CHAPTER 6

THE JUDICIARY

INTRODUCTION

> "A major cause of difficulty is the limited availability of High Court judge time, intensified by the inflexibility and inefficiency of the Assize system. As a result, continuous loading of the judges is given the first priority and time and convenience of other people concerned with the business of the courts is at a discount. We are faced with the highly unsatisfactory situation that, while judges are fully employed and even over-burdened, accused persons, litigants, witnesses, jurors, counsel, solicitors, prison officers, police officers and probation officers are kicking their heels in the corridors of the courts waiting for their cases to come on, and many return to do the same thing on more than one occasion."[1]

1 But for the reference to the Assize system, that lament in the Beeching Report over 30 years ago is typical of the many complaints about the operation of the criminal justice system today. One of the greatest ills of the system is its lack of flexibility in the matching of judges, courts and cases. This manifests itself in the over rigid divide between magistrates' courts and the Crown Court, in the types of cases that High Court Judges, Circuit Judges and Recorders can try in the Crown Court and as to where and when they can try them. The result in all three jurisdictions, crime, civil and family, can be injustice, delay, waste of public and private time and money, and a great deal of frustration all round. There are also difficulties in projecting workloads and how many judges of what level will be needed to deal with them. Under-estimation of both or either, failure because of Treasury constraints to budget sufficiently for either, or inability, because of undue rigidity in the appointments process, to time new appointments to meet workloads all add to the problem.

[1] *Report of the Royal Commission on Assizes and Quarter Sessions*, Cmnd 4153 (HMSO, 1969) para 67

2 At one time, a judge, like the jury, was expected to come to a case without any prior knowledge of the evidence to be adduced, or the legal points that were likely to arise. Nearly all the work that judges did, they did on the bench in court. Now, an increasing amount of their time is spent outside the courtroom in case management and preparing for each day's work in court. In addition, a considerable number of judges have increasingly important and onerous management responsibilities. The Resident Judge at each Crown Court centre takes over-all responsibility for the listing of cases, and for the supervision and co-ordination of disposal of business by both full- and part-time judges. Liaison Judges provide the current link between the judiciary in the Crown Court and the magistracy. At the apex of the system, the Presiding Judges have ultimate accountability for the judicial administration of their circuits, for providing judicial leadership, and for providing a link between the judiciary and the two branches of the legal profession.

3 As I have said in Chapter 4, I do not suggest any change in the division between the summary jurisdiction of magistrates and the jurisdiction of judges sitting in what is now the Crown Court. As to the division and overlap of criminal jurisdiction in the Crown Court, between High Court Judges on the one hand and Circuit Judges and Recorders on the other, I start by acknowledging the special position of High Court Judges and the need to retain it. The need for two levels of criminal and civil jurisdiction above the summary jurisdiction of magistrates has long been recognised. It is a common feature of civilised common law jurisdictions all over the world. It has the value of reserving to a small number of senior judges issues of law and fact of particular difficulty and matters of general public importance, including the protection of the liberty and the rights of the subject against the State.

4 However, in the exercise of criminal jurisdiction, there is a strong case for leaving more of the work now undertaken by High Court Judges to the Circuit Bench. Such a consideration necessarily requires an examination of the centuries' old tradition of High Court Judges 'going on circuit' - visiting on a regular basis the main court centres all over the country. I say straightaway that I am firmly of the view that the circuit system should continue, a view supported by the overwhelming majority of those who have made submissions about it in the Review. It is still a powerful symbol and practical means of bringing justice at the highest level to people all over the country - one form of 'locality' of justice. It is also a valuable means, through the mutual exchange of information and ideas between visiting High Court Judges and local judges of spreading best practice and encouraging national consistency in the administration of justice. As the Council of Circuit Judges have observed in their submission in the Review, it has advantages to both levels of judge. It keeps High Court Judges in touch with what is going on at 'the sharp end' of the criminal justice system. And, because High Court Judges trying crime sit, when in London, in the Court of Appeal (Criminal

Division), it keeps the Circuit Bench up to date with current developments and national good practice.

THE JUDICIAL HIERARCHY

A career judiciary?

5 We used to take pride, rightly or wrongly, in not having a career judiciary. Judicial appointment was and still is to a large extent regarded as an honourable culmination to a successful career as a practising barrister or solicitor. The transition from practitioner to judge was made at or about 50, often without any apprenticeship, other than that of a lifetime's experience as an advocate, or of any special training. Unlike most European civil law jurisdictions, ours was not a 'career judiciary', save for the occasional promotion from the county court Bench to the High Court and, of course from the High Court to the Court of Appeal and beyond.

6 Part-time appointments as Recorders of Quarter Sessions and, to a lesser extent as Chairmen or Deputy Chairmen of County Quarter Sessions, were a means for criminal practitioners who practised on circuit to get the feel of the job and to impress or otherwise as potential full-time judges. At a higher level, distinguished silks might be tried out once or twice as Commissioners of Assize before consideration for appointment to the High Court Bench. But none of those part-time appointments was a pre-condition of full-time appointment and there were relatively few of them.

7 The position changed with introduction of the Beeching reforms in the early 1970s. The comparatively few part-time Quarter Session appointments were transformed into many more Crown Court Recorderships. The new Recorders were committed to sit for only four weeks a year and the fledgling Judicial Studies Board began to provide some rudimentary training for them. As the flow of criminal justice legislation and the complexities and volume of the work increased, so did the training provided by the Board. And, by 1996, when open competition was introduced for all judicial offices below the High Court Bench, the Lord Chancellor's Department decided that, in the main, the only route to full-time appointment was via a number of years' successful sitting as a part-time judge, usually as a Recorder and sitting at least in part in crime.[2] Thus, high flying commercial practitioners - potential Lords of Appeal in Ordinary via the Queen's Bench and Court of Appeal - like

[2] not a statutory requirement, see Courts and Legal Services Act 1990, s 70

criminal and other civil practitioners all had to undergo this probationary period as part-time criminal judges in the Crown Court.

8 Over the same period, more and more work traditionally reserved to High Court Judges was 'released' to Circuit Judges and to a small number of senior Recorders through a system of general and special authorisations. Over the last five or six years, experienced Circuit Judges have also been invited to sit on a regular basis in the Court of Appeal (Criminal Division). These developments have led to greater movement than previously between the Circuit Bench and the High Court Bench. In the last ten years 16 stipendiary magistrates, now known as District Judges, have moved to the Circuit Bench, and 14 Circuit Judges have been promoted to the High Court Bench, one of whom was a former solicitor. So, gradually, some semblance of a career judiciary is emerging. Its further growth is still greatly constrained by the traditional route to it of a successful career as an advocate, but even that is now no longer a necessary pre-requisite of full-time appointment.

High Court Judges

9 High Court Judges, on appointment, must have had either a ten year right of audience in relation to all proceedings in the High Court, or to have been a Circuit Judge for at least two years.[3] There are now 106 High Court Judges, whose annual salary is £132,603. 71 are Queen's Bench Judges, of whom 12 sit in the Commercial List and 23 in the Administrative Court.[4] Most Queen's Bench Judges normally spend half of each law term on circuit and half in London.[5] On circuit they try serious crime and civil cases, but mostly crime. In London their time is split, usually between hearing appeals in the Court of Appeal (Criminal Division) and sitting in civil or administrative matters. There are 17 High Court Judges assigned to the Chancery Division. They sit mostly in London, but two of them also sit frequently on circuit.[6] The 17 High Court Judges assigned to the Family Division also sit mostly in London, but frequently go out on circuit for short periods as the work demands.

10 As one contributor to the Review has observed, proper use of Queen's Bench Judges is fundamental to the efficient working of the senior judiciary and of the various jurisdictions in which they sit.[7] They constitute about two-thirds of all High Court Judges and they play a crucial role in civil and public law proceedings as well as criminal matters. The Bowman Committee, which has

[3] Courts and Legal Services Act 1990, s 71
[4] until recently known as the Crown Office List
[5] those who sit in the Commercial List normally only go out on circuit for one half term a year
[6] Chancery Supervising Judges
[7] The Right Hon Lord Justice Keene

recently undertaken a review of administrative law work, envisages a substantial increase in it and, thus, an increase in the work of the Queen's Bench Judges sitting in the Administrative Court.[8] This is due largely to the ever increasing calls on its jurisdiction in judicial review, now given further impetus by the advent to our domestic law of Human Rights and recent changes to immigration and asylum law and practice. These developments are likely to require a greater focus of High Court Judges' time on matters of public and constitutional importance and less on some of the traditional work that they now share with Circuit Judges when sitting in crime. The High Court Bench is thus a job that requires and should attract appointees of the highest quality, a comparatively small number of judges at the apex of our hierarchy of trial judges, also exercising the vital jurisdiction of judicial review and participating in a major way in criminal appeals.

11 The question, therefore, is not whether significantly to increase the number of High Court Judges or to do away with the distinction between them and Circuit Judges. It is how better to allocate work between them in the interests of appropriate use of judicial resources, of providing an efficient and considerate service to all involved or interested in the criminal process and of attracting suitable candidates for all levels of appointment.

Circuit Judges

12 On appointment, Circuit Judges must have had a ten year right of audience in the Crown or county courts or to have been a Recorder, or to have held a full-time post, such as a member of an administrative tribunal or a District Judge.[9] There are now about 570 Circuit Judges, whose annual salary is £99,420. They are normally appointed to hear both criminal and civil cases, though some exercise specialist civil or criminal jurisdictions. They are supported by part-time judges, Recorders, each of whom normally sits for between three and six weeks a year, with a broadly similar jurisdiction to that of Circuit Judges but generally dealing with less complex and difficult matters. Both Circuit Judges and Recorders are assigned on appointment to one of the six circuits. They may exercise jurisdiction at any court centre in the country, but normally sit at one centre or in one group of courts on their assigned circuit. At each court centre one of the Circuit Judges is appointed by the Lord Chancellor to act as the Resident Judge, that is to undertake responsibility, under the oversight of the Presiding Judges, for management of the judicial work at the centre and as a point of liaison with the court manager. The appointments, which are for four years and may be renewed, carry no extra pay. In the largest centres, these responsibilities are undertaken by judges designated as Senior Circuit Judges, who are appointed under a different

[8] Sir Jeffrey Bowman, *Review of the Crown Office List* (LCD, 12 April 2000)
[9] Courts and Legal Services Act 1990, s 71

system and are paid more than a Circuit Judge, to reflect the considerable administrative and judicial burden that the posts involve.

13 As I have mentioned, the criminal jurisdiction of Circuit Judges has increased markedly since they emerged from their pre-Beeching Quarter Sessions origins, that they now try the bulk of all cases in the Crown Court (82% in 2000) ranging from murder to shop-lifting.[10] As I have also mentioned, some are authorised by the Lord Chancellor to sit in the Court of Appeal (Criminal Division) at the request of the Lord Chief Justice. Many also sit from time to time as Deputy High Court Judges in civil and/or family business.[11]

Recorders

14 England and Wales is almost unique in its extensive reliance on part-time judges, Recorders, in the exercise of criminal and civil jurisdiction in its higher courts. Practitioners are eligible for appointment as a Recorder if they have had a right of audience in the Crown or county courts for ten years or more. There are now nearly 1,400 of them and, in 2000 they dealt with 14% of trials in the Crown Court. For many years until recently, appointment was initially made as an Assistant Recorder for up to three years. At the end of that period, or earlier if the appointee was a Queen's Counsel, and if all went well, he could expect appointment as a full Recorder, again for three years and renewable thereafter every three years. In November 1999, the High Court of Justiciary in Scotland held that Scottish temporary sheriffs were insufficiently independent of the Executive for the purpose of Article 6 of the European Convention of Human Rights because of the insufficiency of their security of tenure.[12] As a result, the Lord Chancellor appointed all existing Assistant Recorders as Recorders and now makes all new appointments to a full Recordership. Appointment is through open competition, the initial period of appointment is normally for not less than five years and is normally renewable automatically. This is part of a general change in the terms of service of all part-time judicial office-holders in England and Wales.

15 On appointment, Recorders are entitled to a minimum of 15 days' sitting a year, and may sit up to a maximum of 30 days each year. If possible, at least ten days' sitting should be in one continuous period. Compliance with these requirements is important for two main reasons. First, if the probationary period as a Recorder is to give them the experience they need and to enable them to demonstrate their ability to cope with the work, they must sit for the minimum periods required and on a reasonably regular basis throughout the

[10] *Judicial Statistics Annual Report 2000* (LCD, Cm 5223)
[11] known as 'Section 9 Judges', after the provision made for them by section 9 of the Supreme Court Act 1981
[12] *Starrs & Chalmers v Procurator Fiscal, Linlithgow* [2000] HRLR 191

whole period of their appointment. Second, unless they commit themselves to continuous sittings of at least two weeks at a time, it is difficult to list work before them efficiently. Even two weeks makes for difficulties in listing, because in the second week even a short case of, say two or three days, cannot be started if there is a risk of not completing it by the end of the week.

16 Ideally, Recorders should commit themselves to a single period of three or more weeks' sitting and keep to it. But the demands of practice often drive them to offering two weeks or less and sometimes having to cancel at short notice. Also, Court Service budgetary constraints at local level have from time to time resulted in courts not being able to provide Recorders with sufficient sittings to enable them to meet their commitments. The result then is often a poor service both ways. If, as the Lord Chancellor intends, "Recordership is a potential step on the ladder to appointment to the Circuit Bench" and is intended to continue as an integral part of the criminal justice system, some changes need to be made. Now that the minimum sitting commitment is for only three weeks a year, I consider that it should be a condition of appointment and renewal that, save in exceptional circumstances and with the permission of a Presiding Judge, Recorders should meet their commitment in a single continuous sitting. Booking sittings well in advance and planning court commitments, including the fixing of trial dates with the booking in mind, should be the aim, even if not always achievable due to the uncertainties of listing. Equally, the Court Service should organise sittings for Recorders to enable them to meet their sitting commitments in this way. If, as I recommend in Chapter 7, the present dual system of courts is replaced by a unified Criminal Court with three Divisions, it may be that work could be found for Recorders in the middle District Division jurisdiction, as well as at the Crown Division level.

I recommend that:

- **it should be a condition of a Recorder's appointment to sit for a minimum of three weeks a year in one continuous block, unless for exceptional reasons a Presiding Judge permits him to sit in more than one block; and**
- **the Judicial Group in the Lord Chancellor's Department should, in consultation with the Presiding Judges, liaise closely with the Court Service to ensure that a minimum of three weeks' annual sitting is provided for each Recorder.**

District Judges

17 For convenience, I repeat briefly here some of the information that I gave about District Judges in Chapter 4 in the context of their exercise of magisterial jurisdiction. There are about 100 District Judges (Magistrates' Courts) who are paid about £80,000 per year from the Consolidated Fund; they are supported by about 150 Deputies, who sit part-time. District Judges are appointed by The Queen on the recommendation of the Lord Chancellor. They are full-time members of the judiciary and deal with a broad range of business that comes before the magistrates' courts, but in particular may be expected to hear the lengthier and more complex criminal matters coming before those courts. The qualification for appointment is to be a barrister or solicitor of at least seven years' standing. There are rather more solicitors than barristers, and about one quarter of District Judges were formerly justices' clerks. Although they have national jurisdiction, they are appointed to a particular MCC area.

Deputy District Judges

18 Finally, I should mention the 150 or so Deputy District Judges. Deputy District Judges are assigned to panels in MCC areas where there is a full-time District Judge. Although they are part-time members of the judiciary, they undertake the full range of business which normally falls to their full-time colleagues. In addition, a full-time District Judge will act as pupil master for each part-timer, periodically observing them in court and providing reports on their progress.

MATCHING JUDGES TO CASES[13]

Levels of jurisdiction in the Crown Court

19 There are effectively four levels of Crown Court judge and four classifications of offence according to their seriousness.[14] First, there are the High Court

[13] since District Judges have, at present, the same jurisdiction as panels of magistrates, I have dealt with this topic in their case in Chapter 4 rather than here

[14] *Practice Direction (Crown Court: Allocation of Business)* (No. 4), 12 February 2001

Judges who can deal with any case within the jurisdiction of the Crown Court, but who, in theory, try the most serious and difficult cases, for example, treason and murder (class 1) and manslaughter and rape (class 2). Second, there are 'ticketed' Circuit Judges. These are judges of experience who are variously authorised to try certain Class 1 and 2 cases, mainly murder and rape,[15] and also, by reason of its special difficulty and complexity, serious fraud (mainly class 3). Many Circuit Judges now have an authorisation of one or more sorts and the bulk of murders and rapes and other serious sexual offences are now tried by authorised 'murder' and 'rape' judges. Third, there are the Circuit Judges who, whether 'ticketed' or not, try the main range of work in classes 3 and 4, some of which, for example, drug trafficking, armed robberies and frauds of various sorts are of great seriousness and difficulty. Fourth, there are Recorders who, depending on their experience and ability, may try work of various levels of seriousness, including rape (class 2) and offences in classes 3[16] and 4, but usually the less serious and, because they only sit for a week or so at a time, the shorter cases.

'Ticketing'

20 There are a number of 'vertical' constraints on, and mechanisms for, matching judges to cases. As I have said, experienced Circuit Judges can be authorised, or 'ticketed', to deal with a range of cases normally reserved for High Court Judges. Thus, currently 26 out of about 570 Circuit Judges have been authorised by the Lord Chancellor to sit in the Court of Appeal (Criminal Division), if requested by the Lord Chief Justice to do so.[17] Each sits usually for one three week period a year in a constitution with a Lord Justice and a High Court Judge. About 50 Circuit Judges have been approved by the Lord Chief Justice to try murder cases specifically released to them by a Presiding Judge. There are about 25 Circuit Judges, not approved to try murder, but approved to try attempted murder, to whom the Presiding Judges may release specific cases. And, there are about 340 Circuit Judges who have been approved by the Senior Presiding Judge to try rape or other serious sexual offences if released to them by a Presiding Judge. On a more informal basis Resident Judges may be consulted by their listing officer about assigning certain types of case or cases to suitably experienced Circuit Judges or Recorders sitting at their court centres.

[15] it is now a pre-condition of a rape authorisation that the judge should attend two days' special training by the Judicial Studies Board. These courses are run twice a year, generally in July and November

[16] as a result of the recent abolition of the office of Assistant Recorder, Recorders may now only try cases in class 3 if they have attended a Judicial Studies Board Continuation Seminar, which is normally two or three years after their appointment, and if they have been authorised to do so by a Presiding Judge; see *Practice Direction (Crown Court: Allocation Of Business)* (No. 4), 12th February 2001

[17] Supreme Court Act 1981, s 9(1)

21 As this summary demonstrates, these processes variously involve the Lord Chancellor, the Lord Chief Justice, the Senior Presiding Judge, the Presiding Judges, the Resident Judge of each court centre and, of course, his listing officer who has to match his lists according to the availability of suitably authorised judges.

22 Below the level of authorisations to sit in the Court of Appeal the system has a number of serious defects. First, it is unduly bureaucratic and rigid. It is bureaucratic in the work required in compilation and maintenance of up to date lists nationally and for each court, and in the burden that it imposes on Resident Judges and Presiding Judges in its operation on a case by case basis. Its rigidity impedes efficient listing. In the constantly moving scene of last minute changes of plea and adjournments for one reason or other, listing officers are required, among all the other pressures on their time and decisions, to keep an eye on which judge is formally authorised to try what.

23 Second, the system is, in any event, a somewhat rough and ready means of marking aptitude for or experience in a particular field of work or in the handling of particular cases. At present, authorisations are given primarily, not as a badge or recognition or of advancement, but to relieve High Court Judges from having to try certain cases of a particular class or category where there are too many for them to try. Thus, there may be many Circuit Judges at court centres all over the county who are not authorised to try rape or other serious sexual offences or serious fraud, not because they are not up to it, but because their centres already have a sufficient number of authorisations and there is other work for them to do. Others may not want to try such work regularly, whatever their ability to do so, and thus do not seek it. And, over the years, the aptitude and application of judges to try work for which they have been particularly authorised may dull. Or, as was discovered a few years ago when the list of 'serious fraud' judges was reviewed, some, for one reason or another, may not have tried for years work for which they are authorised. For those reasons, I suggest that those who, like the Bar Council, suggest developing the system into a formal hierarchy and promotional ladder, perhaps reflected in differing salary scales, are mistaken.

24 Third, for the reasons given in the last paragraph, many individual Circuit Judges regard the system as invidious. Authorisations are awarded on the recommendation of the Presiding Judges, and I know that some Circuit Judges have concerns about how candidates are identified. This concern is heightened by the fact that, although they are encouraged to let their Presiding Judges know if they are interested in trying certain kinds of work, there is no formal system by which they can 'apply' for a ticket. Unless kept within reasonable limits, this system would, in my view, endanger the morale of the Circuit Bench as a whole. Certainly, the formalisation of a hierarchy would

increase the Circuit Judges' general dislike of it and engender more resentment among those whom it did not favour. Any sharpening and/or multiplication of distinctions would, in addition, aggravate the present bureaucracy of and inflexibility in the present system. And, to tie salary scales to a hierarchy of authorisations would be administratively complex and, when ability or application fades, difficult to adjust.

25 What is needed is less complexity and a more flexible system, coupled with a requirement of such judicial training as may be necessary as a pre-condition for undertaking particular categories of work. There should also be some form of regular and systematic appraisal, in which the Resident Judge, in periodic consultation with the Presiding Judges, could assume more responsibility for general and particular allocation of judges to cases at his court centre.

I recommend that:

- **most of the rigidities of the present 'ticketing' system should be removed and replaced by the conferment on Resident Judges wide responsibility, subject to general oversight of the Presiding Judges, for allocation of judicial work at their court centres, but coupled with:**
  - **regular and systematic appraisal enabling Resident Judges and Presiding Judges to determine the experience and interests of the judges; and**
  - **the undertaking by judges of such training by the Judicial Studies Board as may be required as a pre-condition for the trial of particular categories of work.**

Circuit Listing

26 There are also 'horizontal' constraints in the competing jurisdictions for judges' time and as to the courts in which certain offences may be tried.

27 First, there is always a tension between circuits and between circuits and London in their respective claims on High Court Judge time. In London, High Court Judges sit 'on circuit' at the Central Criminal Court. They also sit in civil matters in the Queen's Bench Division, including the Commercial List and in the Administrative Court, in criminal appeals in the Court of Appeal

(Criminal Division) and preside over tribunals. In the regular bidding process for High Court Judges the Vice-President of the Queen's Bench Division[18] has to assess the competing claims of circuits and of London, the aim always being to put the scarce resource of High Court Judges where they are most needed.

28 Second, there is tension in the demands of two or more jurisdictions to which the criminal listing officer must have regard when matching judges to his lists. Some Circuit Judges, depending on the court centre or group of courts in which they regularly sit, sit in crime for only part of the time. Many of them also sit in civil or family matters or both, each of which jurisdictions has its own scheme of 'ticketing'. For example, those who also exercise a family jurisdiction and are authorised to deal with public law care issues are often authorised and much in demand to try rape cases.

29 Third, territorial restrictions are inevitable, given the variety in sizes, facilities and levels of security of different court centres. A case with many defendants, or demanding an especially spacious and/or well equipped and/or secure court, has to be tried at a particular court centre that can provide for it.

30 Fourth, there are the troublesome restrictions that flow from the divide between High Court work and Circuit Judge work and their different working patterns. As I have said, High Court Judges 'go on circuit', that is they follow a pattern of visiting certain courts for short periods. Circuit Judges don't 'go on circuit'; they are assigned on appointment to one of the six circuits and work there, usually full-time in the same court or group of courts, and normally live nearby.

31 The legal year for High Court Judges runs from the beginning of October to the end of July, with, in addition, vacation courts sitting in London and on circuit over the Christmas, Easter and Summer breaks. For practical purposes, the formal legal year is split into three terms and, in turn, into six half-terms of about six weeks each.[19] Routinely, at any one time, about 40% of the Queen's Bench Judges who try crime are on circuit and the other 60% remain in London. Thus, most Queen's Bench Judges go out three times a year or, if they also do vacation duty on circuit, four times a year. At the half-term, those out on circuit return to London and those in London go out. The number of High Court Judges assigned to each circuit and the frequency and length of their visits to individual court centres depends on both the criminal and civil workload. But each circuit has a fairly regular pattern, which may be of a number of judges sitting at one busy centre for the whole six week period, or of one or more visiting a less busy centre for two to three weeks

[18] currently Lord Justice Kennedy

[19] technically, there are four terms, Autumn, Winter, Spring and Summer, but the last two run from Easter to the end of July

every other half term, or a single judge visiting up to three court-centres for about two weeks at a time. While on circuit, High Court Judges are accommodated in what are known as judges' lodgings, to which I return.[20]

32 A further constraint arises from the 'tiering' of court centres to classes of offences. Not only do cases have to be listed before the right level or suitably authorised judge, certain of them can only be tried in certain court centres. Thus, all class 1 and some class 2 cases (other than rape, sexual intercourse or incest with a girl under 13 or an inchoate offence under those categories, which can also be tried at third tier centres specified for the purpose by the Presiding Judges) must be tried at a court centre at which a High Court Judge regularly sits. This is usually restricted to those court centres where there are judges' lodgings. However, some lodgings serve two centres,[21] and Presiding Judges in certain instances arrange for judges to sit at court centres within about an hour's travel from lodgings. All other cases should be listed for trial at the most convenient location.

33 So, in the case of High Court Judges, the court listing officer's task of matching the right judge to the right case is the more difficult because, not only must he fit his listing of it into the pattern of circuiteering, he also has to list it early enough during the judge's six weeks' (or shorter) stay to ensure that he can finish it before he returns to London (or moves to another circuit centre). There are, of course, exceptions to these constraints in special cases, but the six weeks' strait-jacket is the norm. The result is to distort the system in a number of ways that are unjust and upsetting to defendants, witnesses, victims and others involved in the process, and costly and damaging to public confidence.

34 First, there are long delays in the listing of serious cases; it is not unusual for defendants in murder cases for trial by a High Court Judge to have to wait for over a year. These delays not only affect criminal cases, but heavy civil matters too. Because of the infrequency or shortness of a High Court Judge's visits, one or other party may be forced into an unsatisfactory settlement. Or the case may be moved, at great inconvenience to the parties, to another circuit centre or to London. Or they may be faced with a Deputy High Court Judge in a high profile or legally difficult case that they had been led to believe deserved 'a proper High Court Judge'. Or the matter may simply be adjourned at the last moment because the judge cannot reach it before he leaves, because of the priority he is required to give to his criminal list.

35 Second, because of the shortness of each High Court Judge's circuit visit, and in some centres because of its infrequency, it may not be possible to find work

[20] paras 60 - 64

[21] eg those for Newcastle and Teesside, Maidstone, Canterbury and Medway and St Albans and Luton

that is both 'heavy' enough to justify the visit and short enough for him to complete in the time. Complex and lengthy cases meriting trial by a High Court Judge, but which are likely to last, or are at risk of lasting, more than six weeks, cannot normally be put before him. Or his list may collapse at the last moment as a result of late changes of plea to guilty. He may be left with some 'proper', that is, unreleaseable High Court Judge work, but also with some cases which, though technically 'High Court Judge work' would otherwise have been released to suitably authorised Circuit Judges. He may also end up trying lesser and short cases in classes 3 and 4, normally triable by a Circuit Judge or Recorder, just to fill in some time. Meanwhile, the Resident Judge or another Circuit Judge may be sitting next door trying the really heavy and lengthy work that, but for the six week constraint, the Presiding Judges might otherwise have not released.

36 If there is some unexpected short break in a High Court Judge's list it is often good for him and for young local advocates to have some exposure to each other in 'run of the mill' cases. But where, for want of suitable work, he is diverted to lesser matters for any length of time, it is a waste of scarce judicial resources. Information provided by the Court Service in the course of the Review indicated that, taking an average for all six circuits over the year April 1999 to March 2000, over 25% of High Court Judge time sitting in crime was spent in hearing cases properly triable by Circuit Judges.

37 Third, there are the so-called judicial vacations, namely three weeks at Christmas, two weeks at Easter, one week at Whitsun and the two months of July and August in the summer. I say 'so-called' judicial vacations for a number of reasons. First, because these are High Court vacation periods, Circuit Judges do not enjoy the same formal breaks in their work; they are required to sit for a minimum of 210 days a year against the High Court Judges' commitment of 189 days a year. Second, there are sittings by High Court Judges on circuit and in the Court of Appeal in London throughout much of the vacation periods. Thus, although the end of each law term marks an administrative break point in the sense that judges stop sitting wherever they are, the break may be to take a holiday or it may be to undertake vacation duty elsewhere, say four weeks on circuit in September or two weeks in the Court of Appeal over Easter. Second, both High Court and Circuit Judges, who mostly sit in court five days a week, have only the early mornings before and evenings after court and weekends in which to prepare for cases, summings-up and to write reserved judgments. For High Court Judges in particular, the first few days, or sometimes weeks, of vacation are necessary judgment writing time; without it they would never catch up.

38 However, the main point in this context is the break at the end of the law term and the start of the vacation period, or vice versa, which interrupts the continuity of listing and the options open to a listing officer when trying to allocate cases, particularly to a High Court Judge. The Beeching Commission

recommended a progressive shortening of High Court Judges' summer vacation period of two months to something nearer a month, but to be achieved by a staggering of holidays rather than a reduction in holiday entitlement without recompense.[22] I consider that that recommendation should be looked at again, particularly with a view, formally as well as practically, to marking the end of a two months' shut-down of High Court Judge work in many Crown Court centres in the Summer.

39 I recognise that it is more difficult to list cases for trial over the vacation periods than it is in the conventional law terms. Even if judges and court staff are on duty, one or more of the parties or their representatives or witnesses may be unavailable because they have booked a holiday. It only needs one critical participant in a case to be away to hinder its listing for trial. Depending on the outcome of my recommendations below[23] for more sparing use of High Court Judges on circuit, it could lead to a modest increase over-all in circuit demands on them and possibly court staff. However, it seems to me that to curtail the summer legal vacation period to one month in August could help to speed the flow of work once September is recognised as a normal working month for all involved in the criminal process. I should note that, even in August, the Crown Court deals with about 70% of its usual monthly workload, and magistrates' courts, in the main, sit at the same rate as for the rest of the year. It would be a useful discipline in maintaining the momentum of case preparation and management. It would be more in line with the working patterns of most public and private sector organisations. And, it would help to correct a popular misconception about the present work pattern and load of the higher judiciary.

I recommend that:

- **consideration be given to reducing the formal legal vacation periods for High Court Judges sitting in the Crown Court, in particular, to confining the summer vacation to the month of August; and**
- **this should be achieved by greater staggering of the existing sitting commitments of the High Court Bench, not by increasing them.**

40 Fourth, the system for appointment of Circuit Judges is such that there may be long delays before vacancies are filled by judges suitably authorised to try work of the range undertaken by their predecessors. There is an annual cycle of appointments starting in April with a public advertisement, followed by short-listing for interviews, which take place between September and December. This is followed by the submission of names to the Lord

[22] Report of *Royal Commission on Assizes and Quarter Sessions* para 424
[23] paras 44 - 56

Chancellor at about the beginning of February and his personal approval and appointment later that month. This inflexible and lengthy regime can result in courts going for months without sufficient judges authorised to try rape and other serious sexual offences. This in turn can result in long delays, or diversion of the Resident Judge or other senior judges at the centre from other serious work, or transfer of cases to another and less convenient court. Whilst the Lord Chancellor's Department, in consultation with the Presiding Judges, does the best it can in its existing appointments process to anticipate further needs, there is a limit to which it can provide for the various and unexpected contingencies. A system that takes over a year from advertisement to appointment is far too long.

41 Sir Leonard Peach, in his recent *Scrutiny of the Appointments Processes of Judges and Queen's Counsel*, expressed concern about the length of the process and recommended that "consideration should be given to establishing a (very much more) swift procedure for assessing the merits of individual applications".[24] However, this was one of the few of his recommendations that the Lord Chancellor did not accept. He was of the view that, as appointments to most judicial posts are already made following a time-limited competition, he did not see how the process could be shortened appreciably.[25] Perhaps the Lord Chancellor's Department could, as a start, investigate how other senior professional or administrative appointments are made in the public sector and in large organisations in the private sector. I should add that the problem is not confined to new appointments requiring advertisement and open competition; it also affects informal, but critical appointments, for which the Lord Chancellor has personal responsibility, such as that of Resident Judge.

42 With all these obstacles to efficient matching of judges to cases, it is a tribute to them and to administrators of all levels that the Crown Court manages as well as it does in the despatch of its heavy work-load. In all of this, the listing officer is in the front-line. In many large metropolitan court centres he or she may have as many or more than 20 criminal and civil courts to keep occupied with High Court Judges, Circuit Judges and Recorders, - all with their different sitting patterns and some moving from crime to civil or family according to dictates of the work. In that constantly changing scene the listing officer is expected to have regard to the interests and/or availability of the parties, their representatives and others involved in each case, including, importantly, witnesses and victims. Apart from nerves of steel and sensitivity to a wide range of, often conflicting, interests, he needs the support and guidance of the Resident Judge. Most Resident Judges, who have a wide range of administrative responsibilities in addition to sitting full-time as judges, play a critical role in overseeing this daily challenge. Unfortunately,

[24] Lord Chancellor's Department, December 1999, recommendation 21
[25] *Judicial Appointments Annual Report 1999-2000* , Cmnd 4783, (LCD, October 2000), para 2.12

many now are also called upon to sit in other courts from time to time; and, as I have indicated, there may be long delays between the retirement of a Resident Judge and the appointment of his successor. Although the Presiding Judges may designate another judge who sits regularly at the centre to exercise the responsibility, lack of continuity in such general oversight is another impediment to the efficient allocation of judicial resources and listing of work.

43 There are similar problems of delays in replacing a judge at a court centre who has retired or moved elsewhere, with another similarly authorised to do certain classes of work. For example, in the case of a vacancy for a judge to try rape or other serious sexual offences, this may necessitate a wait of several months for the next Judicial Studies Board serious sexual offences training course, attendance at which is a pre-requisite of authorisation to try such work. The Judicial Appointments Group are alive to these problems and have begun to consult the circuits more closely on their judicial needs; however, it is hampered by the ponderous and rigid appointments cycle to which I have referred. If my recommendations below for a more flexible system of allocation of work are adopted, it may be that the vacancy problem could become less acute, but something needs to be done to speed up the appointments system and make it more flexible.

I recommend that:

- **the systems of appointment and assignment of judges should be reviewed with a view to achieving a more efficient system than now obtains to ensure a planned and prompt succession of Resident Judges and appropriately experienced judges at court centres and that, for this purpose, the Presiding Judges, Resident Judges, and Circuit Administrators should be consulted regularly; and**
- **the Lord Chancellor's Department should agree targets with the Presiding Judges within which vacancies for Resident, Circuit and District Judges (Magistrates' Courts) should be filled, after it has received notification of a projected or actual vacancy.**

BETTER MATCHING OF JUDGES TO CASES

44 One suggestion is that High Court Judges, like Circuit Judges, should sit permanently or for a period of several years on circuit, say two or three of them assigned to one or more of the major circuit towns. Given the predominance of criminal work at major court centres outside London, this is

close to a suggestion that only those with considerable experience of criminal work should sit as High Court Judges in crime. Whilst criminal law and procedure are now highly technical, and experience of them of a considerable advantage to a new judge on circuit, most of the contributors to the Review who have considered the suggestion are against it; and so am I. Under the present system, even the most rarefied commercial practitioner will usually have had some years of experience of sitting in crime as a Recorder before full-time appointment. It would create a two tier system of Queen's Bench Judges: those sitting and trying mainly crime on circuit and those dealing with the whole range of High Court work, criminal and civil, including, the commercial list, judicial review, and appellate work, in London. In that respect it would be out of key with the pattern of work for some Chancery, and all Family, High Court Judges who sit both on circuit and in London. It would discourage many of the highest quality candidates from applying for appointment to the Queen's Bench Division, not only because of the permanent location and limited nature of the work, but also because it could require them to uproot their home and family either at the beginning or end of their tenure or both. It would deprive both the High Court Bench and the Circuit Bench of the exchange of information and ideas, so important an aid to maintaining high standards and consistency in the administration of the system as a whole.[26] And it would blur the distinction between the High Court and Circuit Benches.

45 Another and similar proposal is to build on the present system in which the Queen's Bench Judges who sit in the commercial list go on circuit only once a year instead of three times like all the others. Under this proposal, potential appointees would be sounded out as to whether they preferred circuit work - mostly crime - or the wider range of criminal and civil work in London. If the former, they would be allocated to a list of judges who would spend most of their time on circuit; if the latter, they would spend all or most of their time in London concentrating on their own speciality or doing the wide range of High Court Judge work available there. Whilst this might go some way towards relaxing some of the present constraints on listing, the improvement would be minimal because it would not increase the availability of High Court Judges on circuit; there would simply be fewer, visiting court centres more often. It would also suffer from most of the same evils as the last suggestion, namely: the creation of a two tier system of High Court Judges; it would narrow the mutual exchange of information between the High Court Bench and Circuit Bench countrywide, since the circuiteering High Court Judges' main experience would be provincial; and, again it would blur the distinction between the circuiteering High Court Judges and Circuit Judges.

[26] a feature of the system warmly supported by the Beeching Commission; see Report of *Royal Commission on Assizes and Quarter Sessions*, paras 69, 104 and 152

46 A third suggestion is that High Court Judge visits, as part of a regular circuit pattern, should be concentrated on fewer and larger court centres, in the main those requiring two or more High Court Judges sitting at a time. There would be undoubted advantages in the greater efficiency resulting from flexibility of listing that such concentration of judges and work suitable for them would provide. However, even at major centres at which three or four High Court Judges regularly sit under the present circuit regime, there is much waste or inappropriate use of High Court Judge time resulting from late changes in the list for various good or bad reasons, aggravated often by the constraints imposed on their deployment by the rigidity of their six week sitting pattern. And any gain in the efficiency of use of High Court Judges resulting from their concentration at a few major centres would be off-set by the loss of 'locality' of the justice they provide and the inconvenience and expense to all others involved in cases brought in from a long distance. After all, the whole point of the circuit system in its inception and in its continuance is to bring justice at the highest level to where it is needed.

47 A fourth solution, sometimes suggested in conjunction with the last, is to move away from the present regime of sending judges out for blocks of six weeks at a time to try cases that, often, but for their presence, local Circuit Judges could and would try. Under this proposal, High Court Judges would go out on circuit only to try those cases that really demand their attention and, in the main, only for so long as it takes to deal with them. The pattern of working of the judges of the Family Division of the High Court provides a model, as does the allocation of High Court Judges for the trial of specific cases at the Central Criminal Court.

48 Family Division Judges work at the apex of a three tier system of family justice, the High Court, the county court and magistrates' courts. They deal only with the most serious and sensitive cases. For each circuit one of them acts as the Family Division Liaison Judge, a role approximating in the family jurisdiction to that of the Presiding Judges for criminal and civil work. Like the Queen's Bench judges they go on circuit from London. In some instances they go for fixed periods, usually for three or four weeks at a time, to the larger court centres, and in others they leave London only for cases which merit their attention and which are allocated to them by the Liaison Judge. Then they return to sit in the Family Division in London. They too stay in judges' lodgings when on circuit, but usually for much shorter periods than the Queen's Bench Division judges.

49 Prior to the Beeching reforms, the Central Criminal Court - the Old Bailey - was in effect the Assize Court for criminal cases for the Greater London area and the Quarter Sessions for the City of London.[27] Now, it is one of the

[27] Report of *Royal Commission on Assizes and Quarter Sessions*, para 39

Crown Court centres for Greater London. It is headed by two judges appointed by the Queen, following a joint recruitment exercise by the Corporation of London and the Lord Chancellor's Department, namely the Recorder of London and the Common Serjeant, who have the status of Senior Circuit Judges. They are supported by an additional 13 Senior Circuit Judges. All the Old Bailey judges are authorised to try murder, undertaking much work that outside London would be reserved to High Court Judges. Even so, as I have said, High Court Judges 'go on circuit' to the court, usually two or three at a time, to try the most serious cases by its standards.[28]

50 The loosening of the system of 'ticketing' that I have recommended would allow a formal and significant shift in the balance of heavy circuit work from High Court Judges to the more experienced Circuit Judges all over the country. It could follow a similar pattern to that established at the Central Criminal Court, though not necessarily involving any or any significant increase countrywide in the number of designated Senior Circuit Judges.

51 In my view, we should face reality by treating all the work within the jurisdiction of the Crown Court as triable by Circuit Judges unless, on referral to the Presiding Judges, they specifically reserve it for trial by a High Court Judge. It should be the responsibility of the listing officer to draw to the attention of the Resident Judge any case which, in accordance with criteria set by the Lord Chief Justice, may be appropriate for reservation to a High Court Judge. For this purpose, the listing officer should prepare a short assessment, enclosing where available a prosecution summary of the case, for the Resident Judge's consideration. If the Resident Judge agrees, it would then be for him to send the assessment and summary with any comments of his own to one of the Presiding Judges for his decision.[29]

52 Consideration would have to be given to the overriding criterion for reservation. It could be something like "where the case is one of special complexity and/or seriousness and/or public importance requiring trial by a High Court Judge", and include factors of the sort already listed in the Lord Chief Justice's current practice direction.[30] Such a criterion and factors would not apply to many murder or rape cases that many experienced Circuit Judges are competent to try, but which presently require the Presiding Judges to release on a case by case basis. Conversely, they could apply to certain serious and high profile armed robberies and large scale drugs distribution cases, to which Presiding Judges might not now normally be required to give separate consideration because they are class 3 cases.

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[28] the South Eastern Circuit Presiding Judges have recently asked the London Crown Court Listing Co-ordinator to review the deployment of High Court Judges in London

[29] this is already a common-place procedure at many large court centres for consolidation of 'High Court Judge cases' for release to the Circuit Bench

[30] see paras 19 – 25 and footnote 15 above

53 Similarly, I consider that the formal 'tiering' of Crown Court centres should go, especially if, as I recommend in Chapter 7, many 'either-way' cases presently tried in the Crown Court would go to the District Division and all cases triable only on indictment would start in the Crown Division of a unified Criminal Court. The Presiding Judges, in consultation with their Circuit Administrators, should be able to decide who sits where and for what case or cases. Subject to the physical constraints and convenience of location of different courts, if a case needs a particular judge, then he will either move to it or it to him, according to the circumstances.

54 In my view also, the present termly regime of six weeks on circuit and six weeks in London should end. Save in the case of the Presiding Judges, the present regular pattern of circuiteering by High Court Judges should be replaced by one under which the Presiding Judges decide, in consultation with their Circuit Administrators, where and when cases specifically reserved to High Court Judges should be tried. It would mean that particularly serious and high profile cases likely to run for six weeks or more could be put before them more readily than the present system permits, and that they could tailor their visits for shorter cases, whether effective as trials or pleas of guilty. The only exception should be that the Presiding Judges, each of whom holds office for four years, should continue their regular pattern of visiting and sitting at the major court centres on their respective Circuits. That would have two main benefits. First it would counter parochialism and enable them to continue their valuable circuit administrative and 'pastoral' responsibilities, as envisaged by the Beeching Commission in recommending their creation:

> "We propose that they shall, alternately, spend substantial periods in their Circuit so that they may, between them, provide the continuous presence of a judge knowledgeable about the affairs of the Circuit and about the Circuit judges serving there. They will be responsible for a general oversight of the administration and, in particular, for the location and well-being of the judges in the Circuit".[31]

55 Second, they would from time to time deal with the less serious cases as the vagaries of the list dictate, thus ensuring what one contributor to the Review[32] has well described as cross-pollination of the circuits with good practice as it develops at the heart of the administration of justice in London. They would also continue the valuable mutual exchange of information and ideas with the local judiciary, Bar and solicitors which is so valuable a part of the present system.

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[31] Report of *Royal Commission on Assizes and Quarter Sessions*, para 176(f); see also paras 256-265, especially 265

[32] The Hon Mr Justice David Steel

56 Apart from making proper use of High Court Judges on circuit and increasing their general availability in London, such a scheme would secure a better match of judge to case, would make the system more flexible and provide a better service to all involved in it. And, as an important by-product, it would do much to encourage high quality candidates for the High Court Bench who, presently, might be discouraged from accepting appointment by the prospect of spending half their working year away from home on circuit. Most potential appointees are now in their late 40s or early 50s, many have a spouse who has her or his own career, some still have a young family. The days are gone when aged judges shut up their home and proceeded on circuit with their wives for the duration.

I recommend that:

- **there should be a formal and significant shift in the balance of heavy circuit work from High Court Judges to the more experienced Circuit Judges, coupled with greater flexibility in the system of allocating work between them, along the following lines:**
  - **all work within the jurisdiction of the Crown Court should be triable by a Circuit Judge unless, on referral to a Presiding Judge, he specially reserves it for trial by a High Court Judge;**
  - **the listing officer should draw to the attention of the Resident Judge any case which, in accordance with criteria set by the Lord Chief Justice may be appropriate for reservation to a High Court Judge, for the Resident Judge, if he agrees, to refer it to one of the Presiding Judges for his decision; and**
  - **the overriding criterion for reservation for trial by a High Court Judge should be whether "the case is one of special complexity and/or seriousness and/or public importance requiring trial by a High Court Judge";**
- **the formal 'tiering' of court centres for the trial of certain classes of cases should be abolished and replaced by a more flexible system, overseen by the Presiding Judges, for the assignment of cases, adapted to the needs of each circuit and the work, and having regard to the physical constraints and convenience of location of different courts; and**
- **save for the Presiding Judges, the present regular pattern of circuiteering by High Court Judges should be replaced by one under which the Presiding Judges decide, in consultation with their Circuit**

Administrators, where and when cases specifically reserved to High Court Judges should be tried.

JUDICIAL ADMINISTRATION

57 A common feature of the working life of the High Court and Circuit Benches has been a dramatic increase in the volume and complexity of their judicial work and in their involvement in the administration of the courts in which they sit and/or for which they are responsible. This has been accompanied by an increasing awareness of the importance of the role of judges in case management if the system is to work justly and efficiently. In the civil jurisdiction this change of judicial culture, including recognition of work done outside, as well as in, court and of their need for more administrative support, now has the formal imprimatur of Lord Woolf's reforms and is bearing fruit. In the criminal jurisdiction it has taken the form of years of national refinement, with local variants of plea and directions hearings, but generally with insufficient time for judicial preparation and patchy administrative assistance. If the recommendations that I make in this Chapter as to judicial deployment and in Chapter 10 as to preparation for trial are accepted, these out of court responsibilities will increase.

58 Notwithstanding these developments and the reasons for them, there is still a public perception, so well described by the Beeching Royal Commission in the passage from its Report at the head of this Chapter, that courts' working patterns are for the benefit of the judges. And, until recently, the Court Service, long after judges and most others involved in the work of the courts had realised its absurdity, clung to the notion that efficiency equals keeping the judge busy in court all day every day whatever the cost to others. The Court Service and the Treasury have now begun to acknowledge that what may be cost-efficient for the Court Service may not be efficient for the criminal justice system as a whole or to all those who are exposed to its workings. I refer to this question more generally in Chapter 8. I mention it here in the context of Circuit Judges, and in particular, Resident Judges. Despite the increasing complexity of their judicial work and the case management demands made on all of them, little concession is made to the time they need out of court to prepare efficiently for what they do in court. In the case of Resident Judges, who undertake considerable and time-taking administrative responsibilities for no extra pay and, often, with little or no adequate secretarial support, the hindrance to the effective discharge of their daily judicial work and court-wide administrative responsibilities is more serious.

59 I hope and believe that change may be on the way. My proposals should ultimately offer more flexibility in listing cases, and should make available

more time for judges' preparatory and administrative work, but they will also increase their work. There is no reason, for example, why a judge, whose murder trial 'goes short' or collapses on its first day, should not spend time preparing future cases or in dealing with outstanding administration, rather than trying a number of much less serious matters simply to keep him on the bench. The Court Service should, in my view, be more open to opportunities such as this and, in any event, ensure that judges are given adequate time to prepare and manage cases assigned to them, and for Resident Judges to undertake their wider administrative responsibilities. The latter should also be given adequate secretarial or administrative support for the purpose.

I recommend that adequate time should be given to:

- **judges to enable them to manage and prepare cases assigned to them;**
- **judges with additional administrative responsibilities to enable them to fulfil those responsibilities; and**
- **in each case to make suitable provision in secretarial, administrative or clerical help, as may be appropriate, to meet those needs.**

JUDGES' LODGINGS

60 Judges' lodgings are a frequent butt of media and other criticism, which depicts them as the provision of lavish living for judges at the taxpayers' expense. They come in all shapes and sizes, though most are houses of substance that need staff to run them. The Lord Chancellor's Department owns some, rents some and also at court centres that High Court Judges visit infrequently and, for short periods, hires some. In some instances they may be more expensive than suitable hotel accommodation, in others less so, depending on the extent of their use and the particular financial arrangements for each lodging. Their advantages to the system as a whole is that they provide a home and working environment for judges and their clerks who are presently required to spend half their working life away from home. They also provide necessary privacy and security for them and their, often, highly sensitive working papers. The Court Service has recently conducted a study of judges' lodgings and, in November 2000, reported on it to the Lord Chancellor. The report has not yet been made public.

61 The comfort and privacy of lodgings are regarded by some as the quid pro quo of requiring High Court Judges to commit themselves regularly to stretches of six weeks or more away from home. But if the commitment were for less frequent and, often, shorter circuit visits, then, depending on the nature of the case(s) to be tried and the length of stay, I believe that many

High Court Judges sitting outside the major court centres would be content with a good hotel. It would mean that on such, mainly short, visits the judge would not have the benefit of lodgings for fostering and maintaining professional and social links with the community. These links consist, in the main, of the High Sheriff, Circuit Judges, the local bar and solicitors and others involved in the work of the courts. However, as is already the case, the Presiding Judges, who each visit their circuit three times a year, would stay mostly in lodgings at the major court centres and continue to encourage these valuable links there and elsewhere on the circuit. In addition, they and other visiting High Court Judges would continue the present almost universal practice of lunching each day with the Circuit Judges at court, thus ensuring the continuance of mutual exchange of views and experience so important a feature of the circuit system.

62 However, there are other considerations. Whilst the traditional pattern of circuiteering may have had its day, the flexible arrangements that I propose would result in High Court Judges trying more lengthy major cases than is now the case. Also, there are developments that may perpetuate or even increase the need for suitable judicial accommodation in some of the main provincial court centres. As I have mentioned, civil litigants on circuit are poorly served by the High Court Bench, their cases often not listed or put out of the list at a late stage because of the priority given to the criminal list. The removal of inappropriate criminal work from High Court Judges' lists may enable them to give greater attention to their civil responsibilities. And, from time to time, the Court of Appeal both in its Criminal and Civil Divisions now sits outside London, as do judges of the Administrative Court, particularly in Wales and on the Northern and North Eastern Circuits. Some Chancery judges, like Family judges, also go on circuit, as the work demands. The provincial exercise of all such jurisdictions could and should increase as a further manifestation of local justice. This not only takes proper account of the convenience of all concerned in the matters before the court. It may often be cheaper to the system as a whole where the costs of bringing batches of cases to London would exceed the costs of taking judges to the cases.

63 Security is sometimes relied on as an obstacle to substituting a hotel for lodgings. But modern hotels can provide adequate security if required. Advocates and businessmen use hotels even when engaged in sensitive cases and negotiations. And High Court Judges on circuit in Northern Ireland and Scotland and throughout the Commonwealth seem to manage well enough with hotels. As to expense, in larger court centres where lodgings accommodate more than one judge for any length of time, putting them up in hotels would no doubt be more expensive. But there would be beneficial savings in some of the smaller centres where lodgings are used only infrequently and for short periods.

64 It is important that the future of judges' lodgings should not dominate the debate about the future of the circuit system; their future use, and the extent of it, should be determined by it. If my recommendation for confining High Court Judges to trying the gravest criminal offences, whether long or short, on circuit is accepted, there should be an assessment of its likely effect on the existing distribution of work and corresponding need for accommodation on each circuit, whether in the form of judges' lodgings or otherwise. Such assessment should also take into account the likely demands of the circuits for judges of the Chancery and Family Divisions and the development of an intermittent provincial appellate and administrative law jurisdiction to which I have referred.

I recommend that:

- **future use of judges' lodgings should depend on the future volume and pattern of distribution of High Court Judge work on each circuit, not the other way round;**
- **in assessing the future volume and pattern of circuit High Court Judge work, allowance should also be made for present and projected needs of civil and family work and the development of intermittent provincial administrative law and appellate jurisdictions;**
- **if my recommendations are adopted for confining High Court Judge work on circuit to the gravest cases and for greater flexibility as to where and when they should be tried:**
  - **lodgings that are reasonable value for money, taking into account among other things their convenience to major court centres and the number of judges they normally accommodate and for how long, should be retained or obtained; and**
  - **in other cases consideration should be given to suitable alternative accommodation appropriate to length of sitting and type of case[s], for example, hotels, guest houses of the Wolsey Lodge variety and rented and serviced accommodation.**

COMPOSITION OF THE JUDICIARY

Introduction

65 I have considered the systems for and appointment of magistrates and selection of jurors because they (the systems) go to their quality as decision-makers. The professional judiciary come to appointment as trained and experienced barristers or solicitors, mostly with a solid background of work in the courts. There have for a long time been clearer direction and purpose in the arrangements for their appointment than for the selection of their lay counterparts. And Sir Leonard Peach, at the request of the Lord Chancellor, has recently reviewed and reported on the procedures for making judicial appointments.[33] His valuable recommendations for reform are in the course of implementation and, with the exception of a few untied ends, there is not much that I can usefully add to them.

66 The primary criterion for appointment of professional judges is merit. Nevertheless, it is clearly desirable that all sections of society should feel that they have a stake in the administration of justice whether through lay or professional judges. Some contributors to the Review have alleged incompetence and/or unfairness on the part of individual judges or levels of judiciary, or in relation to their ability to try particular types of work. However, the overwhelming impression I have from those who have made submissions or participated in seminars and discussions around the country is of reasonable satisfaction with the quality of the professional judiciary, but of concern that it does not sufficiently reflect the diverse elements of our society. The complaint that it is largely white, male, middle-class and middle aged is borne out by the figures. Taking the span from Lords of Appeal in Ordinary to Deputy District Judges, about 98% are white, about 87% are male[34] and I have no doubt that they are mostly middle-class and middle-aged.

67 There are a number of fairly obvious reasons for this imbalance, as Sir Leonard's and other recent reports[35] have demonstrated. The criteria for

[33] *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales*, (LCD, December 1999)

[34] see *Judicial Appointments Annual Report for 1999-2000*, Cm 4783, (The Stationery Office, 2000), p 88

[35] notably a *Report of a Joint Working Party on Equal Opportunities in Judicial Appointments and Silk* submitted to the Lord Chancellor in September 1999. The Working Party consisted of the Bar Council, the Law Society, the African, Caribbean and Asian Lawyers' Group, The Society of Asian Lawyers, the Society of Black Lawyers, the Association of Women Barristers and the Association of Women Solicitors

appointment are predicated on the (historically correct) assumption that the appointees are the most well-known and well regarded of professional advocates. Consequently, solicitors are, inevitably, less visibly qualified. This is coupled with difficulties in meeting the Lord Chancellor's requirement of initial service as a part-time judge, and a perception on the part of some that the appointments process operates unfairly. Even within the Bar, women and ethnic minorities have difficulties establishing a professional profile of the sort ensuring recognition of achievement enabling them to qualify for appointment. There is a consequent disinclination to apply for it, thereby leading to an even more diminished pool of qualified candidates. The Lord Chancellor's response to those reports, accepting all or most of their recommendations, shows that he is alive to the problems, not least the composition of the professions from which judges are drawn, and to the urgency of doing something about them. An account of his plans and progress can be seen in his Department's Annual Report on Judicial Appointments for 1999-2000.[36]

Appointment to judicial office

68 I should give a brief account about the general principles and mechanics of selection for appointment and refer to Sir Leonard Peach's main recommendations for change, some of which have already been implemented and others are in the process of it. As I have said, there are also some untied ends with which I should deal. The first is the continuing relatively low representation of women, members of ethnic minority communities and solicitors. The second is the weight presently given to the performance in a short interview of candidates for judicial appointments and in respect of whom a wealth of other information is available. The third is the failure sufficiently to tailor appointments to needs, to which I have in part already referred.[37]

69 The Lord Chancellor has a pivotal role in the appointment of all professional and part-time judiciary in England and Wales. His general principles for professional appointments are that: he makes them strictly on merit, regardless of the gender, ethnic origin, professional and other diversities of those he considers for appointment; he does not regard experience of advocacy as an essential requirement for appointment; he normally regards part-time service as a pre-condition of full-time appointment; and he gives significant weight to the views of the professional legal community as to suitability for appointment. As to mechanics, there have been a large number of changes over the last few years and, as a result of Sir Leonard's Report, more are now being made.

[36] at pp 18 - 25
[37] paras 40 - 43 above

70 An anomaly in the obligation to sit part-time as a pre-condition for consideration for a full-time post is that part-time judicial appointments are, at least in relation to crime, available only to those in private practice or who are employed in the private sector. The policy of successive Lord Chancellors has been that it is not appropriate for those who are employed by central government to exercise judicial functions in cases to which the State itself is a party. This policy was considered by Sir Iain Glidewell who recommended reconsideration, not least because it denied the possibility of judicial appointment to employees of the Crown Prosecution Service.[38] The Joint Working Party on Equal Opportunities in Judicial Appointments and Silk also recommended "that the ban on the appointment of lawyers serving in the Government Legal Service and Crown Prosecution Service should be removed".[39]

71 There are clearly issues of perception to be considered here (as Sir Iain Glidewell noted), together with the requirement for criminal trials to be conducted by an independent and impartial tribunal required by Article 6 of the European Convention of Human Rights. Movement between the professions of prosecutor and judge is, however, a feature of a number of continental jurisdictions.[40] And staff from the office of the DPP of Northern Ireland have been appointed direct to the Bench within our own jurisdiction. And nowadays, much as some may regret it, many criminal practitioners, both barristers and solicitors, specialise either in prosecution or defence work and are nevertheless considered eligible for part-time judicial appointments, I see no reason why Crown Prosecution Service and other prosecuting authorities employees should not be treated in the same way.

72 As to the most senior appointments, namely the Law Lords, the Lord Chief Justice and other Heads of Division and the Lords Justices of Appeal, the Lord Chancellor advises the Prime Minister, who is responsible for making recommendations to the Queen. As to High Court Judges, Circuit Judges, Recorders and District Judges, the Queen appoints on the Lord Chancellor's recommendation.

73 In the case of High Court Judges the Lord Chancellor has recently begun to advertise the appointments, though he has reserved the right to approach persons who have not applied in response to the advertisements. As Sir Leonard Peach has noted, it is argued that, as "at this level … the candidates are well known with proven records, there are no interviews".[41] The Lord Chancellor decides whom to appoint after taking into account the record of

[38] *The Review of the Crown Prosecution Service* Cm3960 (HMSO, June 1998) p 179

[39] *Report of the Joint Working Party on Equal Opportunities in Judicial Appointments and Silk*, recommendation 5

[40] Italy and Germany, for example

[41] the Peach Report p 11

general consultations - soundings - on each candidate over the years and the views, given in a meeting, of the Lord Chief Justice and other Heads of Division, the Senior Presiding Judge, the Vice-President of the Queen's Bench Division and the Vice-President of the Court of Appeal (Criminal Division).

74 In the case of Circuit Judges and Recorders, the Lord Chancellor makes the appointment through a system of annual open competitions based on projections of requirements for the following year and his published criteria for appointment. As to Circuit Judges he at present normally considers applications from Recorders of at least two years' standing who are aged between 45 and 60 or from District Judges of three years' standing. As to applicants for Recordership, they are normally expected to be in active practice or already hold another full-time judicial office; and appointment is for at least five years and, subject to age limits, normally automatically renewable at the end of that period.

75 In the case of Senior Circuit Judges, Circuit Judges, Recorders and District Judges appointments, the Lord Chancellor invites applications for appointment by advertisement. For all of those categories, - a panel, consisting of a senior member of the Lord Chancellor's Department (who acts as chairman), a judge of an appropriate level or a Recorder of some seniority and a lay member, [42] short-lists applicants for interview after taking account of: the information provided by them; a record of assessments of the candidate in extensive and systematic annual consultations over many years of judges and others of standing who know his or her worth - described by critics of the system as 'secret soundings'; views of any consultees nominated by the candidate as familiar with his or her work; and the views of the Presiding Judges. Interviews, usually lasting about three quarters of an hour, are conducted by a similarly constituted panel. On the strength of their assessment of each candidate based on all the material available at the short-listing stage, his or her performance in interview and any further views of the Presiding Judges, the panel presents the Lord Chancellor with a list of those whom, in order of priority, it considers as 'highly suitable' or 'suitable' for appointment. Because each of the appointments to be made results from a separate competition and because of the difficulty in making accurate predictions of the judicial manpower required, some of those considered suitable for appointment may be put on a 'reserve list' for possible appointment should a vacancy occur within the ensuing year. If no such unexpected vacancy occurs within the year, those on the reserve list must re-apply in the next annual competition.[43]

[42] currently selected from membership of the local Advisory Committee responsible for recommending appointments to the magistracy; though the Lord Chancellor has been considering other additional sources

76 Resident Judges, who, as I have said, are responsible for management of the judicial work at the Crown Court Centre for which there is no Senior Circuit Judge appointment, are appointed under a different regime. The Lord Chancellor appoints them for an initial period of four years on the recommendation of the Senior Presiding Judge and Presiding Judges of the circuit. He may and does renew such appointments, usually only once unless there are exceptional circumstances. When a vacancy arises, all the Circuit Judges on the circuit are invited to consider applying for it.

77 Sir Leonard Peach, in a letter submitting his report, said:

> "… My overall impression of the Department's work is one of thoroughness, competence and professionalism. It has embraced the many changes of process introduced in recent years and demonstrates a willingness and enthusiasm to pursue further improvements. My assessment is that the procedures and their execution are as good as any which I have seen in the Public Sector".

He included in this tribute the system of annual consultations, the continuance of which he recommended. As he rightly recognised, they are of great value in identifying a broad consensus over a period of time on the suitability of a candidate for judicial appointment. The Lord Chancellor's Department, in its Annual Report on Judicial Appointments for 1999-2000, also rightly challenged the description of the system as one of 'secret soundings':

> "… the consultation system is not one of soundings nor is it secret. The consultations are extensive and systematic. Candidates are generally told which judges and members of the profession will be consulted and are asked to name people who can assess their suitability. Consultees must assess each candidate's suitability against the criteria for appointment … They are asked to be objective in their assessments and to provide written evidence to support those assessments. All comments not based on that approach are disregarded. …"[44]

78 The source of the information is not divulged to applicants, because it is given in confidence, as happens with other appointments processes in the public and private sector. Only in that way can the system ensure full and frank views on the candidates. If a consultee alleges professional misconduct, it is disclosed to the candidate to give him or her an opportunity to respond. And such allegations are not taken into account if they are discriminatory in nature, or

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[43] the rationale for this is the maintenance of the 'purity' or separateness of each year's competition but, as Sir Leonard Peach has argued on page 36 of his Report, the numbers of appointments and competitions are now so great that its proportionality is questionable

[44] *Annual Report 1999-2000*, para 1.10

non-specific, or hearsay without identifying the source, or if the consultee refuses to allow the allegation to be communicated to the candidate. And, unlike other such processes, the Lord Chancellor's Department has a system of reporting back to disappointed applicants about the assessments given on a non-attributable basis, a system that Sir Leonard described as 'impressive'. As Sir Leonard and the Government have acknowledged, the validity of the consultation system depends, not only on the quality and accuracy of the information provided, but also whether there is enough of it in those cases where, for reasons other than merit, the candidate has had insufficient exposure to consultees.

79 Sir Leonard's recommendations included:[45]

- bringing the system of appointment of Deputy High Court Judges, from whom many of the candidates for full-time appointments are drawn, into line with that of Recorders and other part-time appointments, namely inviting applications, consultation, short-listing and interviewing along the established lines;
- piloting a one day 'assessment centre' type selection procedure as a possible substitution for the present interview;
- testing and, if appropriate, commissioning a psychometric and competences test and, after appointment, introducing an annual self-appraisal scheme;
- in the procedure for making full-time appointments, making full use of the material resulting from a self-appraisal system for part-time judges;
- a restructure of the application form to provide more self-appraisal and, so, more information to short-listing and interview panels;
- redesign of the consultation forms to improve the value of the opinions they contain;
- more emphasis on nominated consultees (not less than three nor more than six), particularly in the case of those applicants who may not be sufficiently well known to generate much information in the general consultation, for example, women who have had a break in their career to bring up young children and/or who, for domestic reasons, have concentrated on a paper work practice rather than advocacy, ethnic minorities or solicitors;
- the appointment of a Commissioner for Judicial Appointments and a number of Deputies to participate as lay members in the short-listing and interview panels and to oversee and advise generally on the working of the system;[46]
- allowing applicants who have been assessed as suitable for appointment and placed on a 'reserve list', to remain on it for two years or automatically listing them for interview in the next annual competition;

[45] the Peach Report, pp 45-48

[46] with the exception of the Lord Chief Justice and the Lords of Appeal in Ordinary

- greater speed and flexibility in the making of appointments, including possible compression of the period of sitting as a part-time judge - for example, through concentrated blocks of sittings - and by raising the normal upper age limits for full-time appointment; and
- in order to promote equal opportunity, to introduce greater flexibility in the criteria for appointment and in working patterns and terms of service.

80 The award of silk is seen by many as a stepping stone to the bench. However, as Sir Leonard observed, the qualities required for each, though overlapping, are not identical and achievement of silk should not depend on or be confused with potential for the judiciary.[47] He made a number of recommendations for improvement of the information provided by general and nominated consultees and the contents of the application form similar to his recommendations for improvement of judicial appointments.[48]

81 The Lord Chancellor accepted most of Sir Leonard's recommendations[49] and also most of those in the Report of the Joint Working Party on Equal Opportunities in Judicial Appointments and Silk,[50]which Sir Leonard had also discussed in his Report. As I have said, an account of developments is set out in the Lord Chancellor's Department's Annual Report on Judicial Appointments for 1999-2000.[51] Most importantly, the Queen has now appointed Sir Colin Campbell as the "First Commissioner for Judicial Appointments". His role, and that of his Deputies, is not to decide on appointments to be made. It is independently to conduct a continuing audit of judicial appointments procedures and to advise the Lord Chancellor on any aspect of them that he chooses. In publicly announcing Sir Colin's appointment, the Lord Chancellor said:

> "The First Commissioner and the Deputy Commissioners will be able to investigate every appointment, every piece of paper, every assessment, every opinion and they will also have the right to attend interviews for judicial appointments and meetings at which the most senior appointments are discussed."[52]

82 It remains to be seen whether this grafting of an auditing and general advisory function onto the Lord Chancellor's system of exercising his wide powers of judicial and other legal appointments will satisfy those who think it should be

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[47] the Peach Report, pp 39-40

[48] ibid., pp 40-44

[49] he did not accept the recommendation that the Commissioner or one of his Deputies should participate as a lay member in the short listing and interview panels. They only attend the meetings of such panels as auditors. Nor did he accept the recommendations questioning whether part-time service was essential, or whether an applicant's earnings were relevant, or the strong recommendation for speeding up the process of appointment

[50] see para 67 above

[51] *Annual Report 1999-2000*, Ch 2

[52] LCD Press Notice 103-01, 15th March 2001

taken out of his hands altogether. There is a widely held and growing view that, as in many other jurisdictions, appointment should be made by a minister on the recommendation of an independent commission consisting variously of judges, lawyers, academics, lay people and members of the executive and legislature, using modern methods of selection. As Lord Steyn[53] has observed, the advent of Human Rights to our domestic law has given that cause a further impetus in that judges at all levels will be called upon to make decisions with a higher 'political' content than previously.

83 Whoever is responsible for appointing judges, the present system of regular and wide consultation is of immense value in assessing the worth of candidates and should be retained. As I have indicated, its strength lies in its coverage of a long period of a candidate's career and of the wide range of consultees that it normally includes, as well as the views of his or her circuit's Presiding Judges. There is thus no chance of an effective black ball, however influential the person responsible for it may be, if it differs from the general consensus of assessment. Provided that the method of consultation and the criteria employed are fair, and that the assessments given are sufficiently informative, they are likely to produce a more reliable picture of a candidate for appointment than many conventional procedures for the appointment of senior personnel elsewhere in the public or private sector.

'Untied ends'

84 The first of my 'untied ends', which Sir Leonard recognised in recommending improvements in the other sources of information, is the risk of indirect discrimination in those cases where the candidates may not have had much exposure to the consultees, notably women, ethnic minorities and solicitors. As I have said, the Lord Chancellor has adopted most of his recommendations and of those of the Joint Working Party. He has also encouraged the legal professions to assist with these concerns and has instructed his Department's Judicial Group to consult as widely as possible in the case of all applicants.[54] It is unfortunate and a serious hindrance to those endeavours that the Law Society, in its submission to Sir Leonard Peach's Scrutiny, announced its withdrawal from the process and persists in that stance.

I recommend the utmost vigilance in not letting this iron grow cold, for it is the most constantly raised and anxious concern of those who feel that the appointments system is unfair to them. It is not enough to wait for the

[53] speaking at the Annual Conference of the Bar of England and Wales in October 1999

[54] in 1998 the Lord Chancellor's Department established a team of its officials to concentrate on equal opportunity issues and to encourage applications at events organised by various diversity groups; *Judicial Appointments Annual Report 1999-2000*, para 1.32

professions to present the Lord Chancellor's Department with suitably 'visible' as well as qualified candidates for appointment.

85 My second concern is as to the process of combining - weighting of - the information provided by the candidate, the views of the general and nominated consultees most of whom have seen the candidate at work, and the assessment by three strangers of his or her performance in a short interview. There are instances, of which the Presiding Judges have spoken, of startling differences between peer assessment of a candidate's performance over many years and the impression he appears to have given in interview, and also between widely differing assessments of different panels interviewing the same applicant in two consecutive rounds.

86 Although Sir Leonard spoke highly of the interview process, I believe that the weight to be given to it alongside the information provided by consultees was also of concern to him. As he observed, a limitation of all interviews is that they are necessarily restricted in time, and exploration of some skills and qualities is correspondingly limited.[55] It was for that reason that he recommended other improvements, some of which I have summarised, in the information to be provided to interviewing panels before putting their recommendations to the Lord Chancellor.[56] Possibly the two most important of these are: first, the creation of the post of First Commissioner for Judicial Appointments, who should be able to pick up any startling imbalance between a candidate's proven record of suitability and a contrary assessment in interview; and second, if it proves in pilot to be successful, the substitution of a one day 'assessment' for the conventional three quarters of an hour interview. The Lord Chancellor announced on 5 April 2001[57] that he is intending to pilot 'assessment centres' and has now appointed a firm of recruitment consultants to assist with the development of the first arrangements. The aim is that the 2002-2003 Deputy District Judge competition should be used as an assessment centre pilot.

I recommend that, if the assessment centre pilot proves to be successful, consideration should be given to extending its use to other full and part-time judicial appointments.

87 My third main concern is in part a repeat of my earlier criticism of the slowness of the appointment process[58]and of the lack of tailoring of appointments to needs. As the Presiding Judges have commented in their

[55] the Peach Report, p 17
[56] ibid p 20
[57] LCD Press Notice 139-01
[58] see paras 40 – 43 above

submission in the Review, if a judge of experience in a particular jurisdiction is needed to fill a vacancy, it is not helpful to appoint a judge with other experience, even if he or she did better than others in the most recent round of applications, or a judge who does not live in or near enough to be accessible to the area in which the vacancy has occurred. There are also problems when an appointment is required at short notice to meet an emergency, yet the best candidate may not have applied in the last round and it may be too long to await the next. I know that the Lord Chancellor's Department is alive to these difficulties and is considering how best to overcome them. Nevertheless, I consider it worth emphasising that speedy removal of these basic faults should do much for efficiency of listing and, hence, the service provided by the courts to all court users; and it should be relatively inexpensive. As the Presiding Judges have also observed, this requires input from them as well as the Lord Chancellor's Department. Their proposals, with which I agree and are, in summary, covered by my recommendations 66 – 67,[59]are that:

- in formulating bids for Circuit Judge appointments, Circuit Administrators, in consultation with the Presiding Judges should identify any particular needs that cannot be met from the existing judges on the circuit;
- in the event of unexpected vacancies requiring appointees of particular expertise or experience, consideration should be give to ad hoc consultation and assessment, the evaluation of candidates together with those considered but not appointed in the previous round; and
- in the case of both Circuit Judge and Recorder appointments, the results of the consultation and the assessment should be provided to the Presiding Judges for their comment on Circuit needs before any recommendation is put to the Lord Chancellor.

Disability

88 The Government's present policy is to encourage suitably qualified people to apply for judicial appointment, although they will not be appointed if for reasons of ill health or disability they cannot properly carry out the duties of judicial office. Candidates will not be appointed to a full-time post unless medical examination shows there is the prospect of them "providing a realistic return on the investment made in their training and appointment". Sir Leonard recommended that informal guidelines used by the Lord Chancellor's Department on this subject should be made public, but this has yet to happen. I warmly support Sir Leonard's recommendation that a disabled person's inability to demonstrate that his or her period in office will be of the maximum or stipulated duration should not block appointment or promotion and that appropriate arrangements in such cases should be made for early

[59] see para 43

retirement or loss of office necessitated by disability.[60] I also take the view that, if they do not already exist, formal guidelines should be developed and published, setting out the Department's clear policy on the appointment of disabled persons.

I recommend that the Lord Chancellor's Department should establish and publish clear guidelines on the appointment of disabled persons to judicial office.

TRAINING AND APPRAISAL

Training

89 Training for full and part-time professional judges in England and Wales is the responsibility of the judges themselves, acting through the Judicial Studies Board, a non-departmental public body established in 1979[61] and funded by the Lord Chancellor's Department.[62] The Board is chaired by a Judge of the Court of Appeal, currently Lord Justice Waller, and each of its main committees is chaired by a High Court Judge, thus reflecting the important constitutional principle[63] that the judiciary should control and manage its own training. The Criminal Committee of the Board, currently chaired by Lord Justice Kay, trains all judges who sit in the Crown Court, and its Magisterial Committee, currently chaired by Mrs Justice Hallett, oversees the training of District Judges. The work of the Board has grown enormously since the early 1980s. In the last financial year, it spent nearly £5m in judicial training, excluding the cost of its own accommodation and of other centrally provided services.[64]

90 The scheme of appointment and training of judges who are to try criminal cases is that on appointment to part-time office, either as Recorders or as Deputy District Judges, they must attend a residential induction course before they begin to sit. Thereafter, they are required to attend a residential continuation seminar periodically throughout their judicial career. The content of the courses is continuously reviewed and developed in response to changes in law and procedure, and in society.[65]

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[60] the Peach Report, p 35

[61] following a report by Lord Justice Bridge, as he then was

[62] under a "Memorandum of Understanding" it enjoys "a level of autonomy in its financial affairs … consistent with its independence in assessing the need for, and providing, judicial training"

[63] *Starrs & Chalmers v Procurator Fiscal, Linlithgow* [2000] HRLR 191

[64] *Judicial Studies Board Annual Report for 1999-2000*, p 2

[65] ibid, Annual Strategy, Annex 1

91 For Recorders, the induction course lasts five days and consists typically of a mix of instruction on trial management, evidence, procedure, directions and summing-up to juries, sentencing, discussion of practical problems in small groups and an extended mock trial exercise. Fundamental issues, such as equality of treatment and human rights are the subject of individual treatment as well as being woven into the practical exercises. Considerable preparation is required for the course, in particular, the group work, which can be demanding for those whose professional practice has not been mainly in criminal work. For Deputy District Judges the course lasts four days, with sessions on communication skills in a courtroom context and replicating those elements on the Recorders' course which are not specific to jury trial. To bridge the gap between the induction course and the continuation seminars the Board runs annual 'Recorder Criminal Conferences' for those with between one year and eighteen months' experience of sitting in the Crown Court.

92 Residential, four day continuation seminars are organised on three year cycles for Recorders, Circuit Judges and High Court Judges to inform them of developments in criminal law and procedure and to enable them to discuss sentencing and other practical issues. District Judges and Deputy District Judges also receive continuation training annually by means of a two-day seminar, though this programme is currently under review by the Board. In addition, the Board organises seminars on specific matters such as the conduct of trials of rape and other serious sexual offences (twice yearly) and of serious fraud (biannually),[66] and supports annual sentencing seminars organised by the Presiding Judges of the circuits.

93 In comparison with other jurisdictions the training of our professional judiciary may seem modest. For example, we do not have a centrally staffed and administered national judicial training college or institution as found in many civil and common law jurisdictions.[67] This is partly because of the small size of our professional judiciary, less than 3,000 compared with, for example, over 30,000 in Germany. It is also partly because, unlike in continental jurisdictions, our judges are appointed from the ranks of experienced legal practitioners who, in the main, come to the bench with a good knowledge of the law and procedure they are to administer. As I have indicated, the Board provides most of its training in short residential courses in hotels and conference centres around the country, a system which, so far, has had the advantages of flexibility and good value for money. There have been suggestions that it should be developed into a body more closely resembling a Judicial Training College, with its own premises capable of accommodating its administration, teaching and residential course requirements. With increasing demands made on the Board, some of which

[66] for all judges who are newly authorised to hear such cases; see para 20 above

[67] eg the Ecole Nationale de la Magistrature in France, the Escuela Judiciale in Spain, the Australian Institute of Judical Administration and the Federal Judicial Centre in Washington, DC, USA

would flow from implementation of various of my recommendations, this is an option that may become more efficient than the present system, and is one that should be kept under review.

94 Another possibility would be to combine in a single body responsibility for judicial training with other aspects of judicial policy. There are a number of Commonwealth precedents for this. For example, Canada has a Judicial Council with the broad statutory remit to promote efficiency and uniformity, and to improve the quality of judicial services in its Superior Courts and Tax Court. This remit includes, continuing judicial education, the handling of complaints against Federal Judges, developing consensus among Council members on issues involving the administration of justice and judicial salaries and benefits.[68] New South Wales has a Judicial Commission with a similarly broad statutory role of contributing to the enhancement of the quality of justice by providing professional support services to judicial officers and the courts. Its functions include continuing judicial education, assistance towards consistency in sentencing, complaints against judicial officers and advising the Attorney General on such matters as it thinks appropriate.[69]

95 These examples illustrate the contrast between the Judicial Studies Board's present minimalist, but effective, training function and the possibility of it making a much greater contribution to the role of the judiciary in the administration of justice. Lord Woolf, the Lord Chief Justice, has recently urged such an extension of the Judicial Studies Board's functions to include that of a properly resourced 'think tank' to consider a range of issues including the desired qualities of judges, the manner and terms of their appointment, their deployment, career development and management, the support they require and their role in promoting mediation.[70]

96 Whilst such a proposal is on the fringe of my terms of reference, I would not miss this opportunity of supporting it. But even without such extension of the Board's role, it is plain that its training responsibilities will continue to increase. My recommendations for a move away from a rigid system of authorising or 'ticketing' judges for the trial of specific offences towards a more flexible one based on judicial experience and training will require a sharper focus to the Board's work in fields such as serious sexual offences, serious fraud and possibly drug offences and those involving young offenders. There is also certain to be a continuing and increasing demand for training in information technology. The Board has already adopted a new strategy for training in that field, involving a regular assessment of and response to judicial training needs. There will obviously be a considerable demand for such judicial training if the recommendations I make in Chapters 8, 10 and 11

[68] Canadian Judicial Council: *Annual Report 1999/2000*

[69] Judicial Commission of New South Wales: *Annual Report 1999/2000*

[70] *"The Needs of a 21st Century Judge"*, a speech given to the Judicial Studies Board on 22nd March 2001

for the increased use of information technology in the management of cases, and at trial, are accepted.

97 There is also an increasing need for the training of judges in management skills. There are two aspects to this. First, there is the process of case management itself, where the court will need to take an increasingly robust attitude to the way in which criminal cases are prepared for trial. If my recommendations in Chapters 5 and 7 for allocation of either-way cases are adopted, there will need to be an extensive programme of training of District Judges in their new responsibilities in that respect. Also Presiding and Resident Judges will have to acquire a broader range of judicial management skills if they are to undertake the additional responsibilities that I recommend in this Chapter and Chapter 7.

I recommend that:

- **the Judicial Studies Board should be adequately resourced to meet the increasing training needs of the judiciary, including those in respect of special jurisdictions, case management, information technology and judicial administration.**

Appraisal

98 A trial judge's job is a solitary one. The only judge he sees or hears in action is himself. Such authoritative reassurance or criticism he may receive of his performance is limited to transcripts from the Court of Appeal long after the event. The frequency of those transcripts or the outcome of appeals are no sure indicator that he is doing a good job on a daily basis. Few appeals or unsuccessful appeals from his rulings of his summings up or sentences may indicate little more than that he is over-cautious to the point of undue deference to the defence case out of a desire not to fall foul of the Court of Appeal. Regular exposure to the gaze of the Court of Appeal could mean that he is getting it wrong too often or that he is a judge of sturdy independence making difficult decisions on which there are often two views. Informal enquiries by the judge himself as to how he is doing, or reliance on the views of court clerks, advocates, ushers and others are demeaning and inadequate substitutes for systematic appraisal.

99 Appraisal of work performance is a feature of most public and major private employments. Appraisal for those at the Bar consists largely in the approbation or disapprobation of instructing solicitors and hence on the size and quality of their practice. Most solicitors, though subject to similar client discipline, have developed and are well used to appraisal schemes. Yet there

is no provision for appraisal of members of either profession once they become judges. The Runciman Royal Commission in 1993 recommended the introduction of an effective formal system of performance appraisal,[71] a recommendation that the Government of the day did not accept.

100 Some argue that to introduce a system of appraisal for judges would be a threat to their independence. But I do not see why judges should be inhibited in how they go about their job by some form of objective and knowledgeable assessment of that sort. Magistrates, who have equally powerful claims to judicial independence, have now adopted a national system of appraisal. The District Judges (Civil) on the Wales and Chester Circuit pioneered a system for their Deputies which was so successful that Sir Leonard Peach recommended its extension nationally, and the Lord Chancellor appears to have accepted that recommendation.[72] It is already a feature of their counterparts in the criminal jurisdiction, (and for part-time tribunal members in the Appeal Service). As His Honour Judge John Samuels QC observed in his contribution to the Review, if there are to be closer links between the magistracy, the District Bench and the senior judiciary - as I now recommend in Chapter 7 - it would be anomalous to stop the progress of appraisal below the level of the Circuit Bench. But even without such development, there is, in my view, much to be said for extending some form of appraisal higher up the judicial ladder.

101 What form, or forms, should appraisal of Recorders and full-time judiciary take? There are obvious differences between the needs of the two. In the case of Recorders, particularly those newly appointed, its main purpose should be to enable them better to equip themselves for full-time appointment through observation of, and discussion about, their work in court: As to full-time judges, it should serve as a means of correcting foibles or bad habits that they have consciously or unconsciously developed over the years, alerting them to other and better ways of doing their job and also, importantly, as a medium for development of their judicial career.

102 Any scheme should command the support of the judges, not compromise their independence or distract them from their work. And it should not jeopardise their careers, save in exceptional circumstances and then only on the intervention (in the case of the Circuit Bench) of a Presiding Judge in consultation with the Senior Presiding Judge. The form or mechanics of appraisal would require detailed consideration and consultation among the judiciary and others.

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[71] Report of *The Royal Commission on Criminal Justice*, paras 98 and 99, and recommendation 251

[72] *Judicial Appointments Annual Report 1999-2000*, para 1.35

103 Appraisal of full-time judges could, perhaps, be conducted by a group of three appraisers, not all of whom need be judges or retired judges, but at least one of whom should be or have been a judge of at least the same seniority as the person being appraised. The appraisers would observe him, with his knowledge, in court and in chambers, as if they were court users but sitting in the public benches. They might in an appropriate case or cases be given access to his court papers. At the conclusion of their observations they would reach and formulate joint provisional views, perhaps using a standard format, though in simpler form than presently provided for the magistracy.[73] They would review their provisional views with the judge in an informal way, taking into account his response.

104 The extent to which the appraisers should communicate their conclusions to the higher judiciary or the Lord Chancellor is a matter of some sensitivity and requires careful consideration. It may be that in the case of District or Circuit Judges, they should go to the Presiding Judges, and in the case of High Court Judges to the appropriate Head of Division. Only in the event of some particular problem requiring attention would they communicate further, say, in the case of a Circuit Judge, to his Resident Judge or, exceptionally to the Lord Chancellor through one of his senior officials. This or some similar scheme would require considerable time and money to develop.[74] But it would, in my view, be of considerable benefit, not only in enabling judges to improve the way in which they do their job, but also to bolster public confidence in their professionalism and competence.

I recommend:

- **the introduction of an appraisal scheme for all part-time judicial post-holders, and its reinforcement by a system of regular self-appraisal;**
- **the assessments produced should be available to those advising the Lord Chancellor on full-time judicial appointments; and**
- **consideration, following wide consultation among the judiciary and others, of a system of appraisal for full-time judges; the results of such assessments should, however, only exceptionally be made available to anyone other than the Presiding Judges or the relevant Head of Division.**

[73] Chapter 4, paras 90 - 91

[74] I am indebted to Judge Samuels for much of the content of this suggested framework