

Merit and diversity: Compatible Aspirations in Judicial Appointment?

The Law Society of Scotland's response

On 11th March 2014, the Judicial Appointments Board for Scotland Diversity Steering Group (DSG), a collaborative group of organisations with an interest in diversity in the judiciary, held a conference to discuss this issue. Seventy-five delegates from a diverse range of organisations and with different interests in the matter contributed to the discussion. The Society as the professional body for Scottish solicitors is a member of the DSG.

In March 2015, [a report](#)¹ about the conference was published. The Judicial Appointments Board for Scotland (the Board) is responsible for recommending to Scottish Ministers individuals for appointment to judicial offices, and has commented on the report.

The Society as a member of the DSG has considered the report and taken views from a number of our members and others on issues arising. The Society is pleased to see the changes the Board has undertaken since the conference. Those we consulted with considered that changes are needed. There is a lack of diversity in the judiciary which is not representative of the legal profession or of the population at large. Whilst we note the strides the Board has made since its inception in improving transparency in the appointment process and that the Conference in 2014 and subsequent report have built on this work, the Society recommends that further work is needed to improve judicial diversity. For reference, the current gender balance of the Scottish judiciary is outlined below²:

	Male	Female	Percentages
Senators of the College of Justice	23	9	Male – 72% Female – 28%
Sheriffs-Principal	4	2	Male – 67% Female – 33%
Sheriffs	103	26	Male – 80% Female – 20%
Part-time Sheriffs	35	11	Male – 76% Female – 24%

Given the current terms of office, and historic makeup of the judiciary and the legal professions, we acknowledge that JABS has made good progress regarding gender equality but we also acknowledge more needs to be done to ensure that the judiciary is more representative of the legal professions and wider society.

The Smith Commission – and resulting Scotland Bill – have generated much debate about fundamental changes within Scotland itself. This includes the devolution of some aspects of equal opportunities such as the power for the Scottish Government to use positive action to promote gender equality on public boards.

As well this, both the Scottish Cabinet and Scottish Shadow Cabinet are gender-balanced. In the legal sphere, the solicitor profession is now 50% male, 50% female. Given these contexts, it is the view of the Society that the time is right for a review of the judicial

¹ <http://www.lawscot.org.uk/media/457081/Diversity-Conference-Report.pdf>

² Source: <http://www.scotland-judiciary.org.uk/1/0/Home> on 30th September 2015

appointments system, including the statutory requirements imposed on applicants for judicial office.

RESPONSIBILITY

- To achieve change there has to be a co-ordinated approach from all the organisations which are involved in or have an interest in the appointment of the judiciary. All organisations with an interest in the appointment of judges in Scotland should have a legal responsibility similar to that of the Board in terms of promoting diversity. Currently the Board has a fundamental role in ensuring a diverse judiciary, placed upon it by the Courts (Scotland) Act 2008 as follows:

S14 (1) In carrying out its functions, the Board must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.

This is a wider duty than having regard to the diversity of those it recommends for appointment – it must have regard to the range of individuals available for selection. Organisations with a role and interest in the appointment of judicial roles and those who have an interest in this area as a career option for their members could be part of this process.

- A formal group of representatives of those organisations with an interest and role in developing the pool of potential applicants for judicial office with a specific remit to encourage diversity in the range of individuals available for selection to be recommended for appointment to the judiciary should be established.
- The Board has the power to advise the Scottish Government under s9 of the 2008 Act. The Board should use this to raise issues where it feels legislative change would help it fulfil its duties under s14.

REVIEW

- The Society considers that the eligibility and criteria for appointment should be relevant to the role of a judge and focus on the abilities required to act as an effective and efficient judge.

Currently those eligible to be Sheriffs must be legally qualified (either as an Advocate or a Solicitor) for at least 10 years and if the applicant is a solicitor to have their name on the Roll.

For Judges of the Court of Session and Chairman of the Scottish Land Court, applicants must be:

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

We note that there are cases where an individual with rights of audience in Scottish courts may not be legally qualified as a solicitor or advocate in Scotland. For instance, Commercial Attorneys or Procurators Fiscal operating on a warrant.

Moreover, we note that some legal academics – who may be specialists in particular fields of law and need not be legally qualified – cannot become members of the judiciary. By way of example from another jurisdiction, we note that The Right Hon the Baroness Hale of Richmond, the Deputy President of the Supreme Court, became a High Court judge in England and Wales in 1994. As her biography³ on the Supreme Court website notes, she was *‘the first to have made her career as an academic and public servant rather than a practising barrister’*.

The focus for the role of Court of Session Judge is on what the candidate is – in terms of their role – rather than what the candidate can show what they can do, by reference to their skills, however those have been gained. It is also notable that, while experience as a Sheriff counts for appointment as a Senator experience as a Tribunal Judge does not. In this context it should be noted that the profile of Tribunal Judges is more diverse than that of court-based judiciary – there is a significantly higher proportion of women and of solicitors in the former group than in the latter.

This restrictive position in Scotland is in marked contrast to the position in England and Wales – see, for example, section 50 of the Tribunals, Courts and Enforcement Act 2007 which sets out the ‘judicial appointment eligibility condition’ which is general in nature. The main focus otherwise in that jurisdiction is on providing evidence that a candidate has the skills to perform the role in question.

The criteria stated on the [Board’s Website](#) which the Board used when selecting eligible candidates for appointment (“Judicial Qualities”) shows a focus on experience in court experience and case presentation skills. This necessarily means more court practitioners will apply as they can more easily evidence the required competencies. However, the fact that someone is a competent court practitioner or advocate does not necessarily mean that s/he would be a good judge. We suggest that these competencies be reviewed to develop criteria which focus more on the skills which are required to be a competent judge.

We accept that court experience, and case presentation skills, may well be extremely desirable but we do not consider that these skills are all important (and, as above, there may be cases where they are not necessary). We believe this creates an artificial barrier to appointment. In the appendix we suggested changes for consideration. In essence, we consider that there should be a structural review of eligibility and all other appointment criteria – every requirement (each of which will be act as a potential barrier) should be to ensure that it is relevant to the post in question and justifiable.

ENCOURAGE

- The Board considers that it does not have the ability to use the “tipping point” to choose between 2 equally meritorious candidates. We consider that it does in certain circumstances via the Equality Act 2010. The Equality Act 2010 allows for ‘soft touch’

³ <https://www.supremecourt.uk/about/biographies-of-the-justices.html>

positive action (e.g. encouraging people from certain groups to apply for positions, guaranteed interviews, setting targets). However, positive discrimination – i.e. giving preferential treatment to members of an under-represented group – is generally prohibited on the basis that it is simply another form of discrimination.

There is some debate about whether or not the holding judicial office is classified as being employed. We consider the Supreme Court's decision in *O'Brien v Ministry of Justice* suggests that those holding judicial office in the UK are employed. This means that the provisions of gender equality law (in line with Article 1 of the Recast Gender Equality Directive 2006/54/EC) would apply to conditions of 'access' to that employment including the judicial selection process.

It is possible to give preference to candidates from under-represented groups when it comes to promotion and recruitment in employment so long as it can be shown to be justified and proportionate – i.e. the usual proportionality test is applied.

In the case of *Abrahamsson and Anderson v Fogelqvist (2000) C-407/98*, the CJEU ruled that preferential treatment can be applied to compensate for existing disadvantage as a 'break factor' between 'equally qualified candidates' and that an individual merit ranking system has to be initially applied to rank candidates before any automatic preference could be given to members of an under-represented group.

Knowledge that the Board is able to do this, and is willing to use this will likely encourage less well represented groups to apply.

- It should be an aspiration that the appointment boards convened reflect the diversity of the Scottish population. It is likely that this will encourage applications from less well represented groups if those groups can see that there is diversity on the appointments panels themselves.
- Considerations should be given to the use of guaranteed interview schemes to encourage applications from under-represented groups (provided they meet the statutory criteria).

LEARN

- Consider how other jurisdictions have changed their systems and see what elements of their reforms could be utilised by the Board. As discussed at the conference by Baroness Neuberger, the [Judicial Appointments Commission](#) in England and Wales has done a lot of work in this area.

CAREER DEVELOPMENT

- Ensure that judicial appointment is an attractive career option, in terms of opportunities for career progression, for all those qualified to apply. Suggestions for how this may be achieved are in the attached appendix.

TRAIN

- Ensure that anyone who has an interest in pursuing a judicial career has the option to train for this. This could include 2 options:
 - o Developing a judicial career as a separate career with specific training. This is a model adopted in several European jurisdictions.

- o Training for advocates and solicitors interested in progressing into a judicial career.

These ideas are expanded upon in the attached appendix

OUTREACH

- Informing and engaging groups who may be interested in a judicial career should start at the earliest opportunity. Consider outreach work in schools as well as University and initial professional qualification stage.

Appendix

REVIEW:

1. Eligibility and Criteria for appointment:

The Society notes that the current eligibility requirements and criteria laid down for the appointment of judges focuses on those with case presentation skills and court experience. This does not necessarily mean someone will be a good judge. The aim should be to select good judges, and as such should focus on relevant competencies such as the ability to make good, reasoned decisions within a reasonable time frame; knowledge of the law; knowledge of the rules of court and court procedure; the ability to deal with and understand those appearing before them appropriately and fairly; and the ability to communicate complicated concepts in straightforward language.

This is particularly important if there is an increase in people representing themselves in court because of challenges around accessing legal aid in some situations, the upcoming introduction of simple procedure and summary Sheriffs, and the increase in the privative limit of the Sheriff Court.

- Compare the criteria used by the Board to the criteria for appointing justices of the peace – they are not legally qualified and therefore the criteria are focussed on selecting those who have the skills to be judges. Consider adopting relevant criteria from this process.
- Consider the pool available for appointment – this needs to be adequately diverse to have a diverse range of potential applicants. Criteria which reduce the pool available should be capable of being justified taking account both of the legal test of justification arising from indirect discrimination law and the practical implications of narrowing the pool. It may be possible to link to the Society's [Fair Access work](#) (this looked mainly at socio-economic barriers to becoming a solicitor)

CAREER DEVELOPMENT:

Sheriffs –

1. Encourage change to how they are deployed:

- Structure vacancies so that recruitment will be in connection with a specific disclosed location. A current lack of clarity about where a successful candidate will be required to perform their duties together with the requirement to reside in the sheriffdom can

prevent those candidates who cannot relocate from applying. We suggest that this will restrict specific groups, especially those with carer/parental responsibilities. Being able to apply for a specific vacancy in an area where the applicant already lives will help encourage people to apply who cannot or do not wish to move, and will assist with the desire of the Lord President's Office to ensure that justice is exercised locally by someone who has an understanding of the local community.

- Flexible working - currently there are part-time Sheriff positions. However it may well be possible to introduce truly flexible working patterns to encourage applications. This needn't necessarily be confined to working specific days/hours – Sheriffs could be deployed more flexibly such as annualised hours or on a term-time working basis. This could encourage certain groups to apply.
- Remote connections and use of technology could be used to assist Sheriffs to work flexibly.
- We acknowledge that some of the above is outwith the direct control of JABS. We acknowledge that it is the Lord President's Office which instructs JABS on when to recruit judges, how many to recruit, where for, and with which particular skills. Sometimes this will depend on retirement of judges, sometimes on affordability, and sometimes on administration. We acknowledge that for meaningful improvement in this area it may require all involved in this process – the Lord President's Office, JABS, the Crown Office and Procurator Fiscal Service et al – to work together.

2. Offer sitting in/shadowing and mentoring with current judges

Shadowing and mentoring is a well proven method of encouraging prospective applicants from less well-represented groups. It has been used to good effect in England and Wales.

The Diversity Support Initiative – for barristers, solicitors and legal academics - was open to women, candidates from a BAME background and those coming from less advantaged social or educational backgrounds. The Initiative included up to three days of work-shadowing giving candidates an insight into a judge's work (inside and out of court); mentoring support from a high court judge; and a one-day training workshop on how to prepare for the selection exercise.

The Judicial Appointments Commission continues [to operate a work shadowing scheme and a Judicial Mentoring Scheme \(which focuses on addressing under-representation from BAME lawyers\)](#). This could be replicated in Scotland relatively easily.

3. Judicial specialisation

We believe that it should be possible to reflect the particular skills gained by solicitors in judicial appointments. We consider that there is a need for specialist judges who have an in-depth knowledge of specific areas of the law as well as judges who have a wider, more general knowledge of the law. We suggest that developing specialist judge/sheriffs roles to sit alongside judges with a more general role would assist in the effective administration of justice as well as attracting applicants who have specialised in a particular area of law. This may provide additional career satisfaction for people

who are able to then use their specialist legal knowledge in a new role. This also takes into account the increased specialisation in the legal profession.

4. Career Progression

In some states of the USA, there is a tradition of people moving into and out of judicial roles as their careers progress. This could be adopted in Scotland to allow for a greater turn-over of those sitting in judicial positions. Also seeing judicial appointment as one stage of a career rather than the final stage could attract younger qualified candidates to apply.

5. Tribunal Judges

The judges who sit in tribunals are appointed under a different system using different criteria. So far as the reserved tribunal judges are concerned information at the conference showed that those judges are more likely to be solicitors and more likely to be female than the court-based judiciary.

Tribunal Judges (for example in the Employment Tribunal) can be dealing with legally and factually complex cases including party-party disputes which require in-depth case management and yet the experience they have gained is not treated in the same way as that of a Sheriff when it comes to qualifying for appointment as a Senator. Those Tribunal Judges who might aspire to such a role, but who are solicitors rather than solicitor advocates, would have to give up their tribunal judicial posts and apply to become a Sheriff (in some cases thereby taking a drop in salary and losing judicial leadership responsibilities), then wait for five years, before they could apply.

When this was exemplified at the conference by the President of Employment Tribunals (Scotland) a significant number of those attending expressed concerns about this position. Such barriers do not exist in other comparable jurisdictions (most obviously England and Wales).

Indeed, under the provisions of The Crime and Courts Act 2013, Tribunal judges are able to be deployed into the civil courts to offer judicial assistance. A Tribunal Judge would be able to be deployed into the County Courts and those holding Presidential appointments (including the President of Employment Tribunals (Scotland)) are eligible to sit in the High Court. (By way of example, it is understood that a judicial deployment exercise is about to begin in England whereby some salaried Employment Judges will sit in County Courts, thereby maximising the efficient use of available judicial resources).

Further work is being done in this area in England where a specialist judicial deployment group has been set up as part of the court and tribunal reform programme. In Scotland, on the other hand, Sheriffs and Senators are, simply by nature of their office (rather than their qualifications or suitability), appointed to the First Tier Tribunal (Scotland) but there is no reciprocal arrangement whereby Tribunal Judges are eligible to sit in the civil courts. Allowing this in Scotland would allow Tribunal Judges (who, it should be remembered, are more diverse as a group professionally and personally than court judges) to obtain experience of judicial work in the civil courts and have the additional benefit of ensuring the efficient use of available judicial resources. The need for changes to be made in this regard is arguably more pressing given the proposal to devolve the reserved tribunals to

Scotland. Those tribunals have extremely experienced salaried judiciary who currently have better career prospects if they remain within the judicial structure which otherwise applies to judges in England and Wales than if they come within the scope of the Scottish judicial structure.

The Society considers that if the eligibility conditions for the appointment of Senators remain focused on the need to have experience in a particular post, rather than being competency-based as we would wish, then experience as a Tribunal Judge should count in the same way as experience as a Sheriff does. Thereafter, it would be for Tribunal Judges, just as it is for Sheriffs, to show the JAB panel, that they have the necessary skills and knowledge to perform the to become a Senator on the basis of that experience. As already noted, the current criteria excludes a large number of solicitors with highly relevant judicial experience from even applying for such a post.

TRAIN:

1. Training on gaining - and evidencing - judicial competencies

Training which focused on inculcating the sorts of skills judges require to exhibit would likely be extremely useful for those interested in pursuing a judicial career.

As well as this, organising training on how to apply for judicial selection and, also, how to prepare for JABS interviews would likely be useful. The Society has organised such training in the recent past and would be keen to work with JABS, and other interested organisations, to make sure such training was efficacious.

If work-shadowing/sitting-in and/or mentoring were established within the Scottish judiciary it is likely that training on acquiring judicial competencies, and training on the evidencing of such competencies, would become especially powerful.

2. Specific judicial training and establishing a separate judicial career

This is a model which is adopted in some European jurisdictions, and would be a longer term solution. This means that being a judge is a separate profession. This has the benefit of equipping judges with the desired training and skills throughout their careers. This idea was suggested consistently to the Society during focus groups and – if there is an appetite for this - would require further thinking and policy development across the legal professions.