

Chartered Institute of Patent Attorneys Congress



Speech by Baroness Prashar Chairman of the Judicial Appointments Commission 30 October 2008

Thank you. I am delighted to be here this afternoon at your thirteenth congress. It is good timing for me to be speaking to you. Today, the Judicial Appointments Commission has launched two selection exercises – one for the Deputy Chairman of the Copyright Tribunal and the other, Appointed Person of the Trademarks Tribunal. So these are obviously relevant to your interests.

The Tribunals, Courts and Enforcement Act 2007 means that patent attorneys are included in those eligible for judicial appointment. So, for the first time, some among you are now able to apply for these two posts. I will explain more about these new opportunities later.

I would like to talk to you today about what the JAC does, how we endeavour to select the best judges in the fairest possible way, and of our efforts to encourage diversity in our judiciary.

I understand that your organisation was founded in 1882. The JAC is somewhat younger – we were established in April 2006 as part of the Government's programme of constitutional reform. The Constitutional Reform Act 2005 was evidence of what I call a quiet revolution in how our judges are selected and appointed.

Until then, both the selection and appointment of judges was the responsibility of one Government minister, that is, the Lord Chancellor. That system has now been abolished.

While the Lord Chancellor still formally appoints, the JAC is responsible for the selection of judges and tribunal members in England and Wales. We are independent of Government, independent and open in the way we make our decisions, yet accountable to Parliament through the Lord Chancellor. Those who want to become judges can now apply, provided they are suitably qualified. In fact, you can only become a judge if you apply. It is no longer the case of having your 'shoulder tapped' – an expression and a practice that was buried with the advent of the JAC.

Now, under the Act, the Commission has three statutory duties:

- to select solely on merit;
- to select only people of good character; and

- to have regard to the need to encourage diversity in the range of persons available for selection for appointments.

The Commission – that is myself and my fourteen fellow Commissioners drawn from a range of backgrounds – have been working hard since 2006. Our initial task was to define merit, that is, what makes a good judge. We have devised our own qualities and abilities – criteria that candidates must meet.

These qualities and abilities are:

- Intellectual capacity;
- Personal qualities;
- An ability to understand and deal fairly;
- Authority and communication skills; and
- Efficiency

These are what we call the core qualities of judgecraft. For some posts, more weighting may be given to certain qualities and abilities to ensure that the most appropriate candidate is selected for that particular role.

We have also established and embedded our own robust selection processes and worked hard to ensure that they are free of bias. Candidates must go through a number of key stages. They must complete an application form and nominate referees. They must provide evidence in a self-assessment against our qualities and abilities. They may then have to attend a qualifying test, as a means of shortlisting, and then an interview. Some posts also require candidates to take part in a roleplay.

Fairness and excellence are at the centre of our processes. Selection methods and materials are examined by independent experts to check that they do not discriminate against any particular group. If any bias is evident, we act to correct it.

We carry out diversity checks throughout each exercise. We do this to monitor the progress of different groups of candidates. If any anomalies are spotted, for example if a disproportionate number of women or ethnic minority candidates drop out, we investigate and take action.

One of my fellow Commissioners is assigned to each selection exercise to provide a quality assurance role and a degree of strategic oversight.

We have also recruited thirty-two independent panel chairs to lead our selection panels. Appointed through open competition, they had to demonstrate a commitment to ensuring a fair and equitable process. Our panel chairs have brought a range of highly professional experience to the Commission and we have provided them with comprehensive training, in which consideration of diversity is integral.

We also established the Judicial Appointments Commission Advisory Group, which brings together members of the judiciary and representatives of the Law Society, the Bar Council and the Institute of Legal Executives to assist with the development of effective, bias-free qualifying tests. We use these tests to arrive at a shortlist and we believe that this method of sifting is fair and objective.

I have gone into some detail about our processes because I think they are important. Because until the establishment of the JAC, there was an air of mystery about judicial appointments. Now, every stage of the process is clear and straightforward and fair,

and everyone who applies for a judicial post knows that he or she is going through the same procedure as everyone else.

Now let me tell you a bit about what we have been doing to encourage diversity in the range of people available for selection for judicial appointment – because that is a bigger challenge.

Despite our judiciary's worldwide reputation for excellence, its composition has been criticised for being mostly white and male and coming from a narrow social and educational background. Until recently, this profile was to be expected. Intake to the Bar, the traditional source of most judges, was dominated by people of that description. Even now in 2008, statistics show that just under 20% of judges in England and Wales are women and 4% are from ethnic minorities.

The significance of our task was recently underlined for me when I read the winning entries in the Times/Herbert Smith Student Advocacy Competition to put a case for or against diversity as an issue. The results highlighted the concern amongst young people about the make-up of our judiciary and the legal profession. The winner stated, and I quote, "When wealthy white men dole out justice to the rest, already daunting legal processes can seem totally impenetrable to the public. Those subject to the system are forced to judge whether justice can truly be equal for all when it is decided by the few." I believe such perceptions do not engender confidence.

A modern judiciary, in my view, must represent the communities it serves. And the same goes for the police force, for teachers, for the medical profession. The wider the range of views, and the wider the field of experience from which our judges are drawn, the more fully considered will be their decisions in court.

A judiciary reflective of society is essential to maintaining public trust and confidence in the role it serves. Our institutions provide a bedrock of stability. But it is important that they do not become relics. They must change and evolve.

One of our most important tasks is to raise awareness of the judicial posts that are available and to encourage people to apply. This is particularly important among under-represented groups.

As well as events that we ourselves host, such as candidate roadshows across England and Wales, the Commissioners are keen and willing to speak to any organisation representing people who are qualified for judicial posts but may not know that those jobs are open to them.

Indeed, many members of the legal profession have never even thought about applying for judicial appointment. It is not on their radar screen.

You will know the expression 'widening the pool'. This is a key task for the Commission. In 2008, the pool available to us is still small. Many of our candidates, as you would expect, come from the legal profession, a profession which itself lacks diversity.

Of the practising Bar, only eleven per cent are from ethnic minorities. Around ninety-five per cent of QCs are white. And while nearly sixty per cent of admissions to the Law Society are women, they make up only twenty-three per cent of all partners in law firms. That is the situation we are up against.

No matter how fair our processes, if we do not have a wide field of suitably qualified people who are diverse, then increasing judicial diversity is going to be a difficult task. I know that at entry level the picture is more positive – half of those recruited to

the Bar are women and around 17 per cent are from ethnic minorities. The profession, I know, is working hard on equality and diversity. And we are seeing some progress. But there is much to do to bring about change.

Because our processes are so transparent, the JAC publishes statistics on diversity for all selection exercises. These reflect how candidates fared throughout an exercise, broken down by gender, ethnicity, disability and professional background. We recently published statistics from seven selection exercises, including for the High Court. I am delighted that they show that this year we will have selected five women for appointment to the High Court, bringing the total to seventeen – the highest number ever. This is quite an achievement when you consider that two and a half years ago (before the JAC was set up) there were just eleven women on the Bench.

Earlier this year, we launched the JAC Diversity Forum to bring together representatives from a wide range of interested parties to work collectively on improving diversity within the judiciary and legal profession. I have made clear that this Forum should not be a talking shop. It must be a meaningful forum for dialogue and communication that increases awareness and leads to action. Potential judicial talent must not be wasted.

As well as the limited pool available to us, there are a number of ‘barriers to entry’ to the judiciary to consider. These restrictions are often out of our control. Only if we have real evidence – rather than anecdotes - about what is putting off suitably qualified people from applying can we make the necessary improvements to our recruitment process.

It is for that reason that last week we commissioned its own independent research into what encourages - and deters - people from applying for judicial appointment. Six thousand members of the legal profession will be surveyed and the results will help us to direct our efforts to encourage diversity effectively. In completing that survey, we expect potential candidates to reveal certain obstacles – either real or perceived – that they regard as barriers to becoming judges.

For example, the length of service and fee-paid experience that are needed for a post can sometimes be restrictive and prevent good candidates from applying. These are areas for the Lord Chancellor to decide. However, there are occasions when the JAC challenges some of the overly restrictive non-statutory criteria.

For example, we have asked the Lord Chancellor to consider fee-paid experience for most salaried judicial posts to be desirable rather than essential. We understand that certain posts require definitive experience. What we ask is that such requirements are absolutely necessary, and that they do not adversely impact on the quality of candidates available for selection.

Salaried part-time working is another issue of concern for us. But, again, the number of posts that allow for part-time working is not our decision. It is for the Lord Chancellor, the Courts and Tribunals Services and the judiciary. We have been working hard to highlight the need for part-time working. We know that this can be a real disincentive to people applying. We were pleased when we persuaded the Ministry of Justice and judiciary that for the current Circuit Bench exercise, two posts per circuit would be made available for part-time working.

Overcoming barriers to entry is a joint effort. They are partly for the existing judiciary, the legal profession and the Lord Chancellor to tackle together.

The culture of part-time working, for example, needs to be established in the legal profession itself if it is to transcend to the ranks of the judiciary. A recent study showed that top City law firms are still suspicious of home-working, and of employees who want a healthy 'work-life balance'. Unfortunately the current economic climate is unlikely to help the situation. Sitting experience, another barrier to entry, should also be encouraged by the profession, especially while it remains the Lord Chancellor's policy for this to be a pre-requisite for many salaried posts.

Now I want to come to what I call the selling point! As I said earlier, the Tribunals, Courts and Enforcement Act 2007 will open some judicial posts beyond solicitors and barristers. It will not only enable some of you to apply, but also members of the Institute of Legal Executives and the Institute of Trade Mark Attorneys. We welcome the Act and hope it will assist in our task of widening the pool.

Providing you meet the required criteria, some of you will now be able to apply to become a Chairman or Deputy Chairman of the Copyright Tribunal, or a person appointed to hear and determine appeals under the Trade Marks Act 1994. No longer will you have to have had rights of audience for a specified period. You will need to have held a relevant qualification for five years, and have been gaining legal experience whilst holding that qualification. This experience could have been obtained outside of your professional career if relevant – not necessarily from your most recent case or your most recent role.

You can find more details of the posts that I have mentioned on the JAC and your own websites, and there is also an advertisement in today's Times.

Our creation two and a half years ago marked a huge constitutional change. Despite expectations, I know it will take time to make a real impact. We are talking about a huge culture change. But we have made progress. If you look at the figures for 2007/08, the JAC's first full year using its own processes, many women and minority candidates successfully applied for our vacancies. I won't bore you with the figures, but you can find them in our annual report.

Our judiciary is the envy of the world. And now, the way we select and appoint our judges is the envy of the world. We are determined to ensure that the judiciary of tomorrow reflects the diversity of our society. A judiciary that represents the communities it serves and understands the needs of those communities.

In our work we endeavour to be rigorous in maintaining merit and ensuring that merit is drawn from as wide a field as possible. That is why we want to encourage the best candidates to apply and to look for merit wherever it may be found. The changes brought about by the new legislation can only help us in our aim to promote diversity in judicial appointments. That includes you. And I very much hope that some of you will apply.

Thank you. I would be pleased to answer any questions you may have.