6 The Judiciary

Introduction

6.1 Our terms of reference invite us to address "… the arrangements for making appointments to the judiciary and magistracy, and safeguards for protecting their independence".

6.2 In this chapter we consider appointments procedures and the related issues of tenure, conditions of service, disciplinary procedures and judicial training. All of these matters impact upon the crucial issues of judicial independence and public confidence. For purposes of definition, unless we explicitly say otherwise, references to the judiciary should be taken as including the magistracy. Issues concerning JPs, lay panellists and lay involvement in adjudication are addressed in Chapter 7.

The Role of the Judge

6.3 An effective and impartial judiciary is crucial to the well-being of any society, especially one where there have been divisions and conflict such as have been experienced in Northern Ireland. All parts of the community must have confidence that judges and magistrates are adjudicating on disputes and dispensing justice fairly and objectively in accordance with the law, without being subject to influence from the Government, politicians or other interest groups. In the criminal justice system it is the judiciary above all others who ensure that two of its critical aims, fairness and due process, are, and are seen to be, achieved.

6.4 Objectivity, fairness, knowledge, the ability to command respect and the intellectual capacity to analyse and adjudicate upon an increasingly complex body of law have been and will remain of central importance for the judiciary. The same goes for such qualities as humanity and an understanding of people. However, we believe that the role of the judge has developed rapidly in recent years, in a trend that is set to continue and accelerate. This has implications for selection procedures, judicial training and the crucial issue of judicial

independence. If we are to address these issues, as required in our terms of reference, we do of course have to take account of the work of the judiciary in the civil sphere and all its aspects, as well as in relation to criminal matters.

6.5 There is nothing new in judges interpreting statutes where the literal meaning is unclear or developing case law where statute and precedent are silent, taking account of changing economic and social circumstances; that is how the common law developed over the centuries. However, over the past two decades judges have been called upon to interact increasingly with executive and legislative decisions. Judicial review, where judges determine whether decisions of public authorities have been taken in accordance with proper procedures, has developed to such an extent that the courts have frequently held the executive to account for unlawful acts. Accession to the European Union and developments in the field of human rights have also resulted in more frequent challenge to legislative provisions and have ended the presumption that international legal instruments are separate from and outside the competence of domestic courts.

6.6 Incorporation of the *European Convention on Human Rights* will have an impact at all levels of court. It will mean judges being empowered to declare primary Westminster legislation incompatible with the Convention and to set aside lesser legislation, including Acts of a Northern Ireland Assembly. They will be called upon to determine whether individuals have been treated in accordance with Convention rights and whether acts of public authorities are in contravention of such rights. In many cases the courts will be required under the terms of the Convention to carry out a proportionality exercise which requires balancing the protection of individual rights against the general interest of the community, and to consider whether the protection of such rights is necessary in a democratic society.[1] This is likely to mean not only weighing the merits of competing rights but also considering arguments about their economic and social impact; it will involve giving meaning to fundamental human rights, approaching the Convention as a "living instrument" to be "interpreted in the light of present day conditions".[2] Such considerations also arise in relation to rights and equality legislation in Northern Ireland, and with the prospect of a Bill of Rights as envisaged in the Belfast Agreement. Devolution will bring its own challenges, focusing attention on constitutional matters concerning the relationship between and competence of various organs of government, other organisations and individuals.

6.7 Taken together, these developments point increasingly in the direction of judges, especially but by no means exclusively at the higher levels, hearing high profile cases in which one party at least is a public authority or part of government. They will be addressing rights issues and taking account of the economic and social impact of their decisions. If recent experience in England and Wales is anything to go by, there will be heightened interest in their background. All of this reinforces the need to ensure judicial independence from the executive and to

1 *Rights Brought Home, The Human Rights Bill*, Home Office, London: HMSO, Cm 3782, paragraph 2.5.

2 *Tyrer v United Kingdom* (1978) 2 EHRR 1.

enable the judiciary to act, and be seen to act, in a dispassionate way, free from any sectoral influence, real or perceived. This is especially important in a small jurisdiction. That is not to say however that judges should be distant from the community. Quite the reverse; we attach great importance to their having an understanding of all aspects of the society that is so dependent on them for its well-being.

6.8 Independence and awareness of the social context apply as much to judicial involvement in criminal justice matters as to other parts of the legal system; and human rights issues, especially those arising out of the Convention, will come into play in all of the criminal courts. If informed decisions on sentencing are to be made, it makes sense for judges and magistrates to take an interest in the development of custodial and community-based programmes, crime trends and the social and economic background against which crime is committed. This can be achieved through visits, training, informal contacts and participation in inter-agency groups dealing with criminal justice issues.

6.9 Judges have an important role in helping safeguard the interests of all those who appear in court, including vulnerable witnesses and defendants, and children. This has implications for the management of proceedings in court, but judges and magistrates are also well placed to encourage the managers of court premises to run the facilities in a way that meets the needs of different categories of user. Further, they can help educate the public in the workings of the legal system, for example through participating in the arrangements for court visits by schools and other groups and by talking to groups in the community.

6.10 On both the criminal and civil sides, organisational and case management skills are required, as is demonstrated by the active involvement of the judiciary in current initiatives to reduce delay and generally improve the efficiency of the legal process.

Human Rights Background

6.11 The international human rights instruments, to which the Government is committed, give some clear benchmarks on issues relating to the judiciary. Article 6 of the ***European Convention on Human Rights*** provides that "in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 14 of the ***International Covenant on Civil and Political Rights*** states: "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." In the words of the preamble to the ***Siracusa Principles,***[3] an independent judiciary is indispensable for the implementation of this right.

3 Livingstone and Doak, Research Report 14, Appendix 10.

6.12 Other international instruments set out matters to be addressed in order to secure and safeguard judicial independence, in particular the ***UN Basic Principles on the Independence of the Judiciary***.[4] These start by requiring the state to guarantee the independence of the judiciary and to provide that judicial decisions will be taken without improper influence or interference from any source. One facet of independence is that the assignment of cases to judges should be determined by the judicial administration, independently of the executive. The Principles stress the importance of selection and career management of judges based on objective considerations of merit such as integrity, ability and efficiency, with no discrimination on grounds (inter alia) of race, colour, sex, religion or political opinion. The importance of judicial training and proper remuneration is also identified.

6.13 In order to reinforce the judiciary's ability to act without fear or favour, the Basic Principles lay emphasis on security of tenure until mandatory retirement age or expiry of a fixed term of office. Complaints against judges are required to be processed expeditiously and fairly under an appropriate procedure, against established standards of judicial conduct; suspension or removal of judges is permitted only on grounds of incapacity or behaviour rendering them unfit to discharge their duties. Emphasis is placed on freedom of expression and association for judges, provided that in exercising their rights they act in such a manner as to preserve the dignity of their office, impartiality and independence.

6.14 Other instruments, such as the ***Siracusa Principles*** and the ***Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary***[5] go into matters in rather more detail. For example the ***Siracusa Principles***, in qualifying the entitlement to freedom of expression and association, state that judges should not express public criticism or approval of government or pronounce on controversial political issues, in order to avoid the impression of partisanship. The involvement of a government Minister in making or recommending appointments does not of itself pose a problem in terms of judicial independence.[6] However, it is noteworthy that the recommendations of the Committee of Ministers of the Council of Europe in 1994[7] suggested that where appointments were made by government (as opposed to an independent authority) there should be measures to ensure transparency and independence, for example "a special independent and competent body to give the government advice which it follows in practice" or "the right for an individual to appeal against a decision to an independent authority".

4 Livingstone and Doak, Research Report 14, Appendix 7.

5 Livingstone and Doak, Research Report 14, Appendix 8.

6 But see ***Starrs v Procurator Fiscal,*** 11 November 1999 (unreported judgment of the High Court of Justiciary concerning the appointment of temporary sheriffs).

7 Recommendation No R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

Current Arrangements

APPOINTMENTS

6.15 The complement of judges and magistrates in Northern Ireland and the arrangements for their appointment are set out in the table following, which includes only those judicial posts relevant to the criminal courts.

6.16 Prior to direct rule, the Governor of Northern Ireland made appointments of county court judges and resident magistrates, on the advice of the Minister of Home Affairs. Appointments of High Court judges, Lords Justices of Appeal and the Lord Chief Justice were made by Her Majesty The Queen by Letters Patent on the advice of the Lord Chancellor. Since 1973 the Lord Chancellor has been responsible for making or advising on all judicial appointments in Northern Ireland, while the 1978 Judicature Act also gave him responsibility for the unified courts administration. We understand that the transfer of these responsibilities to the Lord Chancellor was driven mainly by a desire to secure and demonstrate the independence of judicial matters and courts administration from any political office that was closely associated with political and security developments in Northern Ireland.

6.17 Under the Northern Ireland Act 1998, the appointment and removal of judges, magistrates and other holders of judicial office in Northern Ireland are classified as "excepted". In other words the Lord Chancellor's responsibility for judicial appointments in Northern Ireland could not be devolved to the Assembly other than by primary legislation at Westminster. This contrasts with most other justice functions, including courts administration, which are in the "reserved" category; they can be devolved by an Order in Council laid before Parliament in accordance with section 4(2) of the Northern Ireland Act 1998.

Judicial Appointments in Northern Ireland

Office	Eligibility	Present Complement	Procedure
Lord Chief Justice	A Lord Justice of Appeal [or qualified for appointment as] or a Lord of Appeal in Ordinary having practised for not less than 10 years at the Bar in Northern Ireland.	1	Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor.
Lord Justice of Appeal	A judge of the High Court or any person who has practised for not less than 15 years at the Bar of Northern Ireland.	3	Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor.
High Court Judge	Not less than 10 years' practice at the Bar of Northern Ireland.	7	Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice on applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library or persons whom he considers most suitable whether they have submitted an application form or not.
County Court Judge	Not less than 10 years' practice as a barrister or solicitor or not less than 3 years as a deputy county court judge.	14	Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice on applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview.
Resident Magistrate	Not less than 7 years' practice as a barrister or solicitor.	17	Appointment by The Queen on the recommendation of the Lord Chancellor on applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview.
Deputy Resident Magistrate (part-time)	Not less than 7 years' practice as a barrister or solicitor.	20	Applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview are appointed by the Lord Chancellor.

6.18 Eligibility for judicial appointments is set out in a variety of statutes and is governed by the length of time that lawyers have been in active practice (i.e. working as a solicitor or barrister) or their standing (the period since they were admitted as solicitors or called to the Bar). For purposes of the appointments that concern us, length of time in active practice is currently the key consideration. For example to be considered for appointment as a resident magistrate, a barrister or solicitor must have practised for not less than seven years, while appointment as a High Court judge is open to barristers who have practised for not less than 10 years. In Northern Ireland the definition of practice includes lawyers employed by government departments.

6.19 In discharging his duties in relation to judicial appointments in Northern Ireland, the Lord Chancellor receives administrative support from the Northern Ireland Court Service. Three principles underpin the operation of the procedures at all levels of the judiciary.

- Appointments are made on merit, regardless of ethnic origin, gender, marital status, sexual orientation, political affiliation, religion or disability.
- Significant weight is placed upon the views of serving members of the judiciary and heads of the legal profession who have knowledge of the candidates' legal expertise.
- Experience as a part-time judicial office holder is considered desirable as a prerequisite to appointment to full-time office.

6.20 In recent years there has been a trend towards greater openness in the procedures for selecting people to be recommended for appointment. Other than the appointments of the Lord Chief Justice and Lords Justices of Appeal, which are regarded as internal promotions, all vacancies for judicial office are advertised in the Journal of the Law Society of Northern Ireland and the Bar Library, inviting written applications. Application forms include a section requiring candidates to indicate whether they have been the subject of disciplinary proceedings by their professional bodies. The application pack contains information on the selection criteria covering the skills, ability, legal knowledge and experience and personal qualities required for appointment. Typical selection criteria are as follows:

- Legal knowledge and experience.
- Intellectual and analytical ability.
- Decisiveness.
- Communication skills.
- Authority.
- Integrity.
- Fairness.
- Understanding of people and society.
- Maturity and sound judgement.
- Courtesy and humanity.
- Commitment to public service.

6.21 Below county court level, applications are sifted and then those who are successful at that stage will undergo a structured interview by a panel consisting of three members: one from the judicial tier to which the appointment is being made; a representative of the Lord Chancellor's Department; and a senior representative of the Northern Ireland Court Service who is normally in the chair. Applicants are asked to name referees, one of whom should be a

serving full-time member of the judiciary familiar with their work and practice. Further references can be sought. The panel then makes a recommendation for appointment to the Lord Chancellor.

6.22 Where, at present, High Court (and previously county court) appointments are concerned, vacancies are advertised inviting applications, but there is no system of interview and references are not sought from applicants. In coming to a decision on whether to recommend a candidate for appointment by Her Majesty The Queen, the Lord Chancellor receives advice from the Lord Chief Justice. In formulating advice, the Lord Chief Justice consults with judges of the Supreme Court, the Chairman of the Council of Her Majesty's County Court Judges, the Chairman of the Bar Council and the President of the Law Society. This a formal written process, and the written views of those consulted go forward to the Lord Chancellor along with the Lord Chief Justice's own written assessment. We were advised that the Lord Chancellor had decided in principle that in future structured interviews would become part of the appointments process for county court judges. The precise details of how future consultation would be carried out for this category of appointments had not been determined.

6.23 Prior to confirmation of appointment, details of any disciplinary proceedings declared on the application form are sought from the Bar Council or Law Society. Other forms of screening are carried out, for example criminal record checks and, for full-time appointments, financial checks with the Inland Revenue, Customs and Excise and the Enforcement of Judgments Office Register of Judgments. Those appointed to full-time office also undergo a medical examination.

6.24 On appointment, judges and magistrates (and JPs and lay panellists) are required by legislation to take the Oath of Allegiance and the Judicial Oath. The Oath of Allegiance takes the following form:

> "I, [ ], do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth The Second, her heirs and successors, according to law. So help me God."

The Judicial Oath is intended to bind the appointee to perform his or her functions under the law independently and impartially in respect of all citizens. Section 4 of the Promissory Oaths Act 1868 prescribes the form of the Judicial Oath as follows:

> "I, [ ], do swear that I will well and truly serve our Sovereign Lady Queen Elizabeth The Second in the office of [ ], and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God."

For those who do not wish to swear an Oath, there is also the option of making solemn affirmations in similar terms.

JUDICIAL TRAINING

6.25 The Judicial Studies Board for Northern Ireland was formed in 1993. Its aims and objectives are to provide suitable and effective programmes of practical studies for members of the judiciary and to improve upon the system of disseminating information to them. In order to protect judicial independence, and in particular to ensure that sectional interests are not brought to bear on the judiciary through training programmes, the Board is "judge driven". It is chaired by a Lord Justice of Appeal and its membership includes representation from each judicial tier and the Director of Servicing the Legal System Ltd (SLS).[8] The Northern Ireland Court Service provides secretarial support for the Board and finances its work directly from the Court Service vote.

6.26 Seminars and talks arranged by the Board fall into the following categories:

- New legislation.
- Induction/refresher training.
- Sentencing seminars.
- Special interest and topical issues.

6.27 In 1998/99 the Board held a total of 10 seminars and lectures which included presentations on the Criminal Justice (Children) (NI) Order 1998, the Northern Ireland Act 1998 and the *European Convention on Human Rights*. In addition there was judicial representation from Northern Ireland at 39 conferences, courses and seminars, mostly held in other jurisdictions. The Board has compiled and produced publications on such matters as sentencing guidelines through synopses of judgements in particular classes of case and a Crown Court bench book consisting of specimen directions designed to assist judges in directing juries.

6.28 The Board enjoys good working relationships with the Judicial Studies Board for England and Wales. This is of considerable value in that it enables the Northern Ireland Board to draw on experience and advice from its much larger English counterpart in devising seminars and programmes of work; and there are places available in England for Northern Ireland judges on induction and refresher courses which could not be run in Northern Ireland on a cost effective basis. It is working closely with the English and Welsh Board and the Scottish Board in developing and taking advantage of training opportunities in the priority area of the *European Convention on Human Rights* and the implications of incorporation. In one respect the small scale of the operation in Northern Ireland does have an advantage in that mentoring and work shadowing arrangements can be made for new appointees based on their individual needs.

8 SLS was established in 1980 to promote publications, seminars and training on aspects of the law and legal system in Northern Ireland.

6.29 Attendance at Board events is not mandatory, although lists of attendees are kept. The attendance rate is around 66%.

TENURE

6.30 Full-time judges and magistrates have tenure, during good behaviour, until the statutory retirement age of 70.[9] Deputies are appointed for a fixed term of three years, renewable up until the age of 70. Procedures for the removal of judges and magistrates are governed by statute. Judges of the Supreme Court hold office during good behaviour subject to the power of removal by Her Majesty The Queen on an address by both Houses of Parliament. All other appointees may be removed by the Lord Chancellor on the grounds of incapacity or misbehaviour.

STANDARDS

6.31 It is necessary to stress that while the Lord Chancellor does have a disciplinary role in relation to the judiciary, he is not in any sense their line manager and does not have a supervisory or directing role. This is of importance in addressing the independence issue. Moreover, while the Lord Chief Justice is President of the High Court, Court of Appeal and Crown Court, he does not fulfil that function in relation to county courts and magistrates' courts for which there is no such position.

6.32 There is no formal code or statement of judicial ethics. However, memoranda on conditions of appointment and terms of service comprise statements on a range of issues including conduct and the circumstances in which the Lord Chancellor might consider exercising his powers to remove from office on grounds of misbehaviour. These include criminal offences of violence, dishonesty and moral turpitude and substantiated complaints of behaviour which might cause offence on racial or religious grounds or amount to sexual harassment.

6.33 Complaints are received from time to time about members of the judiciary. To the extent that they relate to the exercise of judicial discretion in a particular case, considerations of judicial independence are such that it is not considered appropriate for comment to be made on the substance of the issue in response to a complainant. It may be possible to use the avenue of appeal to address such matters. However, if a complaint relates to the conduct of a judge or magistrate and is not obviously trivial or misconceived, then it would be normal practice for officials, acting on behalf of the Lord Chancellor, to seek comments from the office holder in question and take them into account in replying to the complainant. Further steps, including the personal involvement of the Lord Chancellor, or in practice more likely the Lord Chief

9 The statutory retirement date of 70 was set by the Judicial Pensions and Retirement Act 1993. Judges and magistrates in office when that legislation was enacted retained their existing retirement dates.

Justice, would be considered only if a serious complaint were seen to have been substantiated. In such circumstances, the Lord Chancellor or Lord Chief Justice would be in a position to counsel or guide a judge whose behaviour was in question. Where the matter is particularly serious but action short of dismissal is considered appropriate, such as a rebuke or warning, it is open to the Lord Chancellor to make a public statement.

Views Expressed During the Consultation Period

6.34 Almost all those who participated in the consultative process had something to say about the judicial system. There was a range of views, from those who believed that the current arrangements on the whole worked reasonably well to those who thought them flawed and sought radical change. Given the fundamental importance of securing confidence in the judiciary throughout the community, we wish to take full account of all of those perspectives in our recommendations.

6.35 One of the strongest messages to come across was a desire for transparency in judicial appointments. In some cases, the advertising of vacancies for example, suggestions were made which have already been adopted in Northern Ireland (which might in itself be indicative of the need for more public information). At some of the seminars there were calls to demystify the process, perhaps through publishing a guide on judicial appointment mechanisms. Published criteria for appointments were called for. Openness was seen as of critical importance in demonstrating fairness and that improper influence was not being brought to bear. In this context some doubts were expressed about the way in which consultation with the senior judiciary and professional bodies was being undertaken; there was little knowledge about this and some felt that it flew in the face of the requirement of transparency.

6.36 On the criteria for appointment, merit was seen by most as the overriding governing principle. Within that context the qualities most often mentioned were legal ability, integrity, experience and fairness. Some consultees stressed that appointment criteria should be broadly drawn so as not unduly to restrict the pool of potential applicants. Managerial ability was mentioned as being increasingly important. Opening up appointments at all levels to solicitors was a common theme and, in terms of experience, the Law Society argued that litigation was as relevant as advocacy.

6.37 Impartiality, fairness, independence and freedom from political influence were themes that recurred throughout the consultation process.

6.38 There was little support for the idea of a career judiciary along the lines of that found in civil law jurisdictions (i.e. judges being appointed in their 20s and progressing through the various

tiers of judiciary). Indeed some expressed concern that an entirely promotion-based structure might appear to compromise the independence of judicial decision making, with the impact on promotion prospects coming into play when difficult or controversial cases were being considered. Rather, there was support for the retention of the current system of being able to recruit people with substantial legal experience. There was, however, significant support for movement between judicial tiers being much more the norm than has so far been the case, in order to make the best use of available talent and to remove a possible disincentive for some applicants to judicial office.

6.39 There was much debate about the representativeness of the judiciary in terms of community background, gender and class. There was a widespread view amongst those who commented that judges and magistrates should be representative of society as a whole. One group suggested that "the development of a judiciary reflective of modern societal values as a whole should enable better judicial understanding of the perspective of court users of all types, without loss of legal quality".

6.40 From some quarters we heard serious concern about what was believed to be the unrepresentative nature of the bench in Northern Ireland in terms of community background. Those expressing this view felt that it was not sufficient to point to the existence of Catholic judges and magistrates, many of whom it was believed could be Unionist by inclination. They saw a need to secure a fair balance of Nationalist representation amongst the judiciary. There was one suggestion that a target of three years be set in which to bring this about. In confidence terms the current position was said to be exacerbated by the association of judges with the Diplock Courts. Those expressing these views, and others, suggested that there was a disproportionate tendency to appoint prosecuting lawyers and Crown Counsel as judges, contributing to a perception of the judiciary as a body being too close to the state and favouring the police and prosecution. A number of submissions indicated a clear feeling that the judicial system had not delivered justice to the Nationalist community.

6.41 From another perspective, we heard suggestions that it was policy to maintain a particular proportion of the two communities on the bench; and that there was a tendency to appoint Catholic and Protestant judges alternately, with the implication that the merit principle was being compromised.

6.42 There was considerable concern from many different groups about the under-representation of women at all levels in the judiciary (two out of 17 resident magistrates are women, one out of four district judges, one out of 14 county court judges and no Supreme Court judges). While the increasing numbers of women at the Bar and in the solicitors' branch of the profession might be expected to feed through into judicial appointments, there remained obstacles to their securing preferment. Career breaks and family commitments sometimes made it difficult to get the right sort of experience and there was one suggestion that women tended to gravitate towards family law, with client resistance to employing them in, for example, the commercial and criminal fields. The nature of their experience and economic

considerations sometimes militated against women seeking or obtaining silk (appointment as QC), which appeared in practice currently to be a necessary hurdle to surmount before appointment to the senior judiciary.

6.43 We also received comments to the effect that the judiciary was unrepresentative from a class perspective and it was observed that there was no-one from an ethnic minority on the bench.

6.44 There was not widespread pressure from those who commented to compromise the merit principle in order to secure a more representative judiciary. However, a programme of affirmative action and outreach was advocated by several groups and organisations in order to maximise the pool of applicants and help redress apparent imbalances. In relation to community background this would be associated with a strategy for addressing any "blockages" in the way of potential applicants and removing perceived "chill factors" which might inhibit Nationalists from seeking judicial office - for example, oaths requiring allegiance to Her Majesty The Queen, Royal Crests in courthouses, the use of the term "Royal" etc. Some advocated an open system of equity monitoring, with figures on the community background, gender balance and ethnic origin of the judiciary being made publicly available on a regular basis.

6.45 There were differing views on where political responsibility for judicial appointments should lie, although, as an issue, this did not feature strongly in the consultation process. Some favoured retention of the Lord Chancellor's present role, largely in order to maintain a distance between judicial appointments and local political pressures. However unease was expressed in other quarters about the Lord Chancellor's involvement in view of his political role in government. Others suggested delaying devolution of such an important responsibility until the new institutions of government in Northern Ireland had had time to settle. On the other hand, a significant body of opinion favoured a clear commitment to giving the responsibility to local political institutions, perhaps retaining a role for the Prime Minister in relation to the most senior appointments (as is now the case in Scotland).

6.46 A strong and broad-based body of opinion (from most parts of the political spectrum) favoured the establishment of some form of Judicial Appointments Commission, an independent body to appoint or make recommendations on appointments to the appointing authority. Two main strands of thinking lay behind this. There was a belief that such an independent body, with a demonstrably transparent approach, would help secure the independence of the appointments process from political manipulation. Also, with appropriate lay involvement, it would be a means of ensuring that every effort was seen to be made to open up the appointments process to qualifying candidates from as broad a base as possible - in other words, a component of an affirmative action strategy.

6.47 As for the make-up of such a body, there was general agreement on the need for a substantial judicial element and nominees from professional bodies were also mentioned. Most favoured a strong lay element in the membership, although there were differences between some who

wanted the inclusion of elected representatives or their nominees and others who stressed the importance of minimising any political influence. Lay members of a Commission were seen as bringing a range of qualities including the perspective of court users, recruitment expertise and an ability to assess the non-legal qualities required of prospective judges and magistrates.

6.48 The importance of judicial training was mentioned in many of the submissions that we received and at seminars. Human rights issues and technical legal matters were frequently identified but other subjects for inclusion in training programmes included the needs of victims and vulnerable witnesses, children, women's issues, domestic violence, conflict resolution through mediation, the position of minority groups and cultural awareness. Some believed that training (particularly induction training) should be mandatory and there were suggestions that it should be the responsibility of a Judicial Appointments Commission. However there was also a view that the drive and impetus for training should come from the judiciary and that care should be taken to ensure that judicial independence was not compromised by an interventionist approach in this area on the part of the executive or other groups.

6.49 Terms and conditions and tenure did not feature strongly in the consultation process, although a view was expressed that salaries and other conditions of service should be determined by a procedure which did not allow for political influence to be brought to bear on the judiciary. There was some interest in the idea of a published code of conduct or standards for the judiciary and a suggestion that a statement of judicial ethics might be enshrined in law. To be meaningful, this would need to be supplemented by a published procedure for administering such standards and dealing with complaints. Those expressing these views suggested that such a procedure should be devised in a way that did not compromise judicial independence; and, in this context, the Canadian Judicial Council was mentioned. A suggestion was made that the Lord Chief Justice should take on this responsibility, perhaps assisted by a representative from each branch of the legal profession.

Research and Experience in Other Jurisdictions

6.50 From the research conducted on our behalf and our study visits, it is apparent that the issues raised about judicial appointments and terms and conditions in Northern Ireland have in recent years been a major pre-occupation in both the common and civil law traditions. It follows that there is a wealth of material and debate to draw on in our examination of this topic; but equally there is no model package of universal applicability to be taken off the shelf and also little evidence of the extent to which changes made elsewhere have impacted upon the quality of justice. The arrangements for judicial appointments in Northern Ireland need to be framed in a way that complies with certain key principles, for example those established

in human rights instruments, and are suited to the particular circumstances of our jurisdiction. In the following paragraphs we therefore focus on particular experiences and systems elsewhere which seem to us to be relevant to Northern Ireland.

6.51 In democratic systems there is a universal commitment to promote an independent judiciary in accordance with human rights norms. The principle can be enshrined in written constitutions as in Canada (Articles 96-101 of the Constitution supplemented by the Charter of Rights and Freedoms), the Republic of Ireland and in South Africa, where Article 165 of the Constitution states "the Courts are independent and subject only to the Constitution and the law", and goes on to require organs of the state to assist and protect that independence through legislative and other measures. The separation of powers is perhaps most clearly provided for in the United States Constitution.

6.52 Whatever provisions may be in place to protect the independence of the judiciary in its operation, the manner in which judges are appointed has clear implications for the independence of the judicial system and for public confidence. The trend in recent years has been to dilute the direct involvement of governments and ministries in appointments through the establishment of Independent Boards or Commissions that appoint directly or recommend appointment to the appropriate Minister. We examine this trend in a range of jurisdictions and look at different approaches to the "representativeness" issue.

6.53 The civil law jurisdictions of Europe are characterised by the establishment of higher judicial councils, whose membership typically includes judges at various levels, a prosecutor and sometimes nominees of the government and/or legislature. In these systems, usually with career judiciaries recruited direct from university or law school, it is not uncommon for appointments and promotions to be made under the auspices of the council (as opposed to being recommended to a political authority), for all but the most senior positions.

ENGLAND AND WALES

6.54 The experience of common law jurisdictions, with their judiciary usually appointed after years of working as practitioners, is of more applicability in the Northern Ireland context. England and Wales share many of the features of the Northern Ireland legal system. They have not followed the path of establishing a board or commission responsible for making or recommending appointments, and the Lord Chancellor remains responsible for making or recommending to Her Majesty The Queen most judicial appointments. The Prime Minister advises Her Majesty The Queen on the appointments of Law Lords, the Lord Chief Justice and Lords Justices of Appeal. The details of the arrangements are set out in the research paper on judicial appointments[10] published along with this report.

10 Blair, Research Report 5.

6.55 It is noteworthy that in recent years a number of steps have been taken in England and Wales to enhance transparency (in itself an important factor in securing accountability and demonstrating the reality of independence) and demystify the process. For example there are published criteria for appointment. High Court judicial posts are advertised. Posts up to and including circuit judges are advertised (except for recorderships where posts are filled on promotion from assistant recorder) and there is lay representation on panels that conduct structured interviews. The panels have the opportunity to see and take account of the outcome of consultations with judges and practitioners about applicants. Of particular value is the detailed guide to all aspects of the appointments process published by the Lord Chancellor's Department in March 1999.[11] Northern Ireland is moving in much the same direction and we will return to some of these themes in making our recommendations.

6.56 In the summer of 1999 the Lord Chancellor appointed Sir Leonard Peach to conduct an independent scrutiny of the assessment and selection systems used for judicial and Queen's Counsel appointments in England and Wales, and of safeguards in the system to prevent discrimination on grounds of gender or ethnic origin. His terms of reference focused on how appointments were made, rather than by whom. Sir Leonard's report was published on 3 December 1999.[12]

6.57 Within its terms of reference, the report commented favourably on the selection procedures and their execution as compared with those adopted by other organisations in the public and private sectors. The report's recommendations included the establishment of an independent Commission for Judicial Appointments tasked with keeping the appointments system under review and dealing with complaints and grievances about the process. The report examined many aspects of the appointments process, including the role of consultation with the judiciary and the professions on the merits of candidates. The report also made a number of comments and recommendations for enhancing equal opportunities and the monitoring of applications and appointments on the basis of gender and ethnic background. The Lord Chancellor welcomed the report and accepted its principal recommendation for a Commissioner for Judicial Appointments to provide independent monitoring of the procedures. He indicated that he would consider the report's further recommendations in detail along with other comments and reactions to the report.

SCOTLAND

6.58 Scotland is of particular relevance in that it provides an existing model of devolved arrangements within the United Kingdom context. Prior to devolution the Lord Advocate, in addition to his roles as head of the Prosecution Service and Scottish Law Officer, had a

11 *Judicial Appointments*, (1999), Judicial Group, Lord Chancellor's Department, London: HMSO.

12 *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach,* (1999), London: HMSO (The Peach Report).

pivotal role in judicial appointments. We understand that, although there was some expectation that this would continue after devolution, there has been a degree of public comment on whether such a role is appropriate for the head of the Prosecution Service. This issue is likely to be addressed in a forthcoming consultation paper on judicial appointments procedures. In the meantime, the Scotland Act 1998 places on the First Minister constitutional responsibility for recommending judicial appointments to Her Majesty The Queen or the Prime Minister. The responsibilities of the Lord Advocate in this area are not specified, thus giving the Scottish Executive and Parliament the ability to determine their own approach. One feature of interest is the division of responsibility between Edinburgh and London, with the Prime Minister recommending the appointment of the two most senior judges on the nomination of the First Minister, while the latter recommends directly to Her Majesty The Queen the appointment of judges of the Court of Session, sheriffs principal and sheriffs.

REPUBLIC OF IRELAND

6.59 Articles 13.9 and 35.1 of the Irish Constitution provide for the appointment of judges by the President, acting on the advice of the Government. A Judicial Appointments Advisory Board was established under the Courts and Courts Officers Act 1995. It is made up of the Chief Justice, the Court Presidents, the Attorney General, a barrister, a solicitor and three lay people representing business interests and court users. Appointments are advertised and candidates are shortlisted. The Board provides the Minister for Justice, Equality and Law Reform with a list of at least seven names for consideration by the Government. In advising the President in relation to an appointment, the Government must firstly consider for appointment the persons whose names have been recommended by the Board.

SOUTH AFRICA

6.60 In South Africa, the Judicial Services Commission (JSC) is established by the Constitution. It is made up of the Chief Justice (in the chair), the President of the Constitutional Court, the President of the High Court, two barristers, two solicitors, one teacher of law, the Minister of Justice, six members of the Legislative Assembly (including three from opposition parties), four members of the Council of Provinces and four designated by the President after consultation with the political parties. There is therefore a substantial majority of lay/political appointees. There are special procedures for the President to appoint the four most senior judges, after consultation with the JSC. Vacancies for the Constitutional Court are filled by the President from a list (containing three names more than the number of vacancies)

provided by the JSC. If dissatisfied with the list, the President may ask for a further list, giving reasons for his dissatisfaction, but he must fill the vacancies from this second list. The President must appoint judges of all other courts on the advice of the JSC.

6.61 The position of the judiciary and the courts in South Africa was the subject of considerable debate during the transition from apartheid when, of 165 judges, 163 were white males, one was a white female and there was one judge of Asian origin who is now Chief Justice. We were told that the system had previously been unashamedly manipulated to ensure that judges unsympathetic to apartheid were not allocated sensitive and important cases. In these circumstances, it is not surprising that the issue of representativeness was addressed and Article 174(2) of the Constitution provides that: "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed".

6.62 Given the need to secure and sustain a high quality judiciary and the time that it was going to take to develop a representative profession, a conscious decision was taken not to force the pace of change. The pre-transition judges were re-appointed and, of the appointments made since, around 50% have been non-white while there remains a significant under-representation of women. The significance and benefits of such a measured approach were mentioned in a submission to us and this was confirmed during our visit. It was apparent that at a time of major change the judicial system had made the transition into the new dispensation remarkably well and had the confidence of the community at large.

6.63 The JSC has adopted a very public procedure. It advertises for vacancies and, while there are no published criteria for appointment, the application form gives an indication of the breadth of qualities being sought with a focus on published works, experience as practitioner and then acting judge (service as acting judge is a pre-requisite for appointment), as well as involvement in community and voluntary organisations. The shortlist is prepared by the Chief Justice in consultation with judicial colleagues followed by interviews conducted in public by the full JSC.

6.64 We sat in on three such interviews. There was detailed questioning of candidates about their legal experience and competence, largely orchestrated by the judicial and professional members of the Commission. There were also some questions about candidates' activities outside the working environment and their awareness of societal issues, some of which could be interpreted as coming from a political perspective. The Commission takes its decisions on which candidate to select in private, although there is pressure to open up these deliberations to public scrutiny. In discussion with a variety of interests in South Africa, it appeared that the system was broadly accepted and welcomed; but it was believed by some that the public nature of the proceedings and the possible impact on professional reputations might put off some good candidates and there was concern in some quarters that on occasion merit took second place to political and gender considerations.

UNITED STATES

6.65 In the United States, the myriad of jurisdictions does not have a convenient template of appointment procedures and it remains the case that in some states judges are elected. In short, most appointments at the federal and state levels involve an interaction between the executive and legislature, including nominations and confirmatory hearings, together with a major input from the respective bar associations which screen candidates for professional competence. While in a system governed by separation of powers such procedures do provide checks and balances, the extent of the political input required is such that they are unlikely to find favour in Northern Ireland.

6.66 However, the increasing use of nominating committees or commissions in the United States is of some interest. Senators, in making nominations to the President for appointments to the federal district judgeships, will often appoint nominating committees, representative of interest groups in the community, to broaden the field of potential nominees and encourage nominations from under-represented groups. At state level elections have gradually been replaced by the use of "merit commissions".

6.67 During our visit Connecticut was commended to us as offering a good example of a commission. It consists of 12 members, two from each congressional district; the Governor appoints six Attorneys, one from each district, and the remaining (lay) members are appointed, one each by the presiding officer of the Senate and the House of Representatives and the majority and minority leaders of the two Houses. The American Judicature Society, in promoting the development of these commissions, has stressed that "all appointing authorities shall make reasonable efforts to ensure that the Commission substantially represents the gender, ethnic and racial diversity of the jurisdiction". The Commission in Connecticut is tasked with evaluating incumbent judges for reappointment and seeking qualifying candidates for nomination to the Governor; the Governor is required to appoint from the list produced by the Commission. In the spirit of openness and transparency, each January the Commission reports to the State Standing Committee on the Judiciary covering such matters as the numbers interviewed for appointment, numbers recommended for appointment, statistics on race, gender, years of experience etc. Reporting in this way on the workings of recruitment procedures, without going into individual appointments, may be an idea worth developing for Northern Ireland.

6.68 In the United States we asked about attitudes to merit and representativeness. With the strong history of elected judges and politically dominated nomination procedures it is perhaps not surprising that merit, in terms of legal competence, was not always seen as the sole criterion for appointment. It was clear that in some US jurisdictions it would be regarded as reasonable for a candidate from an under-represented group to be appointed ahead of others

with similar qualifications; and on one occasion it was argued that "representativeness" was an aspect of merit in the sense that if the judiciary was not being demonstrably chosen from as broad a pool as possible, then some of the best candidates were being lost to the system.

CANADA

6.69 In Canada a significant factor in the move to establish appointments committees in the 1980s was the expansion of the judiciary's public policy role associated with the enactment of the Charter of Rights and Freedoms in 1982. This contributed to pressure for greater openness and wider participation in a process of executive appointment with many similarities to that found in the United Kingdom. The federal committees, appointed by the Minister of Justice, consist of three lay people, three lawyers and one judge. In appointing the committees, the Minister is required to ensure that they are reflective of the gender, geographical, language and cultural make-up of the province concerned. The functions of these committees are relatively limited in that on the basis of application papers and interviews, they classify the candidates' level of suitability for appointment in advising the Minister. It remains the case that the Prime Minister is responsible for senior judicial appointments, operating without an advisory committee.

6.70 At provincial level such committees tend to be more proactive. The Ontario committee, for example, consists of a majority of lay members appointed by the Attorney General – seven, together with three lawyers, two judges and a member of the Judicial Council. They engage in the full process of recruitment, seeking views from the bench and bar, interviewing and assessing candidates; they then submit a ranked list to the provincial Attorney General who must select from it or request another list to be drawn up. In its work the Ontario committee is required by statute to have regard to: "assessment of the professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments." Within this framework it has considerable freedom to set criteria for particular appointments. In 1990, it used this freedom to focus attention on under-represented groups through an outreach programme, while at the same time the Attorney General wrote to 1200 women lawyers asking them to apply.

NEW ZEALAND

6.71 The administration of judicial appointments in New Zealand is the responsibility of a Judicial Appointments Unit that at the time of our visit was located within the Ministry of Justice. This system is of interest in that at district court level, a standing list is kept of qualified candidates (barristers or solicitors of seven years experience who are considered fit and

proper for appointment) who respond to advertisements inviting expressions of interest. At the same time as advertising, nominations are sought from a range of groups inside and outside the legal system with a view to ensuring that this initial pool of candidates is socially diverse. Appointments are made from the list in a process that involves sifts, interviews and consultation with professional bodies.

JUDICIAL TRAINING

6.72 It was stressed to us in a number of jurisdictions that judicial training is most effective and independence best safeguarded when the training is judge-driven. That is the case in England and Wales, where the Judicial Studies Board is a non-departmental public body and where judges are course directors; this does not of course preclude the use of academic and other experts to provide training in specialist areas. Our visit to the United States Federal Judicial Centre provided an example of judicial training and court administration in general being the sole responsibility of judges who managed a large administrative machine; their independence was bolstered by arrangements which ensured that they had sufficient finance, subject to their appearing before the Appropriations Committee every three years.

6.73 We found a positive approach to judicial training in Canada, where there has been a tradition of judicially managed training institutes that determine course content and arrange delivery. The National Judicial Institute was established in 1988 with a mission to foster a high standard of judicial performance through programmes that stimulate continuing professional and personal growth and engender a high level of social, gender and multi-cultural awareness, ethical sensitivity and pride of excellence, within an independent judiciary, thereby improving the administration of justice. The Institute organises approximately 40 programmes a year covering substantive law, skills training and social context issues. It undertook a project in 1992, which resulted in the development and publication of standards for judicial education. This recommended that every new judge should take approximately 10 days of intensive judicial education as soon as possible after appointment, with refresher training each year. It was apparent that cultural and social awareness, together with an appreciation of factors surrounding social problems such as domestic violence, was a key priority.

6.74 New Zealand has a recently established Judicial Studies Institute reporting to the Chief District Court Judge. There is an expectation that all newly appointed judges will embark upon a training process which involves sitting with mentor judges, visits to prisons and briefing from other criminal justice agencies. In their first year, they undertake a one-week residential course in which newly appointed Australian and Pacific Island judges are also involved. The Institute also has responsibilities for updating the bench book on an annual basis and for developing a sentencing information system.

TERMS AND CONDITIONS OF SERVICE

6.75 In most common law jurisdictions, tenure was recognised as of critical importance in safeguarding judicial independence. US Federal judges are appointed for life (removable only by impeachment proceedings) but in most cases there is a statutory retirement age of 70 or 75.

6.76 The characteristics of procedures for the removal of judges tend to centre around ensuring safeguards against arbitrary action by any one authority. For example, the Scotland Act 1998 provides that a judge of the Court of Session may be removed by Her Majesty The Queen on the recommendation of the First Minister, which in turn may only be made if agreed by Parliament on the basis of a report from a judicial tribunal concluding that the person in question is unfit for office by reason of inability, neglect of duty or misbehaviour. Such a tribunal may be established on the initiative of the First Minister or the Lord President (the most senior judge in Scotland). In South Africa the President's power to remove a judge may be used only on the advice of a two-thirds majority of the Judicial Services Commission and on the basis of a two-thirds majority secured in the National Assembly; grounds for dismissal are incapacity, incompetence or misconduct.

6.77 In Canada, removal can be secured only following an independent inquiry by the Canadian Judicial Council, a recommendation for removal from the Council to the Governor and a joint address by the two Houses of Parliament. The Canadian Judicial Council comprises the Chief Justices of the Supreme Courts and is the responsible body for federally appointed judges. It is tasked with the responsibility of enquiring into and investigating situations where there are allegations against a judge of: incapacity through age or infirmity, misconduct, a failure to execute his or her duties or having placed himself or herself in a position incompatible with the execution of his or her office. Such arrangements balance the need to safeguard independence with the public interest in having a degree of accountability.

6.78 Another feature of independence is that the judiciary should not feel beholden to government in terms of remuneration or proper resourcing. The South African Constitution provides that the salaries, allowances and benefits of all holders of judicial office may not be reduced. In Canada, since the early 1980s there has been increasing dependence upon independent commissions to advise the executive and Parliament on judicial salaries. At the time of our visit, a judicial review was in progress at provincial level challenging the Alberta Government's decision to reject a commission's recommendation on pay.

Evaluation and Recommendations

6.79 As we pointed out in the introductory paragraphs of this chapter, judges and magistrates are at the heart of the criminal justice system. It is they who ensure due process and who,

without fear or favour, are expected to secure the fair treatment of all parties who appear before them. Their role is developing, especially in the context of human rights, and in ways that serve to emphasise the importance of that part of our terms of reference that requires us to safeguard and protect their independence.

6.80 We said in the introductory chapter to this report that our concern was with the future rather than making judgements about the past. We have, of course, listened to what people have said about the way the judicial system has worked over the past decades; that helps in determining what arrangements will best ensure public confidence in the future. We also take account of the difficulties and challenges that have been faced by judges and magistrates in dispensing justice against a backcloth of civil disturbance and division in the community. The capacity of the judicial system to come through such a period in the way that it has should be borne in mind when considering any future arrangements. While in recent public attitude surveys a significant proportion of respondents described the judiciary as "out of touch",[13] a sizeable majority from both parts of the community was very confident or fairly confident in the fairness of judges and magistrates.[14]

JUDICIAL APPOINTMENTS: KEY PRINCIPLES

6.81 We start by addressing the key principles that should apply, whichever system of judicial appointments is adopted.

6.82 Our terms of reference, the human rights instruments, those who have expressed views to us and international practice point to the independence and impartiality of the judiciary as of paramount importance. The principle is enshrined in the European Convention through its reference to "an independent and impartial tribunal". We noted above that a commitment to judicial independence is enshrined in the constitutions of many countries. **We recommend that primary Westminster legislation should make explicit reference to the requirement for an independent judiciary and place a duty on the organs of government to uphold and protect that independence.**

6.83 Adherence to the concept of independence should not detract from the key requirements of transparency and openness in the administration of appointments and other judicial matters. This is a facet of accountability and we have no doubt that knowledge and understanding of institutions and processes enhance confidence in them. A number of our recommendations are made with this in mind.

6.84 The *International Covenant on Civil and Political Rights* makes specific reference to the entitlement to be heard by a competent tribunal, as well as referring to the qualities of

13 Amelin, Willis and Donnelly, Research Report 2.

14 Community Attitudes Survey, Central Survey Unit, NISRA, Occasional Paper No 10, 1999.

independence and impartiality. **Merit, including the ability to do the job, thus providing the best possible quality of justice, must in our view continue to be the key criterion in determining appointments**. There is of course room for discussion about the attributes that determine merit and we address this later. Our recommendations will also take account of the importance of training in contributing to competence and quality.

6.85 It is clear that the extent to which the composition of the judiciary reflects the society which it serves is a confidence issue and has implications for its legitimacy in the eyes of many in the community. If there is a perception that judges come predominantly from a narrow pool, then there is liable to be concern that the way in which the law as a whole is developed may be unduly influenced by one particular set of values. This is of particular significance in the light of the developing judicial role. For example, the incorporation of the *European Convention on Human Rights*, a living instrument to be interpreted in the light of present day conditions and changing social values, makes it increasingly important that the judiciary should be as reflective as possible of society in its diversity. Moreover the larger the field from which members of the judiciary is chosen, and the more demonstrable the commitment to equality of opportunity, the greater can be the confidence that the best possible candidates are being appointed. It follows that, while merit should be the deciding factor in individual appointment decisions, **it should be a stated objective of whoever is responsible for appointments to engage in a programme of action to secure the development of a judiciary that is as reflective of Northern Ireland society, in particular by community background and gender, as can be achieved consistent with the overriding requirement of merit.** Some detailed recommendations on aspects of affirmative action and equity monitoring are made at various points in this chapter.

6.86 During the consultation process and in our visits to other jurisdictions the idea of securing a judiciary that was so far as possible representative of society arose frequently. In some cases, South Africa and Ontario for example, this objective was given statutory effect, while in others, such as some of the nominating committees in the United States, administrative machinery was established in order to help secure greater representativeness.

6.87 In our view this concept should be addressed with great care in Northern Ireland. We have used the word "reflective" as opposed to "representative" advisedly. Individual judges and magistrates, in carrying out their functions, do not "represent" any particular section of society; rather they should apply objective and impartial consideration to the facts of the case before them, regardless of the background of the parties. If judges were to believe that a factor contributing to their appointment was the extent to which they represented one part of society, this would have serious implications for their impartiality. In looking at this issue we are also mindful of fair employment legislation in Northern Ireland and the human rights instruments which prohibit discrimination (even if the intention of the discriminatory act is to secure a more representative body) and demand selection arrangements based on objective considerations of merit.

6.88 We have given careful thought to the argument that political affiliation (in the sense of Nationalist or Unionist), as opposed to religious background, should be an issue in any consideration of the extent to which the judiciary reflects society. We understand the thinking that lies behind this view. However, it raises in sharp relief the points we make about representativeness. Given the importance of distancing the judiciary from political issues, it would in our view be inappropriate in the context of Northern Ireland to expect candidates for appointment or incumbents to provide information about their political beliefs.

ELIGIBILITY

6.89 Eligibility requirements are significant in that they clearly define the field from which appointments are made. **We endorse the view that extensive experience of advocacy should not be regarded as a prerequisite of success in a judicial capacity and recommend that practice and/or standing requirements for recruitment to all levels of the bench should not differentiate between barristers and solicitors.** Experience and ability as an advocate may well be an indicator of suitability for judicial office but litigation would be of equal significance. There is a perception that acquisition of silk (appointment as a QC) is a pre-requisite of appointment to the High Court bench; we see no good reason why this should be so.

6.90 Northern Ireland's approach to defining practice, enabling employed lawyers to apply for posts, is one that which we would endorse. However the emphasis on practice as opposed to standing in determining eligibility, while increasing (though not guaranteeing) the prospects of a candidate having secured relevant legal experience over a period of years, may in our view serve to limit the field of applicants unduly. We have in mind suggestions made to us in the consultation process and evidence from other jurisdictions that the appointment of legally qualified academics should be allowed. Also, some (particularly women) who have had career breaks or have entered part-time employment for family reasons, might have much to offer yet could fall foul of the practice requirements. If the eligibility criteria were relaxed, candidates would still of course be required to demonstrate that they had the capacity and competence to perform judicial functions and relevant experience would be an important factor in this. **We recommend that consideration be given to consolidating and amending the legislation relating to eligibility criteria for judicial appointments with a view to shifting the emphasis to standing (i.e. period since being called to the Bar or admitted as a solicitor) rather than practice. Time spent in lower judicial posts should also be recognised for eligibility purposes.**

6.91 We are not recommending a career judiciary along the lines of that found in many civil law jurisdictions and envisage that, below the level of Lord Justice of Appeal, most appointments will continue to be made from the ranks of solicitors and barristers. However, we did consider whether there might be more movement upwards from one judicial tier to another

than is the case at present. The main arguments against are that this could compromise the independence of decision making by causing judges (perhaps subconsciously) to contemplate the impact of their decisions on promotion prospects; and that it might inhibit talented practitioners from applying for higher tier posts later in their careers. On the other hand, it is argued that if the best use of available talent is to be made, promotion from one tier to another should be a normal feature. **In our view it should be clear that progression from one judicial tier to another is regarded as an accepted form of appointment, provided that it takes place on the basis of merit as part of open competition.**

POLITICAL RESPONSIBILITY FOR JUDICIAL APPOINTMENTS

6.92 We are conscious of the range of views expressed during the consultation process on where political responsibility for judicial matters should lie and on whether this was a suitable matter for devolution at an early stage or later. In some quarters there was unease about whether judicial appointments, which are at the heart of the justice system, should be put in the hands of new and untried institutions of government. Others firmly believed that devolution of such responsibilities was necessary if other justice matters were to be devolved, thus enabling local institutions to address such matters in a responsible and co-ordinated manner.

6.93 The judiciary, whilst independent in their judicial functions, are nevertheless part of a justice system which needs to be viewed and developed as a coherent whole. This cannot easily be achieved if political responsibility for judicial and related matters is permanently detached from that for the rest of the justice system in Northern Ireland. We are of course mindful of the position in Scotland where responsibility for judicial appointments rests with the Scottish Executive. To contemplate something different for Northern Ireland would, we believe, convey an unfortunate message about our confidence in the ability of devolved institutions of government to operate effectively.

6.94 We take account of the passage in the Belfast Agreement which states that the Government remains ready in principle to devolve policing and justice matters. Once devolution of criminal justice matters has taken place, we do not believe that responsibility for such a crucial aspect of domestic administration as judicial appointments should be retained in London for longer than necessary. Indeed, our preference would be for all justice matters to be devolved at the same time. However, we understand the views of those who emphasise the importance of devolved institutions of government having established and proved themselves before responsibility for such a critical issue as the judiciary is transferred from Westminster. We would not, therefore, rule out the possibility of political responsibility for the judiciary being devolved as part of a staged process, thus allowing for a degree of flexibility over timing.

6.95 For the sake of ensuring confidence and stability, we think it important that the details of the appointments machinery should be included in the legislation that brings about devolution. **We recommend the enactment of legislation enabling responsibility for judicial appointments in Northern Ireland to be devolved on an agreed basis at a date to be determined by the Government in the light of the prevailing circumstances. This would of necessity be primary Westminster legislation. The legislation would include provisions establishing the machinery and procedure by which appointments were to be made.**

6.96 As for where in Northern Ireland administrative responsibility for judicial appointments should lie in the event of devolution, we are conscious that in many jurisdictions the Minister of Justice has this role, although often with mechanisms such as an appointments commission to insulate the process from direct political influence. However, in Northern Ireland we do not feel that the independence of the judiciary would be best served by allocating responsibility for the appointments process to a highly "political" department with operational responsibility for such issues as police, prisons and the criminal law. **On devolution, political responsibility and accountability for the judicial appointments process should lie with the First Minister and the Deputy First Minister.** We believe that it would be sensible to adopt the Scottish model that retains a role for Westminster in the most senior appointments. **For the appointment of the Lord Chief Justice and Lords Justices of Appeal, responsibility for making recommendations to Her Majesty The Queen would lie with the Prime Minister, as now, but on the basis of recommendations from the First Minister and the Deputy First Minister.**[15]

6.97 Throughout our consultation process people stressed the importance of, and the need to protect, judicial independence. Given the importance of this in terms of the constitution and public confidence, **we suggest that consideration be given to including in the primary Westminster legislation that provides for the transfer of judicial matters of a provision that no vote, resolution or Act of the Assembly on judicial matters should be valid unless it has cross community support, as defined by section 4(5) of the Northern Ireland Act 1998.**[16] In addition, we see the *European Convention on Human Rights* as providing an important safeguard against any action that might compromise judicial independence.

15 See paragraphs 6.106 - 6.109 for a detailed description of the responsibilities we propose for the First Minister and Deputy First Minister in relation to judicial appointments.

16 Cross community support means that a vote should have the support of a majority of designated Unionists present and voting, and a majority of designated Nationalists present and voting; or 60% of all members present and voting, including at least 40% of each of the designated Nationalists and designated Unionists present and voting.

A JUDICIAL APPOINTMENTS COMMISSION?

6.98 We now consider the procedure and machinery for judicial appointments in the context of devolution, in particular the desirability or otherwise of establishing an independent body (which we shall call a judicial appointments commission) to be responsible for the process. In examining the case for a commission, we envisage a body responsible for making or recommending appointments. This goes further than the recommendations of the Peach Report[17] which focuses on a commission with responsibility for keeping procedures under review and dealing with complaints and grievances.

6.99 Given that significant progress has already been made, especially in rendering the judicial appointments system more transparent, and that we have further suggestions to make in this context, we considered carefully whether an independent judicial appointments commission would add value to the process. Such an innovation does have potential drawbacks. For example, if judges and/or senior lawyers predominate on a commission, then there is a danger that they might tend to appoint in their own image. On the other hand a predominance of lay people could detract from the critical importance of legal ability in assessing merit and there might be fears that they could bring a political element into the deliberations; or at the very least that they might see themselves as representing particular interest groups. There would be the possibility of appointments being made or recommended by compromise. There would also be issues about accountability and what action would be taken if the commission did not meet with expectations.

6.100 However, we are mindful that a recurring theme in many countries has been the need to ensure that judicial appointments arrangements are immune from partisan political pressure, while at the same time made more open and accountable. This has been addressed in a number of instances by some kind of independent judicial appointments body, although, as we have seen, there is a variety of different models to suit different legal and political cultures. There is little research evidence to shed light on what impact appointments commissions have had, but a recent study has indicated a strong link between the creation of such bodies and growing judicial activism.[18] The argument runs that as the role of judges grows and develops, so there is a greater need than ever to insulate the appointments process from any possible suspicion of political influence; a way of doing this is by creating an independent appointments commission.

6.101 We have noted the strong local support for the creation of an independent appointments commission, especially among a number of the political parties. In the Northern Ireland context, the highly developed "rights" legislation and culture, taken with devolution and the prospect of litigation involving the individual and different organs of government (both

17 *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach* (1999), London: HMSO (The Peach Report).

18 Malleson, 1999 - The New Judiciary.

devolved and Westminster based), point us in the direction of an independent appointments commission. Such a body could be established in a way that would ensure transparency and accountability, while meeting many of the concerns outlined above. The right balance of lawyers and lay people on a commission would ensure that proper account was taken of legal and judicial ability and of the need for a broader awareness of issues in society. Also it could become a public focus of good practice and of measures to ensure a fair system which ensured appointment on merit from a wide pool of candidates reflecting, so far as possible, Northern Ireland in its diversity.

6.102 We believe that in Northern Ireland an appointments commission would enhance public confidence. But the factor which, above all, sways us in favour of recommending such a body is the imperative that if political responsibility for judicial appointments is to be devolved, the appointments process must be transparent and responsive to society's needs on the one hand, but on the other it must be clearly seen to be insulated from political influence. Given the political and community divisions that exist in Northern Ireland, we do not believe that it would be feasible, particularly from the perspective of judicial independence, to leave significant discretion on appointments matters in the hands of Ministers on the Executive Committee. **We recommend that legislation enabling responsibility for judicial appointments to be devolved should include provision for the establishment of a Judicial Appointments Commission.**

6.103 **As for membership of the Commission, we envisage a strong judicial representation drawn from all tiers of the judiciary (including a representative of the lay magistracy – see Chapter 7) and nominated for appointment by the Lord Chief Justice after consultation with each of those tiers. The Lord Chief Justice or his nominee would chair the Commission. In line with practice elsewhere, there would be one representative nominated by the Law Society and one by the Bar Council. In total the Commission might consist of around five judicial members, two from the professions and four or five lay members**.

6.104 We do not envisage that the lay membership would include members of the Assembly or political nominees such as are to be found on the Judicial Services Commission in South Africa and in other jurisdictions. In the Northern Ireland context it is important to keep any hint of political input out of the appointments process. The lay members would be selected on the basis of the additional value which they would bring to the Commission's deliberations, including such qualities as experience of selection processes, the court users' perspective and the ability to assess the personal qualities of candidates. **The lay members of the Commission should be drawn from both sides of the community, including both men and women. This could be achieved through a legislative provision along the lines of section 68(3) of the Northern Ireland Act 1998 which provides that the Secretary of State should, so far as practicable, secure that the Northern Ireland Human Rights Commission is representative of the community in Northern Ireland.**

The First Minister and Deputy First Minister would appoint the nominees of the Lord Chief Justice and the professions and would secure the appointment of lay members through procedures in accordance with the guidelines for public appointments (the Nolan procedures).

6.105 **The Commission should be responsible for organising and overseeing, and for making recommendations on, judicial appointments from the level of High Court judge downwards**, that is over 1,000 appointments. We do not envisage the full Commission conducting interviews as in South Africa and nor do we believe it necessary that each interview panel should consist only of members of the Commission, although that may well be the case for the more senior appointments. **Working through an Appointments Unit, the Commission would organise its selection panels which, for appointments at deputy resident magistrate and above, would always include at least one member of the judiciary at the tier to which the appointment was to be made and a lay person. The selection panel would shortlist, take account of the available information on the candidates, and conduct interviews with a view to making recommendations to the Commission.** While procedures for appointments to the lay magistracy and other positions, such as tribunal members, would be the responsibility of the Commission, it would not be practicable for members of the Commission to participate in the detailed arrangements for all such appointments.

6.106 We considered whether the Commission should make appointments as suggested by some consultees, thus emphasising the independence of the process from political influence, or whether it should recommend appointments to a political authority. If its role is to recommend then, as we have seen in other jurisdictions, there is a variety of models to be considered including the submission of one name or a list of names which might be ranked or unranked. The desirability of an element of political accountability and the involvement of Her Majesty The Queen in making many of these appointments point in the direction of the Commission making recommendations to the First Minister and Deputy First Minister. However we are conscious that in giving a political figure the opportunity to choose from a list or to reject recommendations, as is the case in a number of other jurisdictions, there would be a danger of neutralising much of the purpose of establishing a Commission which is to reduce the scope for political influence. **We recommend that for all judicial appointments, from lay magistrate[19] to High Court judge, and all tribunal appointments, the Commission should submit a report of the selection process to the First Minister and Deputy First Minister together with a clear recommendation. The First Minister and Deputy First Minister would be required either to accept the recommendation or to ask the Commission to reconsider, giving their reasons for doing so; in the event of their asking for a recommendation to be reconsidered, they would be bound to accept the second recommendation. The First Minister and Deputy First Minister would then:**

- **in respect of High Court and county court judges, and resident magistrates, advise Her Majesty The Queen to appoint the recommended candidate; and**
- **in respect of appointment of deputy county court judges and deputy resident magistrates, and of appointments below the level of resident magistrate, make the appointment.**

6.107 As outlined above we envisage that it should be open to the First Minister and Deputy First Minister to refer an initial recommendation for appointment back to the Commission for reconsideration; this could happen at the instigation of one or both of the Ministers. In that event, the Commission would again apply considerations only of merit in reconsidering the case and might well re-submit the same name, which would then have to be accepted. The capacity to refer back must be viewed not as a means of putting indirect pressure on the Commission to take factors other than merit into account, but rather as a safeguard to ensure that recommendations made by the Commission are fully justified.

6.108 We have given some thought to the role of the Commission in relation to the most senior appointments (that is those of the Lords Justices of Appeal and the Lord Chief Justice), when it would be for the Prime Minister to make the recommendation to Her Majesty The Queen, following advice from the First Minister and Deputy First Minister. In doing so, we were conscious that the judiciary at this level are important in constitutional terms and have responsibilities going beyond Northern Ireland in that they are members of the Privy Council. Also in certain circumstances there might be difficulties in convening an appropriate panel from the Judicial Appointments Commission, especially given the small size of the jurisdiction. We are aware too that the position of Lord Chief Justice requires particular skills in the field of organisation and management.

6.109 We note that in some other jurisdictions procedures for the top judicial appointments vary from the rest; in South Africa for example the President consults with the Judicial Services Commission over the appointment of the most senior judges, whereas he is required to accept the Commission's advice for other judicial appointments. In all the circumstances, **we recommend that the First Minister and Deputy First Minister should consult with the Judicial Appointments Commission over the procedure to be adopted in appointments to the positions of Lord Chief Justice and Lord Justice of Appeal and submit such procedure to the Prime Minister for approval. The same principles of transparency and appointment on merit should apply as with other appointments.**

19 See the next chapter for our proposals regarding juvenile lay panel members, who we recommend should be re-titled lay magistrates.

APPOINTMENTS PROCEDURES

6.110 In order to appoint on merit it is necessary to secure a pool of applicants with the right qualities from across the professions and to have in place procedures that will ensure the selection of the highest qualified, based on clearly articulated criteria. That means building on progress already made and applying best practice in selection procedures for judicial appointments. We endorse such features as advertising posts, published criteria for appointment, selection panels, structured interviews and the use of other transparent and open means of securing the necessary information to assess the suitability of candidates for appointment. It also means having in place an organisational structure dedicated to achieving these ends and focused on the appointments process.

6.111 In order to operate effectively, **the Judicial Appointments Commission would require a fully resourced administrative structure in the form of a Judicial Appointments Unit separate from the Court Service (or Department of Justice) but staffed by officials drawn from it. This Unit, under the supervision of the Commission, would assist the Commission in:**

- **establishing criteria for appointment which provide for the level of technical and legal competence required by particular posts and the personal qualities necessary for members of the judiciary, including an awareness of social and human rights issues;**
- **organising the selection processes which would include open advertising, published criteria for appointment and structured interviews for all appointments from High Court judges downwards;**
- **ensuring that selection panels had before them all the information on which to base decisions, including the results of consultation with the senior judiciary and professional associations;**
- **publishing detailed information on all aspects of the appointments system in Northern Ireland, along the lines of *Judicial Appointments*, the Lord Chancellor's Department publication for England and Wales;**
- **publishing an annual report on the appointments process;**
- **developing a strategy of equal opportunity and outreach designed to broaden the pool of potential applicants in a way that maximised the opportunity for men and women from all parts of the community to secure appointments; and**
- **identifying and, where possible, addressing factors which might make it more difficult, or constitute a disincentive, for qualified candidates from particular parts of the community to apply for appointment.**

6.112 Given the importance of judicial appointments, and that there is security of tenure, we believe that those responsible for selection or making recommendations for appointment should have relevant information from a variety of sources. **There should remain a role for formal written consultation with the senior judiciary and the heads of the legal profession in respect of candidates for appointment as county court judge and above. For the sake of ensuring transparency and fairness, the results of such consultation should be made available to the selection panels for these posts, who would consider them along with all other relevant information. We consider that the present practice of asking for named referees for lower tier appointments should be extended to include candidates for appointment as High Court or county court judges and suggest that consideration be given to including an element of self-assessment in application forms for judicial appointments.** The Peach Report contained suggestions for linking the format of application forms, references and consultations more closely to the specific appointment criteria. We suggest that this be examined further in the Northern Ireland context.

EQUAL OPPORTUNITY

6.113 In developing an equal opportunity strategy, we have a number of initiatives to suggest. The extent to which candidates drawn from the ranks of practising barristers and solicitors can demonstrate their suitability for preferment will be largely dependent upon their relevant experience within the profession. We received some suggestions that there might be factors inhibiting the progress of women through the professions (and which therefore impacted upon the pool of candidates qualified for appointment to the judiciary) which would be worthy of attention. **We recommend that those responsible for judicial appointments should engage in discussions with the Bar Council and Law Society about equal opportunity issues and their implications for the judicial appointments process. The Equality Commission should be asked to assist with these discussions.**

6.114 **Efforts should be made to stimulate interest in becoming a judge, especially in sectors which are under-represented or where historically applications have been disproportionately low**. Considerations of gender, geography and community background might come into this. The approach to targeting groups adopted by the Ontario authorities may be worth examining further although we should stress that we are not recommending positive discrimination in the appointments process itself; merit should continue to be the deciding factor.

6.115 **We are attracted to the idea of developing a database of qualified candidates interested in securing judicial appointment, and we recommend that this idea be considered further.** People who have expressed an interest would receive, on a personal basis, details of all posts being advertised and might be invited to familiarisation seminars at

which judges and magistrates would participate. This would also complement an outreach strategy in that it would help in assessing the pool of likely future applicants to establish whether there was the potential for under-representation of particular groups in the future.

PART-TIME APPOINTMENTS AND DEPUTIES

6.116 Part-time appointments to the judiciary are made in a number of jurisdictions. They can be beneficial for equal opportunities purposes and in bringing a breadth of experience and expertise into the judiciary. Such appointments would be made on merit and subject to the same eligibility criteria as full-time appointments and, while part-timers might undertake other work (such as academic teaching), they would not be allowed to practice. This is not the same concept as that of deputies. **We recommend that consideration be given to introducing a small number of part-time appointments.** This would need careful examination from the perspective of the efficient administration of the court system.

6.117 We should say at this point that we gave some thought to the appointment of deputies. The practice enables possible candidates for future full-time appointment to determine whether they are suited to the role. It is also of importance from an administrative perspective in giving the courts' administration the flexibility to cover court sittings and facilitate the efficient despatch of business. Some concerns have however been expressed about the prospect of deputy judges or magistrates, usually lawyers in private practice, presiding in a court where parties are represented by lawyers with whom they have dealings in their practices; this is a particular issue in a small jurisdiction. Another issue is that the involvement of the executive in appointing deputies on a renewable fixed term basis might be taken as compromising their independence. This was recently the subject of litigation in Scotland where arrangements for appointing temporary sheriffs were found to be in contravention of Article 6 of the *European Convention on Human Rights*.[20] Given the need to consider the implications of this judgment, we make no recommendation on the issue of deputies.

EQUITY MONITORING

6.118 We gave careful thought to whether the judiciary should be monitored by gender, ethnicity and community background. Clearly gender does not create a difficulty and parliamentary questions have been answered in which the gender balance of the various tiers of judiciary has been given.[21] However, the question of community background, assessed on the basis of religious affiliation, is more problematic.

20 *Starrs v Procurator Fiscal*, 11 November 1999 (unreported judgment of the High Court of Justiciary).

21 Hansard - 27 July 1999.

6.119 On balance we do not wish to recommend that fair employment legislation be applied to the judiciary, as to do so would have implications for their independence; but we do believe that the principles underpinning that legislation should be applied and be seen to be applied. We are conscious that this is a matter of considerable concern and that there are perceptions in a number of quarters about an imbalance, perceptions which may not be entirely well founded. We do not propose that existing members of the judiciary be asked about their religion although we believe that, if ways could be found to give an indication of the religious balance of the bench, this would help boost public confidence.

6.120 We do understand the reluctance of some to contemplate a situation where applicants for judicial posts are asked for information about their religious or ethnic background. It could be taken as implying a "representative" role for judges of the type that we have made clear is not appropriate; and this might be seen as having implications for judicial independence. On the other hand this form of monitoring and good practice for employment purposes is accepted throughout Northern Ireland and does not compromise the merit principle; and monitoring of this kind is carried out in England and Wales in relation to ethnic background.[22] Having such information would assist the Judicial Appointments Commission in judging the effectiveness of its outreach programme and in assessing the fairness and impact of the selection procedures. **We recommend that consideration be given to finding a satisfactory way, with the assistance of proxy indicators if necessary, of assessing for statistical purposes the religious background of applicants for judicial posts and of those who wish to be included in the database. There would also need to be assessment for statistical purposes of the ethnic background of applicants. This information would not be available to those involved in the selection process.** Particular care should be taken to devise monitoring procedures that do not, and are seen not to, compromise the overriding principles of judicial independence and appointment on merit.

6.121 Consistent with normal fair employment practice, there would be no question of publishing information about community background in a way that would enable individuals to be identified. However, we would expect the annual report of the Judicial Appointments Commission to make reference in general terms to the background of applicants to posts by reference to religion, gender, ethnicity, disability and geographical location.

IMPLEMENTATION OF JUDICIAL APPOINTMENTS PROCEDURES

6.122 We recognise that it may be some time before our recommendations on the devolution of justice matters and the establishment of a Judicial Appointments Commission are implemented. However, many of our recommendations on appointments procedures do not depend on these; in some cases they build upon changes already in train. We think it is

22 *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach,* (1999), London: HMSO (The Peach Report).

important, in order to increase transparency, openness and confidence, that our recommendations on procedure and outreach are implemented as soon as possible. Hence, **we recommend that those elements of our appointments strategy which do not require legislative change be adopted for implementation at an early stage and be operated within the existing structures. Early steps should also be taken to establish a dedicated Judicial Appointments Unit within the Northern Ireland Court Service to assist the Lord Chancellor and the Lord Chief Justice in their duties within the current judicial appointments process.** The Judicial Appointments Commission which we have recommended[23] would thus be served by an already established Judicial Appointments Unit (which would be separated from the Court Service on devolution) and be in a position to continue with a strategy already in train.

6.123 Further, we believe that there is scope for enhancing confidence, openness and transparency by introducing an element of independent oversight of the existing appointments process. **We recommend the early appointment of a person or persons of standing to oversee and monitor the fairness of all aspects of the existing appointments system and audit the implementation of those measures that can be introduced before devolution. Such a person or persons should not be a practising member of the legal profession, should be independent of the judicial system and government, and should have the confidence of all parts of the community. They should have access to all parts of the appointments process and report annually to the Lord Chancellor. That report should be published.** Although the thrust of our thinking on this is similar to that which underpins the Peach Report,[24] the detailed arrangements would have to be tailored to the specific circumstances of Northern Ireland.

OATH OF ALLEGIANCE AND JUDICIAL OATH

6.124 We have already referred to one of the tasks of a Judicial Appointments Commission as having to identify and, where possible deal with, any blockages which might inhibit people from applying for judicial appointments. It has been represented to us by some that the Judicial Oath and Oath of Allegiance (or equivalent affirmation) required to be taken by judges, magistrates, JPs and lay panellists on appointment, could constitute such a blockage.

6.125 We recognise that a substantial element of the community in Northern Ireland aspires to the unification of Ireland. That they should do so has no bearing on their suitability or otherwise for judicial office and we can envisage circumstances where members of the Nationalist community would feel uncomfortable with being required to swear allegiance to or to serve Her Majesty The Queen. We also note the recognition in the preamble to the Belfast

23 See paragraph 6.102.

24 *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach,* (1999), London: HMSO (The Peach Report).

Agreement of the equal legitimacy of differing political aspirations. On the other hand we realise that such oaths, sworn elsewhere in the United Kingdom, are of significance and importance to others.

6.126 We do not believe that maintaining the status quo in this area would show sufficient regard to the position of the Nationalist community. At the same time there should be recognition of the fact of the constitutional position. We considered a number of options:

- no longer requiring the Oath of Allegiance, but retaining the Judicial Oath;
- replacing both Oaths with a new oath which focuses on the judicial function, while including a reference to the fact of the Crown's constitutional position; and
- replacing both Oaths with a politically neutral judicial oath in modern language with no reference to Her Majesty The Queen.

6.127 We have taken advice on the constitutional implications of this and understand that there is no legal or constitutional impediment to any of the options outlined above. We note in particular that the constitutional status of the judiciary is underpinned by its origins in the Royal Prerogative with members of the judiciary being deemed to be doing justice on behalf of Her Majesty. However modern constitutional doctrine now focuses on the impartiality of the judiciary and its independence from the executive.

6.128 In all the circumstances we favour the third option outlined above. **We recommend that, on appointment, members of the judiciary be required to swear on oath along the following lines:**

> **I, [ ], do swear [or do solemnly and sincerely and truly affirm and declare] that I will well and faithfully serve in the office of [ ], and that I will do right to all manner of people without fear or favour, affection or illwill according to the laws and usages of this realm.**

JUDICIAL TRAINING

6.129 We wish to emphasise the importance that we attach to judicial training. Human rights instruments referring to the need for competent tribunals, the views expressed in the consultation exercise and the evidence from other jurisdictions all reinforce our view. The increasing complexity of legislation, the incorporation of the European Convention and the rapidly changing political and social context in which judges operate all point to the need not just for induction training but also for regular refresher exercises. New principles of interpretation arising out of human rights legislation have important training implications and there is a need for training in the policy and social context of legislation, as well as in judicial

techniques. It is a welcome development that judges in many jurisdictions increasingly see training and development as an essential part of their duties, regarding it as an entitlement rather than an obligation.

6.130 We considered whether training should be part of the function of a Judicial Appointments Commission and have no doubt that those responsible for the appointments process should maintain close contact with those who are involved in training. However, we were impressed by the strength of the case for training being "judge-driven", both as a means of ensuring independence from influence by the executive or other interest groups and because in that way the commitment of incumbents to the process is more likely to be secured. The points being expressed to us by the Director of the Judicial Studies Board in England and Wales and by the Federal Judicial Centre in the United States on this matter were compelling.

6.131 We were impressed by what we heard of the Judicial Studies Board in Northern Ireland and **we think that the membership of the Board, drawing representation from each judicial tier, is about right, although an academic input might bring benefits.** However, it is apparent that there is little understanding of its work outside the judiciary and those who are close to the judicial process**. We believe that the Board should produce an annual report on its activities and on its training plans for the judiciary. It should continue to be supported by an administrative secretariat.**

6.132 As for the nature of the training to be delivered, a number of suggestions were made in the course of the consultation process and the Board itself gave us some examples of its activities. Given the importance of training which goes beyond traditional judicial issues, **we think that the Judicial Studies Board should develop a prioritised training plan, with members of the judiciary making the major contribution but also taking account of the views of the professions and other stake-holders**. Such a plan, with regular updating, would be the basis on which to secure funding to ensure high quality training. Thought might be given to issues where joint training with the professions would be appropriate and to the potential value of externally run conferences.

6.133 We are conscious that judicial training in such a small jurisdiction is not easy to run in a way that is cost effective, proportionate to the available resources and at the same time comprehensive. Co-operation with other jurisdictions is therefore important and we note that this is already happening; **we recommend that the Judicial Studies Board pay particular attention to maximising the benefits to be secured from co-operation with England and Wales, Scotland and the Republic of Ireland** in this field. The co-operation between Australia, New Zealand and the Pacific Islands is an example that may be worth examining further.

6.134 As is already the case in England and Wales in relation to some appointments, and in other jurisdictions, **we believe that induction training should be mandatory.** We note that, with only a handful of new appointments to the judiciary each year, it makes sense to utilise induction training opportunities in England and Wales, rather than running bespoke

programmes in Northern Ireland; but we are aware that in Northern Ireland it has proved possible to develop such practices as mentoring, sitting in with experienced judges and visits and briefings from other criminal justice agencies. The advantage of such methods for a small jurisdiction is that they can be tailored to individual needs and costs can be kept within bounds. Otherwise, **we think that training is more likely to have a beneficial effect and secure the necessary commitment if it is developed by the judiciary for the judiciary on a voluntary basis**. **The Judicial Studies Board should monitor closely the progress of voluntary training and the degree of participation in it.** The head of the judiciary and the chairman of the Judicial Studies Board can of course give a strong lead in encouraging attendance at training events.

CONDITIONS OF SERVICE AND COMPLAINTS MECHANISMS

6.135 Tenure, remuneration and other aspects of conditions of service are of considerable importance in the context of judicial independence. If judges are not confident that their positions are secure and that pay will be determined on a fair basis according to objective considerations, then there is the danger of their being open to influence by the executive. On the other hand, there must be procedures for dealing with complaints and with cases of incapacity or misconduct.

6.136 Consistent with the exhortations of human rights instruments about security of tenure, **we endorse the current arrangements that give full-time judges and magistrates tenure during good behaviour until a statutory retirement age**. Currently Supreme Court judges may be removed by Her Majesty The Queen on an address by both Houses of Parliament, while other appointees may be removed by the Lord Chancellor on grounds of incapacity or misbehaviour. Under devolution however, we would not envisage a political authority having the power to remove judges on the basis of an address from the Assembly; this would have serious implications for their independence. Rather, we suggest the adoption of a procedure more akin to the Scottish model. **We recommend that removal from office of a judge or lay magistrate should only be possible on the basis of the finding of a judicial tribunal constituted under statutory authority and convened by the First Minister and Deputy First Minister or the Lord Chief Justice, that a magistrate or judge was unfit for office by reason of incapacity or misbehaviour.** It would be necessary for such a tribunal to have been established specifically to consider the possibility of removal. This recommendation applies in respect of all judicial posts.

6.137 A clear and publicly known complaints procedure is an essential element of accountability and can be devised in a way which does not put at risk judicial independence. **We recommend that a complaints procedure be devised and published. This would make clear that complaints about the exercise of judicial discretion could only be addressed through the judicial (i.e. the appeal) process, essential if judicial independence is to**

be maintained. Complaints about conduct or behaviour would be the ultimate responsibility of the judiciary, although, as now, officials in the Court Service could be tasked with dealing with the administration of such matters. Minor issues would continue to be handled by Court Service officials seeking comments from the judge whose behaviour was the cause of complaint and replying to the complainant accordingly. There would be a commitment to a prompt response. At a more serious level the Lord Chief Justice would be involved personally in seeking to resolve the matter. **We recommend that for the most serious complaints which appear to have substance, including those which might merit some form of public rebuke or even instigation of the procedure for removal from office, the Lord Chief Justice should have the option of establishing a judicial tribunal to inquire into the circumstances and make recommendations.** Removal from office would not occur as a direct result of the findings of such a tribunal; that would only be possible on the strength of the outcome of a tribunal constituted in accordance with the recommendation in the previous paragraph.

6.138 We gave some thought to whether there should be a published statement of ethics for the judiciary in Northern Ireland. We approached this, not out of any doubts over the integrity of Northern Ireland's judges, but because there might be advantage in the public having access to material on the standards required of the judiciary, as a confidence booster. This is especially so in areas such as conflict of interest where there is already in existence carefully drawn up guidance. It would also be an opportunity to raise awareness about the nature of judicial responsibilities. **We recommend that consideration be given to drawing up a statement of ethics which might be annexed to the annual report of the Judicial Appointments Commission.**

6.139 **On remuneration we recommend that judges' salaries continue to be fixed by reference to their equivalents in England and Wales, which are within the remit of the Senior Salaries Review Body.** This will remove any need for the local administration to become involved in setting pay rates for the judiciary here, an important consideration in terms of independence.

JUDICIAL STRUCTURE

6.140 The Lord Chancellor currently holds the pivotal position at the head of all tiers of the judiciary and magistracy in Northern Ireland, although he does not have line management responsibilities in the way that this term would be understood in other organisations. He does have a clear role in relation to disciplinary matters. However, devolution would throw into sharp relief the need for a clearly defined and understood structure for the courts and the judiciary in Northern Ireland. A feature of most other jurisdictions is the existence not only of a hierarchy of courts, but also some degree of hierarchy involving members of the judiciary.

6.141 While judicial decisions are subject to appeal, they are not made the subject of criticism or supervision by other judges. However, there are a number of functions in which the existence of a President or Chief Judge at each tier of the courts might be beneficial. These include the facilitation of disciplinary and complaints mechanisms, the co-ordination and management of court business, representational work in relation to other agencies and the desirability of having a figurehead who can guide, mentor or proffer advice when it is requested. **We recommend that the Lord Chief Justice should have a clearly defined position as head of the whole judiciary (including the lay magistracy[25]) in Northern Ireland.** The Lord Chief Justice might find it helpful to appoint a head or representative of each tier to assist in co-ordination and representational matters.

6.142 We have a further recommendation to make which is intended to demonstrate publicly that the magistracy is an integral part of the judiciary. In looking at the titles of the various tiers of judiciary we gave some thought to the nomenclature of resident magistrates. As we note in the next chapter, the term "resident" has its origins in the nineteenth century when there were particular reasons for wanting office holders to live in the district where they held office. It has no meaning or relevance in the modern context. Moreover we think that there is an opportunity, through a name change, to demonstrate publicly that the magistracy is an integral part of the judiciary. **We recommend that legislation be passed to redesignate resident magistrates as district judges (magistrates' courts).** We favour retention of the term magistrates' court as it is commonly understood and reflected in a very large number of legislative provisions.

JUDICIAL INDEPENDENCE

6.143 In concluding this chapter we come back to one overriding theme, that of judicial independence. It is in our terms of reference and has informed us throughout. It was emphasised in the Guiding Principles and Values published with our consultation paper (see also Chapter 3 of this report) and in the human rights principles underlying our work (paragraphs 6.11 to 6.14). Many of the recommendations in this chapter are framed in such a way as to safeguard or bolster judicial independence. We suggest that it be given legislative backing and our approach on appointments matters is intended to insulate the judiciary from influence, whether political or from sectional interests. It was this consideration which lay behind our recommendations for "judge-driven" training and behind our recommendations on such matters as tenure, complaints and salaries. In the consultation process which will follow this report we hope that consideration of matters relating to the judiciary will focus on quality and maintaining the essential independence of our judges.

25 See Chapter 7.