research reports the views of a sample of barristers and solicitors, and of holders of judicial office on the reasons for the under-representation of women applying for, or in, judicial office and Silk in Northern Ireland (Section 3.0).
- These views were gathered using questionnaires and semi-structured interviews.
- The research examines the representation of women applicants with reference to the position of the Bar Council, the Law Society, the Northern Ireland Court Service, and others responsible for appointment to judicial office or Silk.

B. Key Findings

- Perceived factors explaining women's relatively fewer numbers in applications to judicial office and Silk, compared to men, include limited opportunities in certain areas of practice, lack of self-confidence, and lack of encouragement from professional bodies (Sections 6.3, 6.4, 6.8).
- The following factors were more likely to be cited by women than men as a factor for not applying for Silk (Section 6.1):
 - caring for children or other dependents
 - uncertainty about criteria
- Being a main carer for a dependent is a significant reason why women do not apply for Silk compared to men (Section 6.1).
- The following factors were more likely to be cited by women than men as a factor for not applying for judicial office (Section 6.2):
 - caring for children,
 - uncertainty about criteria,
 - practice shortfall,
 - inconvenience of times of sitting, and
 - inconvenience of travel.
- Just over 40% of female barristers, female solicitors and female holders of judicial office interviewed perceived that informal networks or socialising could adversely affect women's success in applications for judicial office and Silk (Section 6.16).
- Just over half of female barristers, female solicitors and female holders of judicial office interviewed knew of women who had left private practice for reasons associated with their gender (Section 6.15).

- Most female barristers, female solicitors and female holders of judicial office interviewed referred to gender discrimination in briefing practices between solicitors and barristers, and in passing-on of briefs between barristers. This was perceived to adversely affect women's opportunities for achieving judicial office, and, in the case of barristers, attaining Silk (Section 6.11).
- The majority of female respondents reported that they received no encouragement from their professional bodies, the Northern Ireland Court Service or the Lord Chief Justice's office to apply for either Silk (as applicable) or judicial office (Section 6.10).

C. Merit

- The Lord Chancellor, the Lord Chief Justice of Northern Ireland, the Bar Council of Northern Ireland, the Law Society of Northern Ireland and the Northern Ireland Court Service are committed to the principle of appointment on the basis of merit. The challenge is to ensure that those who are able to demonstrate that merit are given the opportunity to do so and that the concept and measurement of merit does not discriminate against women (Section 10.1.5).

D. Recommendations

- This report recommends significant changes relevant to the appointment of women to Silk and judicial office, including:

Availability of work (Section 10.1.1))

- access to work without gender discrimination

Capacity building (Section 10.1.2)

- encouragement to women to apply for Silk and judicial office
- extension of practical assistance, such as work-shadowing of judges

Information about appointments (Section 10.1.3)

- improved communication of information about appointments

Eligibility (Section 10.1.4)

- opening up of judicial office to legal academics and legal executives

Appointments process (Section 10.1.5)

- encouragement to women to apply for Silk and judicial office
- extension of practical assistance, such as work-shadowing of judges
- requiring applicants for judicial office to provide knowledge and understanding of gender issues
- testing of competency across a range of skills and abilities using a range of methods to test a candidate's suitability for judicial office in addition to or instead of interview
- introduction of Assessment Centres for applications to judicial office
- abolition of the automatic consultation procedure, replaced with a process of nominated referees
- further gender sensitivity training for holders of judicial office, assessment panels and middle management in the courts service

Judicial working practices (Section 10.1.7)

- extension of part-time judicial appointments, and also a range of other adjustments including annual hours contracts; flexible rostering; term-time working; school-time working; voluntary reduced working; secondments; and alternative fixed-work patterns

Role of the legal profession (Section 10.1.8)

- effective challenges to gender stereotyping and sexism
 - creation of a Working Party on Women in the Legal Profession
- Any reform to the appointments process in Northern Ireland should incorporate best practice in the rest of the United Kingdom. Most of the recommendations set out in this report are already being adopted in England and Wales.

1. Terms of Reference

The Commissioner for Judicial Appointments for Northern Ireland commissioned this research, the terms of reference of which were:

- (a) To examine why there is an under-representation in the number of women applying for Silk and judicial office in Northern Ireland; and
- (b) To make recommendations on how this under-representation might be addressed.

2. Background

The research arose from a finding in the Audit Report 2003 of the Commissioner for Judicial Appointments for Northern Ireland of the low representation in the number of women in judicial office,¹ and that women under-apply as a proportion of their numbers in the potential candidate pool for Silk.² The Commissioner recommended that 'research should be commissioned into the factors which affect the decisions of barristers and solicitors, and in particular, women on whether to apply for judicial appointments'³ and 'why more women are not applying for Silk.'⁴

The research was commissioned in April 2004 by the Commissioner for Judicial Appointments for Northern Ireland, and co-funded between the Commissioner and the Northern Ireland Court Service.

The report may be of particular interest to the Northern Ireland Judicial Appointments Commission which will be statutorily required to make recommendations for appointment to judicial offices,⁵ secure, so far as it is reasonably practicable to do so, that those holding judicial offices are reflective of the community in Northern Ireland,⁶ and, do anything to assist these functions.⁷

The context in which individuals, including the judiciary, work has been transformed by law, policy and best practice far removed from those that previously existed, and which, in many ways, remained predominant until relatively recently. One respondent to this research observed: '[I]n the old days either you were approached to take various jobs on, or you applied...There was no formal appointments process like there is now.' The risk was that people were appointed who fitted the mould of previous appointments.⁸

¹ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, 2003, chapter 5, para. 5.5.18.

² Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, 2003, chapter 9, paras. 9.10.2-9.10.10.

³ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, 2003, chapter 5, para. 5.5.16.

⁴ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, 2003, chapter 9, para. 9.10.9.

⁵ Justice (Northern Ireland) Act 2002, s. 5 (2): 'Only a person selected by the Commission may be appointed, or recommended for appointment, to a listed judicial office.'

⁶ Justice (Northern Ireland) Act 2004, s. 3.

⁷ Justice (Northern Ireland) Act 2002, Sch. 2, 14: 'The Commission may do anything, apart from borrowing money, which it considers is— (a) appropriate for facilitating, or (b) incidental or conducive to, the exercise of its functions.'

⁸ Commissioner for Judicial Appointments, *Response to the Department for Constitutional Affairs Consultation Paper 'Increasing Diversity in the Judiciary' (CP25/04)*, January 2005: 'We have seen some evidence to support the view that the process is indeed influenced by perceptions of the mould

A report jointly commissioned in 1992 by the Lord Chancellor's Department and the Bar Council of England and Wales concluded that 'gender discrimination appears to be institutionally present within the Bar and the judiciary'.⁹ Researchers found the following factors impeding women: the secrecy of the selection procedure and suspicions about its fairness; a lack of confidence among women; a lack of knowledge of the qualities needed; lack of female role models; and less opportunity than men to appear in high profile cases. A survey in England and Wales in 2004 by the Association of Women Solicitors found that the reasons for not applying were, in descending order: incompatibility with family/caring responsibilities; difficulty in obtaining referees/consultees; lack of advocacy or litigation experience; a perception that judicial appointments are for barristers rather than solicitors; difficulty in combining judicial appointment with practice; a perception that the judiciary is male; and a lack of confidence in succeeding.¹⁰ This present research was conducted during a time of considerable discussion about diversity in the judiciary in England and Wales. In October 2004 the Department for Constitutional Affairs published its consultation paper *Increasing Diversity in the Judiciary*.

Appointments to judicial office have been subject to radical overhaul world-wide.¹¹ Anti-discrimination laws and positive action measures in Northern Ireland require equality and equality of opportunity. Section 75 of The Northern Ireland Act 1998 has pioneered proactive measures to promote equality of opportunity across a range of grounds, including gender. Social changes and perceptions support these measures. Best practice in the workplace now requires openness, fairness, transparency and scrutiny.

In 2000 the Criminal Justice Review Group recommended that 'it should be a stated objective of whoever is responsible for appointments to engage in a programme of action to secure the development of a judiciary that is reflective of Northern Ireland society, in particular by community background and *gender*, as can be achieved consistent with the overriding requirement of merit' (para. 6.85, my emphasis).¹²

The Review Group also recommended that those responsible for judicial appointments should engage in discussions with the Bar Council and Law Society about equal opportunity issues and their implications for the judicial appointments process.

The perception of gender as a factor affecting public confidence in the judiciary has increased. The Lord Chancellor stated in 2004: 'A more diverse judiciary is essential if the public's confidence in its judges is to be maintained and strengthened.'¹³

of people best suited to judicial office and we can understand why people may feel that the process is susceptible to patronage' (para. 11).

⁹ TMS Management Consultants, *Without Prejudice? Sex Equality at the Bar and in the Judiciary*, Bar Council and Lord Chancellor's Department, 1992.

¹⁰ 'We Asked. You Answered', *Link*, Issue 16, Winter 2004/2005, 40-41.

¹¹ See, for illustration: Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions*, Oxford, Hart Publishing, 2003.

¹² Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, The Stationery Office, 2000.

¹³ Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor, and Lord Woolf, Lord Chief Justice of England and Wales, in Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, p. 9. Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, p. 8. See also: 'the make-up of the judiciary has an effect upon the public's perception of, and confidence in, the criminal justice system': Home Affairs Committee, *Judicial Appointments Procedures*, 1996.

In Northern Ireland, the review of the Criminal Justice system in 2000 observed that 'the extent to which the composition of the judiciary reflects the society which it serves is a confidence issue and has implications for its legitimacy in the eyes of many in the community'.¹⁴ The Criminal Justice Review Group reported that while generally 77% of people surveyed expressed confidence in the fairness of the judiciary,¹⁵ '[t]here was considerable concern from many different groups about the under-representation of women at all levels of the judiciary'.¹⁶ Further research for the Review, based primarily on 24 focus groups and six interviews, found that 'there was a pretty general view that the judges and senior people were not just likely to be men, but were also likely to be old, eccentric, self-satisfied and out-of-touch'.¹⁷ This is consistent with survey-research on perceptions of the judiciary in England and Wales.¹⁸

The acknowledgement that public confidence rests, in part, on the diversity of the judiciary leads to a second contemporary concern which is that the judiciary be reflective (or representative) of society. The Lord Chief Justice of England and Wales, Lord Woolf, endorses such a view when he states that '[t]he public have a right to demand not only a highly professional judiciary but also a judiciary that is more representative of the population than it is at present'.¹⁹ The Human Rights Act 1998 and the proliferating laws of the European Union require of the judiciary an understanding of social context that would either never, nor to the same extent, have been required of judges formerly.²⁰ As acknowledged in the Department for Constitutional Affairs consultation paper: 'Society must have confidence that the judiciary has a real understanding of the problems facing people from all sectors of a society with whom they come into contact'.²¹

¹⁴ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, The Stationery Office, 2000, para. 6.85.

¹⁵ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, The Stationery Office, 2000, para. 2.23, citing Kristine Amelin, Michael Willis, and Debbie Donnelly, *Attitudes to the Criminal Justice System in Northern Ireland*, Research Report 2, Review of the Criminal Justice System in Northern Ireland, 2000.

¹⁶ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, The Stationery Office, 2000, para. 6.42.

¹⁷ Seamus Dunn, Valerie Morgan and Helen Dawson, *Attitudes to the Criminal Justice System*, Research Report 12, Review of the Criminal Justice System in Northern Ireland, 2000, para. 5.3.

¹⁸ Genn, Hazel, *Paths to Justice: What People Do and Think About Going to Law*, Oxford, Hart Publishing, 1999, in which it was reported that women were less likely than men to believe that they would be treated fairly by courts (p. 229) and a number viewed the judiciary as remote and out of touch (p. 246).

¹⁹ Lord Woolf, 'The Needs of a 21st Century Judge', Address to the Judicial Studies Board, London, March 22, 2001. <http://www.lcd.gov.uk/judicials/speeches/22-03-1.htm> (Downloaded 10 February 2005). See, also, statement of Edward Nally, President of the Law Society of England and Wales: 'Not only must members of the judiciary be of the highest calibre, they must also reflect the diverse nature of the society they serve', in Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, p. 11.

²⁰ Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism*, Aldershot, Ashgate, 1999.

²¹ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, para. 1.2.

3. Methodology

The research was conducted between September 23, 2004 and February 28, 2005.²²

The research involved, variously:

- a literature review;
- distribution of structured questionnaires to a sample of barristers and solicitors eligible for judicial office in Northern Ireland, and all female holders of judicial office in Northern Ireland;²³
- interviews with respondent barristers, solicitors and female judges willing and able to meet within a scheduled time-frame;
- interviews with a range of those responsible for appointment to Silk and judicial office in Northern Ireland (including 6 male judges);
- interviews with a range of bodies who administered, audited, or otherwise would be expected to have relevant views on the appointments; and,
- discussions with a number of academics whose work is in this or related areas.

Questionnaires and interviews

Questionnaires and optional follow-up semi-structured interviews were used with a sample of barristers, solicitors and female holders of judicial posts. Questionnaires were based on those used by Dr Kate Malleson and Fareda Banda as part of their research on ethnicity and gender in applications to judicial office for the Lord Chancellor's Department.²⁴ The questionnaires were adapted to reflect material differences in legal practice and judicial posts between Northern Ireland and England and Wales.

The questionnaires to barristers and solicitors asked a series of closed questions to obtain statistical data, for example, on age, profession, caring responsibilities and, then, open questions in order to determine respondents' views on representation of women in applications for judicial office and silk.

The questionnaire to female holders of judicial office also sought standard statistical data, including age, relationship status, number of any children, whether main carer for dependents, professional qualification, and, for those qualified as barristers, whether awarded Silk. Two questions were directed at those with a solicitors' background: first, date of appointment as partner/associate/assistant, and secondly, the size of practice. All respondents were asked to indicate main field/level of work before being appointed to judicial office. Respondents were invited to insert the date appointed to one (or more) specified judicial posts. Further questions elicited views on gender aspects of appointment, whether female barristers were under-represented in applications for Silk, and if so, what might be done to encourage more women to apply. Respondents were asked whether barristers and, separately, solicitors were under-represented in applications for judicial office, and, if so, what could be done to encourage more women to apply. One question sought perception as to whether barristers, particularly Silks, were advantaged in appointment to judicial

²² Though reference has been made to some documentation received between the final date of research and publication.

²³ 'Judicial office' is used throughout this report to include all senior judicial offices, listed judicial offices in Schedule 1 of the Justice (Northern Ireland) Act 2002, and any other such judicial offices, including UK-wide judicial posts.

²⁴ Kate Malleson and Fareda Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office*, Lord Chancellor's Department Research Series No 2/00, June 2000.

office. Finally, respondents were allowed space for any further comments about the judicial appointments process.

The interviews were conducted on a confidential basis and comprised structured, open questions intended to draw out some answers given in the questionnaire and to explore new issues. The range of questions included: knowledge of women leaving legal practice for reasons associated with their gender; the fields of work/level of court perceived as important in appointments; briefing practices; work/life balance; informal networks; encouragement; confidence in applying and in challenging gender inequality; experience of gender discrimination; recommendations; perception of any difference that greater female representation would make, and; the culture of the judiciary with reference to gender.

3.1 Barristers and Solicitors

Questionnaires

330 questionnaires were sent in November 2004 to a sample of barristers and solicitors eligible for Silk or judicial office in Northern Ireland. The response rate was higher among women than men (see *Table: Responses*, below). Forty-four per cent (n. 40) of all respondents were available for interview in the time suggested, with a higher rate of availability for women than men. All respondents were contacted to arrange an interview. Due to practical difficulties in arranging interviews, interviews were conducted in total with 23 lawyers: 14 solicitors (2 of which were male) and 9 barristers (two of which were male). The average duration of each interview was 28 minutes.

Table: Responses & Interviews of Barristers & Solicitors

	Number Surveyed	Response Rate	Interviewed
Male Barristers	46	16 (18%)	2
Female Barristers	84	30 (33.7%)	7
Male Solicitors	80	14 (15.7%)	2
Female Solicitors	120	29 (32.6%)	12
Totals	330	89* (100%)	23

* This represents an overall response rate of 27%

3.1.1 Barristers

130 questionnaires were sent to a sample of barristers eligible for Silk or judicial office from a list of 562 barristers supplied by the Bar Council of Northern Ireland. Eligibility for barristers was calculated on the basis that those who were called in Michaelmas Term 1994 would have attained 10 years standing, and those called in Michaelmas Term 1997 would have attained 7 years standing. These comprised all female barristers of between 7 years and 10 years standing (eligible for tribunal office and the judicial posts of Resident Magistrate, Deputy Resident Magistrate, District Judge, Deputy District Judge, or Master of the High Court) (n. 20) and all female barristers of ten years standing and above eligible for Silk and other judicial office (n. 64). A randomly-selected control of remaining male barristers meeting the same criteria of eligibility, and representing 35% of the sample were sent questionnaires, for the purpose of comparing females' and males' responses. A follow-up letter was sent to those who had not replied.

The percentage of completed questionnaires from barristers out of the total returns was 51.7% (n. 46) [with a higher response rate for female barristers compared to male barristers].

3.1.2 Solicitors

200 questionnaires were sent to solicitors in Northern Ireland. According to the Law Society's database, this represents 9.3% of the total number of solicitors registered and practising in Northern Ireland (n. 2,150). Due to Data Protection legislation it was not possible to obtain from the Law Society of Northern Ireland the names and addresses of solicitors maintained on the Law Society's database. Accordingly, the Law Society arranged to post these questionnaires to a sample frame as follows: 60% female/40% male, stratified in each gender category with 30% to those of between 7 years and 10 years standing (eligible for tribunal office and the judicial posts of Resident Magistrate, Deputy Resident Magistrate, Deputy District Judge, or Master of the High Court) and 70% to those of ten years standing and above (eligible for other judicial office). These questionnaires were sent with a cover letter from the Law Society encouraging a response. Due to an inadvertent error, the Law Society did not retain a record of addressees, which prevented a follow-up letter. However, a follow-up notice was placed in the next issue of the Law Society's members' magazine *The Writ*.

The percentage of completed questionnaires from eligible solicitors was 20% (n. 43), with a higher response rate from female solicitors compared to male solicitors.

3.2 Female holders of judicial office

A questionnaire was sent in November 2004 to 45 female holders of judicial office in Northern Ireland.²⁵ Due to Data Protection legislation a list of the names and addresses of female holders of judicial office could not be provided. The Office of the Commissioner for Judicial Appointments for Northern Ireland arranged to forward these questionnaires. Follow-up letters were sent on 18 November 2004.

There was a response rate of 44% (20), of whom two replied anonymously. Of those who responded, 70% (14) indicated willingness to be interviewed, of which thirteen were interviewed. One further interviewee had received a questionnaire as a solicitor, and was interviewed as a female holder of judicial office. An additional four female holders of judicial office, who had not returned questionnaires, subsequently arranged to be interviewed. In total, eighteen female members of judicial office were interviewed. Fifteen interviews were taped, one conducted by e-mail, and two recorded in long-hand. The average duration of each face-to-face interview was 42 minutes.

Table: Responses & Interviews of Female Holders of Judicial Office

	Number Surveyed	Response Rate	Interviewed
Female Holders of Judicial Office	45	20 (44%)	18 (40%)

²⁵ The 45 were selected as a sample, drawn from those who held judicial office as defined by the Department for Constitutional Affairs (DCA) plus a random selection of female tribunal members. The DCA definition as applied to Northern Ireland comprised County Court Judges, District Judges, Resident Magistrates and their associated deputies, plus the Official Solicitor.

3.3 Consultees

A letter requesting a personal interview was sent to each of the existing automatic consultees²⁶ in the process of appointment to Silk in Northern Ireland. These are the Lord Chief Justice of Northern Ireland, the Supreme Court of Judicature of Northern Ireland (comprising three Lord Justices of Appeal and ten High Court judges), the Recorders of Londonderry and of Belfast, the Chair of the Council of County Court Judges, the Chair of the Bar Council of Northern Ireland, and the President of the Law Society of Northern Ireland. In the case of the Recorder of Belfast, which post was vacant at the time of the research, a request was made to the Acting Recorder of Belfast. Interviews were conducted separately with the Chair of the Bar Council and the President of the Law Society, accompanied by their respective Chief Executives.

Seven judges, including the Lord Chief Justice of Northern Ireland, made themselves available for interview. Semi-structured interviews were conducted face-to-face. Consent to taping was given in five interviews. The average duration of each judicial interview was 40 minutes.

Upon request, and following the first interview, judges were provided in advance with a list of indicative framework questions, as follows:

- what may explain the representation in the number of women in Silk and judicial office in Northern Ireland, with reference to historical and contemporary factors?
- whether the process (including procedure or criteria) of appointment to Silk or judicial office had, or has, any gender implications? and
- what, if anything, might be done to improve the process of such appointments, with reference to gender.

At interview judges were also asked about their views on the attributes for being appointed to Silk and the bench; their role in the appointments process; whether they knew of women leaving practice for reasons associated with their gender; what difference having more women in judicial office would make; and, how they would describe the culture of the judiciary in Northern Ireland, with reference to gender.

The range of individuals and bodies interviewed, except confidential interviews, is set-out in Appendix 1.

Quantitative data from questionnaires was analysed using the computer software package SPSS. Qualitative data from questionnaires from questionnaires was processed using the computer software package Access.

²⁶ The same automatic consultees are also used in the appointment of High Court and County Court Judges.

4. Women Applying for Judicial Office & Appointed to Silk in Northern Ireland

4.1 Judicial office

‘...we do have a problem in relation to the under-representation of women.’

Sir Brian Kerr, Lord Chief Justice of Northern Ireland²⁷

Women make up 51% of the population of Northern Ireland.²⁸ The Commissioner for Judicial Appointments reported data in 2003 which showed that women comprise 35% of judicial appointments within his remit.²⁹ Most predominated in tribunals. Above tribunal level, women comprised 18.6%. By March 1, 2005, the proportion of women overall was marginally less. Above tribunal level, women comprised 18% (see table, below).

There were 166 women holders of judicial office in Northern Ireland. Representation varies across judicial office, as shown fully in Appendix 2. There are no women in the High Court. They make up 25% of the County Court and 17% of full-time Resident Magistrates, as illustrated, below:

Judicial Office	Male	Female
Lord Chief Justice	1 (100%)	0
Lord Justices of Appeal	3 (100%)	0
High Court Judges	10 (100%)	0
Deputy High Court Judges	1 (100%)	0
County Court Judges	12 (75%)	4 (25%)
Deputy County Court Judges	28 (85%)	5 (15%)
Masters of the Supreme Court	6 (100%)	0
District Judges	2 (50%)	2 (50%)
Deputy District Judges	3 (60%)	2 (40%)
Resident Magistrates	15 (83%)	3 (17%)
Deputy Resident Magistrates	13 (72%)	5 (28%)
Coroner (Full-time)	2 (67%)	1* (33%)
Deputy Coroners	4 (100%)	0
Part-time Coroners	5 (100%)	0
Chief Social Security & Child Support Commissioners	1 (100%)	0
Social Security & Child Support Commissioners	0	1 (100%)
Deputy Social Security & Child Support Commissioner	1	0
Official Solicitor	0	1
Total	107 (82%)	24 (18%)

* The female full-time Coroner, while appointed as a full-time Coroner, works a 3.5-day week.

²⁷ Minutes of Evidence, Select Committee on Constitutional Reform Bill, United Kingdom Parliament, 6 May 2004, Q1020, in response to a question from Lord Holme of Cheltenham regarding the responsibility of the proposed Judicial Appointments Commission, Northern Ireland, to appoint a judiciary that is, in his words, ‘reflective of society’.

²⁸ Gender Equality Unit, *Gender Matters: A Consultation Document*, Office of the First Minister and Deputy First Minister, Northern Ireland, 2004, Annex 3.

²⁹ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, 2003, Annex H.

Comparisons: In 2004, 24.9% of the judiciary in England and Wales were women.³⁰ 15.8% sat on the bench. At September 2004, 8% of the total number of High Court Judges were women.

Compared to some other jurisdictions, the representation of females in judicial office in Northern Ireland is low. In Canada, 26% of the federal judiciary are women; with one-third of judges at provincial level. In Finland, 46% of judges are women. In France, which has career judges, more than 54% of the judiciary are women.³¹

Frequency in appointments and applications by gender

The Northern Ireland Court Service (NICtS) does not have data on the gender of judges (High Court, County Court, District Court, Magistrates Court, Coroners Court) and tribunal members and the Official Solicitor from the period 1950³²-1981, as applicable, as the NICtS came into existence in 1979 and NICtS did not produce records until 1981. It did not collect systematically, and retain, data on the gender of holders of judicial and tribunal office for the period 1981-2004 similar to data published by the Department for Constitutional Affairs in its report *Increasing Diversity*.³³

However, it did produce data on the applications, interviews and appointments by gender for a range of recent appointments, as follows:

Resident Magistrates

Year	No. of Applicants		Interviews: Nos. & as % of gender		No. Appointed	
	M	F	M	F	M	F
2004-05	27	9	10 (37%)	4 (44%)	1	1
2002	13	9	13 (100%)	9 (100%)	1	1
2001	17	9	11 (65%)	4 (44%)	1	0
1999	15	2	10 (67%)	1 (50%)	2	0

Data for the last four schemes show that female applicants for Resident Magistrate did better in one year, but in two years fared worse, in call-to-interview when compared to men. Male applicants have been significantly more successful in appointment over this period (5 men as against 2 women).

³⁰ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, p. 13. This figure includes postholders in the courts, and legal and lay members of tribunals.

³¹ Ivana Bacik, Cathryn Costello, Eileen Drew, *Gender in Justice*, Trinity College, Dublin, 2003.

³² The year 1950 was chosen because the Department for Constitutional Affairs had obtained data on female High Court and Circuit Court Judges, Recorders and Stipendiary Magistrates in post, 1950-1987, England and Wales, Annex G, *Increasing Diversity*, *ibid*, that would have permitted further comparison.

³³ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004.

County Court

Year	No. of Applicants		Interviews – Nos. & as % of gender		No. Appointed	
	M	F	M	F	M	F
2005	17	6	4 (24%)	1 (17%)	[Pending]	[Pending]
2004	39	13	7 (18%)	5 (38%)	2	2
2002	17	5	4 (24%)	1 (20%)	1	0
2001	15	2	7 (47%)	2 (100%)	1	0
2000	13	4	5 (38%)	3 (75%)	0	1

Data for three of the last five years shows that female applicants for County Court fared better in call to interview compared to men. Male applicants have been marginally more successful in appointment over this period (4 men as against 3 women).

Recommendation: *Where there is a significant disparity between the proportion of men and women called for interview and then appointed, this should automatically trigger a ‘look-back’ exercise to determine if there has been bias in the appointment/s.*

Justices of the Peace

Prior to Partition and until 2004,³⁴ a Justice of the Peace (JP) exercised a range of judicial functions involving the liberty of the individual.³⁵ The Criminal Justice Review Group reported that as of 1 November 1999, 79% of JPs were male. The Group recorded that ‘[t]here were doubts, some of them expressed by JPs themselves, about whether the current selection arrangements secured appointments from a sufficiently broad cross-section in terms of class, gender and community background.’³⁶ It is significant that while the pool of men and women was largely equal, appointments tended to favour men almost fourfold.³⁷

It is also noteworthy that the gender imbalance existed notwithstanding the Lord Chancellor’s guiding principles for selection based, among other things, on (a) ‘merit, regardless of ethnic origin, gender, marital status, sexual orientation, political affiliation and religion’, and (b) ‘the need to include men and women from all walks of life in order to preserve a balanced representation’.³⁸

Lay Panellists

A Lay Panellist, a post which existed prior to the introduction of Lay Magistrates, could sit with Resident Magistrates in family proceedings courts or, together with another Lay Panellist, on a Youth Court (which replaced the Juvenile Court). The Lay Panellists functions also involved significant adjudicative powers, including sharing in

³⁴ The functions of justices of the peace were, in large part, transferred to lay magistrates by s. 10(1) of the Justice (Northern Ireland) Act 2002, pursuant to a recommendation in the Report of the Criminal Justice Review, para. 7.55.

³⁵ For a discussion of aspects of the history of the position of Justice of the Peace in Northern Ireland, see: Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland, 2000, paras. 7.8-7.15.

³⁶ *Ibid*, para. 7.26.

³⁷ By 2004 there were 864 JPs in Northern Ireland, Northern Ireland Court Service, *Annual Report 2003 2004*, Belfast, 2004.

³⁸ Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland, 2000, para. 7.18.

determination of guilt and sentence in respect of any offence short of homicide. Under the Children and Young Persons Act 1968, a Juvenile Court was required to comprise a resident magistrate as Chair, and two lay members one of whom had to be a woman (though the Court could act if a lay member failed to attend).³⁹ It is significant therefore that the representation of women as Lay Panellists as of 1st November 1999 was 56% (out of a total of 145 Lay Panellists).⁴⁰ The rationale for lay panellists was that where children are involved, the panellists can bring a breadth of experience and knowledge to the court and help keep the proceedings relatively informal.

Statements Against 'Wait-and-See'

The Criminal Justice Review Group noted that the expected pool of eligible candidates alone could not explain the representation of women. It stated: 'While the increasing numbers of women at the Bar and in the solicitors' branch of the profession might be expected to feed through into judicial appointments, there remained obstacles to their securing preferment. Career breaks and family commitments sometimes make it difficult to get the right sort of experience and there was one suggestion that women tended to gravitate towards family law, with client resistance to employing them in, for example, the commercial and criminal fields. The nature of their experience and economic considerations sometimes militated against women seeking or obtaining silk...which appeared in practice currently to be a necessary hurdle to surmount before appointment to the senior judiciary.'⁴¹

The Lord Chief Justice of England and Wales rejects the 'wait-and-see' approach. He endorses a more interventionist approach in similar circumstances in that jurisdiction: 'We could just wait until the changing patterns of recruitment into the professions bring about the necessary changes to the pool from which the judiciary is, at present, recruited...I am satisfied a more proactive approach is required...'⁴²

³⁹ Children and Young Persons Act 1968, Schedule 2, para. 3 & 4.

⁴⁰ Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland, 2000, para. 7.21. (93 of these were also JPs.)

⁴¹ Criminal Justice Review Group, Review of the Criminal Justice System in Northern Ireland, 2000, para. 6.42.

⁴² Lord Woolf, Lord Chief Justice of England and Wales, in Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, p. 9.

4.2 Silk

There are 5 women holders of Silk in Northern Ireland, representing 8% of the total who hold Silk.⁴³

The Commissioner for Judicial Appointments for Northern Ireland reported in 2003 that 'the ratio of female to male members of the Bar, with 10 years or more experience, is 48 females to 214 males'. Of the 68 Queen's Counsel, 5 are females and 63 are males. Therefore, out of the 48 eligible females at the Bar, only 10% have been awarded Silk compared to 29% of the 214 eligible males.⁴⁴ The Commissioner noted that in the 2001 Silk scheme fewer females applied than males, 19% (n.6) of the candidates were female and 81% (n.25) were male.⁴⁵ Of the 13 candidates awarded Silk, 15% (n.2) were female and 85% (n.11) were male.

This is similar to the data from other jurisdictions. In Ireland, as of 1st October 2003, women constituted 9% of all Senior Counsel (representing 5% of all female barristers, compared with 22% of all male barristers).

Table: Silk Applications & Award by Gender, 1996-2001

Year	Applicants			Successful Applicants			
	No. of Male	No. of Female	% Female	No. of Male	As % of Male Applicants	No. of Female	As % of Female Applicants
2001	25	6	19%	11	44%	2	33%
1999	31	6	16%	11	36%	1	17%
1996	18	2	10%	12	67%	1	50%

The Commissioner for Judicial Appointments for Northern Ireland notes that in the 1999 competition for Silk, each successful candidate had 20 or more years' experience at the Bar. In the 2001 competition, each, except 3 of the successful candidates, had in excess of 21 years experience. Of the three candidates with less than 21 years experience, all were male and all had 15 years or more experience. The Commissioner observed that '[i]f this pattern continues, it is likely that few women will be appointed, as...it appears that 63% of women at the Bar have less than 10 years experience, 11% have 10-14 years experience, 17% have 15-19 years' experience and 9% have in excess of 20 years experience.'⁴⁶ In the Commissioner's consultation for that report, he alluded to some responses to the effect that a minimum period of years experience could indirectly discriminate against women. He concluded that statistically a female barrister applying for Silk in 1999 and 2001 had a lesser chance of success than a male barrister.⁴⁷

Trends over time

Historically, the pool of female candidates available for judicial office and Silk has been smaller than that for male candidates. The first woman admitted to the Bar of Northern Ireland was Frances Christian Kyle in 1921.⁴⁸ The Law Society of Northern

⁴³ This excludes QCs who are also members of the judiciary.

⁴⁴ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.10.3 (hereinafter *Audit Report*).

⁴⁵ *Audit Report, ibid.*

⁴⁶ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.10.6.

⁴⁷ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.10.10.

⁴⁸ For discussion of women barristers in Northern Ireland, see Noelle McGreenera QC, 'To Infinity and

Ireland was established by Royal Charter in 1922, and, following partition of the island, inherited solicitors north of the border who had formerly been members of the Incorporated Law Society of Ireland. It appears that there were no female solicitors from those northern counties prior to creation of the Law Society of Northern Ireland. The first woman admitted to the Law Society of Northern Ireland was Miss Kathleen Donnelly in 1926. Even then, women took time to regard entry to the legal profession as a suitable vocation, and those that did typically came from middle or upper-middle class backgrounds. Women began to enter both branches of the legal profession in equal numbers only in the late 1980s.

Statistics on women leaving the legal profession

One of the factors that may account for the low representation in the number of women applying for Silk and judicial office is that more women leave the profession by the stage of eligibility than men, as is the case in England and Wales⁴⁹ and other countries.

The only data available for this research was that given by the Bar Council of Northern Ireland for the period 1990 through to Hilary Call 2003. Until 1998 there was, generally, a higher percentage of women no longer in practice as a proportion of their gender being called to the bar than was the case for men. This trend appeared to reverse in 1998, to the extent that there was from that point on a greater percentage of men leaving practice as a proportion of their call compared to women.

While the present research was unable to reach those early leavers, the Commission for Judicial Appointments in England and Wales suggests that reasons for such early exit in that jurisdiction may include non-family friendly working practices at the Bar, the impact of partnership requirements on women solicitors who wish to start a family and the difficulty of re-establishing a practice after taking a career break.⁵⁰ This present research did, however, obtain information second-hand from those who knew women who had left practice for reasons associated with their gender. These responses are set-out in the section 'Findings, Discussion and Initial Recommendations'.

Beyond: Making the Dream Come True', Speech to 'Women in Law' Conference, Belfast, 2003.

⁴⁹ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, para. 1.19. See, also, Bar Council of England and Wales, *Data on Barristers Leaving the Profession*, 11 March 1998.

⁵⁰ *2003 Report of the Commissioners for Judicial Appointments*, para. 5.51.

5. Applying for Silk and Judicial Office in Northern Ireland

In order to understand the perceptions about the representation of women in application for judicial office and Silk, it is necessary to have some knowledge of the procedures used most recently.

5.1 Silk in Northern Ireland

The criteria and procedure for the most recent award of Silk in Northern Ireland have been set-out in the 2003 *Audit Report* of the Commissioner for Judicial Appointments for Northern Ireland⁵¹ and in the judgement of a recent case.⁵² A new scheme for award of Silk has since then been approved by the Lord Chancellor following discussion between the Law Society and the Bar Council of Northern Ireland. That scheme is expected to commence later in 2005, and mirrors equivalent reform in England and Wales. This section sets-out the most recent process, procedure and criteria.⁵³ Brief details of the new scheme are set out in Appendix 4.

In summary, Silk (Queen's Counsel) are appointed by the Crown under Royal Prerogative on the recommendation of the Lord Chancellor who is advised by the Lord Chief Justice of Northern Ireland. Prior to 1973 the appointment was formally made by the Secretary of State for Northern Ireland in exercise of the function previously exercised by the Governor of Northern Ireland on behalf of the Crown. Appointments are normally made every two or three years and, exceptionally, individual appointments may also be made from time to time.

Eligibility

Eligibility requires, ordinarily, an accumulative (but not necessarily continuous) period of not less than 10 years' practice at the Bar.

The *Guide for Applicants in Northern Ireland* states that while a definitive objective statement of the criteria for appointment is not possible, 'in considering recommendations for appointment the Lord Chancellor and the Lord Chief Justice will as a general rule recommend those counsel who have reached the appropriate level of professional eminence and distinction and who display the following attributes to a degree which marks them out as leaders of the profession:

- (a) an established overall ability as junior counsel warranting appointment to the rank of Queen's Counsel;
- (b) a demonstrated capacity for sound judgement, independence, maturity, leadership and diligence in the exercise of their profession;
- (c) a demonstrated commitment on the part of the applicants to high standards of professional competence;
- (d) a commitment on the part of the applicants to the highest standards of professional integrity and honourable conduct; [and]
- (e) a demonstrated worthiness of complete and implicit trust by the Bench, their colleagues and the public.⁵⁴

⁵¹ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, ch. 9.

⁵² *In the Matter of An Application by Seamus Treacy and Barry Macdonald* [2000] NIQB 6.

⁵³ The new process for award of Silk is described in Appendix 4.

⁵⁴ *Guide for Applicants: Appointment of Queen's Counsel in Northern Ireland*, 2001. These enumerated criteria are adopted from the recommendations in the Report of the Committee Established by the Bar Council of Northern Ireland to Consider All Aspects of the Appointment of Queen's Counsel in the Jurisdiction, April 1997, which, in turn, were adopted from recommendations by the Bar Council of England and Wales.

As acknowledged by the Commissioner for Judicial Appointments for Northern Ireland, the concept of a 'leader of the profession' 'might be perceived, by some, to involve a particular risk of indirect discrimination against women and other unrepresentative (sic) groups.'⁵⁵ This was likely to be compounded by the Lord Chancellor's reliance on the criterion: 'marks them out as a leader of the profession, that is to a standard comparable with those already appointed Queen's Counsel in the same or analogous practice type'.⁵⁶

If it were the case that 'leadership' includes also the occupation of senior positions in the Bar Council, it may also be the case that this requirement indirectly discriminated against women. Women hold only 4 out of 19 positions on the Executive Committee (i.e. 21%), and 2 positions as Chair out of the 12 committees of the Bar Council of Northern Ireland that contain this position (i.e. 16.7%). Women make up a majority on only 6 of the Bar's 39 committees/groups/authorities of more than two members.⁵⁷

The criteria for Silk do not acknowledge characteristics normatively associated with women. While not necessarily endorsing the suggestion of the Association of Women Barristers in England and Wales to the Consultation Paper on the future of Queen's Counsel, it is noteworthy that they propose: 'qualities such as empathy, tact, compassion, kindness, gentleness and relationship skills should be given some recognition.'⁵⁸

Recommendation: that the criteria for Silk be equality proofed to ensure that they do not directly or indirectly discriminate against women.

Procedure

The most recent procedure for award of Silk, applicable until implementation of the new scheme in mid-2005, involved a number of stages. An Application Form had to be completed by the candidate. It was then assessed by the Lord Chief Justice. The Commissioner for Judicial Appointments for Northern Ireland observed in 2003 that the application form used in 2001 'might, with advantage, have been more structured. The form was composed of 9 pages and only one was devoted to the criteria for appointment, although candidates were invited to add additional pages if they wished.'⁵⁹ In an examination of submissions by candidates in the 2001 competition the Commissioner observed 'there was evidence of considerable variability in the quality of the applications, particularly in linking the information given to the criteria used in the assessment.'⁶⁰ There would be merit in assessing whether this variability could be partly accounted for on grounds of gender.

Recommendation: That there be an investigation as to whether variability in completed application forms for Silk against the criteria for appointment might be accounted for on grounds of gender.

⁵⁵ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.3.3.

⁵⁶ *Appointment to Queen's Counsel 2003 – Guide for Applicants*.

⁵⁷ Family Bar Committee; Family Liaison Committee; Equal Opportunities Committee; Continuing Professional Development Committee; Charities Committee, and; Bar Immigration Group.

⁵⁸ Association of Women Barristers, *Response of the Association of Women Barristers (A.W.B.) to the Consultation Paper on the future of Queen's Counsel*, London, October 2003.

⁵⁹ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.4.1.

⁶⁰ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.4.4.

A number of consultees were consulted as part of the decision-making process. The list of those consulted was published in the Guide for Applicants. It comprised judicial office holders (High Court Judges, the two Recorders, and the Chair of the Council of County Court Judges), the Chair of the Bar Council and the President of the Law Society. The practice within the Law Society was that the President would consult with the Senior and Junior Vice-Presidents. The Chair of Her Majesty's Council of County Court Judges was consulted and represented the other County Court Judges, except the Recorders of Belfast and Londonderry who were consulted individually.

The Commissioner for Judicial Appointments for Northern Ireland notes that in 2001, some candidates for Silk appeared mostly in the Crown Court before County Court judges. He concluded that given that not all County Court judges are consulted this 'does leave the potential that the views of other relevant County Court Judges may not be sought'.⁶¹ He recommended that '[t]he views of all County Court Judges should be sought in the consultation process'.⁶² Equally, it may be that many women candidates for Silk practise in fields and levels of Court that are not represented in the list of consultees. This present research shares the view of the Commissioner that there is a risk that these candidates may be disadvantaged. The Commissioner recommended that the risk 'would be reduced if candidates were permitted to nominate additional consultees who were able to assess their professional work if they had a concern that the existing automatic consultees would not have had adequate, direct and recent experience of their work'.⁶³

There was no specific guide to consultees in Northern Ireland, as there was in England and Wales.

The Commissioner noted that '[a]s the role of consultees is so critical to the operation of the Silk process and their evaluation of candidates' suitability so crucial, consideration should be given to providing consultees with clearer and more detailed guidance as to how to conduct an evaluation according to the set competencies. *Such guidance would include diversity characteristics to ensure that all candidates have equality of opportunity when making applications.*'⁶⁴

The Commissioner observed that in the 2001 Silk competition, with the exception of the Vice-Chair of the Bar Council, all consultees were male.⁶⁵ He recommended that consultees should be reflective of both genders.⁶⁶ A report by the Bar Council on all aspects of appointment to Queen's Counsel did not make any reference to gender.⁶⁷ The Commissioner also recommended that the assessment process should be reinforced by a panel to assist the Lord Chief Justice and added that '[i]t would also be helpful if the panel is balanced with regard to gender...'⁶⁸

Recommendation: Selection Panels should be gender-balanced, where possible.

Recommendation: that panel members receive gender sensitivity training.

⁶¹ *Audit Report*, para. 9.5.3.

⁶² *Audit Report*, para. 9.5.5.

⁶³ *Audit Report*, para. 9.5.6.

⁶⁴ *Audit Report*, para. 9.5.9 (my emphasis).

⁶⁵ *Audit Report*, para. 9.6.1.

⁶⁶ *Audit Report*, para. 9.6.1.

⁶⁷ *Second Report of the Committee established by the Bar Council of Northern Ireland to consider all aspects of the Appointment of Queen's Counsel in this jurisdiction*. April 2002.

⁶⁸ *Audit Report*, para. 9.6.3.

The Commissioner also recommended that a statement regarding equality of opportunity in relation to the nine categories listed in section 75 of the Northern Ireland Act 1998 should be included in the guidance provided to candidates and consultees so that they are aware of the Lord Chancellor's policy.⁶⁹

⁶⁹ *Audit Report*, para. 9.10.11.

5.2 Appointment to Judicial Office in Northern Ireland

Since 1973 the Lord Chancellor has been responsible for appointing or recommending for appointment all judicial office holders in Northern Ireland. Prior to direct rule, there was a different procedure for appointment of County Court judges and Resident Magistrates, who were appointed on the advice of the Minister for Home Affairs. Appointments of High Court Judges, Lord Justice of Appeal and the Lord Chief Justice, were made by Her Majesty the Queen by Letters Patent on the advice of the Lord Chancellor.⁷⁰

The Judicial Appointments Unit, Northern Ireland Court Service, administers judicial appointments in Northern Ireland on behalf of the Lord Chancellor. The Unit supports the Lord Chancellor on appointments policy and appointments to the office of High Court Judge, County Court Judge and Deputy County Court Judge, District and Deputy District Judge, Master, Resident Magistrate and Deputy Resident Magistrate, and Coroner. The Unit also supports the Lord Chancellor on appointment of legal, medical, lay and lay specialist members to a number of tribunals, and with the operational policy for tribunal appointments.

Appointments to Lord Chief Justice and Lord Justice of Appeal are 'internal appointments', not subject to formal application procedures.

Until relatively recently, the appointments below Lord Chief Justice and Lord Justices of Appeal were less formal than is the case today. Historically, as in England and Wales, individuals were invited to apply. Completion of an application form and attendance at a formal interview was required (except for appointments to the High Court). In England and Wales, a similar informal system meant that judges tended to appoint in their own image, with some anecdotal evidence that judges did not appoint those 'not like us'.⁷¹

A review of the criminal justice system in Northern Ireland as part of the ongoing political process at the turn of the Millennium, led to a number of recommendations for reform of the process of judicial appointments.

Whereas the basic eligibility requirement for appointment to judicial posts in Northern Ireland was amended by the Justice (NI) Act 2002, it was set out in various Acts prior to 2002. In respect of each tier the requirements were in statute and were different.

Prior to the Criminal Justice Review, appointment criteria (Legal Knowledge and Experience, Skills and Abilities and Personal Qualities) were used in many judicial appointments schemes. The Criminal Justice Review Group augmented the criteria for appointment, as follows:

- Legal knowledge and experience.
- Intellectual and analytical ability.
- Decisiveness.
- Communication skills.

⁷⁰ This section does not intend to provide a complete historical account of the process of appointment to judicial office in Northern Ireland. Rather, it sets-out the broad framework, and will, where relevant, refer to those aspects of current and previous processes, criteria and procedures that may have (or had) gender implications. For an outline of appointments, see Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, Stationery Office, 2000, and Colette Blair, *Judicial Appointments*, Research Report 5, Review of the Criminal Justice System in Northern Ireland, Stationery Office, 2000.

⁷¹ Interview with Janet Tweedale, Department for Constitutional Affairs, London, 1 February 2005.

- Authority.
- Integrity.
- Fairness.
- Understanding of people and society.
- Maturity and sound judgement.
- Courtesy and humanity.
- Commitment to public service.

These criteria were translated into criteria for appointment to a range of judicial offices. Thus, for the post of Master (High Court): Chancery, which was advertised in December 2004, these were augmented with ‘communication *and listening* skills’, ‘independence’ and ‘impartiality’. There are a number of criteria, however, that might be read as having a masculine connotation, for example: the requirement of ‘ability to command the respect of court users’ or the ‘ability to reach firm conclusions’. The term ‘command’ is one that has historically tended to be limited to male action. Accordingly, it could be replaced by an expression such as ‘holding the respect of...’ or ‘maintaining the respect of...’ Similarly the word ‘firm’ is probably not one that would usually be used by women. Moreover, what is important in the context of reaching a conclusion is that it be valid and that the judge can stand by that conclusion.

Recommendation: The criteria for appointment to judicial office should be subject to stricter equality proofing to ensure that they do not directly or indirectly discriminate against women.

The current appointments process involves the following steps:

Advertisement⁷²

All vacancies for judicial appointment are advertised publicly, and on the Northern Ireland Court Service Website and in the Bar Library. Publication is also achieved through the *Writ*, the members’ magazine of the Law Society of Northern Ireland, or the *Writ* mailing list if the date of publication of the *Writ* is not suitable and on the Law Society website.

Application

Standard application forms are available from the Judicial Appointments Unit and must be returned to the Judicial Appointments Unit by a given date. A guide for candidates, job description, statement of eligibility and criteria for appointment, and an equal opportunities monitoring form are sent to each applicant.

⁷² In a review of advertisements for Master (High Court): Chancery (26.11.04) and County Court (09.11.04) posts, all advertisements stated that ‘The Lord Chancellor will recommend for appointment a candidate who appears to him to be best qualified regardless of ethnic origin, gender, marital status, sexual orientation, political affiliation, religion, disability (except where disability prevents the fulfilment of the physical requirements of the post), age (subject to the statutory age and reasonable period of service) or whether or not the candidate has dependents’. The advertisements also stated that ‘The Lord Chancellor is committed to equality of opportunity in the appointments process for all those who are eligible for judicial office.’ None mentioned that any group was under-represented and that applications were encouraged from those under-represented groups.

Consultation

Usually, views are sought on the qualities and work of applicants from judicial office holders, the President of the Law Society and the Chair of the Bar Council, as appropriate. There are two types of consultee; automatic and those nominated by the applicant. All consultees are required to complete on a pro-forma assessment sheet a written assessment of the candidate's ability to meet the criteria for appointment. The Lord Chancellor states that no weight shall be attached to unparticularised allegations of misconduct, and that where any specific allegation of misconduct is made the commentator shall be invited to consent to disclosure of same to the applicant. If consent is not given, the allegation will be disregarded. 'Misconduct' refers to conduct, which, if the allegation were substantiated, would be regarded by the General Council of the Bar or by the Law Society, as appropriate, as an infringement of the relevant code of professional conduct and/or might cause the Lord Chancellor to consider whether, in other circumstances, to remove that person from judicial office.

Automatic consultees: In some appointment schemes such as that to the High Court, the Lord Chief Justice conducts a consultation process with senior members of the judiciary and senior members of the profession. The consultees are asked to provide comment on each of the candidates relating to the criteria for appointment. Consultees who do not know a candidate are not expected to provide comment. Comments from consultees that do not relate to the criteria are to be disregarded.

Nominated consultees: In most appointment schemes, candidates are invited to nominate consultees. The person or persons nominated should be sufficiently well acquainted with the candidate's work within the previous 3 years to be in a position to provide comments on the candidate relating to the criteria for appointment. Comments from consultees that do not relate to the criteria are to be disregarded.

Sift

For all appointments up to and including the level of County Court a shortlist of candidates may be compiled based on information provided against the criteria for appointment. Any shortlist is produced by a trained assessment panel normally comprising a judicial member from the relevant court tier and a judicial member from the tier above, a senior official from the Northern Ireland Court Service, and a lay member. County Court, Resident Magistrate and Masters' panels give consideration to the evidence in the self-assessment part of the application form and the evidence provided by consultees, when short-listing. Panels for tribunal appointments have the benefit only of the candidates' self-assessment when short-listing (this flows from a recommendation only to seek consultee comments for a reasonable number of applicants). A shortlist of candidates is compiled taking into account the number of vacancies for the post concerned.

Formal Interview

Candidates are tested against the criteria for appointment at a formal interview before the same, or similarly constituted, panel which has drawn up the shortlist. During the interview the assessment panel make their own assessments by asking questions, which test the required criteria for appointment. All panels also have regard to the evidence provided in the self-assessment, consultee comments and performance at interview.

Following interview a recommendation is made. The Lord Chancellor then appoints or, for County Court and above, recommends an appointment to the Queen.

Checks

When an informal offer is made certain health and financial checks are carried out.

Feedback

Unsuccessful applicants are advised that they are 'welcome to request feedback, which will generally be from the Chairman of the assessment panel.'

6. Analysis of Questionnaires and Interviews

This section sets out the responses to the questionnaires and interviews which may help to explain the number of women compared to men applying for Silk and judicial office. As acknowledged by the Lord Chancellor in response to the research into factors which affect the decisions of barristers and solicitors about whether to apply for judicial appointment or Silk in England and Wales, perceptions are important. The low response rate generally, and especially in relation to particular questions in this research, means that some findings should be interpreted carefully. Nonetheless, the concordance of responses from many female respondents is indicative of a significant range of views.

6.1 Factors Influencing Applications for Silk

Questionnaires

Barristers were asked whether or not they had applied for Silk. Twelve respondents had applied (7 male, and 5 female). Those who had applied were asked to indicate why they had applied, with several prompts, one being, for example, 'status' ranked 'not applicable through to very relevant', and an option for 'other' factors. Those who had not applied were asked why they had not done so, along similar lines.

There was little difference in the factors why men and women applied for Silk; they were, roughly, equally motivated by job satisfaction, financial incentive, status, and career progression. The only 'other' reasons given were by three women, and none appeared to contain gender-relevant factors.

However, when it came to reasons for *not* applying, of the 34 respondent barristers (25 female, 9 male), while men and women shared similar views on work-life balance, women were slightly more likely to treat caring responsibilities, uncertainty about criteria and uncertainty about whether to apply as relevant than men.

Reasons for not applying

Factor	Women	Men
<i>Main carer for children</i>	24% (n 6)	0%
<i>Main carer for other dependent</i>	12% (n 3)	0%
<i>Unsure of criteria</i>	16% (n 4)	11.1% (n 1)

It is significant that of the men who answered the question regarding being the main carer for children, 44.4% did not treat it as relevant, 11.2% as not applicable, and 44.4% gave no response. Twenty-four per cent of women regarded it as being relevant, and 20% did not regard it as relevant. Twelve per cent of women also referred to being the main carer for another dependent as being a reason for not applying, while no men cited this factor. Thus, being a main carer for a dependent is a significant reason women do not apply for Silk compared to men.

Women were slightly more likely than men to report being 'unsure of criteria' for application as also being a reason for not applying.

No male barristers suggested 'other' reasons for not applying for Silk. Nine females offered reasons ranging from undecided, through lack of breadth of experience (n. 1), to lack of duration (having achieved 'only' ten years standing) (n. 1). One female respondent stated: 'I am unsure as to the government's future plans re the

appointment and role of Silks. I would also like to see a more representative Silks appointments process before I would consider applying...I also believe that under emphasis is placed on diversity of practice thereby excluding most females who find themselves in exclusively family fields of work.'

In *O'Rawe v Bar Council, Executive Council*⁷³ the Industrial Tribunal found that the Bar Council of Northern Ireland 'had yet to address the problem caused by childcare', with the Tribunal noting that the Bar Council 'recognised that problems caused by childcare and motherhood were relevant to the NI Bar.'⁷⁴

Recommendation: That the Bar Council and Law Society offer support for further research to address the fact that potential female candidates are not applying for Silk due to their disproportionate caring responsibilities, and to take responsive action.

6.2 Factors Influencing Barristers and Solicitors in Applying for Judicial Office

Questionnaires

Eligible barristers and solicitors were asked whether or not they had applied for judicial office. Twenty-three had done so (8 male, and 15 female). Those who had applied were asked to indicate why they had applied, with several prompts ranked 'not applicable' through to 'very relevant', and an option for 'other' factors. Those who had not applied were asked why they had not done so, along similar lines.

Men and women were, largely, equally motivated by a number of factors, including: job satisfaction, work-life balance, and contribution to the community. The only 'other' reasons given were by two women, and neither appeared to contain gender-relevant factors.

There were some significant differences between men and women in relation to reasons for application, as shown in the table, below.

Table: Reasons for applying

Factor	Women	Men
<i>Convenience of sittings</i>	53.4% (n 8)	37.5% (n 3)
<i>Financial incentive</i>	79.9% (n 12)	37.5% (n 3)
<i>Career progression</i>	73.3% (n 11)	52.5% (n 4)
<i>Status</i>	40% (n 6)	53.4% (n 4)

Respondents were also asked about reasons for *not* applying. Of the 66 respondent practising barristers and solicitors (44 female, 22 male), while men and women shared similar views on work-life balance, women were slightly more likely to see caring for children, uncertainty about criteria, practice shortfall, inconvenience of times of sitting and of travel, as relevant than did the men (see, following table).

⁷³ Case No. 361/00 and 1459/02, 21 April 1995.

⁷⁴ *Ibid*, para. 14. The Industrial Tribunal dismissed the application by a female barrister that the Bar Council's fee structure constituted sex discrimination in that the fee structure impacted more heavily on female barristers on the basis that; (a) in general, female barristers were restricted in the nature of the work which they were able to undertake, and (b) females took greater responsibility for childcare, were more likely to be part-time workers and therefore earned less money than men.

Table: Reasons for not applying

Factor	Women	Men
<i>Unsure of criteria</i>	25% (n 11)	18.1% (n 4)
<i>Practice does not meet criteria</i>	34% (n 15)	17.7% (n 4)
<i>Main carer for children</i>	18.1% (n 8)	9% (n 2)
<i>Deterred by times of sittings</i>	6.8% (n 3)	0%
<i>Deterred by travel</i>	9% (n 4)	0%

Twelve respondents suggested other reasons for not applying for judicial office. Two women offered reasons referring to gender, as follows:

‘Feel it would be a waste of time when I look at the age of people who are appointed and that they are mainly male.’

‘Judicial appointments have the appearance of being about who you know, croneyism and having played the politics at Law Society Committee level. The form and references sought are much more relevant to men who network via the golf course etc. Women don’t have similar network support and tend to spend the time they are not working at home with their family, rather than sucking up to the powers that be at various black tie dinners.’

Recommendation: That the Judicial Appointments Commission ensure that women are given the right information, in the right way, and at the right time to ensure that their greater uncertainty about criteria for appointment to judicial office is addressed.

Recommendation: That the Judicial Appointments Commission conduct research to address the evidence suggesting that women may not be applying to judicial office to the same extent as men due to (i) their disproportionate caring responsibilities, (ii) their being deterred by times of sitting, (iii) their uncertainty about criteria, (iv) their practice not meeting the criteria, and (v) their being deterred by travel.

6.3 Perception of Under-representation of Females in Applications for Silk

Perception of under-representation may be significant in revealing knowledge about a situation and determining willingness to address that situation.

Questionnaires

More respondents agreed than disagreed that female barristers were under-represented in applications for Silk, as shown in the table, which follows.

Perception of Female Under-representation in Applications for Silk

	Yes	No	Don't Know	No response
Female judiciary	45% (9)	5% (1)	25% (5)	25% (5)
Barristers	41.3% (19)	34.8% (16)	23.9% (11)	0% (0)
Male barristers	12.5% (2)	50% (8)	37.5 (6)	0% (0)
Female barristers	56.7% (17)	23.3% (7)	20% (6)	0% (0)

Male barristers were more than twice as likely as female barristers to state that female barristers were not under-represented in applications for Silk, and ten times more likely than the female judiciary to state that female barristers were not under-represented in applications.

*Reasons for under-representation**Questionnaires*

Of those who stated that female barristers were under-represented in applications for Silk a range of reasons were offered on the questionnaires. The preponderant response acknowledged the absence of data allowing a definitive conclusion. Those who offered explanations said:

'I think there's a perception that females should not be more than a % of any particular call for Silk and the number of Silks in any particular call remains relatively static therefore creating a gap [in] the number of women.'

'1. Women, I believe, are not as confident [in] coming forward as the men even though they may be more capable or as capable. They are also not encouraged as they should be to do so.

2. I feel that there is a reality/belief system that men will be more successful in applying for Silk than women.

3. Women are not getting anywhere near as much criminal work/civil litigation/commercial work at all as men are, which gives men more court experience and exposure that puts them in the frame to get Silk.'

'They are not respected and accepted at the Bar to the extent that men are. They therefore have less expectations...They fear being derided if rejected for having thought themselves suitable material for Silk...Fear of not being briefed (as much or at all) if appointed.'

A significant proportion believed that the under-representation would change as the numbers of women reaching eligibility increased. This was explained by one female as follows: 'As yet they are underrepresented largely because of the pyramid effect. Put simply, there are less senior-junior women than senior-junior men'.

6.4 Improvements to Encourage Female Barristers to Apply for Silk

Barristers and solicitors who stated that female barristers were under-represented were asked in the questionnaire what, if anything, might be done to encourage more women to apply for Silk. Of the twenty responses, these fell into several categories, as follows:

(a) Retention:

'I believe we need to encourage more women to stay at the Bar. In order for this to happen more fields of work should be open to women. Women are leaving because they feel they are not getting the type of work they are interested in.'

(b) Criteria and procedure:

- i. 'make selection for Silk more open and accessible, to include clarity on type of qualification needed.'
- ii. 'more transparency in the procedure.'
- iii. 'ensure the criteria do not disadvantage women whose practice has had to adapt to domestic responsibilities.'
- iv. 'individual assessment and encouragement from an advisor.'

(c) Availability of work:

- i. 'prevent the discriminatory division of work to enable an even playing field at the point of application.'
- ii. 'encourage solicitors to brief female QCs and juniors particularly in cases where females are not normally briefed, i.e. civil/commercial/chancery/judicial review.'

(d) Attitudes:

'More judicial respect especially amongst the High Court judiciary towards female practitioners and family/children's work.'

Respondents were also allowed to add any further comments about the Silk appointments process. There was a range of answers. Those with gender implications included the following comments:

'whoever wished to be a Silk should be entitled to practise...and let the market decide. More women might consider such a step if this were the situation.'

'The current review seeks to ensure transparency and fairness by requiring detailed application and assessment of same by an independent panel. The review is timely and needed to engender confidence in the system. I believe that the next round of applications will see women applying in greater numbers...'

'Some judges and magistrates make life more difficult for female barristers, although with the increase in women on the bench this problem is resolving.'

The female judicial respondents made several distinct suggestions: (a) giving women a greater spread of work, (b) educating senior male judges and barristers that women

bring different but just as necessary strengths and abilities to the job as they do, and (c) encouraging part-time work by reducing the Bar fees pro-rata.

Of the five male judges who answered this question, one stated: ‘female members of the Bar need to be encouraged. My experience has been that some of them are reticent to put themselves forward.’

6.5 Perception that Barristers, especially with Silk, Are Advantaged in Judicial Appointments

50% of female judicial respondents believed that barristers, especially Silks, were advantaged in applications for judicial office. 25% thought they were not, the remainder did not respond. 33.3% of the total female judicial respondents who had qualified as barristers denied such an advantage, compared with 23.1% who had qualified as solicitors.

	Yes	No	Don't Know	No response
Female judiciary	50% (10)	25% (5)	-	25% (5)
Barristers	43.5% (20)	28.3% (13)	2.2% (1)	26.1% (12)
Solicitors	76.7% (33)	2.3% (1)	4.7% (2)	16.3% (7)

In general, solicitors were significantly more inclined to believe that barristers, especially Silks, were advantaged in applications for judicial office. These data on perception of Silk-advantage confirm earlier anecdotal evidence.⁷⁵

6.6 Perception of Under-representation of Females in Applications for Judicial Office

Do you believe female barristers are under-represented in applications for judicial office?

	Yes	No	Don't Know	No response
Female judiciary	40% (8)	10% (2)	30% (6)	20% (4)
Male barristers	25% (4)	50% (8)	25% (4)	0% (0)
Female barristers	50% (15)	26.7% (8)	23.3% (7)	0% (0)

Do you believe that female solicitors are under-represented in application for judicial office?

	Yes	No	Don't Know	No response
Female judicials	50% (10)	5% (1)	35% (7)	10% (2)
All Solicitors	62.8% (27)	18.6% (8)	18.6% (8)	0% (0)
Male Solicitors	50% (7)	21.4% (3)	28.6% (4)	0% (0)
Female Solicitors	66% (20)	17.2% (5)	13.8% (4)	0% (0)

⁷⁵ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, 2000.

Recommendation: Given the disparity between male and female lawyers regarding the perception of under-representation in applications for Silk and judicial office, it is important that the professional bodies and Judicial Appointments Commission, respectively, take steps to publish accurate information, routinely.⁷⁶

6.7 Reasons Offered for the Under-representation of Females in Applications for Judicial Office

Interviews

During interviews a range of reasons were offered to explain the low number of women Silks, including the 'trickle-up'; lack of equivalent opportunities to men; and attitudes. One female judicial respondent referred to 'paternalistic attitudes to such applications'.

A number of female respondents alluded to the problem of securing opportunity to engage in the same range of work as men. One said: 'They don't get the work...to the extent as male barristers, so they don't apply'. Another added: 'Not enough women have been able to establish themselves in a stronghold e.g. personal injury work and crime. When women do apply they are turned down because their practice is not varied enough and their earnings are generally lower.' A third explained why she believed women were under-represented: 'Because the majority of female barristers have a practice which is primarily in family law and there is a perception that only 1 or 2 Silk appointments will be made on the basis of a family law practice.' This approach was echoed by one of the male judges:

'I think that the decision to apply for Silk is a very personal one and it's quite a momentous one...I think that unfortunately many women at the Bar have not had the opportunity to branch out into various fields of law because...many of them tend to concentrate, whether willingly or otherwise on family work...**[Interviewer: *What might 'otherwise' suggest?*]** Well, one might...suggest that if they don't get work elsewhere...sadly, certainly, some time ago women were not offered briefs in...and I'm talking in broad generalities...in Queen's Bench work, criminal work, commercial work...were nothing like the same as men...'

Questionnaires

Barristers were asked whether they believed female barristers were under-represented in applications for judicial office. (Solicitors were asked an equivalent question in relation to female solicitors.) For barristers who stated that female barristers were under-represented in applications to judicial office, a range of reasons were offered. There was a marked difference in comments from male and female barristers, which are worth setting-out as illustrative of the divergence between male and female approaches to this issue. There were three separate types of reasons by male barristers, which have been set alongside illustrative counter-points in responses from female barristers, on the following page:

⁷⁶ See tables on applications for Resident Magistrate and County Court Judge posts, section 4(a).

Male barristers' reasons	Female barristers' reasons
'Because not enough of sufficient skill and competence apply'	'They do not have the same opportunities presented to them in criminal and civil fields to develop practice which lend readily to judicial[/] Silk career'
'I do not know of female barristers who would feel held back or restricted because of their [gender]'	'Because they lack the confidence and perhaps the respect of their colleagues. Because the ethos of the Bar requires women to keep their head down and not to promote themselves. Because they lack the experience of civil or criminal litigation, which makes up most of the work of judges' 'Put off by sitting hours and limited practice over other areas of laws over the years' 'I have tried to encourage women at the Bar to apply but I feel that they are held back by their duties in caring for children'
'Not aware of the breakdown of applications' '...information as to applicants is generally unknown...'	'I do not have access to the information I would need to answer this question...with precision' 'Because of an impression or a belief that it is a male dominated process. There is not a single female High Court Judge and this is 2004!'

Illustrative responses from male and female solicitors to the equivalent question relating to female solicitors are set-out, below.

Male solicitors' reasons	Female solicitors' reasons
'Plenty of intelligent females put off by male dominated judiciary'	'Lack of flexibility...also lack of successful role models' 'Still a very male dominated profession on the high levels, mostly because women tend to have more life-balance and family commitment difficulties'
'Long term prejudice and opportunities restricted in progressing through the profession/firms'	'There is a perception that the Bar is favoured significantly over solicitors and that men are favoured over women'
'There are no female high court or court of appeal judges'	'No High Court female judges'
'Don't know – applications confidential'	'I am not aware of the exact proportion of applications for judicial office by female solicitors but this would appear to be the case judging by the number of appointments made'

Interviews

One female judicial respondent explained the under-representation in terms of the exposure to those who made appointments, thus: 'In the past male barristers got better work, more exposure to the High Court, well known to the judges and so advantaged in the judicial appointment system.' Another stated: 'I think there is a perception on the Bench that barristers (and especially the QCs) are better equipped for judicial office – I do, however, sense some change in the approach. The Bar Council is a very powerful organisation and I think it has too much influence.' Given the perception that Silk are advantaged, this may inhibit female solicitors or capable junior counsel from applying for judicial office.

Recommendation: It should be made explicit that achievement of Silk is not taken into account when making judicial appointments.

A range of reasons were offered by female judicial respondents for the under-representation of women solicitors applying for judicial office. Two stated that women were less likely to be partners. One said: 'The perception is that unless you are at a partner level a female is unlikely to be appointed to judicial office.'

One of these also added: 'Women are still more likely to practice in "family law" and can feel this is too restrictive for judicial appointment.'

One respondent said there was a 'perceived bias towards: (a) the Bar (b) need for judicial references.' Another respondent echoed point (a) by stating that women solicitors 'have all the disadvantages which female barristers have but in addition there is resistance in Northern Ireland from the Bar to the appointment of solicitors male and female to the post of judicial office.'

One female holder of judicial office stated: 'I can see no reason in principle why a woman is not as capable of doing any job as a man. I think that all women, all who are at the Bar have gone through more or less the same academic and professional training and therefore the question must arise why are women under-represented in certain areas of work, why are women un[der]represented in Silk, why are women un[der]represented in judicial office. There must be some explanation and it is not a fair system.'

Another female judicial respondent suggested a tokenistic approach: 'Women who have only Family practices, it appears to be very hard to get Silk...I still think there is this feeling; one or two, that's all you require.'

The former requirement of 'practice', rather than 'standing', in applications, particularly for judicial office, was viewed as discriminating against women who had taken time out to have children. This was a particular problem for women historically where they might qualify at age 25, marry and then face the choice of deferring children until their early- to mid-thirties or have children but defer application to judicial office. The Justice (NI) Act 2002 amended the requirement from 'practice' to 'standing'.

One female solicitor remarked: '...because judges are mainly male, the people appointing new judges will be male, there probably is a slight bias on their part.'

One female judicial respondent stated: 'most of the people appointing tended to be male and I think they found it quite difficult to look at women in the same way that they look at male colleagues...I think there was very much a feeling in legal circles that it was a man's profession rather than a woman's profession.'

There was a widespread view that as women bear the bulk of caring responsibilities for children, elderly parents and, sometimes, spouses, that this has hindered progress. One female judicial respondent stated: 'Many of my working mother colleagues feel that their career advancement has had to be curtailed by the constraints of motherhood.' Another woman added: 'Well, I suppose I could have applied earl[ier] except that I had children growing up. I made a conscious decision that I was not going to work full-time while my children were young. But at the same time, I wanted to keep my hand in and the tribunals were a comfortable way of doing that.' A female judicial respondent from a solicitor's background observed: 'my own experience of practice as a solicitor is that it's quite unforgiving in terms of the need to be there full-time.'

Most women noted that there had been recent improvements in the process of appointment to judicial office, which they saw, variously, as more formalised, transparent, and reliant on objective criteria.

One of the few male barristers willing and able to be interviewed supported the 'trickle-up' approach: 'I think that the numbers themselves will force issues...after a while.' This view was shared by all of the male judges, though not all regarded it as a sufficient explanation. One High Court judge, having reviewed a list of female QCs against date of call, compared to male barristers, answered the question about representation by saying: '...there's an obvious explanation...there's a much smaller pool.'

There is some slight variation in the range of additional factors proffered by the male judges. A few refer to the fact that women appear to predominate in Family work, but those respondents do not express a conclusive view on why that is. One judge refers both to 'wastage' among the pool of barristers in the late 1980s in that there were not as many women as men called to the Bar. Another judge referred to a possible 'chill factor' on the grounds of gender for women in the late 1970s and early 1980s. What is significant is the relative uniformity among five of these judges who addressed the two remaining issues of: (a) whether the process for appointment to Silk and judicial office had adverse implications for women, and (b) what might be done to improve the process. Most stated that they were not aware of any ways in which the process of appointment to either judicial office or Silk had gender implications or that the processes could be improved, with reference to gender.

6.8 Encouraging Female Barristers/Solicitors to Apply for Judicial Office

Barristers and solicitors

Questionnaires

Respondents from either branch of the profession who stated that there was under-representation in applications for judicial office, were asked if they had any suggestions about their own profession. Thus, all barristers were asked about female barristers; all solicitors were asked about female solicitors. Overall, 41.6% (n. 37) offered suggestions (34.8% of barristers; and 48.8% of solicitors). The following are some illustrative responses.

Solicitors	Barristers
Appointment should be made solely on merit irrespective of gender. I don't believe in positive discrimination.	A more open awareness [by] all as to the right of a woman to be considered for judicial office
Make them feel more welcome and that their contributions and experiences are valuable	More female QCs
Advertising more targeted at females Forms sent to all female solicitors directly for all posts when they are 10 years qualified	Broader range of work given to female barristers beyond traditional areas
Much greater publicity	Offer more flexibility
Head hunt to apply	Offer support and encouragement to female members of the Bar
Consultations – going through the criteria etc. more transparency in the process	Training
Ensure selection panels are evenly balanced	Objective assessment
Stating the likely hours involved etc would assist	Align half-term with school holidays
Part-time post would suit females with family commitments	Create part-time posts
Appoint more! As more female solicitors are appointed to the judiciary, more females will realise that it is a realistic option for them.	

19% of barrister and solicitor respondents offered further comments on appointment to judicial office. Most of these reflected earlier observations. A few were new, as shown in the table, on the following page.

Further comments

Female solicitors	Female barristers
Training courses should be available to solicitors as to judicial openings and work load etc as part of the general solicitor training, say, with solicitors of more than 5-7 years standing	I believe that the process is still heavily political, in the sense that it is essentially male dominated and pro establishment and that the judiciary play too important an influence.
Competencies should be clearly set out in advertisements and papers should explain the process	
Greater lay involvement required	

Views Expressed in Interviews

There was a spread of suggestions, ranging from changes to working practices through to encouragement to women.

Encouragement

'I believe that a lot of females lack confidence in their ability in a judicial role. Indeed solicitors generally may suffer from this. I think that one of the greatest incentives would be the promise of appropriate...training and support before successful candidates are faced with taking up their new post. There are very few "ready made" judges and particularly solicitors may not feel they have the breadth of court experience necessary for court appointments.'

Another added: 'Positive encouragement to apply from the Judiciary...Use the Bar Council, the Law Society and Judicial Studies Board to provide encouragement and insight...'

A third stated: 'Not enough role models. Female holders of judicial office are not always prepared to encourage other females to apply. Set up a network.'

Working practices

One female judicial respondent said: 'Encourage flexibility i.e. unpaid leave for child care, job share, part time salaried appointments.' Another suggested: 'Opportunity for flexible working.'

Obstacles

One female solicitor observed: 'It is much more difficult for women to achieve partnership status as solicitors. In turn, less experience...'

6.9 Level of Court Work/Field of Work Relevant to Appointment

Twenty-three of the barrister/solicitor respondents had applied for judicial office. The frequency of main areas of work for applicants is set-out below:

Main Area	Frequency	Percent
Family	4	17.4
Criminal	3	13.0
Employment	3	13.0
Conveyancing	3	13.0
Social Security	1	4.3
Personal – Injury	1	4.3
Litigation – Solicitor	1	4.3
General	2	8.7
Other	1	4.3
None	1	4.3
Combined area	3	13.0
Total	23	100.00

When this was adjusted for gender, the main area of work for female applicants for judicial office (n. 15) was Family (26.7%), whereas none of the male applicants for judicial office (n. 8) identified Family as a main area of work. Of the eight men there was an even spread of main areas of work ranging through: criminal, employment, conveyancing, personal injury, general and other.

The main level of court/tribunal was also identified, and the frequency across applicants is set-out below:

Table: Main Level of Court/Tribunal

Main Level	Frequency	Percent
Combination of courts	10	43.5
High Court	4	17.4
County Court	2	8.7
Tribunals	2	8.7
Crown Court	1	4.3
Family Care Centre	1	4.3
No response	2	8.7
Missing	1	4.3
Total	23	100.00

When this was adjusted for gender, the preponderant levels for women were: Combination of courts (n. 8, 53.3%), Tribunals (n. 2, 13.3%), Family Care Centre (n. 1, 6.7%), County Court and High Court (n. 1, 6.7%). Men were more likely to have appeared in High Court (n. 3, 37.5%).

While these data do not provide a complete and accurate record of the main fields and levels of work engaged in by applicants for judicial office (which would be available with great labour through the records of the Northern Ireland Court Service), they do suggest gender differentials. These data were corroborated by the responses in both questionnaires and in interviews.

Many women noted that women appear to have been disadvantaged by virtue of lack of opportunities in certain fields of work. There was a widespread view that women chose Family law because of the lack of opportunities in other areas, and that this in turn limited their chances in applications for judicial office. This perception of limitation was twofold: first, women did not achieve the same degree of visibility as men in certain courts, whose judges would be automatic consultees in relation to Silk and judicial office. Secondly, the apparent reliance on 'breadth' of work in applications for Silk and judicial office thereby disproportionately disadvantaged women.

One female stated in relation to Silk: 'I think that the polymorphic nature of [eligibility] is likely to deter women because looking at the Bar in Northern Ireland...one could count on the fingers of one hand the number of women who have a practice which is broader than the Family practice.'

Another female judicial respondent observed: 'I don't see because you have a Family practice you should not be considered as having a wide enough practice to get Silk. And I say it for this reason, there are men Silks who hardly did a Family case in their life and yet when they have come to the senior Bar to start themselves off to get work, they have taken Family cases. And cross-examination skills are the same...' This was extended to application to judicial office: 'If you can write a paper and deal with legal concepts, if you can address a High Court judge in a Family case, if you can make submissions to the Court of Appeal, why are you not suitable? If you can make submissions on behalf of the Bar Council, if you can go and Chair a Committee and collect the views and collect information why does that not mean you're as good as somebody who hasn't done any of those things but has done a lot of Criminal or Civil...'

Recommendation: Steps be taken by the Bar Council and the Law Society to redress the historically gender-biased preponderance of women in certain fields of work and levels of court/tribunal in order to ensure equality of opportunity for women in applications for Silk and judicial office.

Recommendation: The criteria and process for appointments to Silk and judicial office should not further disadvantage women who by reason of systemic gender-bias have been unable to obtain the same advantages as men. (See 'Summary of Recommendations' for more specific details.)

6.10 Encouragement to Women

Women invariably stated in interview that they received no encouragement from their professional bodies, the Lord Chief Justice's office or the Northern Ireland Court Service to apply for either Silk (as appropriate) or judicial office.⁷⁷ Some indicated that they had, however, received some personal encouragement from colleagues, male and female.

Bar Council

Barristers perceived no encouragement from the Bar Council. One barrister stated: 'Encouragement from senior members of the Bar to reinforce [women's] feelings of suitability...would be very helpful...It could be a very important thing to do to give the right word of encouragement at the right time...'

One female respondent stated that she was not aware of the Bar Council encouraging women to apply for Silk but that equally she wasn't aware of them discouraging women applying for Silk.

Another female respondent stated that 'I don't think that there is any evidence...that they are not encouraged...In appointing anybody to any post, ability and suitability are going to be the deciding things. Gender is a secondary issue in that sense and you can't dilute what is required just in order to get a woman appointed or given Silk.' However, the same judge added: 'Whether just a statement that applications would be welcomed from women, I don't think that would be enough. I think that it would have to be more significant than that. I think that one might have to explain to women that their applications were being looked at sympathetically and also that they might need to be guided on how to fill in application forms, how to conduct maybe Bar interviews, that type of thing. It is difficult to see how you could do that for women without doing it for men.'

One female respondent was of the view that it was not appropriate for the Bar Council to encourage women: '[T]hey are a body to regulate the whole Bar. And how can they encourage women to apply for Silk without discriminating against men.'

One female judicial respondent underlined the importance of facilitating women's professional capabilities and confidence through membership of professional committees. 'Women should have a fair chance to meet influential people and the Bar Council can make sure of that.' A barrister remarked: '[H]ow many women are on the Executive Bar Council?'⁷⁸ That may seem a bit harsh but I think the whole culture has to change...it can be male-dominated. I do feel they act with the very best of

⁷⁷ The Judicial Appointments Commission will be in a position to do so.

⁷⁸ Four out of seventeen.

intentions...Having said that, this is a woman's issue which affects male and female alike...and, yet, we are sadly lagging behind.'

Law Society

The majority of current solicitors and female judicial respondents who were formerly solicitors reported no encouragement from the profession to apply for judicial office.

Several noted that advertisements for judicial posts were printed in the profession's magazine *The Writ*. Two solicitors recalled receiving by post advertisements of judicial posts, which one said 'is quite good, I think'.

One female respondent said: 'I think that there ought to be far more encouragement from the judiciary themselves and probably from the Law Society...They really ought all to be coming together in my view to try to encourage more women to apply for judicial posts. I am not quite sure how they could go about it, but it shouldn't be beyond their wit to devise encouraging processes.'

It was suggested that it was more difficult for women solicitors. 'If you are a partner in the firm of solicitors, you are very much on your own to an extent. You are not going to have anybody spotting you and saying "well, why don't you go for this?"'

Northern Ireland Court Service

All interviewees, except one, stated that women had not recently received any encouragement from the Northern Ireland Court Service to apply for judicial office. One long-standing holder of judicial office noted that one Director in the 1980s had personally encouraged a number of women to apply.

One female judicial respondent stated: '[T]hey are to be contrasted with the Department of Constitutional Affairs (sic)...'

One female stated: 'the Northern Ireland Court Service have made it very clear in how they have advertised in any of the documents that you receive for interview that they are very much willing and keen to appoint women....I think the best way that can be fulfilled is to see women being appointed.'

Another stated: 'No, I don't think they have and...how can they?'

One female respondent volunteered that the appointment of the Commissioner for Judicial Appointments for Northern Ireland would indicate that efforts are being made to encourage applications from people who might not have thought of applying before.

Another female respondent stated that there was 'no lack of encouragement as such, but it is really only lip-service unless real steps are taken to address the root problems. It is no good encouraging women in their 30s, 40s and 50s (and older) to apply if those women know that as compared to their male counterparts, they have significantly less of the relevant experience.'

Lord Chief Justice

One barrister recalled the current Lord Chief Justice stating at the last appointment of four County Court Judges, two of whom were women, that 'it was a good thing there were more women.' She added: 'he is open to change.' One female solicitor added

that he: 'is fairly forward thinking. I think he did give a speech, didn't he, about more women...shortly after his appointment saying that he wanted more women in the judiciary...If he is saying that he would be fairly broad-minded actually and maybe a slightly different mould from the past Lord Chief Justices.'

Discussion:

Malleson and Banda found in equivalent research in England and Wales that this was the one of the most important factors in determining whether women applied for judicial office.⁷⁹

The lack of encouragement and the perceived need for greater encouragement informed a number of recommendations. One female barrister stated: 'there should be a more generalised effort on the parts of various bodies, be it the Bar Council, be it the Court Service, be it the Lord Chancellor's office to encourage and invite women to apply for posts'. One male solicitor commented: 'Could the appointments people be more pro-active in encouraging women? I would say "yes", they probably should be...'

Recommendation: The Bar Council, Law Society, Northern Ireland Court Service and the Judicial Appointments Commission need to encourage women to apply for judicial office.

Recommendation: The Bar Council and Law Society need to encourage women to apply for Silk.

Recommendation: The Bar Council and Law Society should ensure that through their publications and notices they promote awareness of the success of women in their careers.

Recommendation: The Bar Council, Law Society, Northern Ireland Court Service and Judicial Appointments Commission should collaborate in hosting annually over the next four years a seminar or symposium with an eminent speaker or speakers which will facilitate networking and information sharing among female lawyers and holders of judicial office with a view to encouraging women to apply for Silk/judicial office. Such events to attract Continuing Professional Development (CPD) credit.

6.11 Briefing Practices

Almost all lawyers and female judicial respondents referred in interview to the pervasiveness of gender discrimination in certain briefing practices between solicitors and barristers and in 'passing-on' between barristers. This was perceived by most respondent lawyers and female judicial respondents to adversely affect women's opportunities for achieving judicial office, and, in the case of barristers, attaining Silk. One female barrister put it this way: 'Well, you are really talking about the quality of the work that you have. So briefing practices define/determine the quality of the work that you get and the quality of work then gives you your experience which then allows you to put yourself forward for Silk.' She, and most others, referred also to the breadth of work. Most female barristers explained the dearth of female barristers in criminal, chancery, commercial and civil work as indicative of not being passed briefs

⁷⁹ Kate Malleson and Fareda Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office*, Lord Chancellor's Department Research Series No 2/00, June 2000.

or not receiving pass-ons from other barristers. One male barrister noted: 'there's no doubt amongst the solicitors who've told me that many criminal clients don't want a woman barrister, they want a man. I think that hurts the women barristers...' One female recalled an incident when she consulted with her solicitor on passing-on work on bail applications. '[T]he solicitor said to me "don't pass it to a woman"...and I just laughed and he said "well you know what I mean".' Another recalled that 'I started off my practice doing predominantly criminal work and suddenly by about the 6th or 7th year in my practice it really was petering out, but I noticed that I was getting a lot of matrimonial County Court and High Court work, family proceedings work which is in the Magistrates Court...I felt robbed.'

Most female judicial respondents agreed that briefing practices had adverse implications for women in appointments to Silk and judicial office. One stated: 'I think briefing practices are crucial to the question, because it's really in the solicitors office that the whole ethos is set-out. Solicitors are the ones who decide who to send the briefs to. In many cases they pigeonhole women into certain types of work, like family work, children's work, divorce...that sort of thing. A little minor criminal work maybe in the Magistrate's Court but a lot of them are quite unwilling to recognise that women are capable of doing that heavy sort of criminal work, which is necessary for you to progress to the judiciary or Silk.'

Another referred to the historical position: 'twenty, twenty-five years ago a female as a barrister going in without the backing of...knowing solicitors, being married to a solicitor or being in a legal family...the chances of getting work were not great at all.' One female respondent said that until recently the Director of Public Prosecutions did not brief female barristers, and added: 'I notice that the DPP is possibly using more women than in the 80s but certainly the civil panels seem to have a low representation of women and the insurance companies seem to be using less and less women.'

That the preponderance of women in family law practice has an impact on progression into judicial office is illustrated in the comment of one female solicitor working in a family law practice: 'I work in a fairly narrow area of law, so I always feel that I don't have a broad enough range of experience to go for one of the County Court posts.'

One suggested that briefing practices tended to reproduce gender divisions: '[W]henever you are down in Court and you see barristers who impress you, you sort of have an eye on briefing them in future. So if somebody is about the Courts gaining loads of experience they are also meeting lots of people who are going to give them work if they are impressed.' Another female solicitor stated: 'I would never instruct a female barrister to do civil litigation and that obviously contributes to the whole female/barrister/family-work connection.' When asked "why?": 'Well, you want the most experienced person. It's like a vicious circle, you want the most experienced person for your client, therefore it happens that when I first came to this firm they used to be men...and I continue to use them. So, that's the way it continued unfortunately.'

Some solicitors felt constrained by a client's wishes. One recalled: 'I suggested a female barrister to a client the other day. He said: "how could she do anything for me, she is so sweet-natured?" So, I think that may affect your decision as well because obviously it's the clients' choice who they are going to have and if they don't agree with a female, what can you do?' Another stated: 'clients often dictate it. Lots of female clients want female matrimonial lawyers and in private practice you can't afford to do what your client doesn't like.'

One female judicial respondent stated: 'Solicitors employ you as an individual and I am not sure how much you can tell people "we have to brief women"...But what you can tell them is "you shouldn't not be briefing women because of pre-conceptions".' One female barrister when asked whether she was aware that the Bar Council's equality code covered such practices replied 'Yes, it would but what would you do about it?'

It would appear that the disadvantage faced by females is not as fully realised among the High Court as it should be. One High Court judge stated 'In the early days...the 1970s...women said they were disappointed that they weren't instructed. [Interviewer: ***What of the position today?***] I haven't heard that said.'

Discussion:

In the *Equality Code for the Bar*, launched on 5th February 1998, The Bar Council of Northern Ireland has stated that 'work should be distributed on the basis of ability and merit rather than as a result of stereotypical ideas about certain types of work being more suited to men and women.'⁸⁰ This would appear to apply only to passing-on between barristers and not to acceptance of briefs where there is evidence of sex discrimination.

It is noteworthy that the *Model Anti-Discrimination Policy* of the Law Society of England and Wales instructs solicitors to cease to act for a client who requests a barrister on discriminatory grounds, unless the reason is within one of the exemptions permitted by anti-discrimination legislation. Similarly, in England and Wales clerks in barristers' chambers are required by the Bar Council's *Equality Code* not to accede to discriminatory instructions from professional clients, whether solicitors or other instructing agents.⁸¹ Barristers may be selected only on the basis of the skills and experience required for a particular case.⁸²

Recommendation: The Bar Council and Law Society should take renewed steps to encourage their members not to reinforce gender stereotypes or discriminatory practices.

Recommendation: The Law Society and Bar Council should take disciplinary action against members where there is clear evidence or complaint of gender discrimination in briefing practices or passing-on, respectively.

Recommendation: While understanding the pressure to meet a client's wishes, where a request for legal advice is based on reasoning about gender which cannot be objectively justified and the barrister or solicitor accepts the request this should be treated as discriminatory and be susceptible to professional sanction.

⁸⁰ Bar Council of Northern Ireland, *Equal Opportunities*. <http://www.barlibrary.com/equalop.htm> (downloaded 20.10.2004).

⁸¹ Bar Council of England and Wales, *Summary of the Equality Code for the Bar*, Chapter 5 (7)

⁸² *Ibid.*

6.12 Reflecting Stereotypes

A number of female respondents suggested that stereotypes of female barristers remain.

One said: 'there's definitely a perception that the criminal side is tough if you are down in the cells etc. etc. It's tougher for women to make their mark in that respect.'

Another said: 'Now, not every woman at the Bar is suited to being a criminal lawyer because I think there are particular types of attributes criminal defence lawyers have...' The same woman did not add that not all men at the Bar are suited to being a criminal lawyer, which might reinforce the stereotype that women are inherently less capable than men in certain areas of law.

A number of women recounted fairly extensive evidence of sexism in the 1980s and 1990s. One female judicial respondent recounts how in the early 1980s as a young lawyer working late one night, a colleague approached her and asked: 'why aren't you home making your husband's dinner?'

Another instance in the early 1980s reflected a judicial view. '[T]here were two women in court fighting a family case and the [male] judge said "I thought when women came to the Bar the standard of advocacy in Family cases would improve and it hasn't".

One female respondent recounted hearing of barristers refer to her within the last ten years as a 'bitch' in circumstances where she stated 'a man in the same position would not have been classified in those terms.'

One female solicitor referred to a dinner hosted by the Law Society in December 2004. She recalled: 'I have never been to such an archaic event in my entire life... We have a female President. So much was made of the fact that she was only one of five female Presidents in Northern Ireland and we should all congratulate ourselves that we have had five since 1923... [a]nd we should be particularly grateful, not for the fact that she single-handedly introduced CPD [Continuing Professional Development] points and all of these wonderful things, but the fact that she was so pretty. They, actually, every one of the speakers commented on how pretty she was. It was the most horrific thing I have been at. I will not be back either.'

The extent of sexism in any working environment can affect the retention and progression of those working in that environment and the quality of work. While many of the incidents of direct sexism referred to by women referred largely to the 1980s through the mid-1990s, there remains evidence of some sexism and gender-stereotyping which has a chilling effect on women that may adversely affect their applications for judicial office or Silk.

Recommendation: The Bar Council and Law Society should take proactive steps, perhaps in consultation with the Equality Commission, on ways of challenging gender stereotyping and sexism.

Recommendation: The Bar Council and Law Society should take renewed steps to re-publicise their codes of conduct, and enforce strictly those codes.

A female respondent stated that there remained a problem with gender stereotypes at middle management in the Court Service. 'Sometimes how people are treated in judicial office can be off-putting for future applicants', she added. 'I'd be asked if I

would pour coffee and that type of thing. Once I was trying to improve accommodation within my court and I was visited by a member of middle management who embarked on a discussion with me which just wasn't acceptable and really was in the type of terms that he would have addressed his wife if she had overspent the housekeeping money...there are a few dinosaurs in there in their mid-fifties who really just find the concept of female members of the judiciary very odd.'

Recommendation: The Northern Ireland Court Service should reinforce Gender Sensitivity Training for Middle Management.

6.13 Experience of Gender Discrimination in Applications for Silk and Judicial Office

In interviews, no barristers reported any direct experience of gender discrimination in applications for Silk or judicial office, though two female barristers suggested that recent non-appointment of senior women barristers to Silk may have been discriminatory. Only one solicitor said she had experienced discrimination in application to judicial office, which was subsequently decided against her by the time of writing on the basis that the statutory office posts for which she applied did not constitute 'employment' for the purpose of sex discrimination legislation.⁸³

The majority of female judicial respondents stated that they had no personal experience of gender discrimination in applications for Silk or judicial office. However, seven did state that they believed or suspected that there had been discrimination. These answers were twofold, relating to individual discrimination and/or structural discrimination. Four women were of the view that direct discrimination had accounted for their failure to be appointed to judicial posts. Another suggested that an overrun in interviewing which clashed with her family commitments, which she announced to the panel, led to her perception that she had been treated less favourably than a man because she 'had behaved like a mother'. Two stated that the level of representation of women in judicial office suggested indirect discrimination. One said: 'the fact that there are so few females in judicial posts would tend to indicate to me that there is some discrimination.' One female barrister suggested that women with family commitments were indirectly discriminated against by the appointments process.

One barrister indicated the difficulty in being made aware of any discrimination at the Bar. 'The Bar is very secretive' she said. Barristers would not wish it to be known that they had applied in case it led to a loss of work. '[G]enerally people keep their own business to themselves. Whether it's their earnings or what they applied for. So, it's very hard to even know exactly who has applied for anything.'

6.14 Confidence in Challenging Gender Inequality, Including Gender Discrimination

One of the factors that may be associated with a woman's confidence in applying for Silk or judicial office could be her confidence about raising concerns about gender issues with her professional body or the appointments body. This question, in interview, asked respondents to indicate on a scale of 1 to 10, with 10 being highest, how confident they would feel in raising a concern about gender inequality, including gender discrimination, in relation to applications to Silk or judicial office. Interviewees

⁸³ *McHenry-McGarry v Northern Ireland Court Service*, Case Nos. 142297SD, 142397SD, 293397SD, 6898SD (Industrial Tribunal, Northern Ireland, 23 March 2005).

were asked to consider how they would have rated their professional body, the Lord Chief Justice, and, in relation only to judicial office, the Northern Ireland Court Service and Commissioner for Judicial Appointments for Northern Ireland.

The general view among female judicial respondents was that women would not raise complaints for fear of victimisation, and consequent harm to their career. One woman who believed that she may have experienced gender discrimination put it as follows:

‘Well I wouldn’t have felt confident about raising it. I don’t think raising it would have done any good. And the reason I say that is in the areas where I’ve seen women raise these issues for example...[D]o you remember there was a [senior professional woman] who raised the issue that she had been overlooked. But she was destroyed. She was completely trashed and destroyed. And I just think that if you raise these things you are not going to be a popular person, everybody knows that and you’ll be...outside like some lunatic.’

Another added: ‘Even at my relatively senior level, women are inhibited from challenging – for fear of adverse reaction/ “labelling”...Again, the problem is in the profession...rather than in the application system. The resultant disparity of numbers of female Silks [and] judges is directly attributable to the endemic discrimination in the profession.’

Yet another stated that ‘you will have a mark against you for any other judicial posts that you might look at.’

One other added: ‘in circumstances where a male may be regarded as applying his rights, a female would be regarded as a troublemaker.’

Confidence in raising the matter with Bar Council

Of the eight practising barristers who answered this question, the average rating was 4.4 out of 10. One woman when asked how confident she would feel in challenging any gender inequality in her profession, replied: ‘if it happened to me? It happens to me all the time...it happens to me everyday here...People just seem to accept it...’ Another woman stated of the Bar Council: ‘they know about low representation of women. You are talking about bringing something to their attention that everybody knows about and they have chosen not to do anything about...The Equal Opportunities Committee is there now and they are not doing anything. They are more or less saying that nothing can be done.’⁸⁴

Of the four female judicial respondents qualified as barristers who gave a rating, the average rating was 3.5. One woman added: ‘I don’t think I would have ever relied on them.’ Another noted that there was no Women’s Bar Association in Northern Ireland, and observed: ‘given that they don’t feel free to congregate together and band together in that I can’t imagine any of them feeling free to put their head above the parapet.’

⁸⁴ A number of women said that the absence of reduced Bar fees to take account of part-time work, which is more likely relevant to women, indicated a lack of willingness on the part of the Bar to take seriously women’s concerns. The matter of fees was subject to legal proceedings at the time of the research.

Another stated: 'They have, in theory, got a Committee which deals with these matters but I think my suspicion is that it might be window-dressing really and is tolerated by the male members of the Bar really to keep the females quiet.'

Confidence in raising the matter with Law Society

Of the five female judicial respondents qualified as solicitors who offered a retrospective rating in relation to the Law Society, the average rating was 4.9. Of the twelve solicitors who offered a rating in relation to raising a complaint in their profession generally, the average rating was 5.6. Some practising solicitors believed that sex discrimination laws provided a sound basis for such challenge. However, two solicitors expressed concern about potential victimisation. One said: 'I am a sort of Bolshie kind that would challenge, but in your professional practice...I think that would be career suicide...I know a lot of people who suffered quite serious harassment and they were students and pupils, and were advised "you can't make a complaint, you'll never have a career", and I think that stays with you the whole way through.' Another added: 'No-one challenges anything in our profession, because it's such a small world. Even when absolutely outrageous things happen. Like, there is a number of firms I know who treated solicitors coming back from maternity leave in an absolutely outrageous way that [the women] would be jumping in with their IT1 if it was any other employer, but it is all smoothed over because Northern Ireland generally is such a small place.'

One solicitor referred to proceedings taken in the late 1990s by one female solicitor against the Law Society over its refusal to allow a reduction in fees for job-share solicitors. 'They had to be brought to court. They would not actually address the issue. They would not even discuss it. I mean it wasn't a problem, they just thought it was unimportant...'⁸⁵

Confidence in raising the matter with Lord Chief Justice

Four barristers provided an average rating of 4.5 about raising a matter with the Lord Chief Justice. One female judicial respondent offered a rating of 8 observing: 'I could raise issues with the Lord Chief Justice. I could raise issues with this Lord Chief Justice.'

Confidence in raising the matter with Northern Ireland Court Service

Of the eight female judicial respondents who offered a rating, the average rating was 5.6. Of the eight practising solicitors who answered this question the answer was 4.4. Of the three barristers who offered a rating the average was 5.3.

One observed: 'I think the Court Service are now in a situation where they understand they have to take a complaint seriously and they are under...the known principles and transparencies.'

Recommendation: Given the low levels of confidence that allegations of gender inequality, including gender discrimination, would be treated appropriately, confidence-building measures are required by all those responsible for appointments. The Bar Council and Law Society, in particular,

⁸⁵ The Law Society agreed on the eve of the hearing to set-up an Equality Working Party in lieu of proceedings to review the matter of fees, which has now been reviewed to allow retrospective reimbursement of fees if a solicitor states that she or he works less than 20 hours per week.

need to redress significant low levels of confidence in their ability to address concerns.

Recommendation: There should remain some independent audit of judicial appointments and Silk for the foreseeable future.

Confidence in raising the matter with the Commissioner for Judicial Appointments for Northern Ireland

All respondents were asked how confident he/she would feel in challenging any gender inequality, including gender discrimination, regarding applications for judicial office, and a number were specifically prompted regarding the Office of Commissioner for Judicial Appointments for Northern Ireland. One respondent indicated that it would not be necessary in her case to challenge gender inequality through the Commissioner's Office as she was unaware of gender inequality. One female judicial respondent stated that she would have no difficulty if the circumstances warranted. Another stated that the appointment of the Commissioner had made a difference in how confident one might feel about making a complaint. In general, however, few respondents volunteered knowledge about the role of the Commissioner for Judicial Appointments for Northern Ireland, despite the Commissioner's publicity of his role and functions, though one solicitor volunteered knowledge of similar regulation in England and Wales.

Recommendation: There should be extensive publicity given to role of the Commissioner for Judicial Appointments for Northern Ireland.

6.15 Knowledge of Women Leaving Private Practice

Just over half of lawyers and female judicial respondents who were interviewed knew women who had left private practice for reasons associated with their gender.

A variety of reasons were given, the main ones being lack of appropriate work for women in certain areas and being the main carer for dependents. A number of women referred to structural sexism which prevented career progression.

Exit from practice for reasons associated with gender was noted by men and women in relation to both the Bar and solicitors practice. A male barrister observed: 'I do know ladies that have left private practice and gone into ministries and government departments...Maybe they weren't getting as much work here as they should have...[T]here was, therefore, insecurity and they could immediately see that there was security by getting a job like in the Crown Solicitors or in the DPP...[N]ot being self-employed then they're paid all sorts of maternity rights as well.' A female solicitor remarked: 'I know a lot of women who, whilst they may not have left the profession, have moved into the Civil Service.'

Many attributed this to lack of suitable work or opportunity for career progression at the same level as men. Barristers referred primarily to lack of opportunities for women in criminal litigation.

Some attributed the exits to structural sexism. One female judge remarked: 'I know of women who have left firms because of gender issues, because they have been in a male-orientated firm and they have been denied promotion and have changed...left very good firms with very good futures because of gender issues...if the changes were not sideways, they were downwards.' One female solicitor stated: 'I think there

is quite a high level of sexism in terms of promotion...from our year in the Institute [of Professional Legal Studies], I think it must be 95% of the men...are partners and maybe 2 or 3 of the women, and, you know, it was about a 50/50 year.'

Another illustrative view was that of the female judicial respondent who said: 'I know of women who have left legal practice to go and deal with their families.' Another said: 'I look at how hard I have had to work over, say, the last five years as a barrister in order to maintain an extensive practice and in order to show myself to be conscientious and to satisfy what were the reasonable but very considerable demands of solicitors, and I worked very, very long hours. I...could not have combined child rearing — even with a very co-operative spouse — with that quality of practice. And I think that must inevitably influence women either to leave or to minimise their ambitions for particular periods of their lives.'

For some, the combination of child-rearing, increasing fees and pressures in practice at crucial points is too much. One female judicial respondent said: 'I would say the major reasons have been structural in terms of the sheer economics of paying for child care, paying for increased Bar fees which there tend to be in coincidence with women's childbearing years, and the sheer pressure of, usually, a two-career household.'

None of the six male judges interviewed knew of any women who had left practice at the Bar for reasons associated with their gender. One judge noted: 'The Bar can be tough enough for women...[s]ome friends chose a particular way of doing it — picked part-time tribunal work.'

Recommendation: Systematic research is needed on the incidence, scale, trends, and reasons for exits from legal practice. This can most effectively be conducted with the co-operation of the professional bodies, which will require effective methods of data collection. If such research confirms information gathered in this present research, the professional bodies need to take urgent action to help to retain women in practice.

6.16 Networking/socialising

Just over forty per cent of interviewees perceived that informal networks or socialising which had gender implications for women were important in applications for Silk and judicial office. Three types of comments predominated: there were groups which admitted only male members which could adversely affect women's appointments; there were associations or societies which had the effect of excluding women, whether intended or not; and, general socialising which tended to be more accessible to men than women due to the tendency for the latter to be main carers.

Seven female judicial respondents expressed views that informal networks or socialising among men influenced appointments. One thought these 'very important', and continued:

For example, golf clubs — membership of which is seen as prestigious in some way — almost exclusively male-oriented, affording opportunities to interact usefully within the profession...Secret societies also play a part here and, in my view, if not banned altogether membership should be compulsorily disclosed. Judges are not meant to have political affiliations. In my view it is equally repugnant for them to

be members of secret societies such as the Masons or the Knights or Opus Dei...

A similar view was expressed by a senior junior barrister: 'the 19th hole of the golf course was always a very important thing socially for people, particularly if you were playing golf with judges...[T]here's no doubt in the past...the Masonic Brotherhood which is strong in Northern Ireland, particularly strong in the prison service, police force and legal profession, did have significant influence. How much that still pertains is difficult to say, but I also think that the Knights of Columbanus, which is the mirror equivalent in the Nationalist/Catholic side has sufficiently influenced the Catholic judiciary as to who should be appointed in terms of Catholic appointments.'

Another female judicial respondent stated:

The Masons would be one where I would have my suspicions about the closeness of the people who are involved in those organisations favouring each other...I think that there certainly are Silks and the odd judge who has been part of that organisation. Even if they give it up when they join the judiciary, I think that probably the danger is still there that they might favour those who still belong to the organisation.

The significance of these organisations was doubted by only one female judicial respondent. A number of barristers and solicitors shared the view that informal networks and socialising were either no longer as important at all or to the same extent as in the past. Two female judicial respondents thought these more important in the past than at present, and that such influence existed at the higher levels of the judiciary. One said:

I would think certainly the perception in the past would have been that there was an old boys network applied in relation to judicial posts...I have never found any evidence in relation to tribunals.

Some interviewees were of the view that some of the socialising may not consciously seek to exclude women, but in practice has. One female barrister recalled a Bar golf outing to Royal County Down Golf Club 'four or five years ago' at which all the men went into the male members bar, leaving one female barrister standing outside. While a number of men stood outside with her for a drink, the others returned to the Bar. The barrister recounting this added: 'Now, that I think, is very, very clearly The Bar'. Another female barrister, referring to the implications for appointment, said there was a perception: 'If you are getting into little bonded groups you are going to find work passing more through those groups...[y]ou are going to have a bank of goodwill where people will be more inclined to promote you rather than someone who is outside their particular sub-group. So, therefore, when it comes – because of the way Silks [appointments] operate – "Is this person the right kind of person to be a Silk?" you are going to have more people saying "yes, they are" because you are going to have your protectors in a way, your supporters.'

One male barrister remarked 'if you socialise and you're in a social setting with judges and they get to know you and you get to know them, you are more inclined to be freer to approach them for references and the like.'

Many women also have difficulty in joining the same socialising and networks as men. While several women noted that informal networking and socialising was used by women as well, most noted that family responsibilities prevented women from interacting to the same extent as men. One female judge said:

I think that men are much more clubbable than women and, associated with the Bar, there are a lot of sporting organisations, things like the golfing society. I think there's rugby, football, cricket...all of these things provide potential for bonding between men and also for mixing with men who are already Silks or judges. I think this is a problem for women. I am not saying that there aren't organisations which women belong to as well but they don't use them, I don't think, to network in the way that men do.

One other female judge believed that while she had no evidence of any direct discrimination, '...a lot of what people do is subconscious rather than conscious and I think that if you are working in a totally male profession you may see things that are female as being unsuited to that profession.'

These responses are, broadly, consistent with findings in Ireland and in England and Wales, where, while there are some structural differences with Northern Ireland, significant cultural homologies remain. In Ireland, for example, more women than men tend to feel excluded from social networks.⁸⁶ Malleson and Banda found in England and Wales that some respondents believed that their appointment to judicial office depended on the extent to which they were prepared or able to network and socialise in the 'right' circles to get known.⁸⁷

Confidence among the public and members of the legal profession in the administration of justice and the integrity of the legal profession requires that there be no real or apparent conflicts of interest in relation to the appointments process to judicial office and to Silk.⁸⁸

The terms and conditions of service which High Court Judges, for instance, receive prior to application state that there is no objection to a member of the judiciary concerning himself/herself with a charitable organisation but that he/she 'should not undertake any other outside activity or continue an existing one, if it might conflict with his/her judicial office.'⁸⁹

The *Guide to Applicants* for County Court Judge and High Court Judge notes that the Lord Chief Justice will speak to the successful candidate about areas which could be considered to give a potential conflict of interest. The Lord Chief Justice uses a 'Checklist', which suggests a check that: 'A judge should not undertake any outside activity or continue an existing one, if it might conflict with his/her judicial office.' A record is kept of responses, though no register of interests is published.

An additional requirement that an applicant to the High Court disclose 'anything in [his/her] private or professional life which would be a source of embarrassment to [himself/herself] or the Lord Chancellor' is vague and insufficient. It should be a matter for the Judicial Appointments Commission to clarify these criteria, based on

⁸⁶ Ivana Bacik, Cathryn Costello, Eileen Drew, *Gender in Justice*, Trinity College, Dublin, 2003.

⁸⁷ Kate Malleson and Fareda Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office*, Lord Chancellor's Department Research Series No 2/00, June 2000.

⁸⁸ In *Lawal v. Northern Spirit Ltd* [2003] UKHL, [2004] 1 All ER 187 (19 June 2003) the House of Lords ruled that under Article 6 of the European Convention of Human Rights, requiring a right to a fair trial, no person should sit in a judicial capacity in circumstances which would lead a fair-minded and informed observer to reasonably consider that the person may be subconsciously biased. This judgement arose from a case where one of the barristers representing a client before an Employment Appeals Tribunal had previously sat as a part-time judge alongside one of the lay members who was hearing the appeal in that case.

⁸⁹ Clause 19.1, Memorandum on Terms and Conditions of Service, Department for Constitutional Affairs, Northern Ireland Court Service, High Court Judge, June 2004.

best practice in other jurisdictions. The Lord Chief Justice traditionally has been left in the somewhat invidious position of making judgements on these matters alone. It is in the interests of the administration of justice that any checks be subject to scrutiny, which role may be conducted by the Judicial Appointments Commission.

Yet, there remains the perception among many women barristers and female judges that there still exist informal networks or forms of socialising among men that exclude, directly or indirectly, women, and that this may unjustifiably impact on the process of appointment to Silk and judicial office.

Recommendation: The Judicial Appointments Commission, in liason with the Northern Ireland Court Service, should, as a confidence building measure, better advertise the fact, preferably as part of outreach, that conflict of interest precludes appointment to judicial office.

Recommendation: The respective appointing bodies should produce and retain a comprehensive register of interests for those appointed to judicial office and Silk and for those who appoint to Silk and judicial office, consistent with human rights requirements in relation to respect for private life and, also, freedom of association. Any person whose interests might indicate unsuitability for appointment or for participating in the appointments process should be excluded while such interests remain.

7. Questions Specific to Holders of Judicial Office

7.1 Attributes for Judicial Office

Female judicial respondents offered a range of attributes that go beyond those currently expected of applicants. These additional attributes are: empathy, respect for other people, patience, ability to recognise equality issues, and being able to communicate well with members of the public and with colleagues in the profession. One other judge added: '[c]ontinuing contact with the community, being a part of the community and being aware of what's going on in the community.'

7.2 Perceptions about the Gender Culture of the Judiciary

Male and female holders of judicial office were asked to describe the culture of the judiciary with reference to gender. The preponderant view among female judicials was that the culture was male. Many believed it to be changing. Only one female judge stated that she was not aware of any particular culture, another that she was not really close enough to it by virtue of being on a tribunal to be able to comment. Significantly, none of the male judges stated that there was a culture in terms of gender which had any adverse impact on women. A number referred to the recent appointment of two women to County Court posts. Another stated: 'I...would have difficulty with the concept of a judicial culture. We get on well together, but as I say, we are very much each our own man, so to speak, or woman, hopefully.' This was reflected, in part, in the views of one female judicial respondent who said '[I]t's individuals that make up the group.' She continued: 'Some individuals are better than others at seeing gender issues.'

Illustrative of the female views are the following statements:

'It's still very male orientated in its attitudes.'

'Male-orientated.'

'Atonalistic and patronising.'

'Ultraconservative.'

'I am probably out of touch with it now, so that it may have changed. I would have said that certainly until about 5 years ago it was a very male clubby kind of culture.'

'At my level, which is a lower level, I think it is fine, but the perception for a judicial posting from Magistrates upwards is that it's still male dominated.'

'It's still very much an old boy's network...But, that said, my perception is that those who have come in, in recent years are much more forward thinking and they have no difficulty working with women...I think this Chief Justice is addressing the issue.'

'I think they think they are being open to being convinced by individual merits. I think they are trying to be fair, but I think by and large they don't realise how much of their thinking and working practices and assumptions actually are sexist. But I do think there would be a genuine

willingness to open their minds to it. I think a lot of them have daughters who would be lawyers and that maybe changes their thinking slightly.'

'Well, it is still predominantly male, there is no doubt. But I think that is changing...'

'Changing. I mean we are developing a very young judiciary now at the high court level and I think it's a very different place then to what it was 10 years ago.'

'Generally speaking it is representative of the judiciary from which it is drawn...I am pleased to see that there is a much more progressive and enlightened landscape in the Northern Irish High Court bench these days.'

A number of these comments address the ratio of men to women in judicial office, about which recommendations are made elsewhere in this report. However, a number of comments pertain to attitudes that may create a 'chill' factor for women.

It is significant that of the five male judges who answered this question, none believed that there was a culture with reference to gender.

Recommendation: That further gender sensitivity training be provided for holders of judicial office, particularly for those on assessment panels.

7.3 Perceptions About the Difference that Having More Women in Judicial Office and Silk Would Make

The majority of female judicial respondents gave reasons why they believed that having more women in Silk and judicial office would make a difference. The question was also put to male judges for comparison.

Almost all female judicial respondents gave reasons. However, one said that their presence would be 'immaterial' and another doubted that it would make any difference. One of the male judges remarked: 'Women at the Bar have made a difference. They've had a civilising influence. There's now less of the roughness of a boy's club.'

The remaining responses can be categorised as relating to: (a) reflecting the gender ratio of society, (b) enhancing public confidence, (c) bringing different approaches to judicial office than those offered by men, (d) changing the working environment, (e) role-modelling for women. Some of these were combined, as the following statement from one female judge illustrates:

'I think it reflects...the balance in society...[F]rom the public's perception...it goes towards making it more representative. I think women do bring different aspects and skills and different life experiences to men and that means that they will look at situations in a different way – which has merit...The more you get the opportunity to have different views and experiences brought to the Bench can only help in formulating good decisions.' The Lord Chief Justice stated: 'They comprise half the population after all and...they are bound to bring in a side to the job that's different...[W]omen have a different insight. There is no question about that, and I would welcome from time to time the contribution of women that they can convey to

the Court of Appeal. I have just finished a case in which I would have liked to have had the comments of a women on the case.'

Another male judge stated: 'Only women will know what the impact is on a woman and perhaps I will never know. Although I have women in my life – a wife, daughters and of course my mother – there must be differences there. And, we do talk and it does rub off, and we do learn. So, to the extent that it opens our eyes and helps us appreciate the problems that some people might have...we have good social intercourse within the bench, we meet regularly, have dinner regularly, talk regularly, and if that rubs off on us then without that input, I think we would be the poorer judges.'

(a) Reflective of society

This factor was mentioned across types of interviewees. One female judicial respondent observed: 'In general, I don't think that women are exclusively better at anything in particular than men are. I just think that the courts would be better for a balance in that. I think that in all walks of life there should be an equal balance...[in] the representation between men and women and I don't think the Court should be any different.' One barrister added: 'There is a perception...outside that the Law is a very male dominated profession.'

(b) Enhancing public confidence

Several believed that more women would enhance confidence in the judiciary. One female solicitor stated: 'The majority of judges here are men and quite a large proportion of people using the courts are women and I think it would increase the court users' confidence if there was a broader cross-section of the community who actually were involved in judicial office'. One barrister stated: 'women are perhaps one of the largest vulnerable groups and I think it is important for our system to be such that, that vulnerable group feels properly and appropriately represented and that their voice is heard in the administration of justice.'

(c) Bringing different approaches

This view was most commonly expressed by female judicial respondents, though several solicitors and one barrister shared this view.

One female judicial respondent said: 'It would bring in a different dimension...You don't apply the law any differently. But I do think you see things from a different angle...we could probably draw people out better in some ways. Certainly, it comes down to quite a lot of hard work trying to find out how people's feelings were injured or hurt if they have been discriminated against...sometimes we can get the better out of people than men can.'

Another added: 'I do think there's no doubt that women bring different qualities to different things...you do have to take time off to have a child and bring a child up and so on...do the doctors appointments and the dental appointments...and they obviously have a greater understanding of the needs and demands and so on. I think you must have that representation.'

One other stated: 'I think it's the same as in any post, in any work, you need a gender balance to give balanced decisions. I think you would probably find that sentencing would go up dramatically, there's all kinds of child abuse, sex crimes, there's absolutely no doubt about it they have an entirely different attitude to it. I think they

would be more responsive to the needs of the client or customer. They would see it as delivering a service because a lot of them have been on the receiving end of the health service and other kinds of service systems and they would be more likely to see what time we are doing this at, it does not fit in with what people have to do. Why aren't we having courts open in the summer, or...more flexible...I actually think women are very good at managing, organising, being efficient and using time well, simply because a lot of them have had to.'

One female judge remarked: 'I think it's very definitely simple the difference it would make, and I quote Mary Robinson, the President of Ireland "women bring humanity to our job" and I think it means that people, it doesn't matter who they are, men or women, come before the bench and I think, generally, see a more human face...most of them, generally, I think feel that they have had...maybe...a better hearing.'

One male solicitor said: 'I think that women bring just different qualities, would probably bring different qualities to the judgements that are made in courts everyday...perhaps a bit more compassionate.'

One female solicitor added: '...I do think that there are factors that women bring...on many occasions they are able to look at in the round which is obviously an absolutely vital quality for a Judge. They are able to see more than one side of any situation. Obviously there are men that can do that, too, but I think that it's a trait that is more common in women and absolutely crucial as a Judge. I think they see the reality of a situation a good bit better. But I am always very reluctant to treat men and women in a box of their qualities...'

One barrister stated: 'I do think that women are less competitive than men and more into team work...you are going to get a difference in approach that is going to be more inclusive...there is going to be a better work/life balance...[T]he competition will be diluted and it will become a friendly, more open, transparent place...and it will be less self-interested.'

(d) *Changing the environment*

One female judicial respondent stated that it would make a difference to the 'atmosphere in the back corridor' at the Royal Courts of Justice where all the (male) judges of the Supreme Court of Judicature have chambers.' She added: 'if you introduce a different female perspective, I don't think it would do any harm. It's a balance anyway. It's meant to be a balanced society we are in.' A female solicitor stated: 'These days workplaces are more balanced...there's a better environment for having a good balance of male and female. I think any environment that ends up too female or male is not as productive as it might be and I think the combination and balance of the two is going to be helpful to clients, it's going to be helpful to the whole running of things.'

Another referred to the 'boys network, boys club'.

Various examples were given of statements that would tend to undermine women. One respondent noted that during a break in a Judicial Studies Board presentation about the potential difficulties in relying upon evidence from children, a previous Lord Chief Justice stated as an opening comment upon approaching those queuing for coffee: 'It would make one wonder about fantasising women'.

(e) *Role-modelling*

Female barristers, solicitors and judges referred to this factor. One female judicial respondent said: 'I think it would lead to more confidence and it would lead to more applications...'. This was echoed by one female barrister: 'I think it would make an immense difference. I think you would have a lot more motivation with women at the Bar.' A female solicitor added: '[I]t would be sending out a very positive message, particularly to younger women coming through the profession who are in the majority...[W]henever I started here I chose this firm because it had a lady partner and that was very, very rare in 1988 – to see a lady on the notepaper – and, I thought, that's a firm that doesn't have a problem.' One male judge stated: 'I think that it would certainly encourage other women practitioners to believe that they have the opportunity ultimately to aspire to judicial office and to Silk.'

8. The Professional Bodies

8.1 The position of the Bar Council of Northern Ireland

The Bar Council of Northern Ireland is responsible for a range of matters regarding the Bar: maintaining the standards, honour and independence of the Bar; improving the services and functions of the Bar; and, representing and acting for the Bar generally in its relations with others and also in matters affecting the administration of justice. Amongst other responsibilities the Bar Council must survey and regulate all matters relating to the professional etiquette of the Bar, and also the organisation and conditions of work of the Bar.⁹⁰

A meeting was held with the Chair of the Bar Council on 7 February 2005, at which the Chief Executive attended.

The key aspects of the responses of the Chair were:

- the Bar Council has no views on whether the process of appointment to Silk or judicial office has any gender implications,
- nothing needed to be done to improve the process of appointment to Silk or judicial office with reference to gender,
- having more women in judicial office and Silk would make no difference.

The Chair of the Bar Council reiterated the position that appointment to Silk and judicial office should only be on the basis of merit.

The Bar Council stated in its *Second Report of the Committee Established by the Bar Council of Northern Ireland to Consider All Aspects of the Appointment of Queen's Counsel in this Jurisdiction*, April 2002, that while it did not advocate a limit on the numbers of Silk, it suggested that the appointing authority consider 'the fact that appointment as a Queen's Counsel represents...[amongst other things]...the conferring on the individual of an honour which should not be devalued by the appointment of so many individuals that it ceases to be an honour' (para. 15). The Committee did not consider that the matter of how many are appointed to Silk could also have a disproportionate impact on the success of women applicants. Neither the Second Report nor the first Report⁹¹ referred to gender.

In sum, the Bar Council provided no evidence that it was aware of a range of gender implications in the matter of appointment to Silk or judicial office. Nonetheless, the Bar Council and the present Chair have taken certain steps that are sensitive to particular issues facing women. The Bar Council has an Equal Opportunities Committee a number of whose recommendations have led to changes in policy at the Bar in relation to, amongst other things, reduction of fees during maternity leave or a career break; a statement of equality being placed at the Bar Library reception; all lists of available barristers containing an Equality statement; and, providing a car parking facility during pregnancy. Following concerns about sexist remarks against women in the late 1980s and early 1990s the Bar Council arranged for circulars to be sent out to its members and produced an Equality Code in consultation with outside bodies. The Code notes that:

⁹⁰ The Honourable Society of the Inn of Court of Northern Ireland, *Constitution and Byelaws*, Regulation 25. (Downloaded: <http://www.barlibrary.com/codeofconduct/code2.html>, 19 October 2004.)

⁹¹ Bar Council of Northern Ireland, *Report of the Committee Established by the Bar Council of Northern Ireland to Consider all Aspects of the Appointment of Queen's Counsel*. April 1997.

The Bar is often seen to be “aggressive” and “masculine” and therefore inherently unsuitable for women. The language used to describe barristers may reinforce the masculine stereotype and should therefore be inclusive rather than always referring to “he” and “him”.

As a result of the Equal Opportunities Committee identifying the reluctance of some firms, particularly insurance companies, to brief women, the Bar Council sent a delegation of members to the Law Society and insurance companies to try to persuade them to redress their briefing practices with reference to gender.

The present Chair has been instrumental in seeking to expedite payment of fees for legal representation, particularly in family law cases where many women appear to be preponderantly represented when compared to men.

8.2 The position of the Law Society of Northern Ireland

A meeting was held with the President of the Law Society on 10 February 2005, at which the Chief Executive attended.

The Law Society endorsed encouragement of women to apply for judicial office, was keen to see greater flexibility in judicial sittings, and suggested exploration of part-time sittings at the County Court and High Court levels. However, beyond these matters, further awareness of how current and past procedures could have an adverse impact on women, and what might be done to improve the position for women, should be developed.

In relation to the perceived advantage for Silks in attaining judicial office, the Chief Executive stated: 'I suppose most people would say it gives you a head start. Whether within that there's also a particular disadvantage attaching to women solicitors...I'm not so sure.' In response to the question 'Have you any views on whether the process (including procedure or criteria) regarding appointment to Silk had, or has, any gender implications', the President replied: 'Because that is something exclusively for the Bar, it's not something I've given a whole lot of thought to. It's an issue that could be directed to the Bar.' Yet, the Law Society had for some considerable time been one of the consultees in the process for appointment of Silk and, at the time of interview, was discussing a document about the reform of the process of appointment for Silk in Northern Ireland which had been initiated in mid-2004. In response to the question whether there was anything in that document which referred to gender, the Chief Executive replied: 'not that I'm aware of'.

In response to the question, 'Do you know of any women who have left practice as solicitors for reasons associated with their gender?', the President stated: 'It is not something that the Law Society should necessarily be concerned about. There is a difference between leaving the profession and those who make a choice to take time out.' When asked whether the Law Society had done research on those who leave the legal profession or legal practice the Chief Executive stated: 'No'. Similarly, the Chief Executive acknowledged that the Law Society had not undertaken any other research on gender equality following recommendations in a report by the Equal Opportunities Commission for Northern Ireland in 1999.⁹² He stated that the Law Society 'took the most pragmatic action to try and address the equality issue', which was 'the offer' of reduced fees for a practising certificate where a solicitor worked less than a certain number of hours per week. This 'offer' arose from legal proceedings taken by a female solicitor in a job-share partnership who argued that the existing full-fee charge amounted to sex discrimination in that women were more likely to be carers and required part-time work.

In relation to briefing practices the President of the Law Society stated that there was 'a perception of the type of work that men and women typically do' but that 'the Law Society is not in a position to instruct solicitors; that would be more the responsibility

⁹² Equal Opportunities Commission for Northern Ireland, *A Case for Equality: Gender Equality in the Solicitors Profession*, 1999. Recommendation 3: 'The current gender composition of occupational structures should be examined. If women are under-represented in higher positions within a firm, then positive action measures should be developed to encourage greater representation of women in senior positions.' Recommendation 7: 'The basis of remuneration to solicitors should be scrutinised. Examine why women are paid differently, and ensure that the reasons for different methods of payment are objectively valid, especially when the groupings concerned result in gender differences in payment.' Recommendation 10: 'All policies directly or indirectly related to maternity and parental leave should be scrutinised, to ensure that arrangements for maternity and parental leave are clear and consistent with legal entitlement.'

of the Bar Council, which goes to the development of women barristers but is not something that the Law Society should have a position on.'

A range of recommendations in the report of the Equal Opportunities Commission for Northern Ireland in 1999 has not been pursued by the Law Society. A number of the findings of that report are relevant to this research:

- Women were under-represented in senior levels of management in private practice. Overall, less than a quarter of women solicitors (23%) were either equity or salaried partners in their firm, compared with over two thirds of men (69%), and this differential could not be accounted for by either length of post-qualification experience or academic achievement. That research found that whereas 86% of men with 10-19 years of experience were partners, less than half of women (49%) in the same experience group had achieved this position.
- There were significant gender differences in three types of work: criminal law, family law, and personal injury claims. It was found that significantly more men than women spent over a quarter of their time on personal injury claims (40% compared with 30%), and on criminal law (11% compared with 5%). In contrast, nearly one in five female respondents (17%) spent over a quarter of their time on family law, compared with only 4% of their male counterparts.
- 49% of women believed that their career had been affected a lot or a little by maternity leave.
- The second most frequently suggested measure to advance gender equality in the legal profession was to increase the proportion of women members of the Law Society Council (27%).⁹³ (In the period 1998-1999, there were 8 women on the, then, 29-person Council. In the period 2002-2004, there were 4 women on the 21-person Council, i.e. 19%.)

⁹³ The first (53% of respondents) identified the issue of Equal Opportunities Guidelines by the Law Society.

9. Northern Ireland Court Service

The Northern Ireland Court Service came into existence on the 18th April 1979 by virtue of section 69 of the Judicature (Northern Ireland) Act 1978.

The Northern Ireland Court Service did not make available any written policy addressing representation in the number of women in applications for judicial office prior to implementation of the recommendations of the Criminal Justice Review Group in 2000.

In 2002 the Northern Ireland Court Service produced a guide *Judicial Appointments: Policies and Procedures* which states that the Lord Chancellor appoints those who appear to him to be best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, age, whether or not the candidate has dependants, religion or disability, except where the disability prevents the fulfilment of the physical requirements of the office. The Guide publishes the process of appointments, as set out earlier in this report.

The Report of the Criminal Justice Review Group recommended that 'those responsible for judicial appointments should engage in discussion with the Bar Council and Law Society about equal opportunity issues and their implications for the judicial appointments process' (par. 6.113).

The position of the Judicial Appointments Unit, Northern Ireland Court Service

The Report of the Criminal Justice Review Group proposed a dedicated Judicial Appointments Unit (JAU) 'to assist the Lord Chancellor and the Lord Chief Justice in their duties within the current judicial appointments process' (par. 6.122). The Unit was established in 2001. In November 2003, a new division, the Judicial Services Division, was created within the Northern Ireland Court Service to deliver proposals arising from the Criminal Justice Review and subsequent Justice (Northern Ireland) Act 2002. The Division is responsible for three sub-divisions: Judicial Appointments Unit, Lay Magistrates Project, and Judicial Appointments Commission Project.

The Director of Judicial Services reported that he was responsible for implementing in Northern Ireland the Lord Chancellor's framework for judicial appointments. No research on gender and judicial appointments had been conducted prior to the recommendation of the Commissioner for Judicial Appointments in his Audit Report of 2003. The Director of Judicial Services and Head of the Judicial Appointments Unit were unaware of there being any record of complaints made by women about appointment to judicial office prior to the appointment of the Commissioner for Judicial Appointments for Northern Ireland.

The Northern Ireland Court Service had progressed a number of matters with relevance to gender, as follows: equity monitoring of all applicants, training of assessment panels, wider circulation of advertisements, publication of the handbook *Judicial Appointments: Policies and Procedures*, the requirement of application forms up to and including the level of High Court judge, co-funding of research on applications by women for judicial office, and assessment panels reflective of two genders (male and female). The Northern Ireland Court Service had also widened the applicant pool for judicial office through a pilot-outreach event in Londonderry and proposes an 18-month pilot project on part-time sittings for Resident Magistrates. The Northern Ireland Court Service took the view that a number of other matters were properly the function of the proposed Judicial Appointments Commission, of which the Director of Judicial Services and Head of the Judicial Appointment Unit will

form part of the secretariat. The effect of this approach, however, was to suspend, between publication of the Criminal Justice Review report (2000) and the creation of the Commission (June 2005), action across a range of interventions that could more effectively have addressed the representation in the number of women applying for judicial office.

The Review also recommended the creation of a Judicial Appointments Commission for 'organising and overseeing, and for making recommendations on, judicial appointments from the level of the High Court downwards' (para. 6.105). The Review recommended that the JAU would assist the Commission in 'developing a strategy of equal opportunity and outreach designed to broaden the pool of potential applicants in a way that maximised the opportunity for men and women...to secure appointments' (para. 6.111). This was enshrined in the Justice (Northern Ireland) Act 2004.

The Judicial Appointments Unit invites anyone who would like further information about appointments or a discussion with a senior member of staff to contact the Unit. The Unit also maintains a database of candidates interested in judicial appointment. Any person may register such an interest. Those on the register receive notice of appointments schemes. A name remains on the register until that person is appointed or until he or she requests removal of his or her name.

The Judicial Appointments Commission assumed responsibility from the Judicial Appointments Unit in June 2005.

10. Additional Recommendations

10.1 GENERAL

10.1.1 Availability of Work/Progression

A number of respondents referred to the obstacles women face in seeking to enter certain fields or levels of court work. Accordingly, suggestions were made by some respondents for improvements in the availability of work for female barristers and solicitors. One female judicial respondent put it simply: '[G]ive women more and better quality work.' One female barrister suggested that this can be traced back to pupillage. 'There should be some enquiries as to why women don't benefit from their pupil masters as much as men do.' A male barrister added: 'You've got to give them breadth of experience. They've got to be seen to go into the Crown Court'.

Female holders of judicial office were also asked to indicate the fields of work and level of court in which they specialised before appointment, and as a proportion of their total work or appearances. Not all respondents completed this question fully, thus making it impossible to assign codes to different proportions. However, where a proportion over 50% was given or where only one entry was inserted, this was treated as the 'main' field of work or level of court. Accordingly, data showed that no female holder of judicial office had criminal law as a main area of work. Two did indicate that Magistrates Court and County Court (both of which deal, among other matters, with criminal litigation) had constituted their main levels of court work. More women had worked in the High Court (20%) or tribunals (15%) as their main area of work than in any other areas. The highest preponderance of field of work was Family Law (25%), followed by 'General' (15%). The relative absence of female judicial respondents with main field of work as Criminal Law confirms perceptions that women are not receiving the same range of practise experience as men.

A significant proportion (almost 70%) of female judicial respondents who were formerly solicitors had come from either a sole practitioner's practice or from a practice with 1 to 5 partners. This might suggest the need for further research into why women in firms of five or more partners are less likely to be represented in judicial office, and may suggest a need for targeted outreach to those firms.

Recommendation: The Bar Council and Law Society should reiterate that work must be distributed without gender discrimination.

Recommendation: The Bar Council should reiterate to pupil-Masters the importance of distributing work without gendered assumptions about willingness or interest to undertake work.

10.1.2 Capacity Building

Encouragement

In addition to the specific recommendations in relation to encouragement to women already made, encouragement to women at all levels of the academic, professional and CPD stage of education is required.

Recommendation: The Judicial Appointments Commission should liaise with the relevant academic institutions and professional bodies in Northern Ireland

with a view to encouraging women to consider appointment to Silk and judicial office.

Post-maternity/child-care refresher courses

A number of women stated that they believed that taking leave from practice either for maternity or child-care could impede their own progress towards Silk or judicial office. This often accounted for many female barristers taking very short periods of maternity leave. One female solicitor observed: 'There is absolutely no provision for...you know the way if you were a nurse there is back-to-nursing courses and refresher courses? There is nothing like that at all, not one thing. You would just have to hope that some private practitioner trusted you enough to take you on and you would just have to step up and do your own learning and go to as many courses as you can. But there is no provision for people, either through illness or maternity leave or anything like that to have refresher courses, it's a real weakness.'

Recommendation: The Law Society and Bar Council should co-operate on CPD refresher courses to assist women who have returned from maternity leave to practise.

Mentoring

One female solicitor suggested: 'Have women mentored by senior males of their profession.' The practise of mentoring works well in other professions well beyond the one-year pupillage period at the Bar in Northern Ireland. This could be extended optionally for up to a period of three years.

Recommendation: The Bar Council and Law Society should explore the possibility of providing for mentoring to junior barristers and solicitors, respectively, for a suitable period beyond qualification.

Shadowing of holders of judicial office for trainees.

The Department for Constitutional Affairs runs a work-shadowing scheme for all solicitors and barristers in England and Wales whereby they can observe for up to five days the work of either a Circuit Judge or District Judge (Civil). The Department reports that feedback from the scheme has been 'very positive, with many people stating that as a result of their experience they are now more likely to apply for judicial office.'⁹⁴ The Judicial Appointments Unit has completed a discussion paper for the Judicial Appointments Commission on work-shadowing.

Recommendation: The Judicial Appointments Commission should consider conducting a pilot programme of judicial work-shadowing for junior barristers and solicitors.

Careers Advice

Appointment to judicial office has traditionally been treated as the final point in a career in the legal profession, unlike the 'career judiciary' in many civil law countries.

There has been little attempt to structurally nurture or develop those eligible for judicial office. In part this is due to the entirely understandable need to maintain judicial independence. But an independent judiciary and an effective system for building capacity are not necessarily incompatible.

⁹⁴ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, para. 2.6.

All barristers and solicitors should be made aware in a transparent manner throughout their careers of the opportunities for career progression. Such an approach should properly begin at the academic stage of legal education, progress through the professional training stage and then be available throughout professional practice. In addition to having a designated source of information on such career progression, whether on a website or in person, there should be automatic notification to every barrister and solicitor one year before they attain the required period of eligibility that they might wish to consider applying from the following year.

One female barrister said: '[t]here are very, very few female Silks...so, it's not something [women] perceive as perhaps the next step in their career because its still an aberration but that has to be removed and people have to see that it is actually the next rung on the ladder...But because there have been so few for so long it's difficult to give that feeling that it's your natural progression. For a long time there were only two!'

Recommendation: The Law Society and Bar Council should each provide confidential careers advice.

Recommendation: The Bar Council and Law Society should offer periodic formal 'careers' advice to members. In the case of judicial appointments, this should be done in consultation with the Northern Ireland Court Service and proposed Judicial Appointments Commission.

Recommendation: One year before the eligibility of every barrister and solicitor the Bar Council and Law Society should inform those pending such eligibility that they might wish to consider an application.

10.1.3 Information About Appointments

A number of respondents acknowledged a lack of knowledge and general information about the process for applying for Silk and judicial office. One senior female solicitor observed: 'I really do not know how it's done and I can't help but think that I doubt if I'm alone in this. And it may well be that there has been a publicity campaign about it which has just passed me by but it must be of benefit to do more publicity about how the selection is done.' A female barrister said: 'I think it would all centre around communicating with women to allow them to have a better understanding of what the criteria are and how they might go about applying'. The Department for Constitutional Affairs has identified a number of problems with what it terms this 'communication gap' in relation to judicial appointments in England and Wales. First, the lack of awareness about forthcoming competitions and how to apply. Secondly, misconceptions about the process can inhibit application. The Department also noted that there is some anecdotal evidence that some potential applicants may feel disadvantaged by less detailed knowledge of the judicial role, particularly where their practice does not regularly bring them into contact with the courts.⁹⁵

Recommendation: In general, there should be improved communication on the process, criteria and procedure for appointments to judicial office and Silk.

⁹⁵ Department for Constitutional Affairs, *Increasing Diversity*, para. 3.3; Commission for Judicial Appointments, *Annual Report 2003*, para. 2.2.

Advertising

Two female solicitors suggested particular encouragement to women. One referred to similar encouragement in relation to under-representation in the community background of applicants elsewhere: ‘..in the same way that as any job advertised is to say “the company particularly welcomes applications from whatever”, you do tend to think “oh, right, fair enough”. Because we do that to correct religious inequality...’

Recommendation: In so long as there remains under-representation of women in Silk and judicial office, advertisements for Silk and judicial office should state that ‘applications by women are particularly welcome.’

Targeting

The Equality Impact Assessment of the Lay Magistrates Scheme in Northern Ireland persuaded the Northern Ireland Court Service to target a widespread audience and to target under-represented groups. Targeting would appear to have been used with some success in increasing applications for judicial office from women elsewhere, in particular Ontario, Canada.⁹⁶

Recommendation: The Judicial Appointments Commission should explore how women might be targeted to receive information about judicial appointments.

10.1.4 Eligibility

The move to a competency-based assessment for judicial office necessarily diminishes, if not undermines, the need for qualification based only on a period of standing and membership of either the solicitors’ profession or the Bar.⁹⁷

No minimum periods of standing

The setting of periods of standing more than, say, six years, would have a disproportionately adverse effect on women because the pool of female candidates who could meet that requirement would be substantially less than the pool of male candidates. It is arguable that a minimum age limit is not rationally justified and, in other circumstances, would likely amount to indirect discrimination under the Sex Discrimination (Northern Ireland) Order 1976, as amended.⁹⁸

Recommendation: There should be no minimum period of standing for appointment to judicial office.

Eligibility to judicial office outside Solicitors’ profession and the Bar

The limitation to practising barristers and solicitors excludes a range of persons, such as non-practising barristers and solicitors, academics or legal executives, whose legal expertise may be suitable for appointment to certain judicial posts.

Recommendation: The Judicial Appointments Commission should give serious consideration to opening up judicial office, certainly in specialist areas, to legal academics and legal executives.

⁹⁶ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Annex A: Judicial diversity in other jurisdictions, p. 60.

⁹⁷ Department for Constitutional Affairs, *Increasing Diversity*, para. 3.3; Commission for Judicial Appointments, *Annual Report 2003*, para. 5.10.

⁹⁸ Cf. *McGarr v Ministry of Defence*, Employment Tribunal, Case Nos. 2300464/02, 2303733/03, 10 May 2004.

Quotas

One female solicitor recommended quotas. There were no other recommendations for quotas. Some interviewees cautioned against any action that might allow the perception that women were being appointed on the basis of gender rather than merit, and a number referred to the fact that any such action would be subject to sex discrimination laws. There was no recommendation that the relevant legislation be amended. However, it is acceptable to set indicative targets for widening the pool of applicants.

Recommendation: The Judicial Appointments Commission should set achievable indicative periodic targets for widening the pool of female applicants through the range of recommendations in this report.

10.1.5 Appointments Process

‘Appointment should be the final part of the process – it does not itself make someone into a judge. Less mysticism about the appointment more emphasis on the distinct skills and abilities needed and a structured way of obtaining and validating these will open access. If you rely on the process of appointment alone to equalise access, you will fail.’

One female judicial respondent

Application Form

Transparency

Several lawyers suggested more transparency and clearer criteria. One female barrister said: ‘Transparency. Everyone is clear what it is. A consistency as to how the whole thing will work so people feel secure in how applications will be dealt with.’ One respondent suggested that there had been improvements in this regard:

‘I believe the process has improved greatly in recent years and now has transparency that was previously lacking. I think that better information in relation to successful candidates should be provided...The idea that one should have the experience of all areas of the posts is an outdated one.’

Language

The language of the form should be checked for any potentially adverse gender implication/s. One female solicitor recalled that the last application form which she had obtained used the word ‘outstanding’ in relation to professional achievement and effectiveness in their professional practice. She noted, ‘That is a very...a very un-female outlook, for women to say “oh, here are five people who will tell you that I am wonderful”...You sort of think, oh, I wouldn’t like to ask anybody to say that, they would probably laugh at me...I don’t think men have as much self-doubt as women.’

If, as suggested by one woman, women would not self-refer as outstanding it may be that other women assessing them could equally feel uncomfortable using this term. In which case, the use of the term on consultee forms could discriminate against women.

Recommendation: The application materials for Silk and judicial office should avoid language which would directly or indirectly disadvantage or inhibit women.

Income

One female tribunal member said: '[W]hen I filled out an application form I personally took exception to the question asking about income...I felt that was discrimination against females in terms of...there [were] fewer female partners in firms of solicitors than there are male. So I thought that it was difficult for women to compete in that respect.' One High Court Judge suggested that there could be something inviting consultees to comment on quality of work rather than using annual income as a proxy for ability.

In fact, income is not used to assess suitability and in fact is not made available to the assessment panel at any stage. Rather, it is used for the purpose of reporting by the Northern Ireland Court Service to the Senior Salaries Review Board and inform their consideration of the level at which judicial salaries must be set in order to aid recruitment and retention of judicial office holders.⁹⁹ Applications for judicial office, such as the High Court or County Court, do require on the application form details of personal income. In any event, the perception remains such information will be taken into consideration by the assessment panel.

Recommendation: Application materials for judicial appointment should make clear that income is not a factor in assessing suitability for appointment, and explain the need for requesting such information.

Criteria

The concept of 'merit' was approved by those respondents who showed least acknowledgement of structural or cultural obstacles facing women. The concept of merit has, historically, not merely allowed for 'idiosyncratic and arbitrary'¹⁰⁰ assessment but may actually have functioned to replicate previous characteristics,¹⁰¹ or what has been termed 'cloning'.¹⁰² This acknowledgement lies behind the shift from a singular criterion, through the adoption of a list of specific competencies to different modes of testing a range of competencies. Nonetheless, the pre-eminence of the principle of merit in legislation requires that an unexamined criterion of merit be treated with caution as a singular criterion for appointment to judicial office or Silk. A new language is required, one which addresses competencies, skills, functions, and a range of essential attributes for the range of advocacy or adjudicative roles.

The Bar Council of England and Wales recommends that: 'Relevant experience of, or derived from, backgrounds, cultures, perspectives and other diverse circumstances should be part of the strengths that a candidate offers and therefore properly considered in the assessment of merit. Diversity needs to be fed into the test of merit, so that an understanding of and ability to deal appropriately with diversity issues will

⁹⁹ Communication from the Director, Judicial Services Division, Northern Ireland Court Service, April 18, 2005.

¹⁰⁰ Margaret Thornton, 'Affirmative Action, Merit and the Liberal State', (1985) 2(2) *Australian Journal of Law and Society* 28. See, also, Barbara Hamilton, 'Criteria for Judicial Appointment and "Merit"', (1999) 15 *Queensland University of Technology Law Review* 10.

¹⁰¹ '[W]e have seen evidence of a "cloning" process in which people may tend to view merit in terms of the personal characteristics that they themselves possess or that they perceive in those around them/those they know/work with Commissioners for Judicial Appointments, *Response to the Department for Constitutional Affairs Consultation Paper 'Increasing Diversity in the Judiciary'*, January 2005, para. 7.

¹⁰² Helena Kennedy, *Eve Was Framed*, Chatto & Windus, London, 1992.

count in a candidate's favour when assessing his or her application for judicial appointment.¹⁰³

The Commission for Judicial Appointments adds: 'It is reasonable to give consideration to the different perspectives and insights offered by people of different genders and mixed social and ethnic backgrounds, which may improve the overall quality of judicial decision making, not least by contributing to a wider understanding of the issues facing court users.'¹⁰⁴

Recommendation: The criteria for suitability for judicial office should allow assessment of the extent and depth of experience and knowledge of an applicant that would enable that person to deal appropriately with diversity issues, and this should contribute to the assessment of merit.

The criteria for appointment to High Court Judge include a requirement that the applicant will 'respect and have understanding of men, women and children of different ethnic and cultural backgrounds.' However, given the lack of appreciation among the male judges in this research about the reality facing many female lawyers, it seems necessary to require that applicants for judicial office should demonstrate knowledge of, at least, gender issues.¹⁰⁵

This should apply throughout the appointments process, right through to Lord Chief Justice. This report endorses the recommendation of the Criminal Justice Review that upon devolution the First Minister and Deputy First Minister should consult with the Judicial Appointments Commission over the procedure to be adopted in the appointments to the positions of Lord Chief Justice and Lord Justice of Appeal and submit such procedure to the Lord Chancellor for approval.¹⁰⁶

Recommendation: The appointments process should, consistent with the principle of judicial independence, be based on best practice in Human Resource selection methods. A new language is required, one which addresses competencies, skills, functions, and a range of essential attributes for the range of advocacy or adjudicative roles.

Recommendations: Applicants for judicial office should be able to demonstrate, amongst other things, knowledge and understanding of gender issues (amongst other diversity issues).

Competence-based assessment

One female solicitor referred to experience of competence-based assessment in the civil service. 'I see that competence-based interviewing works and...if everybody was aware of what the competencies were and how exactly they were going to be assessed against those competencies, I think that could only be an advantage.' Another stated: 'I think there is too much weight given on the interview.' The

¹⁰³ Bar Council of England and Wales, *Increasing Diversity in the Judiciary: Bar Council Response to Department for Constitutional Affairs Consultation Paper*, 2005.

¹⁰⁴ Commission for Judicial Appointments, *Annual Report 2004*, 2004, para. 2.16.

¹⁰⁵ This is consistent with a recommendation by the Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, para. 5.4.1, which does not yet appear to have been implemented by the Northern Ireland Court Service. See, also, Law Council of Australia Policy on Judicial Appointments 2001 which identifies as an attribute for judicial office 'social awareness, including gender and cultural awareness'.

¹⁰⁶ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, 2000.

Department for Constitutional Affairs proposes introduction of single competence framework for all judicial posts below High Court.¹⁰⁷

There is some anecdotal evidence that women may be performing less well than men in interviews for judicial office and that this may be due to the nature of the interview as method rather than any reflection of the competency of the individual to undertake the tasks concerned. General research studies suggest that interviews are of limited use in predicting performance in office.¹⁰⁸ The Department for Constitutional Affairs notes that the assessment centre approach is 'a more likely indicator of future success than an interview alone, as it is more objective, fair and consistent.'¹⁰⁹

Recommendation: The criteria for appointment must test competency across a range of skills and abilities.

Recommendation: The Northern Ireland Court Service and the Judicial Appointments Commission should explore the introduction of Assessment Centres for applications to judicial office.

Consultees

One senior barrister cautioned against the previous consultation procedure: 'I think this idea of a magic circle of consultees who will whisper to each other is wrong.' This barrister recounted information received from a former High Court judge who had participated in past Silk appointments, recalling: 'stories...which are quite terrifying, about what people said to each other, about what they felt about people. Quite irrelevant criteria were brought into effect, like whether they liked the wife of the person or not, or whether the wife had annoyed them, or they didn't like the look of the guy or his demeanour.'

One female judicial respondent stated, in relation to the former practice, that the role of High Court Judges in advising on appointments for Silk and judicial office was 'very, very significant' and that in the application forms, as then existed, the section on 'limited visibility' suggested by its very nature a second-tier of assessment for those who did not appear in the High Court. This could have had a disproportionately adverse impact on women, particularly women solicitors. In recognition of the limited visibility to automatic consultees, the Northern Ireland Court Service introduced a system whereby the applicant could nominate an additional consultee. Because of the perception that Silk advantages people in applications to judicial office and that those who do not appear regularly in the higher courts, and in particular the High Court, are not as advantaged as those that do, the criteria and consultation process must change.

One of the senior male judges in a revealing answer to the attributes for Silk referred approvingly to the 'aggressive' nature of a number of male counsel, a term that would not normally be applied to women. The potential that judgement about a personal characteristic, unrelated to competence, might affect award of Silk suggests

¹⁰⁷ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, Introduction, para. 4.3.

¹⁰⁸ Commissioners for Judicial Appointments, *Response to the Department for Constitutional Affairs Consultation Paper 'Increasing Diversity in the Judiciary'*, January 2005, p. 12, citing J.M. Smith and I.T. Robertson, *Advances in Selection and Assessment*, 1989 and J.M. Smith and I.T. Robertson, 'Personnel Selection', (2001) *Journal of Organisational Psychology* 441-472.

¹⁰⁹ Department for Constitutional Affairs, *Judicial Appointments Annual Report 2003-2004*, para. 47.

particular need for a transparent process that excludes any conscious or unconscious gender bias.

Another male judge referred to the need for 'hard work' as an attribute for judicial office. This was not referred to by women. Contrast, for example, the first words of one male judge when asked to identify the attributes for judicial office: 'Hard work, persistent work, incessant work.' One of the female judicial respondents replied to the same question: 'prepared to do a day's work'. The slight nuance is significant. Hamilton has drawn attention to the risk that 'women's employment patterns, particularly within the legal profession (with periods devoted to child-rearing and part-time work resulting from family responsibilities) may be regarded as counter-indicative of this trait [i.e. hard work].'¹¹⁰ particularly if it is measured solely according to the hours worked rather than the quality of the work or the speed at which it is produced.

One female judicial respondent noted that historically consultees for Silk and higher judicial office had been male (though in recent years there was one, and for a short period there was two). She added: 'if you were looking at that and saying "well, do I stand a chance?" and then you read the list of consultees, you might think, well, as a woman this is going to be imbalanced against me.' This judge suggested abolition of the automatic consultee process completely and replacement by nomination of whatever is considered to be an appropriate number of referees.

One barrister identified the danger in appointment to Silk where only the Chairs of the Law Society and Bar Council consult with a narrow range of consultees, for example judges in courts where an applicant may never have appeared. If this consultation occurred, for instance, only with High Court Judges and the Recorders of Belfast and of Londonderry it would likely have a disproportionately adverse effect on women applicants as they tend not to appear in the High Court or in the County Court.

Currently, applicants for all judicial posts below County Court Judge are required to nominate up to six, and not less than three, consultees who are familiar with their work and able to comment on specific competencies required.

Recommendation: The automatic consultation procedure for High Court and County Court schemes should be abolished and replaced with a process of nominated referees.¹¹¹ For all schemes the applicant should be required to nominate two judicial referees who know his or her work and can comment on specific competencies required for the post. This should be in addition to two references from professional clients.

Recommendation: Given the potential gender-bias in the association of masculine attributes with judicial office, existing equality training for Assessment Panels should include enhanced gender sensitivity training that takes account of such potential bias.

¹¹⁰ Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1(2) *Queensland University of Technology Law & Justice Journal* 223, at p. 235.

¹¹¹ Consistent with the recommendations of the Judicial Appointments Commission in England and Wales, *Annual Report 2004*, para. 3.28.

10.1.6 Interference With Appointments

The Association of Women Barristers in England and Wales referred to an allegation made by a third party to the Lord Chancellor against an applicant to judicial office in England and Wales. While the Lord Chancellor disregarded the allegation, the Association were of the view that preventing any such attempt at interference required effective sanction.¹¹² Such interference might occur anywhere, including Northern Ireland.

Recommendation: If any member of the legal profession seeks to influence the process of appointment outside the legislative procedure this shall be a professional offence subject to disciplinary action, and any such person and also any holder of judicial office who does so, shall no longer be allowed to participate in the process of appointment to Silk or judicial office, as may be relevant.

Disciplinary Offences

A worrying fact is that following recent appointments of some women to the bench female respondents conveyed the view of some male barristers that these appointments were token appointments. Given that these appointments were made in an open, transparent and audited manner, any such statement is clear evidence of defamation. It also tends to undermine the position of women generally, in that it assumes that provided a 'woman' is appointed the token gesture has been made. Given the potential damage that this may cause to confidence in the administration of justice, the reputation of individual judges, and the working environment of women lawyers any evidence of such a statement should lead to disciplinary sanction.

Recommendation: Any statement disparaging an appointment on the grounds of gender should be treated as a professional disciplinary offence.

10.1.7 Judicial Working Practices

More flexible sittings

Many women referred to the challenges of a full-time practise and caring for dependents. One solicitor said: 'my family would come first...because of that you don't have the flexibility and I think that women will always look out for their family first whilst a male will be able to say "oh, my wife is at home to look after the children and the house and I won't be tied".' Another female solicitor with children remarked: '..if some of these posts were to be advertised as a job-share post, I might then think about them...' Several female judges and solicitors recommended part-time sittings and job-share. One judge suggested this up to County Court, at least for family cases. A number of male judges thought that this might be difficult at High Court level, but that it was not insurmountable with adequate resources.

One female barrister also referred to the difficulty of travel to attend regular sittings. 'If I was to apply for either a District Judge, County Court job...I would have to leave home in the morning to travel to Derry, say, or Limavady and I wouldn't be able to leave my children to school. Therefore my domestic responsibilities would become impossible because to get someone in early enough in the morning to allow you to do that is very, very difficult and very, very expensive.'

¹¹² Interview, 31 January 2005.

The Lay Magistrates' Eligibility and Selection Policy, screened on 14th October 2002, though not strictly concerned with judicial office, suggests the importance of the timing of sittings to the administration of justice in that post. One substantive point arising from the screening was that people with caring responsibilities would have particular needs in relation to court sittings.

The option of part-time sittings across all judicial posts was supported widely by consultees in the present research.

The need for flexibility is supported by evidence from a survey of solicitors in England and Wales that more women than men considered leaving the profession because of 'long hours, being overworked' and 'lack of flexibility' in working practices.¹¹³

Recommendation: The Northern Ireland Court Service should explore the possibility of extending part-time court sittings, and also a range of other adjustments including annual hours contracts; flexible rostering; term-time working; school-time working; voluntary reduced working; secondments; and alternative fixed-work patterns.

Career Judiciary

The radical option of introducing a 'career judiciary' along the lines adopted in many civil law countries was not favoured by respondents to the 2003 Consultation Paper on Constitutional Reform, *A New Way of Appointing Judges*. There was little support for this during the consultation on the Criminal Justice Review in Northern Ireland¹¹⁴ and only one female judicial respondent referred to it in passing in this present research.

Allowing judges to return to professional practice

While no respondents expressed views on wishing to return to professional practice after serving in judicial office, this has been proposed elsewhere as a way to increase diversity in the judiciary. A typical objection to such a proposal is that this may compromise judicial independence and impartiality in that a judge might be unduly influenced to reach a decision in favour of a potential employer. However, this is not currently seen as a sufficient reason to prevent part-time judges from sitting, and, should not, by the same token, prevent full-time judges from returning to professional practice —provided there are necessary safeguards for judicial independence and impartiality. Accordingly, consideration should be given to extending the concept of return to professional practice.

Recommendation: The Judicial Appointments Commission should clarify the policy and procedure by which judges might be permitted to return to professional practice after serving on the bench.

¹¹³ Jo Siems, *Equality and Diversity: Women Solicitors*, Research Study 48, Volume 1, Quantitative Findings, Strategic Research Unit, Law Society of England and Wales.

¹¹⁴ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*, para. 6.38. In 2004, The Law Society of England and Wales provided £71,000 to the Association of Women Solicitors (AWS), which represents 5.65% of the income from practising certificate fees in England and Wales. The Law Society of England and Wales also has one dedicated AWS member on its Council.

10.1.8 Role of the Legal Profession

The Department for Constitutional Affairs states in its consultation paper *Increasing Diversity in the Judiciary*: '[J]udicial appointments can be made only from the pool of people in the legal profession who are eligible and who have decided to apply. It is, therefore, important that the profession is itself diverse and supports its members who are interested in seeking judicial appointment.'¹¹⁵

Given the substantial lack of confidence among many women in raising concerns about gender inequality with their professional bodies, it has already been recommended that the professions engage in confidence-building measures.

There exists in England and Wales an Association of Women Solicitors and an Association of Women Barristers. There are no equivalent active associations for women in Northern Ireland. The Association of Women Solicitors in Northern Ireland does not have the equivalent level of activity. One respondent attributes this, in part, to relatively weak support from the Law Society in Northern Ireland for the AWS (NI), compared to the support of the Law Society in England and Wales for the sister association there. The respondent also refers to the unsupportive stance from colleagues generally which is based partly on the perception among many women that to be members of such associations would compromise their careers.

Such organisations provide necessary and valuable forums for women to express and lobby upon collective concerns. A number of women also noted the need for networks of support for women, particularly in view of the fact that reliance will be placed on referees in future appointments. The professional bodies should support such associations in Northern Ireland. This should be alongside a range of additional measures to encourage and support women.

Recommendation: The Bar Council and Law Society should support local associations of Women Solicitors and Women Barristers.

Recommendation: The Bar Council and Law Society should seek to ensure that through their publications and notices they promote awareness of the need to encourage women in their careers.

Recommendation: Equality and diversity training should be a compulsory part of Continuing Professional Development.

10.1.9 Monitoring

While this research is concerned with the reasons why women are under-represented in applications for Silk and judicial office it seems axiomatic that the monitoring of the success of any future applications is required.

Recommendation: Data should be kept and published annually on the gender profile of applications and appointments to judicial office (by the Judicial Appointments Commission) and to Silk (by the Bar Council).

Recommendation: The Judicial Appointments Commission should co-ordinate a periodic review every five years of the gender profile of applications and appointments to judicial office.

¹¹⁵ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04, Date of Publication 13 October 2004, p. 48.

Recommendation: The Bar Council should monitor the gender of those who obtain application forms for Silk. It is possible that a higher percentage of women as compared to men may not pursue an application.

Recommendation: The Northern Ireland Court Service should, in order to monitor trends, keep reliable data on the gender of those who seek application forms for judicial office. Application forms should be available only upon provision of such information.

10.1.10 Further Research

Recommendation: There should be research to explore if there is any significant difference between the length of practice of male applicants and female applicants for judicial office and for Silk, the reasons for that difference, and what might be done to address any difference.

10.1.11 Sufficient Resources

Monitoring, processes of auditing, and research require sufficient funding.

Recommendation: The Judicial Appointments Commission should be provided with adequate resources to deliver the recommendations in this report.

10.1.12 Working Party on Women in the Legal Profession

The issue of appointment to Silk and judicial office can only properly be understood in the context of the place of women in the legal profession. Accordingly, it may be helpful to consider the establishment of an ad hoc Working Party on Women in the Legal Profession in Northern Ireland, which could comprise members from the various professional bodies; representatives from each of the professional associations of women solicitors/barristers/judges; Judicial Appointments Commission; civil service; the Institute of Professional Legal Studies; academia; the Equality Commission; and, NGOs/community organisations.

Recommendation: Consideration be given to the creation of a Working Party on Women in the Legal Profession.

10.1.13 Terminology

Recommendation: There should be gender-neutral language throughout the process of judicial appointments. For instance, the title of the Office of 'Lord Chief Justice' should be replaced with the title of 'Chief Justice'. The term 'Master' should be replaced with a gender-neutral term. The term 'Chairman' should be replaced with a gender-neutral term (such as 'chairperson')

10.2 RECOMMENDATIONS SINGULAR TO SILK

The Commissioner for Judicial Appointments for Northern Ireland recommended that a new application form should be devised with a separate section devoted to each competency and a candidate should be asked to state how her/his experiences demonstrate meeting the test of each competency.¹¹⁶

The Commissioner recommended that the appointment process for Silk might attract more female candidates if the requirement for 10 years experience ('ordinarily required') was refined with less emphasis on length of experience as a criterion for appointment.¹¹⁷

Recommendation: The new scheme for Silk should specify on the application form how the applicant's experience meets the test of each competency.

Recommendation: Given the potential actual or perceived imbalance of power on the Selection Panel for Silk lay members should be equal, or greater, in number to legal members, and there should be a lay chair.¹¹⁸

¹¹⁶ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.4.5.

¹¹⁷ Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, February 2003, para. 9.10.8.

¹¹⁸ See Appendix 4.

11. Summary of Recommendations

The disadvantage experienced by women in application for Silk and judicial office cannot be treated in isolation from their experience in the legal profession and in society more broadly.¹¹⁹ This disadvantage is long-standing and remains stubbornly resistant to change. However, it is not unchangeable.

Equality in the representation of women in Silk and judicial office will be insufficient if the culture of the legal profession and judiciary does not sustain women's full contribution nor redress adequately the perception and experience of women that the legal profession and bench is male-dominated.

While this research has focused on appointment by virtue of the terms of reference of the research, it has been acknowledged that whether or not an individual applies, the application process is part of broader context that requires comprehensive examination and understanding. Part of that context includes the nature of academic and professional legal education and the occupational culture and working practices of the legal profession, which could not have been fully explored within the time and resources available for this research. Part of that context also includes extensive and pervasive sexism within society.

Many of the problems and proposed recommendations regarding the under-representation of women may resonate for other groups which have not occupied dominant or privileged positions in the legal profession or in judicial office. While this report has focused on gender, the intersection of discriminations, for example on grounds of gender and sexual orientation, or gender and disability, may produce complex experiences that require more complex responses.

GENERAL

Recommendation: The criteria and process for appointments to Silk and judicial office should not further disadvantage women who by reason of systemic gender-bias have been unable to obtain the same advantages as men.

AVAILABILITY OF WORK

Recommendation: The Bar Council and Law Society should reiterate that work must be distributed without gender discrimination.

Recommendation: The Bar Council should reiterate to pupil-Masters the importance of distributing work without gendered assumptions about willingness or interest to undertake work.

CAPACITY BUILDING

Recommendation: The Judicial Appointments Commission should liaise with the relevant academic institutions and professional bodies with a view to encouraging women to consider appointment to Silk and judicial office.

Recommendation: The Law Society and Bar Council should co-operate on CPD refresher courses to assist women who have returned from maternity leave to practise.

¹¹⁹ Equal Opportunities Commission, *Sex and Power: Who Runs Britain? 2005* Equal Opportunities Commission, London, 2005.

Recommendation: The Bar Council and Law Society should explore the possibility of providing for mentoring to junior barristers and solicitors, respectively, for a suitable period beyond qualification.

Recommendation: The Judicial Appointments Commission should consider conducting a pilot programme of judicial work-shadowing for junior barristers and solicitors.

Recommendation: The Law Society and Bar Council should each provide confidential careers advice.

Recommendation: The Bar Council and Law Society should offer periodic formal 'careers' advice to members. In the case of judicial appointments, this should be done in consultation with the Northern Ireland Court Service and Judicial Appointments Commission.

Recommendation: One year before the eligibility of every barrister or solicitor the Bar Council and Law Society should inform those pending such eligibility that they might wish to consider an application.

INFORMATION ABOUT APPOINTMENTS

Recommendation: That the Judicial Appointments Commission ensure that women are given the right information, in the right way, and at the right time to ensure that their greater uncertainty about criteria for appointment to judicial office is addressed.

Recommendation: In general, there should be improved communication on the process, criteria and procedure for appointments to judicial office and Silk.

Recommendation: In so long as there remains under-representation of women in Silk and judicial office, advertisements for Silk and judicial office should state that 'applications by women are particularly welcome.'

Recommendation: The Judicial Appointments Commission should explore how women might be targeted to receive information about judicial appointments.

Recommendation: Given the disparity between male and female lawyers regarding the perception of under-representation in applications for Silk and judicial office, it is important that the professional bodies and Judicial Appointments Commission, respectively, take steps to publish accurate information, routinely.

ELIGIBILITY

Recommendation: There should be no minimum period of standing for appointment to judicial office.

Recommendation: The Judicial Appointments Commission should give serious consideration to opening up judicial office, certainly in specialist areas, to legal academics and legal executives.

Recommendation: The Judicial Appointments Commission should set achievable indicative periodic targets for widening the pool of female applicants through the range of recommendations in this report.

Recommendation: That the Judicial Appointments Commission conduct research to address the evidence suggesting that women may not be applying to judicial office to the same extent as men due to (i) their disproportionate caring responsibilities, (ii) their being deterred by times of sitting, (iii) their uncertainty about criteria, (iv) their practice not meeting the criteria, and (v) their being deterred by travel.

APPOINTMENTS PROCESS

Recommendation: The criteria for appointment to judicial office should be subject to stricter equality proofing to ensure that they do not directly or indirectly discriminate against women.

Recommendation: The criteria for suitability for judicial office should allow assessment of the extent and depth of experience and knowledge of an applicant that would enable that person to deal appropriately with diversity issues, and this should contribute to the assessment of merit.

Recommendation: The application materials for Silk and judicial office should avoid language which would directly or indirectly disadvantage or inhibit women.

Recommendation: Application materials for judicial appointment should make clear that income is not a factor in assessing suitability for appointment, and explain the need for requesting such information.

Recommendation: It should be made explicit that achievement of Silk is not taken into account when making judicial appointments.

Recommendation: The appointments process should, consistent with the principle of judicial independence, be based on best practice in Human Resource selection methods. A new language is required, one which addresses competencies, skills, functions, and a range of essential attributes for the range of advocacy or adjudicative roles.

Recommendation: The Judicial Appointments Commission, in liaison with the Northern Ireland Court Service, should, as a confidence building measure, better advertise the fact, preferably as part of outreach, that conflict of interest precludes appointment to judicial office.

Recommendation: The respective appointing bodies should produce and retain a comprehensive register of interests for those appointed to judicial office and Silk and for those who appoint to Silk and judicial office, consistent with human rights requirements in relation to respect for private life and, also, freedom of association. Any person whose interests might indicate unsuitability for appointment or for participating in the appointments process should be excluded while such interests remain.

Recommendations: Applicants for judicial office should be able to demonstrate, amongst other things, knowledge and understanding of gender issues (amongst other diversity issues).

Recommendation: The criteria for appointment must test competency across a range of skills and abilities.

Recommendation: The Northern Ireland Court Service and the Judicial Appointments Commission should explore the introduction of Assessment Centres for applications to judicial office.

Recommendation: The automatic consultation procedure for High Court and County Court schemes should be abolished and replaced with a process of nominated referees. For all schemes, the applicant should be permitted to nominate two referees who know her work and can comment on specific competencies required for the post. This should be in addition to two references from professional clients.

Recommendation: That further gender sensitivity training be provided for holders of judicial office, particularly for those on assessment panels.

Recommendation: Given the potential gender-bias in the association of masculine attributes with judicial office, existing equality training for Assessment Panels should include enhanced gender sensitivity training that takes account of such potential bias.

INTERFERENCE WITH APPOINTMENTS

Recommendation: If any member of the legal profession seeks to influence the process of appointment outside the legislative procedure this shall be a professional offence subject to disciplinary action, and any such person and also any holder of judicial office who does so, shall no longer be allowed to participate in the process of appointment to Silk or judicial office, as may be relevant.

Recommendation: Any statement disparaging an appointment on the grounds of gender should be treated as a professional disciplinary offence.

JUDICIAL WORKING PRACTICES

Recommendation; The Northern Ireland Court Service should explore the possibility of extending part-time court sittings, and also a range of other adjustments including annual hours contracts; flexible rostering; term-time working; school-time working; voluntary reduced working; secondments; and alternative fixed-work patterns.

Recommendation: The Judicial Appointments Commission should clarify the policy and procedure by which judges might be permitted to return to professional practice after serving on the bench.

Recommendation: The Northern Ireland Court Service should reinforce Gender Sensitivity Training for Middle Management.

ROLE OF LEGAL PROFESSION

Recommendation: Steps be taken by the Bar Council and the Law Society to redress the historically gender-biased preponderance of women in certain fields of work and levels of court/tribunal in order to ensure equality of opportunity for women in applications for Silk and judicial office.

Recommendation: The Bar Council, Law Society, Northern Ireland Court Service and the Judicial Appointments Commission need to encourage women to apply for judicial office.

Recommendation: The Bar Council and Law Society need to encourage women to apply for Silk.

Recommendation: The Bar Council and Law Society should ensure that through their publications and notices they promote awareness of the success of women in their careers.

Recommendation: That the Bar Council and Law Society offer support for further research to address the fact that potential female candidates are not applying for Silk due to their disproportionate caring responsibilities, and to take responsive action.

Recommendation: The Bar Council, Law Society, Northern Ireland Court Service and Judicial Appointments Commission should collaborate in hosting annually over the next four years a seminar or symposium with an eminent speaker or speakers which will facilitate networking and information sharing among female lawyers and holders of judicial office with a view to encouraging women to apply for Silk/judicial office. Such events to attract Continuing Professional Development (CPD) credit.

Recommendation: The Bar Council and Law Society should take renewed steps to encourage their members not to reinforce gender stereotypes or discriminatory practices.

Recommendation: The Law Society and Bar Council should take disciplinary action against members where there is clear evidence of gender discrimination in briefing practices or passing-on, respectively.

Recommendation: While understanding the pressure to meet a client's wishes, where a request for legal advice is based on reasoning about gender which cannot be objectively justified and the barrister or solicitor accepts the request this should be treated as discriminatory and be susceptible to professional sanction.

Recommendation: The Bar Council and Law Society should take proactive steps, perhaps in consultation with the Equality Commission, on ways of challenging gender stereotyping and sexism.

Recommendation: The Bar Council and Law Society should take renewed steps to re-publicise their codes of conduct, and enforce strictly those codes.

Recommendation: The Bar Council and Law Society should support local associations of Women Solicitors and Women Barristers.

Recommendation: The Bar Council and Law Society should seek to ensure that through their publications and notices they promotes awareness of the need to encourage women in their careers.

Recommendation: Equality and diversity training should be a compulsory part of Continuing Professional Development (CPD).

MONITORING & AUDIT

Recommendation: There should remain some independent audit of judicial appointments and Silk for the foreseeable future.

Recommendation: Data should be kept and published annually on the gender profile of applications and appointments to judicial office (by the Judicial Appointments Commission) and to Silk (by the Bar Council).

Recommendation: The Judicial Appointments Commission should co-ordinate a periodic review every five years of the gender profile of applications and appointments to judicial office.

Recommendation: The Northern Ireland Court Service should, in order to monitor trends, keep reliable data on the gender of those who seek application forms for judicial office. Application forms should be available only upon provision of such information.

Recommendation: Where there is a significant disparity between the proportion of men and women called for interview and then appointed this should automatically trigger a 'look-back' exercise to determine if there has been bias in the appointment/s.

FURTHER RESEARCH

Recommendation: Systematic research is needed on the incidence, scale, trends, and reasons for exits from legal practice. This can most effectively be conducted with the co-operation of the professional bodies, which will require effective methods of data collection. If this research confirms information gathered in this present research, the professional bodies need to take urgent action to help to retain women in practice.

Recommendation: There should be research to explore if there is any significant difference between the length of practice of male applicants and female applicants for judicial office and for Silk, the reasons for that difference, and what might be done to address any difference.

Recommendation: Given the low levels of confidence that allegations of gender inequality, including gender discrimination, would be treated appropriately, confidence-building measures are required by all those responsible for appointments. The Bar Council and Law Society, in particular, need to redress significant low levels of confidence in their ability to address concerns.

SUFFICIENT RESOURCES

Recommendation: The Judicial Appointments Commission should be provided with adequate resources to deliver the recommendations in this report.

Recommendation: There should be extensive publicity given to the role of the Commissioner for Judicial Appointments for Northern Ireland.

WORKING PARTY ON WOMEN IN THE LEGAL PROFESSION

Recommendation: Consideration be given to the creation of a Working Party on Women in the Legal Profession.

TERMINOLOGY

Recommendation: There should be gender-neutral language throughout the process of judicial appointments. For instance, the title of the Office of 'Lord Chief Justice' should be replaced with the title of 'Chief Justice'. The term 'Master' should be replaced with a gender-neutral term. The term 'Chairman' should be replaced with a gender-neutral term (such as 'chairperson')

ADDITIONAL RECOMMENDATIONS SINGULAR TO SILK

Recommendation: The new scheme for Silk should specify on the application form how the applicant's experience meets the test of each competency.

Recommendation: Given the potential actual or perceived imbalance of power on the Selection Panel for Silk lay members should be equal, or greater, in number to legal members, and there should be a lay chair.

Recommendation: Selection Panels should be gender-balanced, where possible.

Recommendation: That there be an investigation as to whether variability in completed application forms for Silk against the criteria for appointment might be accounted for on grounds of gender.

Recommendation: The Bar Council should monitor the gender of those who obtain application forms for Silk. It is possible that a higher percentage of women as compared to men may not pursue an application.

Recommendation: Human Resource and Equality training should be provided to the Secretariat in the new scheme for selection of Silk.

Recommendation: The premises and staffing of the Secretariat in the new scheme for selection of Silk should be separate, and clearly perceived to be independent, from the Bar Council of Northern Ireland.

Recommendation: Clarification is required of some of the criteria for appointment in the new scheme for selection of Silk.

Recommendation: Clarification is required of the process and criteria to collectively grade each candidate that will be used by the Selection Panel in the new scheme for selection of Silk.

Recommendation: Given the potential actual or perceived imbalance of power on the Selection Panel in the new scheme for selection of Silk, lay members should be equal, or greater, in number to legal members, and there should be a lay chair.

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Appendix 1

List of organisations/individuals interviewed non-confidentially (in chronological order)

Judicial Appointments Board for Scotland (27 January 2005)

Sir Neil McIntosh CBE, Chief Commissioner
Margaret Peattie, Secretariat

Commission for Judicial Appointments, London (31 January 2005)

William Arnold, Secretariat
John Critchfield, Secretariat

Cheryl Thomas, PhD, Director, Jury Diversity Project, University of Birmingham (31 January 2005)

Chief Commissioner, Equality Commission for Northern Ireland (9 February 2005)

Dame Joan Harbison

Association of Women Barristers, London (31 January 2005)

Janet Tweedale, Department for Constitutional Affairs, London (1 February 2005)

Association of Women Solicitors, London (1 February 2005)

The Chair of the Bar Council of Northern Ireland (7 February 2005)

Peter Cush QC

The President of the Law Society of Northern Ireland (10 February 2005)

Attracta Wilson, together with John Bailie, The Chief Executive of the Law Society

The Lord Chief Justice of Northern Ireland (15 February 2005)

The Right Honourable Sir Brian Kerr

Northern Ireland Court Service (17 February 2005)

Alan Hunter, Director, Judicial Services
Helen Fullerton, Head of the Judicial Appointments Unit

Commissioner for Judicial Appointments for Northern Ireland (21 February 2005)

John Simpson OBE

Appendix 2

Breakdown by Gender of Judicial Office & Silk, 1 March 2005

Judicial Office	Male	Female
Lord Chief Justice	1	0
Lords Justice of Appeal	3	0
High Court Judges	10	0
Deputy High Court Judges	1	0
County Court Judges	12	4
Deputy County Court Judges	28	5
Masters of the Supreme Court	6	0
District Judges	2	2
Deputy District Judges	3	2
Resident Magistrates	15	3
Deputy Resident Magistrates	13	5
Coroner (Full-time)	2	1*
Deputy Coroners	4	0
Part-time Coroners	5	0
Chief Social Security & Child Support Commissioners	1	0
Social Security & Child Support Commissioners	0	1
Deputy Social Security & Child Support Commissioner	1	0
Official Solicitor	0	1
Appeals Tribunal		
President	1	0
Full-time Panel Member	1	0
Part-time Panel Members Experienced	9	51
Financial	6	1
Part-time Legal	30	21
Part-time Medical (consultant)	15	3
Part-time Medical (generalist)	52	20
Industrial Tribunals & Fair Employment Tribunals		
President	1	0
Vice-President	0	1
Full-time Chairman	2	3
Part-time Chairman	13	11
Lands Tribunal		
President	1	0
Member	1	0
National Security Certificates Appeal Tribunal		
Chairman	1	0
Deputy Chairman	1	0
Part-time Legal Members	1	2
Part-time Lay Members	4	2
Mental Health Review Tribunal	15	9
Special Educational Needs Tribunal		
President	1	0
Chairman	1	4
Social Care Tribunal (Part-time Chairman)**	2	0
Criminal Cost Assessment Panel	16	6
Legal Aid Advisory Committee	9	2
Reserve Forces Appeal Tribunal		
Chairman	1	1
Member	10	3
Member RC	10	2
TOTAL	311	166 (35%)
Silks	63	5

* The female full-time Coroner, while appointed as a full-time Coroner, works a 3.5-day week.

** The Social Care Tribunal replaced the Registered Homes Tribunal.

Appendix 3

Categories of Judicial Appointment (including authority for appointment and criteria)

Post	Status	Criteria	Appointed By	Legislative Basis
Lord Chief Justice	Permanent	(a) Member of the Bar of Northern Ireland of at least ten years' standing; or (b) Solicitor of the Supreme Court of at least ten years' standing	Queen	Judicature (NI) Act 1978, s. 9, as substituted by s. 18(3) of the Justice (NI) Act 2002
Lord Justice of Appeal and High Court (Puisne) Judge	Permanent	(a) Member of the Bar of Northern Ireland of at least ten years' standing; or (b) Solicitor of the Supreme Court of at least ten years' standing	Queen, following recommendation by the Lord Chancellor	Judicature (NI) Act 1978, s. 9, as substituted by s. 18(3) of the Justice (NI) Act 2002
County Court Judge	Permanent	(a) Member of the Bar of Northern Ireland of at least ten years' standing; or (b) Solicitor of the Supreme Court of at least ten years' standing	Queen, following recommendation by the Lord Chancellor	County Courts Act (Northern Ireland) 1959, s. 103(1), as amended by Justice (Northern Ireland) Act 2002, s. 18(4)
Deputy County Court Judge	Part-time renewable	(a) Member of the Bar of Northern Ireland of at least ten years' standing; or (b) Solicitor of the Supreme Court of at least ten years' standing	Lord Chancellor	County Courts Act (Northern Ireland) 1959, s. 107(1), as amended by Justice (Northern Ireland) Act 2002, s. 18(5)
District Judge	Permanent	(a) Member of the Bar of Northern Ireland of at least seven years' standing; or (b) A person holding any other statutory office listed in Schedule 3 of Judicature (NI) Act 1978	Lord Chancellor, following consultation with Lord Chief Justice of Northern Ireland	Judicature (NI) Act 1978, Sch. 3
Deputy District Judge	Part-time renewable	(a) A barrister or solicitor with at least seven years' standing; or (b) a person holding any other statutory office listed in Schedule 3 of Judicature (NI) Act 1978	Lord Chancellor, following consultation with Lord Chief Justice of Northern Ireland	Judicature (NI) Act 1978, Sch. 3

Resident Magistrate	Permanent	(a) A member of the Bar of Northern Ireland of at least seven years' standing; or (b) a solicitor of the Supreme Court of at least seven years' standing	Queen, following recommendation by the Lord Chancellor	Magistrates' Courts Act (Northern Ireland) 1964, s. 9(1), as amended by Judicature (NI) Act 1978, s. 100.
Deputy Resident Magistrate	Part-time renewable	(a) A member of the Bar of Northern Ireland of at least seven years' standing; or (b) a solicitor of the Supreme Court of at least seven years' standing	Lord Chancellor	Magistrates' Courts Act (Northern Ireland) 1964, s. 10(1), as amended by Judicature (NI) Act 1978
Statutory Officers Masters of the Supreme Court	Permanent	(a) A barrister or solicitor with at least seven years' standing (formerly 10 years); or (b) a person holding any other statutory office listed in Schedule 3 of Judicature (NI) Act 1978	Lord Chancellor, following consultation with Lord Chief Justice of Northern Ireland	Judicature (NI) Act 1978, Sch. 3, as amended by Justice (NI) Act 2002, s. 18(8) & (9)
Coroners	Full-time (permanent) deputies, and part-time (part-time permanent)	(a) A member of the Bar of Northern Ireland of at least five years' standing; or (b) a solicitor of the Supreme Court of at least five years' standing	Lord Chancellor	Coroners Act (NI) 1959, as amended by the Judicature (NI) Act 1978 and Justice (NI) Act 2002, s. 18(7).
Chief Social Security and Child Support Commissioners (Permanent), Social Security and Child Support Commissioners (Permanent),	Permanent	Barrister or solicitor of at least 10 years' standing	The Queen	Social Security Administration (NI) Act 1992, s. 50(1)
Deputy Social Security, and Child Support Commissioner (Part-time Renewable)	Part-time renewable	(a) barrister or solicitor of at least 10 years' standing, or (b) a person with a 10 year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990, (c) an advocate or solicitor of Scotland of at least 10 years' standing.	Lord Chancellor	Social Security Administration (NI) Act 1992, s.50(2)

President of the Appeal Tribunals	Permanent	Barrister or solicitor of at least 10 years' standing	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Panel Member, Appeals Tribunal	Full-time, Permanent	Barrister or solicitor of at least 7 years standing	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Financial Member, Appeals Tribunal	Part-time	Membership of the Institute of Chartered Accountants in England and Wales or the Institute of Chartered Accountants in Scotland, or the Institute of Chartered Accountants in Ireland, or the Association of Chartered Certified Accountants, or the Chartered Institute of Management Accountants, or the Chartered Institute of Public Finance and Accountancy.	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Part-time legal member, Appeals Tribunal	Part-time	Barrister or solicitor of at least 5 years standing	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Part-time medical member, Appeals Tribunal	Part-time	Fully registered medical practitioner in a European Economic Area (EEA) State, and either registration as a specialist in an EEA state or possession of a vocational training certificate in general practice recognised under European Directive 93/16/EEC, or not less than 10 years' experience in clinical practice or as a medical analyst or research worker in similar disciplines	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Part-time experienced members, Appeals Tribunal	Part-time	Experience in dealing with the needs of disabled persons, other than as a registered medical practitioner, in either a professional or voluntary capacity or through being disabled themselves.	Lord Chancellor	Social Security (Northern Ireland) Order 1998
Chairman of Social Care Tribunal	Part-time (renewable)	Barrister or solicitor who has practised for not less than seven years	Lord Chancellor. In practice, the DHSSPS is consulted during the appointment process	Registered Homes (NI) Order 1992 as amended by Health and Personal Social Services (NI) Act 2001, s. 15
Industrial Tribunals and		Barrister or solicitor of not less than 7 years' standing	Lord Chancellor to Fair Employment	Fair Employment (NI) Act 1989

Fair Employment Tribunals:			Department of Employment and Learning to Industrial Tribunal	
President	Permanent			
Vice-President	Permanent			
Full-time Chairman	Permanent			
Part-time Chairman	Part-time (renewable)			
Lands Tribunal:		Barrister or solicitor of not less than 7 years' standing	Lord Chancellor	Lands Tribunal and Compensation Act (NI) 1964, s. 1(2)
President	Part-time permanent	(a) Barrister or solicitor of not less than seven years' standing; or		
Member	Full-time permanent	(b) Persons who have had experience in the valuation of land.		

<p>National Security Certificates Appeal Tribunal</p> <p>Chairman & Deputy Chairman</p> <p>Part-time Legal Member</p> <p>Part-time Lay Member</p>	<p>All part-time renewable</p>	<p>Chairman or Deputy Chairman: Hold or have held office of Judge of the High Court of Justice in Northern Ireland, or Lord Justice in the Court of Appeal or the Court of Appeal in Northern Ireland</p> <p>Part-time legal member: Existing full or part-time Chairman of the Industrial Tribunals or Fair Employment Tribunals</p> <p>Part-time lay member: Persons who have knowledge or experience of public safety or public order issues</p>	<p>Lord Chancellor</p>	<p>Northern Ireland Act 1998, s. 91 & Sch. 11</p>
<p>Mental Health Review Tribunal</p> <p>Chairman & Deputy Chairman</p> <p>Medical and Lay members</p>	<p>Part-time renewable</p>	<p>Legal members: such legal experience as the Lord Chancellor considers suitable</p> <p>Medical members: appointed after consultation with the Department of Health & Social Services and Public Safety</p> <p>Lay members: such experience in administration, such knowledge of social services or such other qualifications or experience as the Lord Chancellor considers suitable</p>	<p>Lord Chancellor (re Chairman & Deputy Chairman)</p> <p>Medical & Lay members appointed by Lord Chancellor after consultation with the Head of the Department of Health and Social Services and Public Safety</p>	<p>Mental Health (NI) Order 1986, s. 1 & 3.</p>

Appropriate Authority	Part-time renewable	Such number of barristers, solicitors and lay persons as the Lord Chancellor may from time to time determine.	Lord Chancellor Nominations for barristers and solicitors are sought from the Bar Council and Law Society, respectively. In practice, the Legal Aid Department is consulted during the appointment process	Legal Aid in Criminal Proceedings Rules (NI) 1992
Special Educational Needs Tribunal President & Chair	Part-time renewable	Such legal qualifications as the Lord Chancellor considers suitable	Lord Chancellor In practice, the Department of Education is consulted during the appointments process	Education (Northern Ireland) Order 1996, art. 22(2)
Reserve Forces Appeal Tribunal Chairmen and Members	Part-time permanent	Chairmen: A member of the Bar of Northern Ireland or Solicitor of the Supreme Court of Northern Ireland of at least 10 years' standing Members: Appointed after consultation with such persons or bodies as the Lord Chancellor considers appropriate, including: (a) a body appearing to him to represent the interests of employers, a body appearing to him to represent the interests of employees, and a body appearing to him to represent the interests of the self-employed; and (b) the associations established under Part XI of the Reserve Forces Act 1996 or a body appearing to the Lord Chancellor to represent those associations.	Lord Chancellor	Reserve Forces Act 1996, ss. 90 & 91

Appendix 4

A New Scheme for the Selection of Silk

The key features of the new scheme for selection of Silk are that it transfers principal responsibility for selection from the Lord Chief Justice to a selection panel which will comprise lay membership and which will receive training. There will no longer be 'automatic consultation', what was occasionally referred to as 'secret soundings'. The Scheme requires references from those who have personally seen the candidate, and takes two such references from each of the following: judges, practitioners, and professional clients and clients (or client proxies). The new scheme will also permit removal of the award of Silk for cause. Additionally, it provides new arrangements for feedback to unsuccessful candidates, and for a complaints procedure.

A Secretariat will manage the administration of the scheme. A Selection Panel comprising seven members would select successful candidates. The Panel would be chaired by a senior retired Northern Ireland judge, two 'distinguished' lay members, two senior barristers, and two senior solicitors.

The new scheme states that the Selection Panel will be independent. It is proposed, however, that the Secretariat will be accommodated within the premises of the Northern Ireland Bar Council. The Bar Council proposes that it is feasible for the administrative and secretarial work to be absorbed into the existing workload of the Bar. Given the clear perception arising from this research that barristers are advantaged in applications for Silk, and that this may have adverse implications for women solicitors particularly, there is an issue about the perception of independence of part of the scheme from the Bar Council. The Scheme does note that 'for obvious reasons it is considered undesirable that interviews should be conducted in the Bar Library premises' (*Note on Infrastructure*, 21 February 2005).

There will be a number of features of the scheme which remain to be clarified or the effect of which remain to be tested. For instance, paragraph 4.4 states that '[g]uidance will be prepared for the Selection Panel about the extent to which previous criminal convictions or findings of professional misconduct should be taken into account in assessing a candidate's suitability.' It is not clear who will provide such guidance, and whether this will be on a case-by-case basis or on a general basis. Clearly, the scope of interpretation of 'professional misconduct' calls for general guidance from the Secretariat.

Clarification is also required of the process and criteria that will be used by the Selection Panel to collectively grade each candidate (para. 7.9). Some considerable discretion is conferred on the Secretariat in the process of selection. The Secretariat would initially review and filter completed application forms. Any application which 'appeared *plainly* not to demonstrate the competencies' required 'would be put to the Selection Panel for a decision to treat the application as unsuccessful'. The Scheme notes that '[t]his process must be carefully audited to ensure that it is carried out fairly'. It is not stated by whom this audit should be conducted. In line with recommendations in this report such audit should be independent of the Secretariat. While the Scheme states that the Selection Panel would receive training from suitable experts on equal opportunities and on modern human resources processes, it states in respect of the Secretariat that human resources and equal opportunities training would be provided 'if required'. Given the key role of the Secretariat in the process there seems to be no reason that equivalent mandatory training should not apply to the Secretariat.

Given that the Scheme states that the panel would act in 'the service of the public interest' (para. 7.1), it is of concern that the lay representation of two members on the Selection Panel will be outnumbered by five legal professionals, one of which will be a retired judge in the Chair. This concern applies even more strongly to the composition of the Complaints Committee: one senior judge, one senior barrister, one solicitor, and one lay person (nominated by the Chair of the Bar and the President of the Law Society after consultation with the Commissioner for Judicial Appointments for Northern Ireland). In this research one solicitor stated, albeit in the related context of appointment panels to judicial office: 'I think it is very difficult for people who are not lawyers to be sitting on a panel with lawyers, particularly judges...I wouldn't like to be a non-judicial member of a selection panel because I think it would be exceptionally difficult to try and challenge whatever the judicial members of the panel were saying.' Given the potential actual or perceived imbalance of power on the Selection Panel for Silk lay members should be equal, or greater, in number to legal members, and there should be a lay chair.