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1.

Introduction: Diversity and the JAC's First Ten Years

Graham Gee and Erika Rackley

This is an age of diversity. In a pluralistic polity such as the UK, diversity often serves as shorthand for a series of related questions about how best to respond to our mutual differences of, amongst other things, gender, race, sexuality and social background. Over the last twenty-five years or so there has been growing recognition that these questions are as relevant to the courts and tribunals as for other areas of public life. Today, across the UK, there is widespread agreement that the judiciary should reflect the society it serves. Especially welcome is the evidence in recent years that this agreement traverses the judicial and political spheres, with the need for faster and more visible progress on judicial diversity increasingly acknowledged across the ideological spectrum. There is, in other words, a political salience to debates about judicial diversity largely absent just a few years ago. This has significant spill-over effects for the design, working and assessment of judicial appointments: previously relatively discrete debates about the independence, legitimacy and accountability of the appointment regime are frequently now framed in terms of, and by reference to, widely shared concerns about the need for judges who are more visibly reflective of society. Diversity is not the only goal of a selection regime of course, but it has begun to shape how those other goals are viewed. In brief, there is now such widespread agreement about its importance that judicial diversity 'has in recent years become a truth almost universally acknowledged'.[1]

Although most now accept the pressing need for a more diverse judiciary, there is considerably less agreement about the implications of recognizing diversity as an important goal of the judicial appointments regime. In fact, beneath the veneer of agreement that a diverse judiciary is—all else being equal—normatively desirable, there is substantial disagreement about almost everything else including the methods, forms, timescales and justifications for bringing it about. Differently put: the risk is that the consensus amongst politicians, judges, lawyers, officials and lay people about the need for a diverse judiciary conceals tricky and largely unaddressed questions about not only how to achieve diversity, but also the very meaning of diversity in this context. Some questions have a conceptual orientation. For instance, precisely how diverse is a diverse judiciary? Do understandings of diversity change if we think in terms of the over-representation of traditionally privileged

[1] E. Rackley, 'Rethinking Judicial Diversity' in U. Schultz and G. Shaw (eds), Gender and Judging Oxford: Hart Publishing, 2013 pp. 501, 503.

groups rather than the under-representation of historically marginalized groups? How is judicial diversity best secured when the wider social environment is informed by entrenched patterns of power, privilege and perhaps even prejudice? Do changes to the judicial role —a greater emphasis on leadership, case management and communicating with litigants and the public at large—suggest that traditional understandings of 'merit' need to evolve? Other questions are more practical. For example, how does the need to diversify the judiciary align with policies on retirement? What degree and sort of involvement in appointment processes for judges, ministers, lawyers and lay people helps or hinders the pursuit of diversity? What lessons—if any—can be drawn from the approach to promoting diversity in other legal systems?

This collection brings together current and retired judges, officials, lawyers and academics from Australia, Canada, South Africa and the UK to debate these and other questions. It is the first collection investigating diversity debates in light of the changed institutional terrain of judicial appointments in England and Wales. The collection's premise is that debates about diversity are complex and interrelated, with transformation of the judiciary's composition likely only via a systematic and collaborative approach. Systematic insofar as diversity must be addressed not only within the appointments process itself, but when thinking about a myriad of other matters as well: retention as well as recruitment; the terms and conditions of judicial service; the provision of training; arrangements for judicial welfare; promotion and professional development across a career; policies on retirement and post-retirement and so forth.[2] A systematic approach also extends more broadly to include thinking about how judicial recruitment is influenced by multiple political and social changes, including changes to the public sector, legal regulatory regimes, legal labour markets and the career choices and working arrangements of lawyers. Insofar as debates about diversity should be informed by the perspectives, experiences and insights of the many different actors with a stake in the judicial system, the approach must also be collaborative.[3] This requires, at a bare minimum, that all of those with a stake in the judicial system engage in good faith, reasoned and constructive debate. Of course no single collection could address all of the interrelated issues implicated in these debates nor include all of the perspectives on them. All that having been said, this collection strives to discuss a number of conceptual and practical questions relating to judicial diversity, and to do so via several lenses: judicial and non-judicial, legal and lay;

[2] The Report of the Advisory Panel on Judicial Diversity 2010 at para 4.

[3] For discussion of the new judicial appointment regime as collaborative, see G. Gee, 'Judicial Policy in England and Wales: A New Regulatory Space' in R. Devlin and A. Dodek (eds), Regulating Judges: Beyond Independence and Accountability, Cheltenham: Edward Elgar, 2016, p. 145.

practitioner and academic; domestic and international; analytical and experiential; and insider and outsider.

Debates about diversity must be attentive to the real world institutional settings in which individual selection decisions are made. The institutional focus for this collection is the Judicial Appointments Commissions ('JAC'). Created under the Constitutional Reform Act 2005, beginning its work in 2006 and marking its tenth anniversary last year, the JAC is the body responsible for recommending candidates for appointment to all courts and tribunals in England and Wales (as well as certain tribunals whose jurisdictions extend to Scotland or Northern Ireland). The JAC is of course only one part—albeit a very significant part—of the new architecture of appointments that plays host to debates about diversity. The statutory context, the structure of the legal professions and the behaviour of other stakeholders in the judicial system remain key determinants of the rate of progress on recruiting candidates from a wider pool of talent that is more reflective of society at large. Inevitably, however, the JAC is today the primary focus of many of the most pressing debates about diversity—and, as illustrated throughout this collection, views differ on the extent to which its processes and policies have helped or hindered the transformation of the judiciary. Perhaps unsurprisingly, one site of disagreement is between those on the inside of the JAC-managed regime (i.e. the JAC, senior judges and officials at the Ministry of Justice) and those on the outside (i.e. academics and lawyers, particularly those from groups under-represented in the judiciary). Insiders and outsiders often have markedly differing assessments of the scale of the diversity deficit, the pace of progress so far and the tools needed to address it, and in particular whether the JAC has utilized the levers available to it as fully as it might. They also often have rival views on whether the levels of judicial and ministerial involvement in JAC-run selections help or hinder the push for a more diverse bench. In short, insiders and outsiders appear to have different experiences of and expectations for the JAC's selection regime. Across the last ten years, constructive debate has proved very challenging because views diverge so markedly, with insiders and outsiders often seeming to speak past each other.

This collection encompasses both insider and outsider perspectives on the JAC, with many of the contributors using their essays not only to reflect on the many challenges that the JAC has confronted during its first decade, but also to chart how it can tackle the challenges that are likely to define the next ten years. In addition to a dozen chapters written by academics, this collection includes six 'reflection essays' by people with practical, firsthand experience of the judicial appointment processes in England and Wales. The authors of these experiential essays have all been involved in judicial appointments in one guise or another. They include former and current commissioners on the JAC (Frances Kirkham and Noel Lloyd

respectively), two former senior civil servants (Sir Thomas Legg and Jenny Rowe), and two prominent practitioners who have been vocal critics of the rate of progress on diversifying the judiciary (Karon Monaghan QC and Cordella Bart-Stewart). Between them, these authors' involvement with judicial appointments dates from the early 1980s to today. The collection also contains an opening essay reflecting on the JAC's first ten years by its recently retired chair, Christopher Stephens. It closes with a longer essay by Lady Hale on the process for selecting the Justices of the UK Supreme Court. Lady Hale is, of course, not only the Court's Deputy President, but also one of the most powerful voices in the common law world on the importance of judicial diversity.

The collection's objectives are threefold. First, it aims to illustrate the range of views on and experiences of the JAC-run regime, which is after all more inclusive than the pre-2005 regime, involving as it does ministers, judges, civil servants, lawyers and lay people. Second, it attempts to identify possible reasons for, and suggestions on how to respond to, the contrasting assessments of those on the inside and outside of the regime, especially as those assessments relate to the rate of progress on diversity. Third, the collection attempts to reframe in novel and fruitful ways some of the familiar debates that have led to an impasse between insiders and outsiders: debates relating to, among other things, 'merit', quotas and the respective roles of judges and politicians in the selection process. In doing all of this, the collection furnishes a number of competing assessments of the JAC's first decade as well as mapping out alternative paths that the JAC could pursue in its second. In this Introduction, we offer an outsider's account of the JAC's first decade, albeit one that draws on interviews and conversations with insiders. Our goal is to give readers a flavour of the highs and lows and ups and downs of the JAC's first ten years and to sketch some of the main challenges that will confront it in its second decade.

The New Institutional Terrain of Judicial Appointments

The terrains on which diversity debates play out have changed. In line with the international trend, there are now central roles across the UK for independent commissions in the appointment of judges to courts and tribunals.[4] Just as there are multiple domestic judiciaries

[4] In 81% of Commonwealth jurisdictions there is now a judicial appointments body that plays some role in the selection or short-listing of candidates for appointment to the judiciary: generally J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice, London: Bingham Centre for the Rule of Law, 2015 at para 1.6. See also K. Malleson, 'Introduction' in K. Malleson and P.H. Russell (eds), Appointing

in the UK, so there are also a number of selection processes, each anchored around its own commission.[5] The Judicial Appointments Board for Scotland ('JABS') was created in 2002; the Northern Ireland Judicial Appointments Commission ('NJIAC') in 2005, whilst the JAC was established in 2006.[6] (This collection includes contributions from former lay commissioners at JABS and NIJAC: Alan Paterson and John Morison respectively). The Supreme Court, itself a recent creation which only began its work in 2009, has its own recruitment process involving ad hoc commissions that are specifically constituted whenever vacancies arise.[7] But the changing institutional landscape extends much further than this. In England and Wales, for example, there has been continuing change over the last decade to the roles and responsibilities of several crucial actors in the selection regime such as the Lord Chancellor and the Lord Chief Justice. Transferring staff and functions from the Ministry of Justice to the JAC and the Judicial Office (which was created in 2005 to support senior judicial leaders in England and Wales) has also moulded relations between crucial stakeholders in the selection regime. Other new bodies are charged with important coordinating functions, including the Judicial Diversity Forum, the Judicial Diversity Taskforce and the Judicial Diversity Committee of the Judges' Council. The UK Parliament also takes a greater interest in the appointments regime.[8] This changed terrain inevitably influences the tenor and direction of debates about diversity, although as shall become evident across this collection the new selection regime in England and Wales is marked by continuity as well as change (for example, the continued dominance of a traditional understanding of 'merit').

Judges in an Age of Judicial Power: Critical Perspectives from Around the World, Toronto: University of Toronto Press, 2006, pp. 3, 6-7.

[5] We do not discuss the process for selecting UK judges that sit on the Court of Justice of the European Union or the European Court of Human Rights or any other international courts. For useful recent treatments, see M. Bobek, *Selecting Europe's Judges: A Critical Review of the Appointment* Procedures to the European Courts, Oxford: Oxford University Press, 2015; and R. Mackenzie, K. Malleson, P. Martin and P. Sands, Selecting International Judges: Principles, Process and Politics, Oxford: Oxford University Press, 2010.

[6] See A. Paterson, 'The Scottish Judicial Appointments Board: New Wine in Old Bottles?' in K. Malleson and P.H. Russell (eds), Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, Toronto: University of Toronto Press, 2006, pp. 13; and G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge: Cambridge University Press, 2015, pp. 159-193 and 239-249.

[7] S. Shetreet and S. Turenne, Judges on Trial: The Independence and Accountability of the English Judiciary, Cambridge: Cambridge University Press, 2nd edn, 2013, pp. 140-150.

[8] See Gee et al, The Politics of Judicial Independence, pp. 188-189.

The JAC has a heavy workload, overseeing the recruitment of between 300 and 800 judges each year. The exact number of vacancies varies from year to year, depending on the number and type of competitions that the JAC is requested to run. (See Appendix I for a breakdown of the number of recommendations that the JAC has made over its first decade). Partly because of this large and variable workload, it has a relatively large membership by international standards, with 15 members: seven hold judicial office, one of whom is a magistrate, two lawyers, and six lay people, one of whom serves as the JAC's chair. More information on the identity of the commissioners is set out in Appendix II. In contrast to the informality and secrecy that for a long time characterized the selection regime run by the Lord Chancellor, the JAC runs a much more formal and relatively inclusive regime. Its recommendations for judicial office are made following open competition, with the process of evaluating a person's suitability for judicial office requiring the input of multiple actors at several different stages. The JAC is under a statutory duty to select candidates 'solely on merit',[9] but where two or more are assessed to be of equal merit then it can recommend a candidate on the basis of improving diversity on the bench.[10] We explain the selection processes overseen by the JAC in more detail in Appendix III, including the slightly different process for senior appointments, but for now it suffices to offer a brief summary of a typical selection exercise run by the JAC.

At the outset of a selection exercise the Lord Chancellor is required to consult with the Lord Chief Justice. Supported by their officials, the Lord Chancellor and Lord Chief Justice discuss the details of the job description. This discussion is informed by advice and data from H.M. Courts & Tribunals Service about the judicial vacancy in question. Upon receiving a vacancy request from the Lord Chancellor, the JAC runs the process (advertising the post; compiling a short-list; running a selection day at which the short-listed candidates will be interviewed and may also be required to participate in role-play activities; and then recommending a single candidate for each vacancy). Despite its name, the JAC was created as a recommending body, not an appointing body. It makes initial recommendations for judicial office, with the final say whether or not to appoint lying with, depending on the exact vacancy in question, the Lord Chancellor (for the High Court and above), the Lord Chief Justice (for all lower level courts) or the Senior President of Tribunals (for most tribunal vacancies). Before 2014, the JAC made all of its recommendations to the Lord Chancellor. However, the Lord Chancellor's role was diluted by the Crime and Courts Act 2013, which transferred the final say over appointments to the lower courts to the Lord Chief Justice and over most tribunal

[9] Constitutional Reform Act 2005, s. 63.

[10] Crime and Courts Act 2013, Schedule 13.

appointments to the Senior President of Tribunals.[11] As a result, the Lord Chancellor has the final say over only 3 per cent of all selections. Between 2006 and 2016, there were only six occasions out of nearly 5,000 appointments where the final appointing authority did not accept the JAC's recommended candidate. In other words, the JAC's recommendations were accepted 99.9 per cent of the time. What this means is that although created as a recommending body, the JAC effectively functions as an appointing body.

Even though the terrain of judicial appointments has been reshaped since 2005, there has been significantly less change in the composition of the judiciary itself, especially at the highest echelons of the courts in England and Wales. It is true that there has been progress in the lower courts and the tribunals. For example, more than half of both court judges (51 per cent) and tribunal judges (64 per cent) under the age of 40 are female,[12] with 1800 women appointed to judicial office between 2006 and 2016.[13] Particular progress has been made in the two crucial entry-level positions to the judiciary; namely, Recorder and Deputy District Judges. For example, there has been an increase over the last decade in the proportion of female Deputy District Judges from 25 per cent to 37 per cent. It is also true that some progress has been seen in higher courts. From 2005, the number of women judges in the High Court and the Court of Appeal rose from 10 to 22 and from two to eight respectively.[14] This is indeed progress—but the numbers are still exceptionally small, representing only 21 per cent and 19 per cent of the total number of judges sitting on those courts, with no women at the time of writing occupying any of the five most senior leadership roles in the English and Welsh judiciary.

The statistics for British, Black, Asian and minority ethnic ('BAME') judges tell an even more dispiriting story. The numbers of BAME candidates applying for and being selected for judicial office is greater than when the JAC was created, with 400 BAME judges appointed since 2006. But BAME judges still represent a very small minority in the judiciary. Of the approximately 3200 professional judges in England and Wales, ethnicity information is known for 84 per cent, with 174 (6 per cent) declaring their background as BAME.[15] The numbers are slightly higher in the tribunals where 10 per cent of judges declared their

[11] Crime and Courts Act 2013, Schedule 13.

[12] Judicial Diversity Statistics 2016: Judicial Office Statistics Bulletin (Published 28 July 2016. Revised 2 December 2016) p. 5.

[13] Letter dated 7 April 2016 from Christopher Stephens (Chair of the JAC) to the Lord Chancellor.

[14] Judicial Diversity Statistics 2016: Judicial Office Statistics Bulletin (Published 28 July 2016. Revised 2 December 2016) pp. 6-7.

[15] ibid, pp. 8-9.

background as BAME, with this rising to 16 per cent for under-40s. At the time of writing, however, there are still no BAME judges in the Court of Appeal, and only two on the High Court. For many selection rounds, the proportion of applicants from BAME is equal to or greater than the eligible pool, yet the proportion of applicants recommended for appointment is often substantially lower. A similar story is seen in terms of professional background: around a third of court judges (34 per cent) and two-thirds of tribunal judges (65 per cent) have been appointed from non-barrister backgrounds, but there is only one solicitor out of 105 judges sitting on the High Court, and none on the Court of Appeal.[16] The unrepresentative bar, in other words, still retains a disproportionate presence at all levels of the court judiciary, especially the top courts. In practice, this consolidates the stranglehold that white, middle and upper class men enjoy on judicial office. Other more diverse pools of talent—such as solicitors, government lawyers, legal executives and academics—are still not successfully progressing through the new selection processes in sufficient numbers.

Although the JAC (through its Chair or his or her nominee) plays only a limited role as one of five members of the UK Supreme Court ad hoc appointment commissions, it is important to note that progress over the last decade in changing the composition of the UK's apex court has been positively glacial, if indeed it is even apt to talk of any progress at all. Every one of the thirteen appointments over the last decade has been a white man, and all but one has spent the majority of his career at the Bar, prior to appointment as a judge. Even the somewhat contentious expansion of the pool of potential appointees beyond the Court of Appeal, which enabled direct appointments to the Court, could do nothing to stem the tide. At the time of writing, it has been used once: to appoint another white, male barrister. A number of appointments will be made to the Supreme Court in the next couple of years, and it might be that the UK's top court looks more diverse than it does at the time of writing. This would of course be welcome, but diversity will remain a real and enduring challenge at all levels of the judiciary even if there is what seems like a sudden splurge of more diverse appointments to a Supreme Court that is currently staffed by only one women. Indeed, there is also the real risk that very visible progress in the UK's top court will conceal the continued dispiriting lack of progress in other parts of the senior judiciary.

Ten years on, then, some limited progress on diversity has been made, but this greater diversity has not been evenly distributed across the judiciary as a whole. The rate of progress has also been much slower than many had expected, with England and Wales still lagging

[16] ibid, p. 5.

very far behind comparable countries in terms of judicial composition.[17] No doubt a complex mix of related reasons accounts for this. A major impediment to faster progress is the continued stratification of the legal profession, with the upper echelons of legal practice not reflecting the growing diversity found at the early stages of a legal career or in the branches of legal practice traditionally regarded as less prestigious than the bar. Another impediment is the fact that judicial careers have traditionally lacked flexibility, especially in terms of part-time posts[18] and the general expectation that High Court judges who are generally based in London will go 'on circuit' (i.e. to sit on courts outside of London, often for many weeks at a time).

But what of the JAC itself? Whilst recognizing the importance of these impediments, and whilst acknowledging that the statutory framework confers only limited tools to promote diversity on it, some commentators argue that the JAC's timidity is part of the explanation for why there has not been faster progress over the last ten years. The JAC's 'passivity'[19], it is often argued, is seen in inter alia: its failure to displace traditional understandings of 'merit'; its reluctance to downgrade the importance attached within the selection process to judicial references and statutorily required consultations with senior judges; and its failure to resist selection criteria that can disadvantage candidates from non-traditional backgrounds (for example, the requirement to have 'fee-paid' experience in a part-time judicial position whilst continuing in a day job, which might not be practicable for some types of legal practice such as solicitors in city firms or high-street practices). There can be little doubt that the JAC's timidity is related to and partly a consequence of its difficult and sometimes tumultuous relations with other stakeholders in the judicial system, and the senior judiciary and the Ministry of Justice in particular. Or to put this more bluntly: the JAC's willingness to agitate for faster progress on diversity (or for that matter to make full and effective use of the tools available to it under the statutory scheme) has been limited by the need at various points

[17] See e.g. Council of Europe, European Judicial Systems. Efficiency and Quality of Justice: CEPEJ Studies No 23 (2016) 101, where the UK ranks alongside Armenia and Azerbaijan at the very bottom of Council of Europe Contracting Parties in terms of the percentage of women in professional judicial roles.

[18] This is changing. The Crime and Courts Act 2013 amended the Senior Courts Act 1981 to allow the maximum number of judges in the High Court and the Court of Appeal to be comprised of a specified number of full-term equivalents (i.e. a mix of full-time and part-time positions) rather than a maximum number of individual judges. There are also similar provisions applicable in respect of the Supreme Court.

[19] See L. Barmes and K. Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' Modern Law Review 74, 2011, pp. 245, 258-261.

during its first ten years to placate its stakeholders in order to safeguard its position on the constitutional map.

The JAC's First Decade: Securing An Institutional Foothold

Over ten years on from its creation, the JAC today occupies what most regard as a secure place on the constitutional map.[20] The new model of appointments overseen by the JAC attracts 'broad consensus', with few proposing significant departures from it.[21] However, this belies the number and scale of challenges that the JAC confronted during what at times was a tumultuous first decade. Much of this tumult resulted from rocky relationships between the JAC and its stakeholders (the judiciary, the legal professions and the Ministry of Justice), with the JAC's future seeming to be uncertain at various points during the ten years as a result. In brief: although the JAC now enjoys a secure position on the institutional landscape, the history of its first decade illustrates that it occupies an extremely narrow constitutional space, with its ability to drive policy change limited by, amongst other things, the need to nurture the confidence of multiple stakeholders whose interests do not always coincide. This is a useful reminder that, in the real world, debates about diversity do not occur in the abstract, but can be buffeted by the competing interests, priorities and personalities of the various stakeholders in the judicial system. For these purposes, it is possible to divide the JAC's first decade into three phases: an initial period between 2006 and 2010 defined by tensions and even hostility between the JAC and its main stakeholders; a period of stabilization and further change from 2011 to 2014; and finally, some evidence of renewed tensions with the judiciary between 2014 and 2016. A golden thread that runs throughout the decade is the way in which opposition from stakeholders crimps the JAC's willingness to innovate in bold and novel ways.

Tensions and Hostility (2006-2010)

From the very beginning of its work in 2006, the JAC faced a number of serious financial, staffing and workload challenges.[22] The financial challenge took the form of a 5 per cent

[20] It is overstating matters, however, to suggest, as the Ministry of Justice did in 2015, that the JAC is "a universally respected part of the constitutional landscape": Ministry of Justice, Triennial Review: Judicial Appointments Commission London: Ministry of Justice, 2015, p. 3.

[21] House of Lords, Select Committee on the Constitution, Judicial Appointments, 25th Report of Session 2010-12, (HL 272), para 5.

[22] See Gee et al, The Politics of Judicial Independence, pp. 166-167.

budget cut in its first year. That most of its staff was seconded from the Department of Constitutional Affairs (i.e. the predecessor ministerial department to the Ministry of Justice) led not only to some officials struggling to adapt to the new way of selecting judges, but also to a perception among some outsiders that the JAC was not independent from, but rather an adjunct of, the government.[23] The workload challenges included a lack of reliable forecasting data from the Courts Service about the number of likely vacancies to arise in any one year. All of this occurred at the same time as the JAC was devising its own processes for identifying well-qualified candidates as well as managing a number of selection rounds underway under the pre-2006 processes and which were inherited from the Department of Constitutional Affairs.

This translated into the JAC's early years being marked by criticism, suspicion and hostility, as powerfully recounted in the essay in this collection by Frances Kirkham (who served as a judicial commissioner on the JAC from 2006-2011). Many in the legal profession criticized the JAC for the length of time it took for judicial vacancies to be filled under the new selection regime. However, most of this criticism was misplaced insofar as delays mainly resulted from the time that it took the Ministry to finalize its vacancy request at the outset of the process (a step that was required before the JAC could initiate a selection exercise) and then to accept the JAC's recommendation at the process's end. Many judges and barristers also criticized the JAC's reliance on application forms, qualifying tests, interviews and evidence-based evaluations that relate to explicitly stated criteria for appointment. Typical were complaints that several barristers widely viewed as high-flyers had not been successful in securing an appointment under the new processes even though they would almost certainly have done so under the pre-2006 processes. This period was also characterized by tensions between the JAC and the Ministry of Justice, with ministers and officials left frustrated that the government was formally responsible for the new appointments regime yet lacked effective levers to influence its day-to-day workings.[24] Jack Straw, the Lord Chancellor from 2007-2010, was frustrated by both the slow progress on diversity as well as his limited input into senior appointments.[25] In brief: whilst the JAC stressed its role as an independent body

[23] Baroness Prashar, 'Translating Aspirations into Reality: Establishing the Judicial Appointments Commission' in Judicial Appointments Commission, Judicial Appointments: Balancing Independence, Accountability and Legitimacy, London: Judicial Appointments Commission, 2010, p. 47.

[24] This section draws on the account of the JAC's early years in Gee et al, The Politics of Judicial Independence, pp. 164-170.

[25] See J. Straw, *Aspects of Law Reform: An Insider's* Perspective, Cambridge: Cambrige University Press, 2013, pp. 58-59.

performing an important constitutional task in identifying candidates for judicial office, the Ministry regarded the JAC as insufficiently responsive to the concerns of judges and lawyers.

One measure of the level of unease is that the Ministry undertook two reviews of the JAC within the first two years of its birth, with a total of seven reviews of one sort or another between 2006 and 2012. Relations deteriorated to such an extent around 2009-2010 that the Ministry mulled the possibility of abolishing the JAC and either bringing judicial appointments back in-house or delegating the responsibility for appointments to the senior judges, although neither option was pursued with seriousness. This was the JAC's first 'near death experience' (as it came to be known inside the JAC), with a second to follow in 2010 when the JAC was included in Schedule 7 of the Public Bodies Bill, which sought to empower ministers to abolish or restructure a wide range of non-departmental public bodies. The bodies listed in Schedule 7 would not inevitably be scrapped or restructured but would have remained subject to the risk that ministers could use their delegated powers to purge them at some point in the future. This was the Cabinet Office's Bill, and the JAC was included in it against the Ministry's advice that this would lead to substantial resistance from the judiciary and the legal professions. The Ministry's prediction was accurate, with judges and lawyers setting aside their misgivings about the new appointment processes to defend the JAC, with their efforts successful in securing the JAC's removal from the Bill. According to some insiders, these near death experiences helped to cement much more constructive relationships between the JAC, senior judges and the legal profession.

Stability and Change (2011-2014)

In one sense, the JAC survived these near death experiences. In another sense, what emerged from these series of bruising encounters with the Ministry was in effect a 'new' JAC. There were significant staff changes throughout the JAC. By 2011, Christopher Stephens and Nigel Reeder had been appointed as the new Chair and Chief Executive, replacing Baroness Prashar and Claire Pelham respectively. By 2012, the JAC was staffed by a new cohort of commissioners. This was no accident; it was a state of affairs that the Ministry engineered by extending some of the inaugural commissioners' terms by just a single year to ensure that most of their terms in office would conclude by early 2012. Budget cuts of 18 per cent introduced in the new age of austerity between 2006 and 2013 led to reductions in the JAC's personnel from 109 to 79 over the same period. Accompanying all of this was the JAC's renewed effort to be more responsive to the business needs of the judicial system. It is only a slight exaggeration to say that by 2011 the JAC—with its new leadership, a new cohort of

commissioners and a streamlined internal organization—was willing to embrace a new vision of its own role.

Some of the tensions in the earlier period had derived from competing visions of the JAC's role. In the face of suspicion and hostility from judges and lawyers, the JAC's initial leadership sought to secure its place on the institutional map by stressing both its independence and the importance of its role in identifying suitably qualified candidates for judicial office. In its early years, the JAC's first leadership team was particularly concerned to protect the boundaries of its role from interference by judges, ministers or civil servants. On this 'constitutional' vision, the JAC was a proactive actor playing a central role in directing policy on appointments and diversity. One concrete example of this can be seen in the willingness of the JAC's initial commissioners to challenge the use of fee paid experience as an additional criterion for appointment. The JAC objected to this criterion on the grounds that it would tend to disadvantage candidates from non-traditional backgrounds. It took this stand even though both the judiciary and the Ministry felt that those appointed to the bench should have some prior experience of fee-paid judicial office in order that newly appointed judges could 'hit the ground running'. This was one of a number of issues in respect of which there were intense clashes between the JAC on the one hand and the Ministry and the judges on the other.

In contrast to a 'constitutional' vision of the JAC's role, the Ministry embraced a 'recruitment' vision. This envisaged the JAC serving as a recruitment agency whose chief responsibility was to respond to the business needs and workforce requirements of the judiciary, as determined by senior judges and the Ministry. By 2011, with new leadership at its helm, the JAC was more sympathetic to the Ministry's recruitment vision. The new leadership team reshaped the JAC into a leaner, cheaper and more responsive outfit. As Christopher Stephens explains in this collection, the JAC's leadership oversaw a change agenda that included: cutting the JAC's costs; reducing the length of the end-to-end selection process from up to 40 weeks to an average of less than 20 weeks; improving satisfaction levels with the JAC's processes amongst those who applied for judicial office; and better supporting the business needs of the justice system. Emblematic was the fact that, in its more responsive mode, the JAC largely abandoned its policy of resisting fee paid experience as an additional eligibility criterion, accepting instead the argument that business needs required that those appointed to 'hit the ground running'. The JAC did so even though a practical effect of this was to narrow—and in all likelihood also render less diverse—the pool of potential candidates who would meet this additional criterion. On one reading, then, the JAC prioritized the need to

stabilize relations with the senior judiciary and the Ministry over the need to aggressively promote judicial diversity.

By subscribing to the Ministry's 'recruitment' vision of its own role, the JAC repaired relations with its primary stakeholders and stabilized its foothold on the institutional map. More generally, this period was one of both stability and change. Important changes were made to the statutory framework. The Crime and Courts Act 2013 further diluted the involvement of the Lord Chancellor in individual selections by passing the final decision whether or not to appoint the candidates recommended by the JAC to the Lord Chief Justice (for all court vacancies below the High Court) or the Senior President of Tribunals (for most tribunal vacancies). What bears emphasis is how during this period stability and change were interrelated. Stability flowed in large part from change: as the JAC adopted a more conciliatory approach to its stakeholders by becoming much more responsive to the business needs of the justice system, so its institutional position stabilized. Change in turn flowed from this new found stability: with the confidence of its main stakeholders on the rise, and its institutional position secured, the JAC's new leadership team won notable victories that had eluded its inaugural leadership. These included the introduction of advertisements, application forms, short-listing and interviews for appointments to the Court of Appeal and leadership positions such as Heads of Division.[26] Another example was the extension of the JAC's remit to include the role of Deputy High Court Judges, a fee-paid position that is widely seen as a stepping-stone to a full-time appointment to the High Court.[27] These fee-paid positions had originally been excluded from the JAC's regime. That filling these positions had been regarded instead as deployment decisions within the Lord Chief Justice's discretion—with an accompanying lack of transparency and formality, and with no publicly available data by which to measure diversity—had been a 'running sore' during the JAC's early years.[28] But it was only when its own place on the institutional map had been stabilized that the JAC was able to persuade the Ministry and judiciary that its remit should embrace appointing Deputy High Court judges.

Renewed Tensions with the Senior Judiciary (2014-2016)

By 2014, critics were already characterizing the JAC as an excessively cautious body that so far as possible would avoid innovating in ways that would unsettle its critical stakeholders.

[26] Gee et al, The Politics of Judicial Independence, p. 184.

[27] See Judicial Appointments Commission Regulations 2013.

[28] See House of Lords, Select Committee on the Constitution, Judicial Appointments, para 166.

The publication in 2014 of its policy on the 'equal merit provision' confirms this characterization.[29] The Crime and Courts Act clarified that the requirement for the JAC to recommend candidates 'solely on merit' (as provided under s63 of the Constitutional Reform Act 2005) did not prevent it preferring a candidate on diversity grounds where two or more candidates were of 'equal merit'.[30] Views differed on whether this new provision would translate into more diverse appointments. Some doubted whether there are really many occasions where two or more candidates can be deemed to be equal; the JAC's then chair Christopher Stephens had suggested in 2011 that there had been no two indistinguishable candidates out of the nearly 500 recommendations made by the JAC since he had assumed office earlier that year.[31] Others involved in the appointments process—notably, the JAC's former Vice Chair, Lady Justice Hallett—had opposing views, suggesting that it was 'not as rare as people think that you have candidates who are equally qualified'.[32] Either way, the statutory change created space for the JAC to devise its own policy on how to implement the 'equal merit' provision.

In designing the policy the JAC had two questions to address. First, should the equal merit provision apply at multiple stages of the selection process (including short-listing) or only at the final stage when the JAC makes a recommendation? Second, to which groups of people should the provision apply? That the JAC answered both questions in a very narrow, minimalist fashion is in keeping with its cautious approach to policy innovation. The JAC initially decided that the provision would only apply at the final stage of recommendation, and not at short-listing. This minimalist approach was short-sighted, to say the least. The premise that there can be candidates exhibiting different combinations of strengths and weaknesses who are determined to be of equal merit is as relevant to short-listing as final recommendation. Applying the provision at short-listing could conceivably help counteract deep-seated barriers that prevent candidates from being invited to an interview.

In answering the second question, the JAC further resolved that the provision would only apply to race and gender on the grounds that the provision should only be used where under-representation can be substantiated by reference to published data. Gathering reliable data for groups other than race and gender can indeed be problematic, but some suggest that the JAC

[29] Judicial Appointments Commission, Equal Merit Provision Policy (April 2014).

[30] Crime and Courts Act 2013, Schedule 13. This provision derives from s159 of the Equality Act 2010.

[31] House of Lords, Select Committee on the Constitution, Judicial Appointments: Oral and Written Evidence 25th Report of Session 2010-12, (HL 272) Q.364.

[32] ibid, Q.240.

needs to devote more of its time and resources to become a pioneer on such matters.[33] That in 2015-2016 the provision was only invoked in a mere 14 out of 308 recommendations is scarcely surprising given the narrowness of the JAC's policy.[34] There thus a very real risk that the JAC's policy will come to be dismissed as 'merely another positive headline backed by very little positive impact in terms of addressing the glaring diversity deficit'.[35] The cautiousness of the JAC's policy was a response to the judiciary's concerns. Over half of the responses to the JAC's consultation on how to implement the equal merit provision were from judges and their representative bodies. There were also detailed negotiations in private between the JAC, the Ministry and the judges. Suggestions of the strength of judicial concerns were apparent when Christopher Stephens commented that 'there is serious caution among many', with the JAC's 'stakeholders … cautious about the equal merit provision'.[36] He noted that the reaction from the judges and lawyers was 'mixed'. Augmenting this picture of a body that is hemmed in by its main stakeholders is the fact that the JAC sought to revisit its policy shortly after its introduction. An internal report prepared in 2016 had recommended that the JAC should extend the provision to short-listing.[37] This proposal triggered considerable controversy with senior judges. On this occasion, the opposition of some judicial members on the JAC ultimately stymied the widening of the equal merit policy. This seems to confirm both the degree to which the JAC has to placate its stakeholders and the degree of the judicial influence on its internal decision-making. Nevertheless, in January 2017 the JAC published a slightly tweaked version of their equal merit policy which explains that whilst the provision would not formally be applied at short-listing, the JAC will increase the number of candidates who are shortlisted where there are two or more applicants assessed as being of equal merit, including some women or BAME applicants.[38] Perhaps inevitably, this too seems like a fudge, representing neither a full-throated application of the rationale nor the spirit of the equal merit provision. And as such it seems unlikely to make much, if any, difference to the appointments made.

[33] G. Gee and K. Malleson, 'Judicial Appointments, Diversity and the Equal Merit Provision' UK Constitutional Law Blog , 6 May 2014.

[34] Judicial Selection and Recommendations for Appointment Statistics, April 2015 to March 2016.

[35] A. Paterson and C. Paterson, Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary, London: CentreForum, 2012 p. 48.

[36] House of Commons Justice Committee, The Work of the Judicial Appointments Commission (HC 1132) (5 March 2014) Q.31.

[37] Judicial Appointments Commission, Minutes (July 2016) para 4.1.

[38] Judicial Appointments Commission, Equal Merit Provision Policy. First published in 2014 and revised in 2017.

This episode coincided with another change in the JAC's leadership. In 2016, Christopher Stephens's term as chair ended. Repairing the JAC's relations with the judiciary had been one of his priorities when first appointed chair five years earlier. After initial success on this front, Stephens's relationship with the senior judiciary proved more challenging towards the end of his term. The JAC's leadership found it difficult at times to cultivate a constructive working relationship with Lord Thomas, the Lord Chief Justice since 2013. Inside the JAC it was felt that the Lord Chief Justice was second-guessing many of its decisions. There was also concern that some in the senior judiciary were keen to reverse some of the major elements of the JAC's selection processes (for example, the requirement that all applicants must complete a standardized and competence-based application form; the use of interviews). For their part, some senior judges felt that the JAC lacked an effective strategy for encouraging judicial diversity while others complained that its selection processes made too many onerous demands of the senior judiciary (for example, in terms of writing references, providing feedback as consultees and sitting on interview panels). These tensions occurred during a period of low judicial morale, caused in part by changes to judicial pensions as well as more general concerns about the increasing workload pressures placed on individual judges.[39] Many judges believe that the stature of the judiciary has been seriously diminished by substantial cuts in real terms to pay and pensions, with this the reason why two recent recruitment exercises for the High Court have not filled all of the vacancies. Indeed, working out how to promote a positive relationship with the senior judiciary—one that takes account of judicial concerns but does not submit unthinkingly to them—is a central challenge for Lord Kakkar, who was appointed the JAC's third chair in October 2016.

The JAC's Next Decade: Continuity and Change

Without doubt the JAC's first decade has been tumultuous at times. Some of this tumult has been of its own making. Some of it has not. Either way, it is important not to lose sight of the fact that the idea of a selection process that is organized around an independent recommending body is now accepted as an integral part of the judicial system. Despite all of the criticism it receives—much of it justified—the JAC is today widely viewed as performing a critical role in nurturing the rule of law by overseeing the appointment of qualified candidates who are recruited following a fair and open competition. Over the decade, the JAC has succeeded in introducing quicker, more efficient and more candidate-focused selection processes, and has done so on a smaller budget and with fewer staff. In terms of corporate governance, the JAC is a small and inexpensive public body that secures value for money.

[39] See generally C. Thomas, 2016 UK Judicial Attitudes Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals, London: UCL Judicial Institute, 2017.

And with the publication of its annual report and accounts, board minutes and policy papers, the JAC is in many respects an exemplar of an open and accountable public body. It is certainly the case that the JAC ends its first decade on a stronger institutional and reputational footing than when it began its work in 2006, and certainly stronger than at many points during its first ten years.

But what of the next ten years? What are the issues, opportunities and challenges facing the JAC as it enters its difficult teenage years? For all of its success in establishing itself on the institutional landscape, the JAC has had much less success in transforming the judiciary. It has rightly been criticized for publishing press releases that cherry-pick statistics that could lead casual readers to conclude that greater progress has been made on addressing the diversity deficit than is in fact the case.[40] Of course, the JAC's (limited) effectiveness at securing greater judicial diversity should be assessed in a wider context that acknowledges the systemic issues that impact on diversity. Much has been made of the fact that the JAC's ability to drive change is limited by the lack of diversity within the legal profession. However, the JAC is also limited by a statutory framework that is not designed to be a full-throated endorsement of diversity, but instead serves multiple other goals as well (for example, enhancing the independence, legitimacy and transparency of the appointment processes). The diversification of the judiciary is, at best, a secondary goal of the statutory framework. Even the statutory duty imposed on the JAC is relatively weak, only requiring it to have regard to the need to encourage diversity among those who are available for selection.[41] The impact of the equal merit provision—one of the few diversity-oriented tools conferred by statute on the JAC—has been largely stymied by judicial opposition. In all of this lies evidence of the 'regulatory bind'[42] that has ensnared the JAC for the last ten years: it has a specific albeit weak statutory duty relating to judicial diversity, but very limited scope to influence several of the key determinants of success. At the same time, notwithstanding these wider systemic factors, the JAC has been too timid. It could—and, over the next decade, should—do more. Many of the contributions to this collection offer thoughts on how the JAC should approach the next ten years. For our part, we would suggest that there are five main tasks that should animate the JAC's second decade.

First, the JAC should do more to challenge the judiciary not merely to pay lip-service to diversity, but to pursue policies that will lead to faster change in the composition of the bench.

[40] K. Malleson and R. Hunter, 'Women judges: inconvenient truth' Law Society Gazette, 20 January 2014.
[41] Constitutional Reform Act 2005, s. 64.
[42] Barmes and Malleson, 'The Legal Profession as Gatekeeper to the Judiciary', p. 259.

While there are some judges who have a long-standing commitment to judicial diversity, for many more—including, often, those in leadership positions—this commitment is qualified by a deeply-seated reluctance to unsettle traditional understandings of what (or who) makes a 'good' judge. For sure, the judiciary has introduced a number of welcome initiatives such as a Judicial Working Shadowing Scheme (which enables lawyers considering a career in judicial office to spend time observing the work of sitting judges) and a Judicial Role Models Scheme (where judges from a range of diverse backgrounds assist outreach events and serve as mentors).[43] What is undeniable, however, is that the judiciary needs to be encouraged—and even harried—into doing more. The JAC has an important role to play here. It should, for example, challenge many judges' continued attachment to traditional understandings of merit. It should resist the judiciary's insistence on fee-paid experience since this not only favours long-serving barristers, but also reinforces that same traditional understanding of merit. And it should insist on a bolder equal merit policy that applies at short-listing in the same way as well as at the final recommendation, and it should look out for opportunities to use it.

Second, the JAC should work to weaken the bar's grip on access to a judicial career in the courts. It should, for example, work with professional associations to ensure that candidates from unconventional backgrounds who have the potential to make excellent judges have the information and opportunities to develop skills and undergo activities that prepare them for judicial office (such as fee-paid experience, training and mentoring). The JAC should build and strengthen relationships with key interest groups such as the Women Judge's Association, the Black Solicitors Network and the Lawyers with Disabilities Division of the Law Society. These groups not only have enormous expertise which should help to inform the JAC's future policies and direction, but are also excellently placed to operate as a conduit between the JAC and highly-qualified non-traditional candidates. It is also vital that the JAC focus on the implementation and outcomes (and not simply the inauguration) of measures designed to put pressure on key gatekeepers in the legal profession; for example, by asking questions about the action taken to give effect to commitments made by leading Magic Circle and other law firms in initiatives to encourage senior staff to apply for judicial appointment.[44] The JAC should also do more to puncture continuing myths—identified in its own research as well as elsewhere—surrounding the appointments process and the judicial role; an example is the persistent misconception that a reference from a High Court judge is need to apply successfully for lower level judicial vacancies. Many myths are still widely held by under-

[43] See e.g. Judicial Diversity Committee of the Judges' Council, Report on Progress 2013-2016, London: Judges' Council, 2016.
[44] J. Rayner, 'Leading firms sign up to judicial recruitment campaign', Law Society Gazette, 27 July 2012.

represented groups.[45] Here actions speak louder than words. The quickest and most effective way to demonstrate the JAC's commitment to widening the appointment pool would be a significant and sustained step-change in the number of appointments made from across all branches of the legal profession, including solicitors, academics, lawyers in the public sector, lawyers from the employed bar and legal executives.

Third, the JAC should review—and, where necessary, improve—its own internal practices and operations. To be fair, the JAC has not been short of internal and external reviews during its first decade. It is important, however, that the JAC continues to scrutinize and improve its processes and procedures—for example, in relation to the collation of diversity data and the operation of its online tests—as well as innovating new ones.[46] In particular, there should be greater transparency of the short-listing and selection day processes, particularly the role of the (non-JAC) lay and judicial panellists in these processes. Reviewing its internal processes should not be used, however, as an excuse for senior judges to reverse important progress that the JAC has made in the formalization of the selection process, especially in respect of senior vacancies. Attention should also be paid to ensuring the effective engagement of all of the JAC's commissioners. At times, some commissioners seem somewhat disengaged from some aspects of the JAC's work, especially its ongoing tensions with key stakeholders. For sure, the commissioners all have busy and demanding day-jobs, and their remuneration for the JAC's work is limited to around 28 days per year. It is especially important, however, that the JAC's leadership team ensures that the newly appointed commissioners—especially but not only the lay commissioners—are able to contribute to the JAC's work as soon as possible following appointment. According to one official at the JAC, it can take up to a year for a lay commissioner to find his or her feet in their new role. The JAC must ensure that the risk of being 'captured' by key stakeholders is highlighted as part of the training of new commissioners.

Fourth, the JAC should take more 'ownership' of the process for making senior appointments. At present, statute specifies the membership of the ad hoc panels that select candidates for appointment to the Court of Appeal and senior leadership positions such as Heads of Division and the Lord Chief Justice. Strictly speaking, these panels operate as "committees" of the JAC, with their membership comprising senior judges as well as commissioners from the JAC.

[45] Judicial Appointments Commission, Barriers to Application to Judicial Appointment: Report (July, 2013).

[46] See e.g. criticism of the disproportionate failure rate of BAME candidates in the online tests and recommendation that the JAC monitor the social and educational background of applicants, shortlisted candidates, those recommended for appointment and current post-holders in Geoffrey Bindman and Karon Monaghan's report on judicial diversity (G. Bindman and K. Monaghan, Judicial Diversity: Accelerating Change, London: Labour Party, 2014, pp. 33, 49-50).

These appointments do not fall under the full auspices of the regular JAC-run regime. The precise composition of these panels depends on the senior vacancy in question, but each includes senior judges who do not sit on the JAC. There is no clear rationale for having these appointments lie outside the usual JAC processes other than to give senior judges greater say in the selection of their colleagues. However, as academic critics have argued, senior judges have too much influence over the selection of other senior judges.[47] Several of the lay commissioners who have sat on selection panels for senior posts have expressed concern about their ability to challenge the judicial panellists. According to one study, the lay commissioners on these panels tend to perform a limited, secondary role of corroborating the senior judicial panelists' assessment of the candidates.[48] If acting in this way, the JAC's lay commissioners can perform an important role in helping senior judges to understand the importance of leadership skills and people management. They can also help to ensure that decisions are evidence-based and made in terms of and by reference to the selection criteria. What it also means, however, is that there is likely to be limited change in the type of candidates who succeed in the competitions for senior posts. It is also likely to mean that traditional understandings of merit will continue to prevail. Addressing this would ideally involve statutory change to bring top appointments fully within the normal JAC regime, with selection panels that are drawn wholly from the JAC's cohort of commissioners. The JAC should push for this statutory change. However, short of statutory change, the JAC should take greater responsibility for these selections. At present, it is commonplace to hear commissioners and staff at the JAC talk about selections above the High Court as not "one of ours". This reveals a mindset in which the JAC self-identifies as a secondary actor in top appointments, with the senior judges who participate on the ad hoc panels having the decisive say. This is concerning since some who are closely involved in the JAC concede that there are still "who is next in line?" and "whose turn is it?" attitudes amongst senior judges when it comes to deciding appointments to the Courts of Appeal and leadership roles.

Finally, and implicit in the four preceding points, the JAC must provide much stronger and more forceful leadership on diversity. It should provide active and strategic leadership on the need for, and design of, the fundamental and far-reaching changes to the selection process. But its leadership should extend more broadly to include judicial working conditions, training, mentoring and appraisal. The JAC should be forward-thinking in its interpretation of policies and changes already introduced (for example, around the availability and publication of part-time and flexible working-arrangements). And it should be provocative in its support and

[47] See generally A. Paterson and C. Paterson, Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary, London: CentreForum, 2012.
[48] Gee et al, The Politics of Judicial Independence, p. 185.

lobbying for new ones (including changes to historical relics, such as the requirement to go out on circuit, and—where these unnecessarily limit the applicant pool—statutory and non-statutory minimum qualifications for judicial appointments). Indeed, in relation to the latter, the JAC is uniquely placed to offer evidence-based arguments for change. The JAC should also encourage the judiciary and the Ministry to provide more resources to the cash-strapped Judicial College so that more extensive training and mentoring can be made available for newly appointed judges. To do this requires the JAC to demonstrate clear and deliberate leadership. At various points during the last decade the JAC has seemed to lack the nerve for proactive leadership.

The recent Ministry of Justice consultation on Modernising Judicial Terms and Conditions in late 2016 is arguably a case in point.[49] As part of a package of measures aimed at improving diversity, the Government proposed single non-renewable terms for fee-paid judicial posts. The Government argued that this would allow for a larger and more diverse cohort of candidates to obtain fee-paid experience prior to applying for a salaried judicial role. This is not a trivial concern: as noted earlier, rightly or wrongly, considerable weight is placed on fee-paid judicial experience as an eligibility criterion for appointment to a salaried judicial position, and often this requirement can disadvantage non-traditional candidates. Driving the Government's proposal was the hope that a wider cohort of candidates with fee-paid experience might in turn lead to a more diverse salaried judiciary. Admittedly, views differed on the proposal. Those in favour welcomed the opportunity to widen the pool of candidates for judicial office who had fee-paid experience, with the hope that over time this would disturb settled expectations about the type of lawyers who are appointed to fee-paid positions. However, many fee-paid judges and lawyers' associations were opposed, citing training and workload concerns relating to the time that fee-paid judges need to acquire experience. Their worry was that many fee-paid judges would not have sufficient opportunity before their non-renewable term lapsed to develop relevant experience in certain types of case (for example, serious sex offences). Some also contended that the Government's proposal might actually make the fee-paid role less attractive to particular groups, for example those with child caring responsibilities who preferred the flexibility of a part time role and who might not have any desire to progress to a salaried role. Their worry was that the introduction of single non-renewable appointments might offset the benefits to diversity brought by a quicker turnover of fee-paid judges, and could disproportionately disadvantage particular groups. The Law Society also cited concerns that those employed in law firms would need to negotiate

[49] Ministry of Justice, Modernising Judicial Terms and Conditions: Consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions, London: Ministry of Justice, 2016.

arrangements with their employer to undertake a part time fee-paid judicial role. However, law firms might become less amenable to letting their employees pursue a fee-paid role if their tenure as a fee-paid judge were time-limited or if there was uncertainty as to whether they would be leaving the firm for a salaried judicial role at the end of the term. Plainly, this was a difficult policy question with a range of competing arguments, including opposing arguments grounded on diversity concerns. But what was the JAC's view? Although it submitted a response to the consultation, the JAC's view was unclear.[50] It failed to take a strong stance, choosing instead to simply offer a risks/benefits analysis of the proposal, including of the implications of the proposal for its own workload and resources. It may be that this ambivalence reflected split views on the JAC itself. However, this represents a missed opportunity to draw on its expertise and experience. For whatever reason, the JAC opted not to offer clear and deliberate leadership on a difficult question of diversity.

Reflecting on the JAC's first decade, what seems clear is that change will only come once the scale of the current diversity deficit is recognised and greater weight is attached (by the JAC, the judiciary, ministers and the legal profession) to the importance of remedying it. What is also clear is that clear, positive and strategic leadership is essential to making this happen. If the JAC is serious about providing such leadership (and it should be) then it is important that every opportunity is taken to make and demonstrate this point. No doubt JAC insiders would say that they have been endeavouring to do all of these things, to varying degrees. The same insiders might also add that it can be difficult for the JAC to exhibit leadership on judicial diversity given the narrow constitutional space that it occupies, with the constant need to navigate the concerns and interests of the senior judiciary, the Ministry and the different branches of the legal profession. Perhaps so, but the JAC needs to be bolder. It should have greater confidence in its ability to weather external pressures. Similarly, it should feel more confident in its ability to withstand and challenge the preoccupations of ministers, a self-interested legal profession and an embattled judiciary. After the various ups and downs of its first decade, the JAC has acquired some political 'capital'. It should begin to spend it.

[50] Judicial Appointments Commission, Ministry of Justice Consultation on Modernising Terms and Conditions: JAC Response, London: Judicial Appointments Commission, 2016.