THE JAC FOR ENGLAND AND WALES: REFLECTING ON (NEARLY) TWO DECADES

Abstract: The Judicial Appointments Commission for England and Wales is nearly 20 years old. Although it has largely been a success as a constitutional reform where appointments once rested on a closed and informal process, they are now bureaucratic, formal and based (almost) exclusively on merit. In this article I outline some of the reasons for the move to a Commission model in England and Wales, and how lingering conflict about some of these reasons have left a mark on the JAC since its establishment.

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Introduction

On 3 April 2006 the Judicial Appointments Commission (JAC) came into operation in England and Wales, following the enactment of the Constitutional Reform Act 2005. The JAC replaced an informal system in which judges were appointed by the Lord Chancellor. Candidates selected would often be unaware that they were even in the frame for a judicial post until given a 'tap on the shoulder' by an official,[1] and prior to that point, 'secret soundings' would be taken amongst senior judges about potential candidates. As the judiciary grew in size, this informal system was gradually rationalised.

It remained, however, informal, secretive and – given the influence of serving judges – prone to judicial self-replication. As most judges were male, white and privately educated, this inevitably had consequences for diversity, and this was one of the key reasons for change.[2] Another was the lack of formality. Despite strong judicial input and a focus on merit, this was nonetheless a system of political appointment to the bench. For the New Labour government, constitutional modernisation was an important goal. The advent of devolution had led to the creation of independent judicial appointment bodies for Northern Ireland in 2002 and for Scotland in 2003. The adoption of equivalent systems for England and Wales was a natural development following on from this, especially given the centrality of the Lord Chancellor.[3] When the incumbent Lord Chancellor, Lord Irvine, fell out with Tony Blair for a mixture of personal and political reasons in 2003, the stage was set for a radical change to the UK's constitutional arrangements. The dismissal of Lord Irvine, the abolition of his office, and the abolition of the appellate committee of the House of Lords were announced by a press release, without prior notification to the judiciary, on 12 June 2003. The senior judiciary were taken completely by surprise.[4] Far from regarding the Lord Chancellor as a

[1] Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011) 90-95.

[2] Much of the background in this passage is taken from a book jointly authored by myself and others as part of a project on judicial independence in the UK that ran from 2010 to 2015: Graham Gee and others, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 160-161.

[3] The Lord Chancellor was Speaker of the House of Lords, head of the judiciary, and a senior government minister responsible for justice. Many lawyers felt that the legal aspects of the role were vulnerable to an Article 6 ECHR challenge, especially after *McGonnell v UK* [2000] 30 EHRR 289.

[4] In fact, the wider policy proposals had been in development by the Lord Chancellor's Department for some time, with a view to taking politics out of the system. The failure by Downing Street to consult the judiciary prior to making the announcement led, however, to judges assuming the opposite: an attack on judicial independence. By unhappy coincidence, most of the senior judiciary were on an away day without communications access when the press release was issued. Patrick O'Brien, 'Does the Lord Chancellor really exist?' (*UK Constitutional Law Blog*, 26th June 2013) <https://ukconstitutionallaw.org/2013/06/26/patrick-obrien-does-the-lord-chancellor-really-exist/> accessed 5 November 2024.

threat to the separation of powers, many judges regarded him as their man in government.[5] Some, at least initially, appeared to hold genuine fears that the move was the beginning of something like a coup d'état. The breach of trust took some time to heal. A year of negotiations between the Lord Chief Justice and the Lord Chancellor's Department led to a very detailed document that became known as 'the Concordat' which set out parameters for future relations between the government and the judiciary. When it was enacted, the Constitutional Reform Act 2005 ('the 2005 Act') broadly realised the constitutional agenda announced in the press release,[6] but implemented it through the very detailed rules agreed in the Concordat.

This slightly protracted backstory goes some way towards explaining both the difficult birth of the JAC, and the significant constraints under which it operates. The institutional design of the new JAC reflected a desire to repair the poor relations that existed between judges and the government. As a consequence, the 2005 Act was more complex and gave significantly more influence to senior judges than might have been conferred had the rupture between judges and government not occurred. In particular, the new system preserved and extended the system of secret soundings, giving judges enormous influence over the new appointments process.

The JAC System & Process

The Structure of the Commission

The JAC was established by the Constitutional Reform Act 2005 as a non-departmental public body, working to provide recommendations for judicial appointment to the Lord Chancellor (the lead minister at the Ministry of Justice).[7] In large part, because the workload arising out of the size of the England and Wales jurisdiction is quite substantial, the JAC is a large commission. There are fifteen commissioners, appointed for terms of three years (which may be renewed).[8] Six commissioners, including the chairman, must be lay. Of the remaining members, two must be professional lawyers, six must be judges and one must be a lay judge. The regulations specify further that the judicial members must be drawn from a range of courts (one each from the Court of Appeal, High Court, etc).[9] The two senior judicial members of the Commission (the Court of Appeal and High Court judges) are selected by the Judges' Council.[10] The most senior judicial commissioner is designated the vice-chairman of the JAC.[11] The vice-chairman is therefore, in effect, selected by the judiciary.

In comparison with the other UK jurisdictions, and with Ireland, the JAC is a big organisation (around 100 commissioners and staff) responsible for a large volume of

[5] The first female Lord Chancellor in the history of the office was Liz Truss, who served from July 2016 to June 2017.
[6] The office of Lord Chancellor remained, though mostly in name only. Patrick O'Brien, '"Enemies of the People": Judges, the media and the mythic Lord Chancellor' (2017) *Public Law* 135.
[7] The Ministry of Justice replaced the Department of Constitutional Affairs (DCA) in 2007; the DCA had in turn replaced the Lord Chancellor's Department in 2003.
[8] The legislation does not specify a number, and the composition may be altered by the Lord Chancellor (in consultation with the Lord Chief Justice) in secondary legislation, provided that the number of judicial members is always less than that of non-judicial members; see Constitutional Reform Act 2005 sch 12, para 3(A).
[9] Judicial Appointments Regulations 2013, s 4(2).
[10] The regulations provide that the Lord Chancellor must recommend the persons selected by the Judges' Council for appointment.
[11] Constitutional Reform Act 2005, sch 12 para 11(1).

appointments. This is, as mentioned, a natural consequence of England's large population, but is also partly due to the role played by tribunals with the court system.[12] During the 2023-24 term, it selected 867 judges from nearly 7,000 applications, and in each of the five prior years, the organisation recommended an average of 1,043 new judges from an average of 6,587 applicants.[13] The majority of these appointments were to tribunals. In 2023-24, 314 judges were selected for the courts, and 553 for tribunals. The scale of the operation requires the JAC selection process to share more features with non-legal human resources processes than might be the case in other jurisdictions.

The JAC is required to recommend a single person for each vacant post. Under the original 2005 scheme, these recommendations were all made to the Lord Chancellor, who had the option to accept, reject or request a reconsideration of the recommendation. It became clear early in the life of the new system that the powers of the Lord Chancellor were effectively unusable. In 2010, then Lord Chancellor Jack Straw attempted to reject the recommendation of Sir Nicholas Wall as President of the Family Division. This intention was leaked to the press, leading to speculation that this was retribution for Wall's criticism of the government for failing to adequately fund family justice. After Straw's view became public knowledge, he and his officials concluded that rejecting Wall would be seen as a partisan and improper decision.[14] Straw instead requested that the JAC reconsider its recommendation. After doing so, the JAC again recommended Wall and he was appointed. Straw's theory was that the story was deliberately leaked to the press by supporters of Wall to politicise the decision and thereby achieve precisely this outcome.[15] Straw's successor, Ken Clarke, complained that he knew nothing about the names being put before him by the JAC, and felt that his role was purely cosmetic. Lacking any knowledge of those proposed, he had no option but to accept the JAC's recommendations as a matter of course. In practice, if not in principle, the JAC was an *appointing* body, not merely a recruiter.

Concerns of this kind, coupled with a widespread view that the 2005 Act was far too detailed and prescriptive ('an interesting mix of high principles and low-level bureaucracy')[16] led to a significant change to the law underpinning the JAC in 2013. Much of the detail in the original 2005 Act (which had, in turn, derived from the Concordat agreed between Lord Woolf and the Lord Chancellor's Department) was removed by the Crime and Courts Act 2013 in order to allow the detailed operation of the JAC to be determined by more flexible regulations.[17] Since 2013, the detailed rules for judicial appointments in England and Wales have been

[12] Most departmental tribunals previously run by UK government ministries were incorporated as a single unified system into the courts, presided over by the Senior President of Tribunals and under the ultimate authority of the Lord Chief Justice, by the Tribunals, Courts and Enforcement Act 2007. Whilst some tribunal panel members will therefore not be judges, and may not be lawyers in the case of specialist tribunals roles – eg on medical or valuation tribunals – many are appointed as judges (including as High Court or Court of Appeal judges).

[13] Statistics taken from JAC annual reports from 2018 onwards. JAC, 'Annual reports and accounts' <https://judicialappointments.gov.uk/annual-reports-and-accounts/> accessed 30 September 2024.

[14] Gee (n 2) 186.

[15] Wall retired on health grounds only 18 months after his appointment. In 2021, Straw explained that he had concluded from the papers presented to him by the JAC that Wall was not competent to do the job, and that he was 'being damned with faint praise' by judges consulted about his appointment. Senior judges Straw consulted personally had, on his account, agreed with this assessment. Richard Ekins and Graham Gee, *Reforming the Lord Chancellor's Role in Judicial Appointments, Policy Exchange* (London, Policy Exchange 2021) 7, <https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor's-Role-in-Senior-Judicial-Appointments.pdf > accessed 30 September 2024.

[16] Usha Prashar, 'Translating Aspirations into Reality: Establishing the Judicial Appointments Commission' in Jeffrey Jowell (ed) *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (JAC 2010) 45. Baroness Prashar was the first chair of the JAC.

[17] Patrick O'Brien, 'Changes to Judicial Appointments in the Crime and Courts Act 2013' (2014) *Public Law* 179.

contained in regulations that must be enacted by the Lord Chancellor as a statutory instrument and agreed with the Lord Chief Justice.[18]

The Lord Chancellor was also removed from most of the process. Since 2013, recommendations of judges appointed to courts below the High Court have been made to the Lord Chief Justice (for the courts) or the Senior President of Tribunals (for tribunals). These judges have the same options as the Lord Chancellor (to accept, reject or request reconsideration). The Lord Chancellor is therefore now involved as final decision-maker only for a much smaller number of senior judges appointed each year, though remains as a consultee for some appointments. For the vast majority of judicial appointments, senior judges are now responsible for making the final decision.

The Selection Process

Although the JAC is an independent body, its objectives are set by the Lord Chancellor and the Ministry of Justice. At the beginning of each recruitment exercise, the Lord Chancellor and officials prepare selection objectives for each post. These can go beyond the statutory criteria required, and commonly include a requirement that applicants should have prior judicial experience. These non-statutory criteria were a site of conflict early in the life of the JAC, reflecting two distinct views of the Commission: as a recruitment agency on the one hand, and as a constitutional body focussed on diversifying the judiciary on the other. Judges and officials typically focussed on the former: what was important in judicial appointments was the business need of the courts for judges to quickly take up office, without much need for additional training. This required candidates to demonstrate (primarily through fee-paid judicial work) that they had already done the job. By contrast, the JAC felt strongly that any requirement for prior experience would hamper the other key objective of the JAC – diversity – by making it more difficult to recruit non-traditional candidates. In the beginning, the JAC regularly challenged the Lord Chancellor's additional criteria, to the extent that the relationship was characterised by one official as 'trench warfare'.[19] Relations were so poor, and the government's view of the performance of the new organisation so negative, that two departmental reviews of judicial appointments were conducted in the JAC's first two years of life. At one point, the Commission had a 'near death' experience when it was included, with many other agencies, in the Public Bodies Bill 2010. This Bill former part of the 'bonfire of the quangos', a project to reduce the size and cost of the state by merging or eliminating large numbers of public bodies. The negative reaction the JAC's inclusion in the Bill generated from judges, the Law Society, and the Bar Council may, perversely, have saved the organisation. In 2011 the first chair of the Commission, Baroness Prashar, who had a very combative relationship with the Ministry, was encouraged to resign early. Her successors and their staff appear to have been anxious to maintain smoother relationships with the Ministry and to be more realistic in their approach to judicial recruitment.[20]

The recruitment process in practice

The JAC recruitment process typically has six stages:

[18] Constitutional Reform Act 2005 ss 94 and 94(C). The generally accepted complaint that the 2005 Act was too inflexible may have been wide off the mark. The first set of regulations, the Judicial Appointments Regulations 2013 (made by the Lord Chancellor shortly after the enactment of the 2013 Act), reproduced a simplified version of the original 2005 scheme and have yet to be amended. It may be more accurate to say that the original scheme was simply too complex.
[19] Gee and others (n 2) 172.
[20] ibid 167-173.

i. Application

A call for applications is made through the JAC website. These calls typically have two forms: a recruitment for a specific vacancy, or regular rounds of recruitment to specific courts (there are annual recruitment rounds for the courts and many tribunals).

ii. References

As part of the application process, applicants are required to provide two references (termed 'independence assessments' within the process). Referees are required to provide specific examples of the applicant's work that demonstrate that they can meet the requirements of the post. The referee requirements vary depending on the nature of the job and applicant (a sitting judge will, for example, be required to provide two judicial referees; a non-judge may offer judicial or professional referees). Guidance is provided to applicants on how to select referees but the process may be daunting for referees who lack experience of the process, and who may thus lack the experience to couch their reference in a way that will satisfy the JAC. This is one of the many parts of the process that is likely to benefit those with pre-existing contacts within the judiciary and the senior bar.

iii. Shortlisting

Early in the process, application forms, self-assessment, and online tests are used to create criteria for a shortlist. This part of the process has been the source of a long-running critique of the JAC. At the start of the new organisation's activities, the introduction of standardised testing and metrics for appointment created an unexpected result: traditional candidates for the bench were performing poorly.[21] The problem, as judges and lawyers saw it, was that barristers, traditionally self-employed, had no experience of this kind of recruitment process and were not equipped to demonstrate their skills in this way. The process was thus tweaked in an attempt to alleviate these issues.

The recruitment process has been adjusted constantly since then, and remains an object of critique. A lingering concern is that the skills and competences assessed by the judiciary are not particular to judicial or even legal settings, but embrace broader civil service attributes (often referred to in British public administration as the 'Nolan Principles') including 'working with others', and 'exercising judgment'. One retired judge who had been through the process several times described it negatively: "My experience of the appointment/application procedure was far from transparent … There was an ever-changing raft of tests, screening, comprehension tests and sifting processes which did not appear to properly assess [my professional skills and experience]".[22]

More recent critiques focus not just on the selection process, but on the fact that the process lends itself to coaching. It is possible to 'prep for the exam' and there is evidence that those

[21] ibid 180.

[22] Carolyn Mellanby, 'JAC: lack of transparency and missed opportunities', (*Law Society Gazette,* 3 March 2023) <https://www.lawgazette.co.uk/practice-points/jac-lack-of-transparency-and-missed-opportunities/5115320.article> accessed 30 September 2024.

who pay consultants for help with the process outperform those who do not.[23] There is also evidence that female and BAME candidates are disadvantaged by their inexperience with form filling and frequent their unwillingness to be boastful about their skills and achievements.

iv. Selection Day

Selection processes are focussed on Selection Days, which involve in-person interviews, role-play and testing, overseen by a selection panel which will include JAC commissioners. The precise make-up of the selection day will depend on the nature of the recruitment, and role-plays and questions will typically try draw intuitive responses from candidates on scenarios they are likely to face (judicial leadership roles, for example, will include a focus on management and leadership functions).

v. Statutory Consultation

Statutory consultation essentially recreates (and is often still referred to as) the 'secret soundings' part of the judicial appointment process within the new JAC system. Although the JAC is not required to follow the views expressed by consultees, they are required to give reasons if they fail to do so.[24] It is thus part of the design of the process that departing from the views of consultees will be an exceptional, rather than a routine, occurrence. The role of serving judges in the process naturally tips the process in favour of candidates who are already known to judges, and gives senior judges a near veto on all appointments.

A report commissioned by the JAC in 2022 found significant issues with statutory consultation, in particular, that consultation produced unreliable and inconsistent information about candidates, that it was not used consistently between recruitment exercises, and that candidates were given no opportunity to refute claims made about them.[25] Following this report, the JAC undertook to introduce additional safeguards to the process, and to dispense with consultation for some large recruitment exercises where it was felt to impact upon the process unfairly.[26] The Law Society, however, argued for the complete abolition of consultation, on the basis that it inhibits diversity.[27]

vi. Recommendation

Depending on the nature of the role, the JAC will make a recommendation of a single name for each available position to the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals. The decision-maker then has the option to accept, reject or request that the JAC

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[23] Sherwood Consulting, 'Judicial Appointments' <https://sherwoodpsfconsulting.com/what-we-do/judicial-appointments/>; Tim Collins Consulting, 'Expert Judicial Appointment Advice' <https://asktim.org/making-judges/> accessed 30 September 2024.

[24] Constitutional Reform Act 2005, s 89(2).

[25] Work Psychology Group, 'Review of Statutory Consultation' (Independent Review of Statutory Consultation, 1 March 2022) <https://judicialappointments.gov.uk/wp-content/uploads/2022/03/WPG-Review-of-Statutory-Consultation-Final-Report_publication.pdf> accessed 30 September 2024.

[26] The requirement for consultation can be waived if the JAC chair and decision-maker (e.g. the Lord Chief Justice) agree. Judicial Appointments Commission, 'Response to the Review of the operation of Statutory Consultation conducted by Work Psychology Group' (March 2022) <https://judicialappointments.gov.uk/wp-content/uploads/2022/03/Review-of-Statutory-Consultation-JAC-Response-.pdf> accessed 30 September 2024.

[27] Monidipa Fouzder, 'Secret soundings for judiciary must go, says Boyce' (*Law Society Gazette*, 7th September 2021) <https://www.lawgazette.co.uk/news/secret-soundings-for-judiciary-must-go-says-boyce/5109706.article> accessed 30 October 2024.

reconsider. For the High Court and above the decision is made by the Lord Chancellor. For court posts below High Court level, the recommendation goes to the Lord Chief Justice for decision. For tribunal posts below this level the decision is made by the Senior President of Tribunals.

vii. Senior Judicial Posts

Different approaches apply to appointments made above High Court level, which fall outside of the exclusive purview of the JAC. Where a senior vacancy (e.g. for Court of Appeal, Head of Division, or Lord Chief Justice) arises, the JAC convenes an ad hoc selection panel. The precise composition of the panel varies depending on the role, but most panels will comprise five members, including two senior judges. The panel for the appointment of a Head of Division, for example, will comprise the Lord Chief Justice, the next most senior available judge of England and Wales, the Chairman of the JAC, a lay member chosen by the JAC chair, and a fifth member designated by the Lord Chief Justice (who may be a judge or a layperson).[28] The panels have discretion to choose their own processes, though they are required to consult certain key figures (e.g. the Lord Chancellor, First Minister of Wales and the Lord Chief Justice) with the precise list of consultees depending on the role and the composition of the panel.

Evidence suggests that judges have had a significant, sometimes overwhelming, influence on these senior panels. In some cases, interviewees suggested that job descriptions may have been tailored to privilege or exclude specific candidates for the job (though, by the same token, for some of the most senior roles the list of eligible candidates may be no more than a handful). Some lay members reported that their involvement was minimal or even futile. At one selection meeting, the Lord Chief Justice and Master of the Rolls reportedly told the lay commissioners who was to be appointed.[29] Despite the absence of the direct knowledge and expertise of the judicial members of the panel, lay members are nonetheless in a position to emphasise the importance of the non-legal aspects of the process (for example leadership and management skills) and to press the judicial members to support their views about the legal attributes of candidates.[30]

Though it falls outside my scope here,[31] appointments to the UK Supreme Court take a similar approach, with the *ad hoc* selection panel for that Court being chaired by the President (or Deputy President) of the Court, with representation from the three territorial judicial appointment bodies and another senior judge.[32] As with the JAC and the *ad hoc* panels, this offers significant influence to serving judges.

[28] Judicial Appointments Regulations 2013, reg 11.
[29] Gee and others (n 2) 184.
[30] ibid 185.
[31] The UK Supreme Court operates as a distinct appellate jurisdiction, separate from the three UK territorial legal jurisdictions.
[32] Prior to 2013, the President and Deputy President of the Supreme Court sat on all selection panels for that court. Following the 2013 reforms, there is a requirement only that a judge of the Supreme Court must sit, and the President and Deputy are barred from sitting on panels to select their successors. O'Brien (n 17) 184.

Key fault lines

Lay, legal and judicial influence

The balance of judicial-to-lay membership has not been a particular object of concern for judges in England and Wales. Lay input, and the lay chair, were deliberately included as a feature of the new JAC in order to create a more open process and to dilute the influence of judges on the process. In research conducted into the 2010-2015 judicial selection processes, JAC interviewees typically felt that there was little evidence of deference to judges in the process, and little practical difference between the behaviour of lay and legal members. Lay members of the Commission held a mixed view on their own role. A minority felt their input was purely cosmetic, and that they lacked the knowledge or authority to challenge the views of judges on the suitability of candidates. Others felt the opposite. This may be accounted for by variations in experience and personality.[33]

There is nonetheless a very strong impression that there has been judicial capture of the process as a whole. Given the opportunities for judges to influence the process, however, it is arguable that the new system gives judges more, rather than less, input into judicial appointments. Judges (whether as members or consultees) are often cast in positions of experts on legal careers, and as repeat players and lawyers themselves, they can express themselves forcefully and confidently within the process.[34]

Merit and Diversity

The tension between appointment on merit and increasing the diversity of judicial appointments has been evident from the beginning of the 2005 scheme. Appointment on merit is a totemic feature of judicial appointments in England in particular. In her study of judicial appointments in Ireland, Jennifer Carroll-MacNeill noted that female judges in Ireland felt comfortable acknowledging that their appointment was made at least in part with the overall diversity of the judiciary as an objective.[35] Judges from England and Wales that I interviewed as part of our project on judicial independence in the UK were insistent on the principle of appointment on merit, and female judges were explicit that their authority would be threatened if their appointment were thought of as anything other than a purely merit-based decision. The conception of merit was also historically very narrow. Merit was traditionally associated with a narrow category of senior commercial barristers who had come through Oxford or Cambridge and, even more narrowly and crudely, equated with earnings at the bar. Whilst this view has softened over time, it set up an obvious cultural dissonance between the twin objectives of merit and diversity. This plays out in the statute underpinning the JAC itself. The JAC is required to make appointments 'solely on merit'[36] but is also subject to a duty to 'encourage diversity in the range of persons available for selection'.[37] Since 2013, it has also been possible to prefer a candidate on diversity grounds where two eligible and appointable candidates are otherwise tied on merit assessments.[38]

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[33] Gee and others (n 2) 185.
[34] ibid 179-186.
[35] Jennifer Carroll-MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press Dublin 2016) 108.
[36] Constitutional Reform Act 2005, s 63(2).
[37] ibid 64(1). Section 64(2) expressly subordinates this objective to the merit requirement in section 63(1).
[38] This tie-breaker 'tipping point' provision derives from section 159 of the Equality Act 2010 and was applied to judicial appointments by the Crime and Courts Act 2013 (amending section 63(4) of the Constitutional Reform Act 2005); O'Brien (n 17) 185-6.

Progress on diversity has been slow (note the various aspects of the process, described above, that tend to favour well-connected or privileged candidates). Judges interviewed tended to be of the view that there would *always* be some merit-based point that could be used to distinguish two candidates, and so the diversity tie-breaker would amount to a dead letter. It is difficult to assess this claim fully, although the most recent statistics record that the tie-breaker was used seven times at shortlisting and six in selection during the 2023-24 reporting year.[39] Nonetheless, statistics on diversity have improved after a slow start. While in 2010 women made up only 20 per cent of courts-based judges, and judges who identified as belonging to an ethnic minority only 4.8 per cent,[40] by 2020 these figures had risen to 32 per cent and 8 per cent respectively (though the proportion of Black judges remained unchanged, at 1 per cent).[41] It is worth noting, however, that the Irish judicial appointment system, with greater political input, has achieved a faster and more significant improvement in gender diversity on the bench than its counterpart in England and Wales.

Judicial careers and discontent

Part of the rationale behind the creation of the new Irish appointments system is to address the lacuna in the prior system, whereby applications by non-judges were considered by the Judicial Appointments Advisory Board and promotions of serving judges were considered solely by the government. Whilst it was necessary to remedy this disconnect within the judicial appointments process, this did in turn raise the possibility of creating discontent amongst serving judges if they cannot see, at least, the possibility of a career path within the judiciary.

A perhaps unanticipated consequence of the development of the JAC in England and Wales is the requirement that serving judges are obliged to compete against external candidates for what they may see as natural career progression. There is serious discontent amongst serving judges in England and Wales (particularly below High Court level, where workload is higher and prestige lower) at the difficulty of professional progression. One Circuit Judge who retired and returned to the bar did so in part because he felt he had reached a career dead-end. He felt strongly that he was disadvantaged in competition against practising barristers for more senior judicial roles, because his managing judges were (despite good intentions) unable to offer him sufficient experience hearing more difficult or complex matters, and the traditional route to this experience (a Deputy High Court role) now required a formal application through the JAC:

> If I'd stayed in silk, I'd probably fulfil the criteria, but now I just wouldn't fulfil the criteria, because the work history I've got over the last three years will never tick the boxes for the JAC.[42]

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[39] Ministry of Justice, 'Diversity of the Judiciary: Legal Professions, new appointments and current post-holders – 2024 Statistics' (11 July 2024). <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2024-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2024-statistics#things-you-need-to-know> accessed 30 September 2024).

[40] Advisory Panel on Judicial Diversity 2010, 'Improving Judicial Diversity' (May 2011) <https://assets.publishing.service.gov.uk/media/5a7ba17f40f0b62826a04cfe/judicial-diversity-report-2010.pdf> accessed 30 September 2024.

[41] Diversity statistics for tribunals tend to be slightly better than for the courts. Ministry of Justice, 'Diversity of the Judiciary 2020 statistics: report' (17 September 2020) <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2020-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders#:~:text=8%25%20of%20court%20judges%20and,and%20above)%20compared%20to%20others> accessed 30 September 2024.

[42] Former judge interviewed by the author as part of a project on judicial retirement.

Another barrister, who had a long and successful practice as a Queens Counsel specialising in murder cases prior to joining the Circuit bench, retired early, in large part because he was refused permission to hear murders.[43] These individual experiences mirror survey data indicating high levels of dissatisfaction amongst judges. In the most recent survey of judicial attitudes, between 30 per cent and 54 per cent of court judges below High Court level reported that they were considering resignation.[44] This dissatisfaction is by no means directly or exclusively caused by the appointments process (it is connected to workload and remuneration to a significant extent). Nonetheless, it highlights the extent to which personnel management, career and appointments are intertwined.

Conclusion

The experience of the JAC for England and Wales highlights a trite point that nonetheless bears emphasis as its Irish counterpart begins its work. Unintended consequences abound within judicial appointments. As a constitutional reform, the JAC has mostly been successful on its own terms. Judicial appointments now run on an open and rational basis. As a measure for enhancing diversity, however, it has been less so: there has been a slow and steady, rather than a dramatic, change in the composition of the judiciary. This has played out against a wider backdrop of disenchantment amongst serving judges about their working conditions and careers.

Many of the problems identified here stem from the sheer size of England and Wales as a jurisdiction, which has necessitated a big budget and large-scale recruitment processes. In this respect, the new Irish JAC has an advantage. The flexibility that is possible in a smaller jurisdiction may allow the Irish JAC to avoid some of the tensions that have characterised its counterpart in England and Wales. Nonetheless, the lesson from across the Irish Sea is to tread carefully, because everything is connected.

[43] Another former judge interviewed as part of the judicial retirement project.
[44] The range of statistics reflects different survey returns for each category of judge. Cheryl Thomas, '2022 UK Judicial Attitude Survey' (UCL Judicial Institute, 28 March 2023) 106 <https://www.judiciary.uk/wp-content/uploads/2023/04/England-Wales-UK-Tribunals-JAS-2022-Report-for-publication.pdf> accessed 30th September 2024.