

Michael Blackwell**Starting out on a judicial career: gender diversity and the appointment of Recorders, Circuit Judges and Deputy High Court Judges 1996—2016****Article (Accepted version)
(Refereed)****Original citation:**

Blackwell, Michael (2017) *Starting out on a judicial career: gender diversity and the appointment of Recorders, Circuit Judges and Deputy High Court Judges 1996—2016*. *Journal of Law and Society*, 44 (4). pp. 586-619. ISSN 0263-323X

DOI: [10.1111/jols.12059](https://doi.org/10.1111/jols.12059)

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**Starting out on a judicial career:
gender diversity and the appointment of
Recorders, Circuit Judges and Deputy High
Court Judges 1996—2016**

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This paper is a quantitative study of those who are appointed Recorders and Circuit Judges, and who are authorised or appointed as Deputy High Court Judges. This paper considers the period 1996-2016, being the twenty years that straddle either side of the creation of the Judicial Appointments Commission (JAC). A key focus of this paper is the gender diversity of these appointments and how this has changed over time, including whether the transfer of appointments to the JAC has made a difference to gender diversity or whether increases in the proportions of female judges are attributable solely to a changing demographic among the pool of lawyers from which such judges tend to be appointed. Who are appointed to these positions is significant both because of the importance of these positions themselves, but also because they comprise the pool from which, as a practical reality, the Senior Judiciary are appointed.

OUTLINE

This paper is an empirical study of Recorder, Circuit Judge and Deputy High Court Judge appointments during the period 1996–2016. These

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My thanks to Sir Ross Cranston, Katrin Hohl, Linda Mulcahy and Michael Zander QC for their comments on earlier drafts of this paper.

appointments are important both because of the volume of cases heard by these judges, and also because these appointments provide an important gateway to membership of the senior judiciary. The gender breakdown of these appointments is generally considered important for reasons that include democratic legitimacy, equal opportunities and (most contentiously) decision-making.¹ Despite the importance of these appointments, no previous empirical study has been undertaken into whether the changes made to the appointments process during this period (including the establishment of the JAC in 2006) have made a difference to the gender diversity of who is appointed; or whether (as Lord Sumption, a Justice of The Supreme Court and former JAC Commissioner, argues) any changes to who is appointed is purely a function of the changing composition of the legal profession and that only positive discrimination would make a difference.²

This paper comprises seven sections, including this introduction. The second section discusses the significance of Recorders, Circuit Judges

¹ B. Hale, 'Equality and the Judiciary: why should we want more women judges?' [2001] *Public Law* 489. Writing in 2001, Brenda Hale expressed herself 'more than a little sceptical' of some arguments that diversity would make a difference to the substance of decision making: *id.*, p. 501. However in her evidence in 2011 before the House of Lords Select Committee on the Constitution, she suggested a difference can be made, citing R. Hunter, C. McGlynn and E. Rackley (ed.) *Feminist Judgments: From Theory to Practice* (2010) as evidence: Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence* (2012), Q222.

² J. Sumption, 'Home Truths about Judicial Diversity' (Bar Council Law Reform Lecture, 15 November 2012) 3.

and Deputy High Court Judges. The third section details various changes in appointment processes and practises that have been made during this period. The fourth introduces the sources of data on which the empirical analysis in this paper is based. The fifth presents descriptive statistics with regard to relevant judicial appointments during the twenty years of this study. The sixth section considers whether and to what extent the various changes to the appointments process considered in the fourth section can be thought to have impacted upon the gender composition of the judicial offices considered in this paper. The final section is a conclusion.

WHY THESE APPOINTMENTS ARE IMPORTANT

Those who are appointed as Recorders, Circuit Judges and Deputy High Court Judges is important because of the large volume of cases heard by these judges: predominately in the Crown Court and County Courts, but also substantial numbers in the High Court and Court of Appeal. Between 1997 and 2005 there were on average 111,118 judicial sitting days each year across the Senior Courts of England and Wales (the Court of Appeal, High Court and Crown Court), of which 90,760 (82%) were sitting days by the judges considered in this study. These sittings were mainly in the Crown Court where these judges accounted for 95% of all

such sitting days, compared to 37% of sitting days in the High Court and only 7% of sitting days in the Court of Appeal.³

Many readers will be aware of the role of Circuit Judges and Recorders (who exercise a similar jurisdiction on a salaried and fee-paid basis respectively), but may be less aware of the role of Deputy High Court Judges. There are two categories of Deputy High Court Judges.⁴ One category is certain existing judges, mainly⁵ Recorders and Circuit Judges, who are authorised to sit in the High Court under section 9(1) of the Senior Courts Act 1981 (“section 9(1) authorisations”). The other category allows for any person who meets the statutory qualification⁶ for appointment as a puisne judge of the High Court to be appointed as

³ Statistics cited in this paragraph are calculated from annual reports of *Judicial Statistics* (1997-2005) and *Judicial and Court Statistics* (2006-2015). Indeed of the judges considered in this paper only Circuit Judges could possibly sit in the Court of Appeal: Senior Courts Act 1981 s. 9.

⁴ Historically it appears that only section 9(4) appointments were styled as Deputy High Court Judges, but contemporary usage includes section 9(1) authorisations. The Senior Courts Act 1981 refers to section 9(4) appointments as being ‘deputy judge[s] of the High Court’, but suggests no similar title for section 9(1) authorisations. Similarly, literature by the Lord Chancellor’s Department only referred to section 9(4) appointments as ‘Deputy High Court Judges’: Lord Chancellor’s Department, *Senior Judicial Appointments* (Leaflet 1, 1995) 2. However, the practice of the JAC is to refer to both section 9(1) authorisations and 9(4) appointments as Deputy High Court Judges: see for example the joint section 9(1) protocol by the JAC and Judiciary of England and Wales or the JAC’s webpage on Section 9(1) authorisations: <<https://jac.judiciary.gov.uk/section-91-authorisations>> accessed 19 July 2017.

⁵ Since changes made by the Crime and Courts Act 2013, effective from 1 October 2013, certain tribunal judges listed in s. 9(1ZB) Senior Courts Act 1981 can also be so authorised.

⁶ Currently the statutory requirement is either (i) satisfying the judicial-appointment eligibility condition on a 7-year basis; or being a Circuit judge who has held that office for at least 2 years: s. 10(3)(c) Senior Courts Act 1981.

a deputy High Court Judge under section 9(4) of the Senior Courts Act 1981 (“section 9(4) appointments”). Thus section 9(4) appointments are always fee-paid, while section 9(1) authorisations are fee-paid if they relate to Recorders, but a mode of the exercise of a salaried appointment if they relate to Circuit Judges.

Division	Circuit Judge	Recorder	s9(4) DHCJ	other ⁷	Total
Chancery	2 (6%)	14 (41%)	11 (32%)	7 (21%)	34 (100%)
Family	4 (13%)	24 (80%)	0 (0%)	2 (7%)	30 (100%)
Queen's Bench	24 (17%)	117 (81%)	0 (0%)	3 (2%)	144 (100%)
Total					208
	30 (14%)	155 (75%)	11 (5%)	12 (6%)	(100%)

Table 1: Table showing the judicial office held by High Court judges appointed since 1996 immediately prior to their appointment to the High Court bench.⁸

Who are appointed to these judicial offices is also important since they provide a gateway to membership of the senior judiciary. It has been government policy since the 1970s that in order to be appointed as a full-time judge, it is necessary to have part-time judicial experience first,⁹ although not necessarily in the same sort of judicial role as the full-time appointment. Of the 208 High Court judges appointed since 1996, 155

⁷ See footnote 10 below for a discussion of how it is not possible to be sure that these 12 judges were not Deputy High Court Judges.

⁸ The High Court judge appointments were identified from lists of judges at the start of the printed versions of the official *Law Reports*. The full names of these judges was obtained from *Who's Who*. These were then checked against the lists of Records and Circuit Judges assembled using the methodology described below (see section entitled 'Dataset'). The table identifies the 11 section 9(4) judges as such as they were listed as Deputy High Court Judges in *Who's Who*, and not listed as a holding any appointment that would permit their authorisation under section 9(1). The table does not subdivide the Recorders and Circuit Judges into those that are listed in *Who's Who* as Deputy High Court Judges, both for clarity of presentation and due to many former Deputy High Court Judges not seeming to list this status, as discussed in footnotes 10 and 11 below. It is expected that a much greater proportion of s. 9(1) authorisations will not be listed than 9(4) appointments: due to the former only historically having been regarded as a mode of exercising an existing judicial office, not an appointment.

⁹ P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (2011) 65.

(75%) were Recorders immediately prior to their appointment and 30 (15%) were Circuit Judges immediately prior to their appointment (of whom all but one were Recorders prior to becoming Circuit Judges). Of the 23 (11%) High Court judges appointed since 1996 who were neither Recorders nor Circuit Judges immediately prior to their appointment, at least 11 were section 9(4) Deputy High Court Judges.¹⁰ However, this pattern of previous judicial experience is not consistent across the divisions of the High Court. Table 1 shows how prior experience as a section 9(4) Deputy High Court Judge (without ever being a Recorder or Circuit Judge) is very common in the Chancery Division, accounting for a third of appointments to that Division, but is not an established career path in the other two Divisions of the High Court. The pattern of previous judicial experience is similar across both the Family Division and Queen’s Bench Division, with the bulk of those High Court Judges having been Recorders immediately prior to their appointment, but with a substantial number having been Circuit Judges. Even among judges who are Recorders and Circuit Judges, being ‘authorised’ under section

¹⁰ Identified from the *Who’s Who* entries of those 11 judges. It may be that others were Deputy High Court Judges, but did not list it in *Who’s Who*: see footnote 11 below for further discussion. It is possible to be sure that none of the 23 were either Recorders or Circuit Judges, since all such appointments are published in the *London Gazette*. However there is no available method to verify that the remaining 11 were not Deputy High Court Judges, since these appointments are not published in *London Gazette*.

9(1), rather than being ‘appointed’ under section 9(4) to sit as a Deputy High Court Judge provides crucial experience to progress to being a High Court Judge. This is shown by how during the first five and a half years of the JAC’s existence, they made 54 appointments to the High Court and over 80% of them were Deputy High Court Judges.¹¹

This paper focuses on the gender breakdown of those judges. For many years there has been a consensus on the need for more women judges to be appointed for a variety of reasons.¹²

¹¹ Evidence of Christopher Stephens (Chairman of JAC), Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence* (2012) Q352, given on 7 December 2011. However, only 32 of the 58 (55%) of the High Court Judges appointed between June 2006 and December 2011 are listed in *Who’s Who* as having been Deputy High Court Judges (all-but-one of these 58 judges has a *Who’s Who* entry. The discrepancy between Christopher Stephens’ statement (>80%) and the *Who’s Who* entries (55%) suggests that not all Deputy High Court Judges list their appointments in *Who’s Who*.

¹² Examples of scholarly work include R. Hunter, ‘More than Just a Different Face? Judicial Diversity and Decisionmaking’ (2015) 68 *Current Legal Problems* 119; S. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (2013); K. Malleon, *The New Judiciary: The Effects of Expansion and Activism* (1999); K. Malleon, ‘Rethinking the Merit Principle in Judicial Selection’ (2006) 33 *J. of Law and Society* 126; K. Malleon, ‘Diversity in the judiciary: The case for Positive Action’ (2009) 36(3) *J. of Law and Society* 376; H. Sommerlad, ‘The “Social Magic” of Merit’ (2015) 83 *Fordham Law Rev.* 2325; H. Sommerlad, ‘Diversity, Merit, and the English Judiciary: The Lessons that can be Learned from the Reform of the Selection Process: A UK Contribution’ (2013) 40 *Fordham Urban Law J. City Square* 94. Examples of judicial speeches discussing the need for diversity include Lord Neuberger, Rainbow Lecture 2014 on Diversity (House of Commons, 12 March 2014). A detailed list of seminal works on this topic can be found in the Research Repository of the Judicial Diversity Initiative: <<http://judicialdiversityinitiative.org/research/>> accessed 19 July 2017.

CHANGES IN APPOINTMENT PROCESS AND PRACTICES

This section reflects on a number of institutional changes that occurred with regard to the appointment process and practices for these judges over the period of this study. The most prominent of these was the transfer of selection from the Lord Chancellor to the JAC. There were also a series of changes to broaden the eligibility criteria, various measures to encourage more female candidates and the introduction of the equal merit provision,¹³ all of which were said to be motivated by a desire to improve judicial diversity. There have also been other changes not motivated by an intention to impact on gender diversity but which, as is shown in this paper, have had a substantial impact on it: most notably the introduction of the selection of Recorders based on knowledge of the area of law in which the Recorder will sit. While it has not been solely the issue of gender that has been the focus of policy developments in this period – ethnic origin, disability, sexual orientation, geographical location, socioeconomic background and professional

¹³ Constitutional Reform Act 2005 (CRA 2005) s. 27(5A) inserted by Crime and Courts Act 2013 s. 20 and Schedule 13 para. 9.

background have also been key factors in policy development¹⁴ – it is gender diversity that this paper focuses on.

1. *Transfer of selection from the Lord Chancellor to the JAC*

The selection of Recorders and Circuit Judges was transferred with the establishment of the JAC in 2006.¹⁵ However, for Deputy High Court Judges selection was only transferred in 2013.¹⁶

Prior to 2006, selection was the responsibility of the Lord Chancellor. By 1996 the previously informal application process for Recorders and Circuit Judges had been replaced by an ostensibly much more formal process: there were advertised vacancies, application forms, job descriptions, and statements of eligibility. On the basis of their application forms and references, candidates were invited to interview by a panel comprised of a judge, layperson and civil servant. The Lord Chancellor would then make his decision on the basis of the interview

¹⁴ Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010* (2010) 14.

¹⁵ CRA 2005 ss 88(1)(c) and 85(1)(b).

¹⁶ The technical position is that selections in respect of section 9(4) appointments are made by the JAC with appointments by the Lord Chief Justice: CRA 2005 s. 85(1)(d) and Sch. 14 Part 2 Table 2 (as amended by Crime and Courts Act 2013). For section 9(1) authorisations, the JAC select members of the ‘pool of requests’, from which the Lord Chief Justice (after consulting the Lord Chancellor) can authorise section 9(1) Deputy High Court Judges: SCA 1981 s. 9(2) and 9(2B) and CRA 2005 s. 87(1A) (each as amended by Crime and Courts Act 2013).

panel's assessment, the views of the senior judiciary and senior members of both branches of the practising profession.¹⁷

Significant flaws in the operation of the system were identified by the Commission for Judicial Appointments ('CJA'), a different body to the later-formed JAC. The CJA was established following the Peach report¹⁸ and its role was to review the appointment procedures and investigate complaints about the operation of those procedures: they did not select judges. An audit of Circuit Judge appointments showed that the appointment criteria changed during the process and that the appointed candidate was ineligible according to the advertised criteria.¹⁹ A similar audit of Recorder appointments showed there to be inappropriate judicial interventions, attempting to alter the outcomes on the basis of very little evidence 'including seeking to veto an appointment on the basis of what turned out on further investigation to be unsubstantiated gossip.'²⁰ Some candidates were invited for interview as Recorders without having to complete an application form and go through the paper sift.²¹ The audit

¹⁷ Lord Chancellor's Department, *Judicial Appointments: The Lord Chancellor's Policies and Procedures* (1995a) 7-11, Lord Chancellor's Department, *Circuit Judge Appointments* (Leaflet 2, 1995b) and *Lord Chancellor's Department, Recorder and Assistant Recorder Appointments* (Leaflet 3, 1995c).

¹⁸ L. Peach, *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (Lord Chancellor's Department, 1999) 39.

¹⁹ The Commission for Judicial Appointments, *Retrospective audit of a competition for the appointment of a specialist circuit judge* (2005) paras. 4.10-4.21.

²⁰ The Commission for Judicial Appointments, *The Commissioners' Review of the Recorder 2004/05 Competition (Midland Circuit)* (2005) para. 3.3.

²¹ *id.*, para. 3.20.

of Midland circuit Recorder appointments by the CJA suggests that female candidates might have been inappropriately disadvantaged.²² The report expressed concern that women's poorer interview scores may have been due to stereotypes and unconscious biases. The report thought it arguable that the competencies on which women scored higher than men were 'more capable of objective testing at interview and may be less susceptible to assumptions about the sort of person who would demonstrate them well.'²³ The report also noted that the CJA:

also looked at the competition report entries for the fifteen female candidates who were unsuccessful at interview and a similar number of male candidates (randomly selected) who ranked from C to E. We found that the report referred to 33% of the female candidates as nervous or timid, compared to 6% of the male candidates in our sample. This may result from a number of factors, including the interview setting or preconceptions about the nature of female candidates.²⁴

The report also expressed concern that post-interview decision-making exacerbated the discrepancy between genders, observing that:

²² id., Annex G, para. 2.

²³ id., Annex G, para. 12.

²⁴ id., Annex G, para. 13.

[n]either of the two female candidates ranked as lower B were offered appointment whereas two of the male candidates ranked as lower B were offered appointment.²⁵

Concerns with the operation of the system resulted in the transfer of selection to the JAC in 2006. The JAC is independent of government and the commissioners are comprised of a mixture of judges, lawyers and lay members. The JAC is required to ‘have regard to the need to encourage diversity in the range of persons available for selection for appointments.’²⁶ However, the JAC is required to select ‘solely on merit’, subject to candidates being of ‘good character.’²⁷ The JAC operates a competency-based recruitment system and employs a range of modern HR practices for selection.²⁸ The exact format used varies over time and with a selection exercise. The 2015 Recorder competition had three rounds. The first round involved completion of an on-line test. The second involved a further on-line test together with the candidate’s self-assessment against the published competencies. The final stage

²⁵ id., Annex G, para. 2.

²⁶ Constitutional Reform Act 2005 s. 64.

²⁷ CRA 2005, s. 63.

²⁸ G. Gee et al., *The Politics of Judicial Independence in the UK’s Changing Constitution* (2015) 170-176.

included a selection day and consideration of the comments of the candidates' referees.²⁹

In contrast, it was only in October 2013 that selection of Deputy High Court Judges was transferred to the JAC.³⁰ Prior to that, it remained with the Lord Chancellor. However, it was not subject to the same seemingly transparent appointment system that applied to Recorder and Circuit Judge appointments, rather it was 'invitation only'.³¹ Information on these appointments remained fairly secretive with no official list of Deputy High Court Judges published, despite the conclusion of the Select Committee on the Constitution that such a list should be published.³² Following the establishment of the JAC, it was represented that these appointments were 'not an appointment to judicial office at all,' but rather 'simply part of a system which will enable those who are already appointed to be deployed to the best advantage'.³³ It was further

²⁹ P. Reed and A. Tipples, *Recorder Competition - 2015 Selection Exercise: The Qualifying Test* (2015a), Penelope Reed and Amanda Tipples, *Recorder Competition - 2015 Selection Exercise: The Second Stage of Shortlisting* (2015b) and Penelope Reed and Amanda Tipples, *Recorder Competition - 2015 Selection Exercise: The Outcome* (2016).

³⁰ Judicial Appointments Commission, *Section 9(1) Policy: Selection of persons for membership of a pool for requests under section 9(1) to act as Deputy High Court Judges* (2014) 2.

³¹ Lord Chancellor's Department, *Senior Judicial Appointments* (Leaflet 1, 1995) 2.

³² Select Committee on the Constitution, *Judicial Appointments* (HL 2010-12, 272) para. 167.

³³ Written evidence of Rt Hon the Lord Judge, LCJ to the Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence* (2012), 324.

argued that the appointments were necessarily informal to promote flexibility. For example Lord Falconer said the powers were not transferred to the JAC because Lord Woolf (as LCJ) said ‘he would frequently be rung up from courts outside central London, with people saying that they were sitting in a particular case, often family cases, and that they needed to be a High Court judge to deal with a particular jurisdiction. He said that you therefore needed flexibility.’³⁴ Similarly Lord Judge when LCJ argued that the 9(4) provisions were required since they ‘enable Circuit Judges, Recorders or practitioners to be appointed to sit as Deputy High Court Judges on an emergency basis, for instance due to unexpected illness.’³⁵ Even if one were to accept these arguments, it does not justify the need for flexible arrangements whereby individuals who are not already appointed as Recorders or Circuit Judges should be appointed as Deputy High Court Judges under section 9(4). In Lord Woolf’s scenario, section 9(1) could always be used, assuming it was a Recorder or Circuit Judge making the request. This would seem likely as the context suggests a care case issue has arisen that needs the High Court’s inherent jurisdiction: eg. a parent in a care case has absconded with a child abroad. In Lord Judge’s scenario it is

³⁴ Oral evidence of Lord Falconer of Thoroton (12 October 2011) id., p. 241.

³⁵ Written evidence of Rt Hon the Lord Judge, LCJ id., pp. 324-325.

questionable why a ‘practitioner’ who was not a Recorder should have been allowed to sit as a judge of the High Court on a spur of the moment: it is unclear how they could be properly trained at such short notice. Also it is impossible to reconcile any such ‘emergency appointments’ with the policy of the Lord Chancellor’s Department that part time appointments (including Deputy High Court Judges) would be for a period of not less than 5 years,³⁶ such policy having been introduced to comply with the decision in *Starrs v Ruxton* 2000 JC 208 (HCJ) below.

While the the foregoing description of the appointments process prior to the transfer of powers to the JAC suggests that the more open and objective system would have increased female representation, others disagree. Lord Sumption has argued that:

The irony is that if the Lord Chancellor had retained the power to select judges, instead of passing it to the Judicial Appointments Commission in 2006, he could, and I suspect would, have treated diversity as a criterion for appointment.³⁷

Lord Sumption then notes that the JAC could not engage in such positive discrimination, both because of the requirement to select on ‘merit’ and that its procedures are published and transparent. With regard to Lord

³⁶ Lord Chancellor’s Department, *Judicial Appointments Annual Report: 1999-2000* (2000) para. 2.15.

³⁷ Sumption, *op. cit.*, n. 2.

Sumption's claim that the old system would have positively discriminated in favour of women, there is some evidence of that, when Lord Chancellor, Lord Irvine 'sought to promote promising barristers from non-traditional backgrounds'.³⁸ Rackley has noted how in the first year following the JAC's initial appointments, there was a drop in the proportion of women appointed to the judiciary as a whole, which fell from 41 to 34 percent.³⁹ Indeed, a study⁴⁰ of the Court of Appeal appointments between 1985 and 2005 suggest that it is possible that 'non-elite' candidates were favoured from 2003 when the threat of reform loomed over the old appointments system.

2. *Encouraging more female candidates*

The period of the study has seen various attempts to promote gender diversity by encouraging female candidates, either by directly soliciting such applications or indirectly by soliciting applications from groups with a higher proportion of women, such as solicitors.⁴¹ Even when judicial applications were solely the responsibility of the Lord Chancellor, there was some attempt to encourage more female applicants

³⁸ Gee et al., op. cit, n 28, p. 162.

³⁹ E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (2009) 93.

⁴⁰ J. Blanes in Vidal and C. Leaver, 'Are tenured judges insulated from political pressure?' (2011) 95(7-8) *J. of Public Economics* 570, 578-581.

⁴¹ Select Committee on the Constitution, op. cit., n. 32, paras. 75 and 118-125.

through the ‘don’t be shy, apply’ initiative.⁴² The JAC is under a statutory duty to ‘have regard to the need to encourage diversity in the range of persons available for selection for appointments’.⁴³ However the JAC’s desire to expand the pool of candidates as widely as possible to achieve this has often been thwarted by additional selection criteria imposed by the Ministry of Justice, specifically the Lord Chancellor’s expectation that candidates for salaried posts will have sufficient directly-relevant previous judicial experience.⁴⁴

Recently the Judiciary (independently of the JAC) has sought to promote female applications through the diversity support initiative. This initiative aimed to appoint more exceptionally high quality lawyers and legal academics from non-traditional backgrounds to sit in the High Court in London in the 2015 section 9(4) Deputy High Court Judge appointment competition.⁴⁵ The initiative included a specially-designed programme of mentoring and support. Since there has only been one selection exercise to date in which mentoring has been offered and since

⁴² E. Rackley, ‘Judicial diversity, the woman judge and fairy tale endings’ (2007) 27(1) *Legal Studies* 74, 83.

⁴³ CRA 2005, s. 64.

⁴⁴ Gee et al., op. cit., n. 28, p. 172; JAC, *Pre-legislative Scrutiny by The Joint Select Committee on the Draft Constitutional Renewal Bill: Evidence from The Judicial Appointments Commission* (June 2008) [79]; Sumption, op. cit., n. 2, p. 8.

⁴⁵ ‘Diversity Support Initiative’ (*Courts and Tribunals Judiciary*, 6 September 2015) <<https://web.archive.org/web/20150906181301/https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/diversity-support-initiative/>> accessed 19 July 2017.

no figures have been released on the relative success of mentored candidates, it has not been possible to assess the success of the scheme in this study.

3. *Alteration to the statutory eligibility criteria*

One strategy used for increasing diversity was reducing the amount of prior legal experience required by statute as a prerequisite for appointment. It was considered that ‘broadening eligibility would widen the pool of potential appointments and thus enhance diversity’,⁴⁶ the logic being that as women enter the legal professions at increasing rates, junior lawyers are more likely to be female. For appointments since July 2008,⁴⁷ Recorders have had to satisfy the judicial-appointment eligibility criteria on a 7-year basis, rather than having 10 years post-call or post-admission experience as was previously required. Similarly, for appointments since July 2008, Circuit Judges have had essentially to meet the same condition.⁴⁸

⁴⁶ Department for Constitutional Affairs, *Increasing Diversity in the Judiciary: Responses to the DCA Consultation Paper CP 25/04* (2005) 6.

⁴⁷ Courts Act 1971 (CA 1971) s. 21(2), as amended by Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).

⁴⁸ CA 1971, s. 16(3), as amended by TCEA 2007. Whilst individuals are *technically* eligible if they either are Recorders or have held certain full-time judicial appointments (eg District Judges) for at least three years, as a practical matter all such individuals are likely to satisfy the judicial-appointment eligibility criteria on a 7-year basis.

4. *Alteration to non-statutory appointment requirements*

There were also changes in the non-statutory rules for appointment in the period of study, including some relaxation of the requirement for part-time service *in that post* prior to full-time appointment, and a removal of minimum age requirements.

Prior to the establishment of the JAC, the Lord Chancellor expected that ‘before being considered for any [full-time] judicial post, a candidate must have served in that or a similar post in a part-time capacity.’⁴⁹ For Circuit Judges, this meant that the Lord Chancellor would ‘normally only consider applicants who have sat as Recorders for two years.’⁵⁰ This requirement for previous judicial experience was strongly contested by the JAC when it took over responsibility for judicial appointments, as it considered that it ‘narrowed the pool of eligible candidates and jeopardised its efforts to increase diversity.’⁵¹ However, the Ministry of Justice and HM Courts & Tribunals Service sought to retain the requirement for such prior experience.⁵² The present situation is that for most Circuit Judge appointments, some ‘directly relevant prior judicial experience’ is necessary, but this only

⁴⁹ Lord Chancellor’s Department, *op. cit.* (1995a), n. 17, p. 6.

⁵⁰ Lord Chancellor’s Department, *op. cit.* (1995b), n. 17, p. 1.

⁵¹ Gee et al., *op. cit.*, n. 28, p. 171.

⁵² *id.*

requires ‘sitting as a judge in a salaried or fee-paid capacity.’⁵³ Furthermore, the requirement for previous judicial experience is waived for certain Circuit Judge appointments.⁵⁴

When appointments were the responsibility of the Lord Chancellor, he would not usually recommend a person for appointment to a Recordship below the age of 38.⁵⁵ Similarly, he would normally only recommend Recorders aged between 45 and 60 for appointment as Circuit Judges.⁵⁶ Following the transfer of appointment powers to the JAC, there is no upper or lower age limit apart from the statutory retirement age of 70. However, the JAC consider that the age at which someone is appointed as a Circuit Judge must allow for a reasonable length of service of five years before retirement, thus there is an effective upper age limit of 65.⁵⁷

5. *Equal merit provision*

Under the equal merit provision, for selection exercises launched since 1 July 2014, where two or more candidates are assessed as being of equal

⁵³ ‘025 CJ information page’ (*The Judicial Appointments Commission*) <<https://jac.judiciary.gov.uk/025-cj-information-page>> accessed 19 July 2017.

⁵⁴ ‘Specialist Civil Circuit Judge, Chancery/Mercantile’ (*The Judicial Appointments Commission*) <<https://jac.judiciary.gov.uk/vacancies/035>> accessed 19 July 2017.

⁵⁵ Lord Chancellor’s Department, op. cit. (1995c), n. 17, p. 1.

⁵⁶ Lord Chancellor’s Department, op. cit. (1995b), n. 17, p. 1.

⁵⁷ op. cit., n. 54.

merit, the JAC can select the candidate that will increase the representation of women and ethnic minorities in the judiciary.⁵⁸ The limited circumstances in which such positive discrimination is permitted are as a result of EU law.⁵⁹ Before the provision was introduced, it was regularly suggested in the media that its introduction would make a substantial impact on judicial diversity.⁶⁰ Others have been more sceptical however. Lord Sumption noted that the ‘ambitious claims’ made for the equal merit provision are unfortunate as its impact is likely to be limited.⁶¹ The report of the House of Lords Select Committee on the Constitution recommended the introduction of the equal merit provision, but noted that such ties would only be likely to occur in large assessment exercises, such as where over 100 vacancies were to be filled.⁶² Although over 100 Recorders are sometimes appointed in a selection exercise, the fact that they apply to geographic circuits (although they can apply to more than one) may mean that the effective number appointed in any individual competition is less than this

⁵⁸ CRA 2005 s. 27(5A). Although the Act refers generally to increasing diversity, under the JAC’s present policy this is only applied in respect of gender and ethnicity.

⁵⁹ L. Barnes, ‘Equality Law and Experimentation: the positive action challenge’ (2009) 68(3) *Cambridge Law J.* 623, at 644.

⁶⁰ eg F. Gibb, ‘More women to reach top ranks of judiciary under diversity strategy’ *The Times*, 15 November 2011, 21.

⁶¹ Sumption, *op. cit.*, n. 2, p. 6.

⁶² Select Committee on the Constitution, *op. cit.*, n. 32, para. 99.

threshold of 100. However, it is understood⁶³ that in the next Recorder competition, in February 2017 Recorders will not be appointed to circuits, which may increase the likelihood of a tie and so increase the likelihood of the equal merit provision being applied.

6. *Selection on the basis of relevant legal knowledge*

Some controversy has been caused by the contents of the qualifying test for Recorders, which has shifted to require substantial knowledge of the law and procedures of the relevant jurisdiction. In and prior to 2009, the qualifying test used a hypothetical jurisdiction and invented statutory materials.⁶⁴ However, in 2011 and 2015 the selection exercises were based on the actual jurisdictions (criminal and family) being recruited for.⁶⁵ Although candidates were given pre-reading in 2015, it appears that for the criminal law test, one half, or more, of the questions were not covered by the reading.⁶⁶ For the family law test, a non-specialist candidate reported that it was ‘impossible to actually know the answers from pre-preparation unless you had spent at least the entire 2 weeks

⁶³ E. Truss, ‘Women in the legal industry’ (Spark 21 Conference, 9 November 2016) <<https://www.gov.uk/government/speeches/women-in-the-legal-industry>> accessed 19 July 2017.

⁶⁴ Reed and Tipples, *op. cit.* (2015a), n. 29, para. 12.

⁶⁵ *id.*, para. 145.

⁶⁶ *id.*, para. 7.

studying, and even then I doubt it.’⁶⁷ Candidates also reported that the preparatory material was not reasonably accessible to non-specialists.⁶⁸

This change in the test content is associated with a steep decline in the number of non-specialists appointed. In the 2009 southeastern competition, of the 128 Recorders appointed, 47 (38%) had neither criminal nor family practices, 60 (47%) had criminal practices and 19 (15%) had family practices: the remaining two were from an unknown professional background.⁶⁹ In the 2011 Recorder (Family) competition all those appointed had family law practises,⁷⁰ and in the 2015 Recorder (Family) competition, of the 35 Recorders appointed, 33 (95%) had a family practice.⁷¹ In the 2011 Recorder (Crime) competition, of the 80 Recorders appointed, 69 (86%) had a criminal practice,⁷² and in the 2015 Recorder (Crime) competition, of the 64 Recorders appointed, 53 (83%) had a criminal practice.⁷³

The information on the JAC’s website does not explain any policy reason for this shift to using a qualifying test based on the jurisdiction in which the Recorders will be required to sit.⁷⁴ However, Lord Sumption

⁶⁷ *id.*, para. 120.

⁶⁸ *id.*, para. 80.

⁶⁹ *id.*, Appendix 3.

⁷⁰ *id.*, Appendix 2.

⁷¹ Reed and Tipples, *op. cit.* (2016), n. 29, p. 5.

⁷² Reed and Tipples, *op. cit.* (2015a), n. 29, Appendix 1.

⁷³ Reed and Tipples, *op. cit.* (2016), n. 29, p. 4.

⁷⁴ Reed and Tipples, *op. cit.* (2015a), n. 29, para. 140.

(a former JAC commissioner) has noted how the JAC are limited by the Ministry of Justice insisting on appointees who can ‘hit the ground running instead of having time to grow into the job.’⁷⁵ Gee et al.’s research shows that after 2011 there was an almost complete change in the commissioners of the JAC, who were less willing to resist pressures from the Ministry of Justice.⁷⁶ Accordingly, the change to a criminal law-based test in 2011 onwards might be explained by the JAC accommodating pressures from the Ministry of Justice to appoint candidates who require less training.

Following pressure from the Chancery Bar Association, Lord Justice Burnett, the Vice-Chair (Judicial) of the JAC, has announced that the 2017 Recorder competition will not involve any testing of knowledge of criminal law and procedure, or family law and procedure.⁷⁷

7. Assistant Recorders

Prior to 2002, in order to become a Recorder it was first necessary to be an Assistant Recorder, which was a temporary appointment, with the appointment reviewed annually.⁷⁸ A minimum of three years of service

⁷⁵ Sumption, *op. cit.*, n. 2, p. 8.

⁷⁶ Gee et al., *op. cit.*, n. 28, p. 170.

⁷⁷ Ian Burnett, ‘2017 Recorder Competition-Fundamental change to the selection process’ (Lord Justice Burnett on the forthcoming Recorder competition, 11 October 2016).

⁷⁸ Lord Chancellor’s Department, *op. cit.* (1995c), n. 17, p. 2.

as an Assistant Recorder (or two in the case of QCs) was usually required prior to appointment as a Recorder.⁷⁹ In *Starrs v Ruxtion*, the High Court of Judiciary in Scotland held that temporary Sheriffs were insufficiently independent of the executive for the purposes of Art 6 ECHR, because they had insufficient security of tenure. Following that decision, the Lord Chancellor undertook a review of all part time judicial holders.⁸⁰ In consequence, the Lord Chancellor announced in April 2000 that the distinction between Assistant Recorders and Recorders served no useful purpose and all existing assistant Recorders were given the status of full Recorder.⁸¹ No further Assistant Recorders were appointed, although the status was only officially abolished in 2013.⁸²

DATASET

This study both considers the composition of and appointments to the judicial offices of Recorder and Circuit Judge between 1996 and 2016. In this period, 1,913 individuals were appointed as Recorders and 889 were appointed as Circuit Judges. There were also 904 Recorders and 519 Circuit Judges in office at the start of this period.

⁷⁹ *id.*, p. 1.

⁸⁰ Lord Chancellor's Department, *op. cit.*, n. 36, paras. 2.14-2.15.

⁸¹ Lord Chancellor's Department, *Judicial Statistics* (1999) 91.

⁸² Crime and Courts Act 2013 s. 20 and Schedule 13, Part 7.

The names and appointment dates of all Recorders and Circuit Judges were obtained from the official notices in the *London Gazette*. Lists of those who were serving Recorders and Circuit Judges during the study, together with the geographic circuit they were assigned to, was obtained from various editions of *Butterworths Law Directory* published between 1996 and 2015, when the publication ceased.⁸³ The details of serving Circuit Judges during the period was also accessed where possible from the web-pages of the Judiciary⁸⁴ and the Lord Chancellor's Department,⁸⁵ with historic web-pages accessed via the UK Government Web Archive⁸⁶ and the Internet Archive Wayback Machine.⁸⁷ This had the advantage of accessing the data in a machine-readable format: allowing it to be entered more quickly and eliminating possible errors from having to freshtype the entries. The gender of all of these judges was inferred from their names, and where names were

⁸³ It was not possible to identify Recorders from the final 2015 edition, as that only listed them by their surname and many Recorders share the same surname. A list of who was a serving Recorder in 2016 was obtained by a FOI request against the Ministry of Justice, with the response provided on 16 March 2016.

⁸⁴ 'Who are the judiciary?' (*Courts and Tribunals Judiciary*) <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-judiciary/>> accessed 28 January 2017.

⁸⁵ 'List of Circuit Judges in England & Wales' (*Lord Chancellor's Department*) <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-judiciary/circuit-judge-list/>> accessed 28 January 2017.

⁸⁶ 'UK Government Web Archive' <www.nationalarchives.gov.uk/webarchive/> accessed 19 July 2017.

⁸⁷ 'Internet Archive Wayback Machine' <<https://archive.org/web/>> accessed 19 July 2017.

ambiguous or otherwise uncertain⁸⁸ to the author were clarified by an internet search.

Breakdowns by gender of the numbers of applications and appointments for each of the Recorder and Circuit Judge competitions held since 1998 were obtained from the relevant published statistics. Data on applications since 2007 is taken from the official statistics published on the JAC website.⁸⁹ Data on appointments from 1998 to 2006 is taken from the annual reports on judicial appointments available on the Department of Constitutional Affairs website, now archived as part of the UK Government Web Archive.⁹⁰ Information on the use of the equal merit provision in Recorder appointments was obtained by a Freedom of Information Act (FOI) request made to the JAC.

The professional backgrounds and dates of admission (for solicitors) or call (for barristers) was obtained by looking up the full name of the judges in various editions of *The Bar Directory*, *The Law Society's Directory of Solicitors and Barristers* and similar publications. Similarly, the chambers which barristers were in at the time of their judicial appointment were identified by looking up the barrister in the

⁸⁸ This was mainly related to foreign names. An internet search was required in 48 instances.

⁸⁹ 'JAC official statistics' (*The Judicial Appointments Commission*) <<https://jac.judiciary.gov.uk/jac-official-statistics>> accessed 19 July 2017.

⁹⁰ UK Government Web Archive, op. cit., n. 86.

relevant edition of *The Bar Directory*. Further information on the judges, including whether they had been Deputy High Court Judges and their date of birth, was obtained from their entries in *Who's Who*.

To assess the extent that changes in the proportion of women appointed as Recorders are merely a function of changes in the gender composition of the Bar, a dataset comprising of the members of the 118 chambers that produced the most Recorders between 1996 and 2006 is used, assembled from old editions of the *The Bar Directory*.⁹¹

The identities of serving Deputy High Court Judges, both authorised under s9(1) and appointed under s9(4), was obtained by FOI requests to the Ministry of Justice.⁹² The disclosure provided details of the appointment dates and retirement dates. However, the disclosed information related only to the individuals who were Deputy High Court Judges at the time of the disclosure, as the Ministry stated that it does not hold historic data on those who were previously Deputy High Court Judges. From the same FOI requests, it is possible to know the gender breakdown of Deputy High Court Judges presently holding office. Assuming that there have been no resignations since their appointments,

⁹¹ M. Blackwell, 'Taking Silk: An Empirical Study of the Award of Queen's Counsel Status 1981–2015' (2015) 78(6) *Modern Law Rev.* 971, at 981-987.

⁹² The list of 9(1) authorisations was provided on 6 January 2016 and the list of s9(4) appointments was provided on 5 May 2016.

it is possible to know the gender breakdown of those Deputy High Court Judges appointed most recently. However, it is more difficult to discern the gender breakdown of those appointed in earlier periods. The Ministry of Justice has stated that it does not possess such historic data, and none has been officially published in the *Judicial Statistics*. This lack of official data is especially unfortunate given the report of the Select Committee on the Constitution which recommended that such data be published.⁹³ Although the disclosed list of current Deputy High Court Judges contains their appointment date, this is clearly not a complete list of appointments in earlier periods as it necessarily excludes those who have been appointed as puisne judges or those who have retired. The further in time one goes back, the less complete the list is likely to be: the longer time period having offered greater potential for promotions or retirements. Such lack of completeness does not of itself mean that the sample is unrepresentative: this would only be so if female Deputy High Court Judges had a different propensity to retire or be promoted than their male counterparts. Some insight into any possible selection bias may be gleaned from a published statement of the Advisory Panel on Judicial Diversity on section 9(1) Deputy High Court Judge authorisations, namely that in the three years preceding 8 November

⁹³ Select Committee on the Constitution, *op. cit.*, n. 32, para. 169.

2011, there were 74 authorisations made, 19 (26%) being for female judges.⁹⁴ The list of presently-authorized section 9(1) Deputy High Court Judges names 84 individuals first authorised in the three year period ending 8 November 2011, 21 (25%) being female. There is neither a substantive nor a statistical⁹⁵ difference between these two proportions, suggesting that any lack of completeness of the data does not make it a biased sample with regard to gender. Clearly, however, there is some unreliability in either (or both of) the list of authorisations provided under the FOI request, or in the data provided to the Advisory Panel on Judicial Diversity, as the latter suggests that fewer authorisations were made in the period that the former source states to be the number of judges now authorised under section 9(1) who were first authorised in that period. Given the incompleteness and both potential bias and potential unreliability, one needs to be cautious in interpreting this data. Even so, as the only available data it provides a valuable insight into Deputy High Court Judge appointments.

Some of the information presented below in the fifth section of this paper would be available from compiling subsequent editions of official

⁹⁴ Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (Annual Report, 2012) 73.

⁹⁵ p=1.

statistics: however, it is only since 2001 that a breakdown by gender of serving Recorders and Circuit Judges has been published.⁹⁶ A major advantage of the data used in this study over that presented in the official statistics is that it uses individual level data rather than univariate aggregate data. Indeed, the quality of the official statistics has diminished substantially since responsibility passed to the JAC. When the statistics were the responsibility of the DCA, the *Judicial Appointments Annual Reports*⁹⁷ contained cross-tabulations of gender against professional background and of gender against ethnic background, but under the JAC such features are only reported in univariate form. Furthermore, the DCA statistics provided much richer information on ethnic background (initially categorising applicants as white, black, Asian and other and from 2003–4 into much more detailed categories), whilst the JAC reports use a smaller number of less informative reporting categories (white, BME and other). Accordingly, unlike the JAC’s official statistics, this study enables an assessment of whether women are more or less likely than men to be appointed,

⁹⁶ ‘Annual diversity statistics 2001’ (*Courts and Tribunals Judiciary*) <<https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2001/>> accessed 19 July 2017.

⁹⁷ These can be downloaded from ‘Judicial Appointments: Annual Reports’ (*Department for Constitutional Affairs*) <<http://webarchive.nationalarchives.gov.uk/20060213205513/http://www.dca.gov.uk/judicial/jaarepfr.htm>> accessed 19 July 2017.

controlling for possibly confounding variables such as length or nature of prior legal and judicial experience. Using individual level data also avoids erroneous inferences such as ecological fallacies.⁹⁸

For the same reason, the analysis in this paper is more insightful than the analysis of the JAC which is based on ‘pools’⁹⁹ of eligible lawyers. The analysis based on these pools is essentially a univariate analysis based on the implicit assumption that each individual in the same appointment pool should have the same chance of appointment, subject to the single variable that is analysed in each analysis. Thus, for example, such analysis is predicated on the assumption that all part-time judicial office holders are equally likely to obtain any full-time appointment. However, the general belief is that it greatly improves the prospects of appointment if applicants have held a part-time appointment of the same rank as the full-time one applied for.¹⁰⁰ Similarly, the analysis based on pools is predicated on all applicants being equally eligible for appointment. Yet despite there being far more solicitors than barristers,

⁹⁸ W.S. Robinson, ‘Ecological Correlations and the Behavior of Individuals’ (1950) 15(3).

⁹⁹ eg. Judicial Appointments Commission, ‘Judicial Selection and Recommendations for Appointment Statistics, April 2013 to September 2013’ (5 December 2013) <https://jac.judiciary.gov.uk/sites/default/files/sync/news/jac_official_statistics_dec_2013.pdf> accessed 19 July 2017.

¹⁰⁰ B. Hale, ‘Women in the Judiciary: Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society’ (27 June 2014) <<https://www.supremecourt.uk/docs/speech-140627.pdf>> accessed 19 July 2017, 15.

far more barristers are appointed to the judicial offices considered by this study than solicitors. The proportion of females among practising solicitors also exceeds that of females among practising barristers.¹⁰¹ The JAC's univariate pools approach may therefore suggest that women are under-appointed, when the situation is more complex and the analysis should consider whether the disadvantage is because they are women, or because they are solicitors. In some ways the naivety of the JAC's analysis is especially surprising since they presumably do have the individual level data on applications which would allow them to carry out a multivariate analysis.

CHANGING REPRESENTATION OF WOMEN

This section presents descriptive statistics in relation to the gender of those individuals appointed as Recorders, Circuit Judges and Deputy High Court Judges during the period of this study. Statistics are also presented as to the gender composition of those serving judges during this period (which therefore includes some appointed before the period began). This section shows there to be a steady increase in the proportion of women both appointed and serving, as well as large regional

¹⁰¹ M. Blackwell, 'Old Boys' Networks, Family Connections and the English Legal Profession' [2012] *Public Law* 426, at 429.

variations in the proportion of Recorders and Circuit Judges that are female.

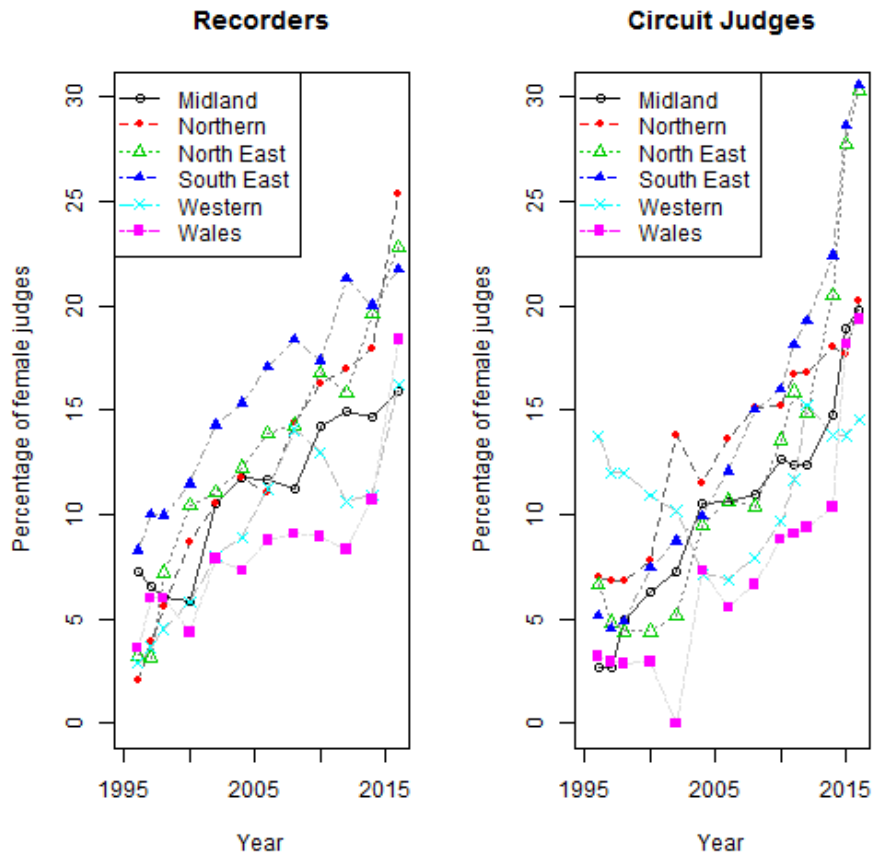


Figure 1: The changing percentage of Recorders and Circuit Judges in office who are female broken down by geographical area between 1996 and 2016.

In 1996, 6% of existing Recorders were female and 6% of existing Circuit Judges were female. These proportions have increased at a fairly constant rate. In 2016, 21% of sitting Recorders and 25% of Circuit Judges were female. However, as is shown in Figure 1 above, the

proportions are not consistent across the six geographical circuits to which Recorders and Circuit Judges are assigned. The lowest proportion has generally been in Wales, where only 4% of Recorders and 3% of Circuit Judges were female in 1996, but with the respective proportions increasing to 18% and 19% in 2016. The greatest proportion has generally been in the South East, where 8% of Recorders and 5% of Circuit Judges were female in 1996, with the respective proportions increasing to 22% and 31% in 2016. This disparity in the regional gender breakdown of the judiciary seems not to be reflected in the Bar.¹⁰² Such regional differences are important, since it means that individuals' encounters with justice are likely to be highly contingent on the part of the country in which their cases are heard.

¹⁰² Between 1993 and 2008 the *Bar Council Annual Statistics* included a cross-tabulation of the gender of practising barristers by whether they were based in London or 'the provinces.' In no year is there a substantial difference between these figures. Regrettably they do not separate 'the provinces' according to circuit. Also there is no similar geographical gender breakdown in the Law Society's *Annual Statistical Report*.

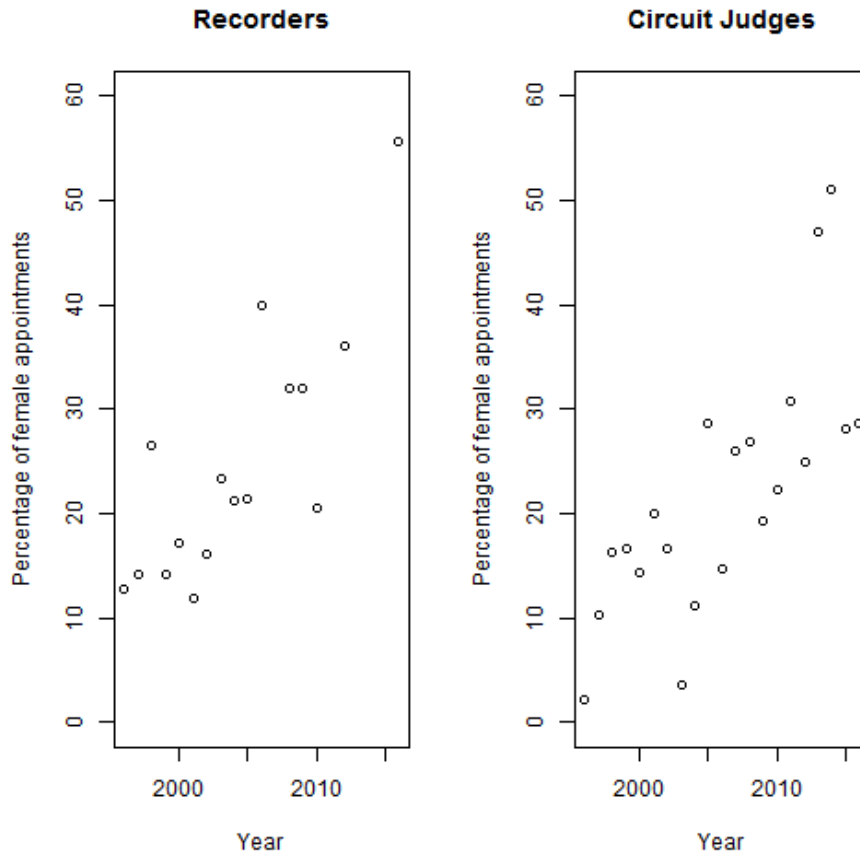


Figure 2: The percentage of Recorders (left) and Circuit Judges (right) appointed each year who were female.

The gender breakdown by year of appointments of Recorders and Circuit Judges is shown in Figure 2 above. Both in respect of Recorders and Circuit Judges, this shows a steady increase over time in respect of the proportion of female appointees. A striking feature of the graph showing Recorder appointments is the large variation in the proportion of female appointees in the four most recent years in which appointments have been made: 2009, 2010, 2012 and 2016. The percentage of female

Recorder appointments in each of these years is, respectively, 32%, 21%, 36% and 56%. As discussed below (in the subsection entitled ‘Selection on the basis of relevant legal knowledge’), the likely explanation for this variation is variations in the practise area of the individuals appointed in these years – family law and crime are generally associated with a high-proportion of female barristers,¹⁰³ and civil areas, especially chancery and commercial law, are associated with a lower proportion of female barristers.

In 2016, 31 (18%) of the 173 Recorders and 55 (28%) of the 195 Circuit Judges ticketed as Deputy High Court Judges under s9(1) are female, and 19 (17%) of the 111 Deputy High Court Judges appointed under s9(4) are female.

EFFECTIVENESS OF REFORMS TO THE APPOINTMENT PROCESS

This section considers the effectiveness of a number of changes and strategies that have been adopted to facilitate the increased representation of women in the judiciary. This section shows that many reforms that were heralded with much fanfare as promoting diversity

¹⁰³ J. Rogers, ‘Representing the Bar: how the barristers’ profession sells itself to prospective members’ (2012) 32(2) *Legal Studies* 202, at 220.

(such as changes to the statutory appointments criteria and the introduction of the equal merit provision) have had little impact. That is not to say that there were not good reasons for making some or all of these changes: but that the reason of improving diversity that was given was not achieved. Conversely, the change with the greatest impact (appointing criminal and family specialists in those areas) seems not to have been introduced to further diversity, but rather to save cost. Given the impact of this latter change, it is unfortunate that it is being revoked in the 2017 Recorder competition.

1. *Transfer of Selection from the Lord Chancellor to the JAC*

This subsection considers whether the transfer of functions to the JAC has made a difference to the proportion of female judicial appointees. Theoretically there are two mechanisms through which this might have occurred. First, following the transfer a greater proportion of *applicants* might have been women. This could have been, for example, because women perceived their chances of success to be greater under a transparent and independent appointments process. The second method would be if an independent and transparent selection process was more likely to *select* women, due to the former process discriminating against women, possibly due to unconscious biases.

(i) *Applications*

This subsection shows how until around 2009 the proportion of female applicants generally tracked the proportion of women among the pools of lawyers likely to be appointed. Whilst there was no change immediately following the establishment of the JAC in 2006, in around 2009 the rate of applications began to diverge from the trend among the relevant pools, with women being more likely to apply.

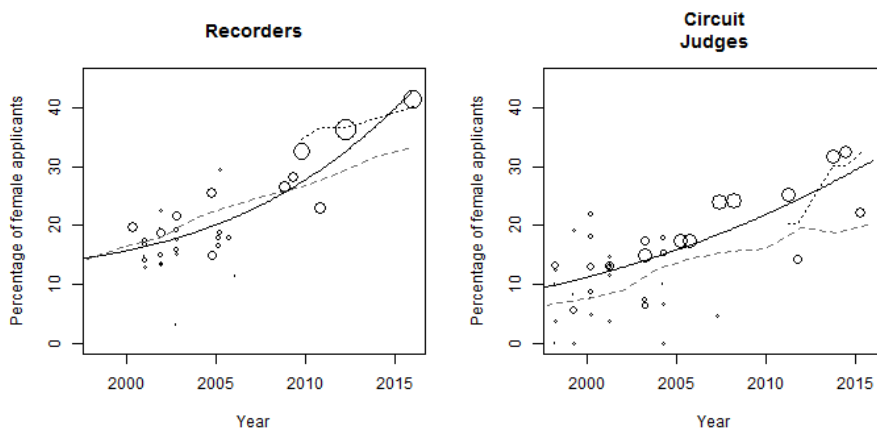


Figure 3: The changing percentage of female applicants in competitions for Recorders and Circuit Judges between 1996 and 2016. The solid black line shows a line of best-fit in relation to the applications data. The upper dotted line shows the pools of eligible candidates based on JAC data. The lower broken line shows the percentage of women in pools of *likely* eligible applicants.

The changing percentage of applicants to competitions for Recorder and Circuit Judges between 1996 and 2016 is shown in Figure 3. Each of the circular points represents the percentage of female applicants for

any given competition. The area contained by each of the points is proportional to the total number of applicants in that competition. It is immediately apparent from the plots that the percentage of female applicants has steadily increased during this period.

This trend is confirmed by the solid black line, which is a line of best-fitting regression models¹⁰⁴ in relation to the points. The published data on applications was disaggregated (so there was one observation per applicant) and models were fitted with MLwiN,¹⁰⁵ using MCMC estimation¹⁰⁶ and the R2MLwiN interface.¹⁰⁷ A multilevel¹⁰⁸ logistic model was used in which each application was ‘nested’ within the relevant selection exercises to account for any dependency within

¹⁰⁴ The best fitting models are estimated for Recorder applications as:

$$\text{logit}(FEMALE_{ij})=u_j+\beta_{1ij}(YEAR)+\beta_{2ij}(YEAR^2)$$

and for Circuit Judge applications as:

$$\text{logit}(FEMALE_{ij})=u_j+\beta_{1ij}(YEAR)$$

in both instances where:

$$\text{logit}(FEMALE) \sim \text{Bin}(1, \pi_{ij});$$

$$E(FEMALE_{ij}) = \pi_{ij};$$

$$\text{Var}(FEMALE_{ij}) = \pi_{ij}(1 - \pi_{ij}); \text{ and}$$

$$u_j \sim N(0, \sigma_j^2)$$

¹⁰⁵ J. Rasbash et al., *MLwiN Version 2.1* (Centre for Multilevel Modelling, University of Bristol 2009).

¹⁰⁶ W.J. Browne, *MCMC Estimation in MLwiN v2.1* (Centre for Multilevel Modelling, University of Bristol 2009).

¹⁰⁷ Z. Zhang et al., ‘R2MLwiN: A Package to Run MLwiN from within R.’ (2016) 72(10) *J. of Statistical Software* 1.

¹⁰⁸ For discussions of multilevel models see T.A.B. Snijders and R.J. Bosker, *Multilevel Analysis: An Introduction to Basic and Advanced Multilevel Modeling* (2012).

selection exercises not accounted for by the general trend.¹⁰⁹ Alternate models were fitted with a dummy variable to account for the post-reform period (to allow for a jump immediately following reform) and also with an interaction between that dummy variable and the year (to allow the trend of increase to change in the post-reform period). However, the addition of such variables did not improve the fit of the model: which might suggest that the reforms did not result in any alteration to the trend of change in the gender breakdown of applications.

To assess the extent to which the rise in the proportion of female applications might simply be attributable to changes in the gender breakdown of likely applicants, the plots show the gender breakdown of pools of arguably likely applicants. The highest dotted line (shown only in respect of certain JAC selection exercises where it was reported) shows the ‘eligible pool’, being the proportion of women among everyone who meets the formal eligibility criteria and additional selection criteria for a post.¹¹⁰ This is the benchmark used by the JAC and published in their official statistics. However, it is somewhat misleading as it suggests that anyone in the pool is equally likely to be appointed and exaggerates the proportion of female candidates that are

¹⁰⁹ The need to account for such dependency is shown by how the DIC statistic is much higher in the models that do not account for such dependency.

¹¹⁰ *Statistics definitions and measurement 2015-16* (Official Statistics, 2016) 6.

genuinely in contention. In respect of Recorders it will include all solicitors and barristers who satisfy the judicial-appointment eligibility criteria on a 7-year basis. Only 11% of those individuals are barristers.¹¹¹ Presently 36% of practising barristers are female,¹¹² but women account for 49% of solicitors with practising certificates.¹¹³ The inclusion of solicitors thus greatly increases the proportion of eligible women: but as a matter of practical likelihood few are likely to be appointed, as it is far more difficult for employed solicitors to obtain their employer's agreement to time off for a part-time judicial appointment than it is for self-employed barristers to make that choice.¹¹⁴ Only 199 of the 1,894 (10.5%) Recorder appointments since 1996 where professional background is known have been solicitors. Similarly the JAC's eligible pool for Circuit Judges is composed of those who meet the judicial-appointment eligibility criteria on a 7-year basis and have served as a fee-paid judicial office holder for at least 2 years, or have completed 30 sitting days in a fee paid capacity. These would include many tribunal

¹¹¹ Judicial Appointments Commission, *Judicial Selection and Recommendation for Appointment Statistics, England and Wales*, April 2015 to March 2016 (2016) 13.

¹¹² Bar Standards Board, 'Practising barrister statistics' <<https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>> accessed 19 July 2017.

¹¹³ The Law Society, *Annual Statistics Report 2015* (2016).

¹¹⁴ H. Genn, *The attractiveness of senior judicial appointment to highly qualified practitioners: Report to the Judicial Executive Board* (Directorate of Judicial Offices for England and Wales, 2008) 23.

judges and (Deputy) District judges, who are disproportionately female in comparison to the rest of the judiciary.¹¹⁵ But as discussed further below (in subsection 4, entitled ‘Alteration of non-statutory appointment criteria’), 95% of the Circuit Judges appointed since 1996 were Recorders prior to their appointment.

More realistic pools are shown in the lower dotted line that extends between 1996 and 2016. For Recorder appointments, these pools are comprised of all barristers between 15 and 29 years’ call in the 118 sets that produced four or more Recorders in the period. Between them these sets produced 1,176 of the 1,913 Recorders appointed during the period of this study. For Circuit Judges the pools are comprised of all serving Recorders with between 2 and 16 years’ experience following their appointment. These periods of post-call and judicial experience are selected, as 90% of all barristers appointed Recorders and of all Recorders appointed Circuit Judges were appointed within these periods.

For Recorders, comparing the trend in actual appointment rate (the solid black line) to this more realistic pool of potential appointees (the broken line), it can be seen that the actual rate of female applications was fairly consistent with their female representation in the pool of potential

¹¹⁵ There were 1,894 judges in the tribunals on 1 April 2016, of which 45% were female. On the same date, 20% of Recorders were female. Source: Judicial Office, *Judicial Diversity Statistics 2016* (Judicial Office Statistics Bull., 2016) 5 and 12.

applications until around 2009, since when the actual proportion of applicants who are female has consistently exceeded the proportion of the pool that is female. For Circuit Judges the actual proportion of applicants who are female has consistently exceeded the proportion of the pool that is female for the entire period, although since 2009 the trend of increase has diverged from the underlying pools, with an accelerated increase in female applicants. Neither for Recorders nor for Circuit Judges was there any change in the rate of applications relative to the pool around 2006, when the JAC was established. This again suggests that the transfer of appointments to the JAC has not of itself made a difference to application rates among eligible women. However, this does not rule out the possibility that action by the JAC might be responsible for the increase in female applications from around 2009.

(ii) *Appointments*

This subsection shows that in Recorder competitions the success rate is very similar for male and female applicants throughout the twenty years of this study. However, throughout the twenty year period, female applicants routinely outperform male applicants in Circuit Judge competitions, with this difference being more pronounced in the period following the establishment of the JAC.

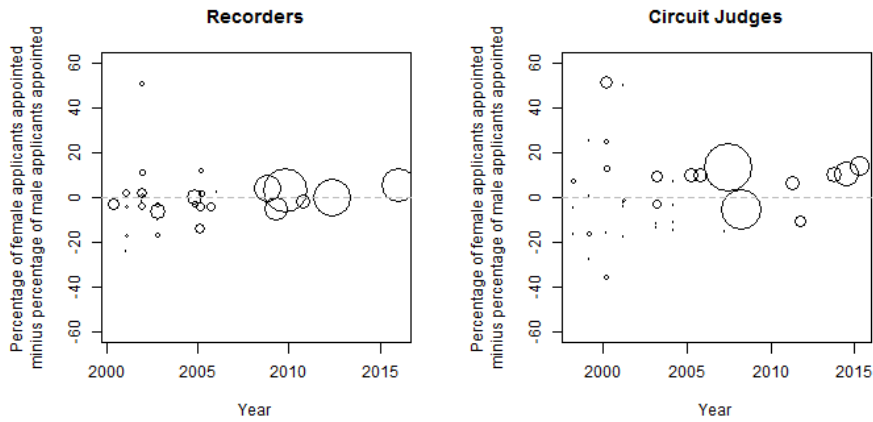


Figure 4: The changing percentage of female applicants appointed Recorders and Circuit Judges between 1996 and 2016. In respect of Circuit Judge appointments, there are two outlier observations not shown on this graph, as their value exceeds the size of the y-axis.

The changing relative success rate of female applicants to male applicants in Recorder and Circuit Judges competitions between 1996 and 2016 is shown in Figure 4. Each of the circular points shows the success rate for female applicants in any given competition, less the success rate for male applicants. Thus where the centre of a point is above the x-axis (shown as the dotted grey line), it indicates that women were more successful than men in that competition. The area contained by each of the points is proportional to the total number of applicants in that competition. It is immediately apparent from the plots that there is not a substantive difference in the success rate between genders for applicants in Recorder competitions. However, the success rate for

female candidates in Circuit Judge competitions exceeds that for male candidates. This general trend is confirmed by a closer analysis of the statistics.

In the ten years preceding the establishment of the JAC, 79 (15%) of the 528 female applicants in Recorder competitions were appointed, in comparison with 392 (17%) of the 2,311 male applicants. In the same period, 54 (21%) of the 260 female applicants in Circuit Judge competitions were appointed, in comparison with 211 (13%) of the 1,627 male applicants. In the ten years following the establishment of the JAC, 187 (12%) of the 1,608 female applicants in Recorder competitions were appointed, in comparison with 323 (10%) of the 3,140 male applicants. In the same period, 114 (26%) of the 439 female applicants in Circuit Judge competitions were appointed, in comparison with 258 (20%) of the 1,284 male applicants. In both the pre- and post-reform period, there is no statistically significant¹¹⁶ difference between the proportion of male and female applicants that were appointed Recorders. There are, however, substantial and statistically significant¹¹⁷ differences in both the pre- and post-reform period between the proportion of male and

¹¹⁶ $p > 0.1$.

¹¹⁷ $p = 0.001$ in the pre-reform period and $p = 0.012$ in the post-reform period.

female applicants that are appointed Circuit Judges, with female applicants having a greater probability of appointment.

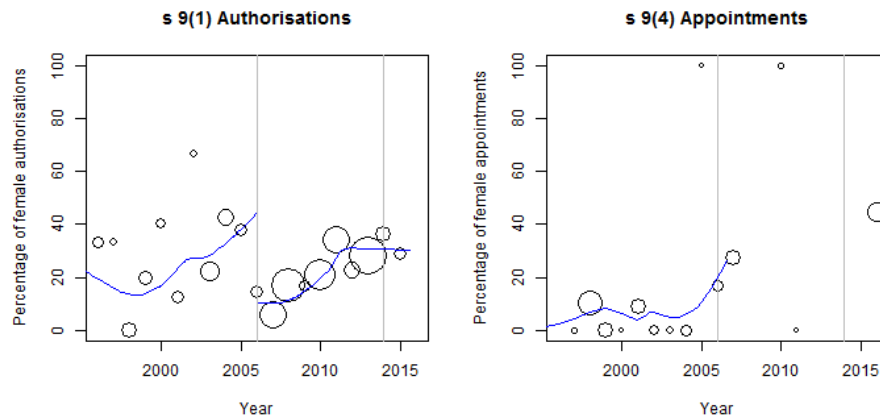


Figure 5: Known authorisations of section 9(1) and appointment of section 9(4) Deputy High Court Judges between 1996 and 2016. Note that, as discussed in the main text, this only includes those who are presently in office.

(iii) *Section 9 appointments and authorisations*

The annual percentages of Deputy High Court Judge authorisations and appointments who are female between 1996 and 2016, in respect of those still in office in 2016, is shown in Figure 5 above. The plot is divided into three parts by two vertical grey lines. The first grey line is in 2006 when the JAC was established. However it will be recalled that transfer of responsibility for Deputy High Court Judge authorisations and appointments was only done in October 2013, shown by the second of the two vertical grey lines. For section 9(1) authorisations, it shows separately fitted lines of best-fit between 1996 and 2006 and between

2006 and 2016. For section 9(4) appointments, it shows a line of best fit between 1996 and 2007, since after 2008 there were hardly any¹¹⁸ authorisations until 2016.

A startling feature of the plot of s9(1) authorisations is the sharp drop in the percentage of female appointments at around the time the JAC was established in 2006. This is especially alarming due to these appointments being ‘pivotal entry-level positions’¹¹⁹ for access to full time appointment to the High Court, as discussed above in the second section of this paper. Since responsibility for these authorisations remained with the ministry, it is surprising to see such a sharp and distinct change. Perhaps it may be explained by the ministry no longer feeling under public scrutiny with regard to judicial diversity following the establishment of the JAC and so, perhaps, reverting to traditional practises.¹²⁰ Indeed, this raises the possibility that despite the transfer of

¹¹⁸ There were two authorisations in 2010 and one in 2011.

¹¹⁹ Stephens, *op. cit.*, n. 11, Q352.

¹²⁰ One JLS reviewer queried whether a change in the division in which the new 9(1) Deputy High Court Judges sat might account for the sudden decline in the proportion of female authorisations, given the different gender representation in different practice areas at the Bar (see Table 4) which might be thought to follow through to the historic under-representation of women in the Chancery Division and Queen’s Bench Division compared to the Family Division. In 2009 the proportion of female High Court Judges in these divisions was respectively 5%, 9% and 37%: C. Thomas, *Understanding Judicial Diversity: Research Report for the Advisory Panel on Judicial Diversity* (UCL, 29 June 2009). This seems unlikely. Firstly it is not likely that any change in areas to which such judges were appointed would occur so suddenly and coincide with the change in selection mechanism: rather it would be a response to gradually changing business needs of each division. Secondly, to verify this, BAILII was used to identify the division

High Court Judge appointments to the JAC, the numbers of female appointments were limited by the decisions of the ministry which suddenly reduced the proportion of female Deputy High Court Judges. An alternate explanation might be that prior to the creation of the JAC, the ministry were starting to regard diversity as a part of merit,¹²¹ but following the creation of the JAC they followed the JAC practice of separating it from merit.

2. Encouraging more solicitors to facilitate the increased representation of women

As previously noted, it has often been suggested that gender diversity in the judiciary would be improved by appointing more solicitors to the bench.¹²² The intuitive logic of this argument is that, for a long time, the proportion of women has been much higher among solicitors than barristers: so if more solicitors are appointed, this will increase the proportion of women, as the proportion of women should be higher among the appointed solicitors than among the appointed barristers.

where the 80 s. 9(1) Deputy High Court Judges with known appointments starting between 2004 and 2007 (inclusive) predominantly sat. That analysis does not suggest any changing trend in division. It was only possible to identify cases in which 45 of these 80 judges sat.

¹²¹ See footnotes 37 to 40 and associated text.

¹²² Select Committee on the Constitution, *op. cit.*, n. 32, paras. 75, pp. 118-125.

However this subsection shows that the intuitive argument is not straightforwardly supported by an analysis of the empirical data.

	LCD appointments		JAC appointments	
	male	female	male	female
Barrister	1,023 (83%)	212 (17%)	292 (63%)	168 (37%)
Solicitor	108 (73%)	40 (27%)	37 (73%)	14 (27%)

Table 2: Breakdown of Recorder appointments by professional background (where known) and gender in the pre- and post-reform periods.

	LCD appointments		JAC appointments	
	male	female	male	female
Barrister	378 (85%)	67 (15%)	232 (71%)	94 (29%)
Solicitor	62 (81%)	15 (19%)	24 (60%)	16 (40%)

Table 3: Breakdown of Circuit Judge appointments by professional background (where known) and gender in the pre- and post-reform periods.

The professional backgrounds of individuals appointed as Recorders and Circuit Judges, broken down by whether it was the LCD or JAC that made the selection, are shown in Tables 2 and 3. Of the 51 known solicitors appointed as Recorders following selection by the JAC, 14 (27%) were women compared to 168 (37%) of the 460 barristers appointed as Recorders following selection by the JAC. Interestingly, this is the reverse of the position for Recorder appointments following recommendations by the LCD, where the proportion of women was

higher (27%) among solicitors who were appointed as Recorders than among barristers (17%).

With regard to Circuit Judge appointments (Table 3), we see that both in the post- and pre-reform periods the proportion of women was greater among solicitors than among barristers, although this difference is much greater in the post-reform period.

It is also noteworthy that the average post-qualification experience (PQE) of solicitors appointed as Recorders is much greater than that of barristers. Thus among all solicitors selected as Recorders by the JAC, the median PQE is 23 years compared to 19 years for all barristers. The effect is the same, but of somewhat reduced magnitude, if we just look at females appointed as Recorders by the JAC where the median periods of PQE are 20.5 years for solicitors and 18 years for barristers. The difference in years of PQE between solicitors and barristers is likely to be indicative of an even greater difference in age, as barristers are normally called soon after completing their vocational stage of training (the BTPC, previously BVC), whilst solicitors are usually only admitted following completion of a training contract which is usually at least two years after completing their vocational stage of training (the LPC). It was noted before that a reason why Recorder appointments is important is because they provide the main gateway of access to the High Court and

above. However, if solicitors are appointed at a later age, this means that they have less time for career progression and so less opportunity to diversify the High Court and above.

3. *Alteration to statutory eligibility criteria*

This subsection shows how the changes to the statutory appointment criteria have had virtually no effect on who has been appointed as a Recorder or Circuit Judge. It follows that they have had no impact on the gender diversity among appointees.

It will be recalled that the statutory appointment criteria was basically changed from having 10 years PQE, to satisfying the judicial-appointment eligibility condition on a 7-year basis for Recorder and Circuit Judge appointments made after 21 July 2008. Of the 1,894 Recorder appointments since 1996 where professional background is known,¹²³ only three of the Recorders were appointed with less than 10 years' post-call or post-admission experience, and of these two were women. One was a female barrister of 9 years' call, one a male solicitor with 8 years' PQE and one a female solicitor with 9 years' PQE. None of the Circuit Judge appointments since 1 January 1996 had less than 13 years' post-call or post-admission experience: indeed only two (both

¹²³ It was not possible to identify professional background in respect of 19 (1%) of the 1,913 appointments.

barristers) had less than sixteen years' PQE. Thus the expansion of the statutory eligibility criteria has had basically no effect on the proportion of Recorders who are women.

It is possible that going forward this could have a greater effect for barristers than previously was the case. This is because for all barristers called prior to 1 January 2002 they qualified on call, but for barristers called after this date they qualified on completion of pupillage.¹²⁴ The statutory eligibility criteria looks at post-qualification experience. Assuming barristers are appointed Recorders, the same number of years after commencing independent practice, the change in the qualifying date should result in barristers with less PQE being appointed. So far only nine barristers called after 1 January 2002 have been appointed as Recorders.

4. Alteration to non-statutory appointment requirements

This subsection shows how the removal of the expectation that Circuit Judges have served as Recorders, allowing them to have had other part-time judicial experience, has promoted greater gender diversity. It also shows how the removal of the age requirement for Circuit Judges has

¹²⁴ Judicial Appointments Commission, 'Eligibility for legally qualified candidates' <<https://jac.judiciary.gov.uk/eligibility-legally-qualified-candidates>> accessed 19 July 2017.

increased diversity, although the numbers appointed under 45 are so small that the magnitude of the effect is fairly negligible.

Since the JAC took control of appointments there has been a substantial increase in the number of Circuit Judges that were not previously Recorders, although still the vast bulk of Circuit Judge appointees were previously Recorders. Of the 426 Circuit Judge appointments since 31 March 2007,¹²⁵ 32 (7.5%) were not Recorders, compared to 16 (3%) of the 463 appointed between 1 January 1996 and 1 March 2007.

The proportion of women is much higher among Circuit Judges that were not previously Recorders than those who were. In the post-March 2007 period, 14 (44%) of the 32 Circuit Judge appointees who were not previously Recorders were women, compared to only 29% (114 out of 394) of those who previously were Recorders. Of those who were not Circuit Judges the majority were District Judges prior to their appointment. With regard to the removal of the age requirement, it is only possible to assess its effect with regard to Circuit Judges. This is because becoming a Circuit Judge entitles the appointee to a *Who's Who*

¹²⁵ Although the JAC was established in April 2006, the JAC only recommended the appointment of 3 Circuit Judges prior to 31 March 2007: Judicial Appointments Commission, *Annual Report: 2006-2007* (2007) 33. The vast majority of appointments in the first year would have been from a competition previously run by the LCD. Hence the cut off used here is 31 March 2007.

entry from which it is generally possible to determine age. Of the 426 Circuit Judges appointed since 31 March 2007, 305 (72%) have *Who's Who* entries which specify their age in their entry. Of those, 16 (5%) were appointed aged under 45. Of those, 8 (50%) were women, compared to 75 (26%) of the 289 appointees aged over 45. Whilst the difference in proportions suggests that lowering the age limit may have improved gender diversity somewhat, the numbers appointed under 45 are so small that the effect is fairly negligible.

5. *Equal merit provision*

This subsection shows that the equal merit provision has so far had no effect on Recorder appointments. While going forward it may have some minor effect, such an effect will not be transformative on the gender breakdown of the judiciary.

It is known from an FOI request¹²⁶ that the equal merit provision was not used in the only Recorder competition that has taken place since its introduction. More generally it is known that 14 out of the 308 selections made by the JAC between 1 April 2015 and 31 March 2016 were made following the application of the equal merit provision.¹²⁷ Similarly, it is

¹²⁶ Email from Judicial Appointments Commission to author (20 January 2016).

¹²⁷ Judicial Appointments Commission, *Statistics Bull.: Judicial Selection and Recommendation for Appointment Statistics*, April 2015 to March 2016 (2016) 11.

known that 7 of the 305 selections made by the JAC between 1 October 2014 and 31 March 2015 were made following the application of the equal merit provision.¹²⁸ Thus it seems that the implementation of the provision will not have a transformative effect on the judiciary, although it might have the potential to make some changes at the margins. Further, the move to selection disregarding circuits, to be implemented in the 2017 Recorder competition,¹²⁹ is likely to increase the number of ties and hence the application of the equal merit provision.

6. *Selection on the basis of relevant legal knowledge*

From Figure 2 above it is apparent that there have been large fluctuations in the percentages of women appointed as Recorders in recent years. In 2009¹³⁰ 32% of appointments were female, but in 2010 this fell to 21% of appointments. Since then it has risen to 36% in 2012 and 56% in 2016. This subsection explains how this dramatic increase is likely to have been partly caused by the content of the qualifying tests changing to require knowledge of the substantive law of the jurisdictions to which the Recorders were appointed. This is because there are more female

¹²⁸ Judicial Appointments Commission, *Statistics Bull.: Judicial Selection and Recommendation for Appointment Statistics*, October 2014 to March 2015 (2016) 4.

¹²⁹ Truss, *op. cit.*, n. 63.

¹³⁰ In addition to the SE appointments listed in Table 4, this also includes 66 appointments to the Midland circuit which were not reported on by the CBA.

practitioners in criminal law and family law. The large dip in 2010 is likely to have been caused by the recruitment of mainly civil practitioners for civil Recordships.

Appointment exercise ¹³¹	Predominant area of legal practice								Total	
	Criminal		Family		Civil		Unknown			
	male	female	male	female	male	female	male	female	male	female
2009 SE	37 (62%)	23 (38%)	8 (42%)	11 (58%)	36 (77%)	11 (23%)	0 (0%)	2 (100%)	81 (63%)	47 (37%)
2010 civil	-	-	1 (50%)	1 (50%)	26 (87%)	4 (13%)	4 (57%)	3 (43%)	31 (79%)	8 (21%)
2012 crime	48 (70%)	21 (30%)	-	-	7 (70%)	3 (30%)	0 (0%)	1 (100%)	55 (69%)	25 (31%)
2012 family	-	-	13 (48%)	14 (52%)	-	-	-	-	13 (48%)	14 (52%)
2016 crime	21 (40%)	32 (60%)	1 (50%)	1 (50%)	5 (56%)	4 (44%)	-	-	27 (42%)	37 (58%)
2016 family	-	-	16 (48%)	17 (52%)	1 (50%)	1 (50%)	-	-	17 (49%)	18 (51%)
TOTAL	106 (58%)	76 (42%)	39 (47%)	44 (53%)	75 (77%)	23 (23%)	4 (40%)	6 (60%)	224 (60%)	149 (40%)

Table 4: Breakdown by gender and area of legal practice of Recorder appointments by professional background in the 2009 South Eastern, 2010 (civil), 2011 (crime and family) and 2016 (crime and family) Recorder competitions.¹³²

¹³¹ The years referred to below are the years in which the Recorders were appointed. This is so the table is consistent with the results presented in Figure 2. However, this differs from the reports of the Chancery Bar Association which refers to the exercises by reference to the year in which they commenced.

¹³² The classifications by practice area in respect of the 2009 and 2012 competitions comes from Reed and Tipples, op. cit. (2015a), n. 28. In respect of the 2016 competition it comes from Reed and Tipples, op. cit. (2016) n. 28. The CBA do not provide a breakdown in respect of the 2010 civil Recorder competition. Accordingly, these were classified by the author primarily using P. Havers (ed.), *Havers' Companion to the Bar: 2009-2010* (2009, 19th edn.), supplementing it with a web-search when there was not an entry. The CBA do not provide a breakdown by gender: this was added by the author.

It can clearly be seen from Table 4 that the proportion of women is greatest among Recorders with practises in family law (53%), closely followed by those with practises in criminal law (42%). Among those appointed from civil practises, the proportion of women is much smaller (23%).

The increase in the proportion of female appointees in the 2012 and 2016 appointments may therefore be attributable to the decline in the proportion of civil appointees, which (as discussed above) is likely due to the qualifying test requiring technical legal knowledge of criminal/family law, rather than being based on a hypothetical jurisdiction.

CONCLUSION

This paper has shown to be false Lord Sumption's thesis that substantial change in the gender diversity of the judiciary can only be brought about by positive discrimination and that all other changes are simply a function of the increase in the gender diversity in the population of lawyers from which judges are recruited. Some changes have made a substantial difference, such as the reforms to the content of the qualifying tests. Other reforms have made a noticeable difference, such as the relaxation of the requirement for prior judicial experience, so that any

part-time experience counts not just part time experience in the full-time jurisdiction being applied for. However, some of the most publicised reforms (such as the equal merit provision) have made little difference. In and of itself the transfer to the JAC has made little difference, although the increase in female applicants post-2009 (where the increase accelerates beyond the rate in the population) might have been caused by actions by the JAC.

The establishment of the JAC was meant to create a transparent appointment process. Yet it remains murky, thankfully somewhat less so since the selection of Deputy High Court Judges was transferred to the JAC in 2013. The opacity of the appointment process is shown by how the identities of those presently appointed as Recorders and Deputy High Court Judges are not publicly available, so the author had to resort to a FOI request to perform the analysis set out in this paper. There has been a decrease in the quality of the official statistics, which no longer provide a cross-tabulation by various diversity characteristics, but only provide a univariate analysis (lumping together all ethnic minorities as BME). There has furthermore been significant criticism of the JAC's qualifying tests.¹³³ The response to this has been a further lurch to secrecy, with

¹³³ eg. the Chancery Bar Association's Written Evidence in Select Committee on the Constitution, op. cit., n. 11, pp. 142-147.

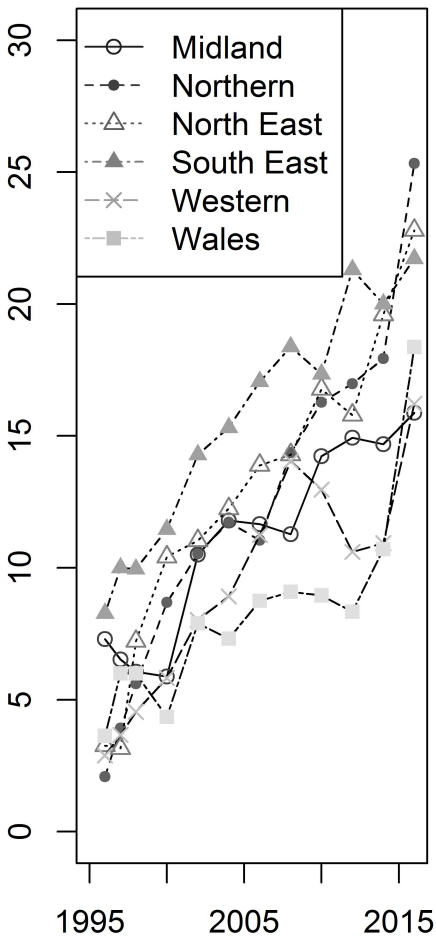
candidates sworn to keep confidential the contents of these tests (there clearly being no good reason for this, since if the tests are re-used it puts past candidates at a clear advantage). The JAC's past practice of putting all past papers (and often detailed feedback) on-line has been abandoned, with previous papers removed.¹³⁴ However, this paper has shown there to be a genuine public interest in the content of these tests, since it can substantially impact on gender diversity. Today, as much as in the past when selections for judicial appointment were made by the Government, there seems to be the need for an independent body such as the old Commission for Judicial Appointments to scrutinise the operation of the system.

This paper has also highlighted some issues that would benefit from future study. One such issue is why there is such a gender disparity between the geographic Circuits into which England & Wales are divided. Such regional disparities are clearly important, since they relate to individuals' particular encounters with justice. It is unclear whether the present Lord Chancellor's plan to recruit on a national basis going

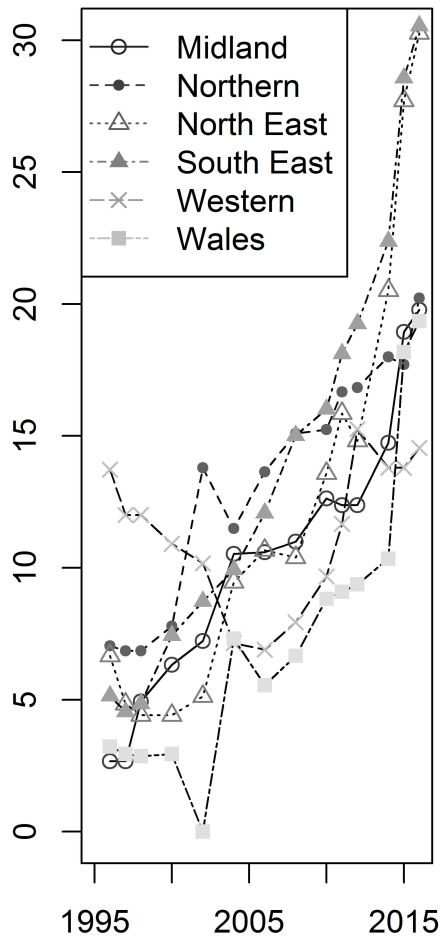
¹³⁴ However, they can be accessed with the UK Government Web Archive. Interested readers can find the content of past papers here: 'Past qualifying tests and feedback reports' (*The Judicial Appointments Commission*) <<http://webarchive.nationalarchives.gov.uk/20130402174357/http://jac.judiciary.gov.uk/selection-process/861.htm>> accessed 19 July 2017 and 'Older tests' (*The Judicial Appointments Commission*) <<http://webarchive.nationalarchives.gov.uk/20130402174357/http://jac.judiciary.gov.uk/selection-process/130.htm>> accessed 19 July 2017.

forward (discussed above in relation to the equal merit provision), will result in such regional gender disparities being hidden. Thus it is to be hoped that if Recorders and Circuit Judges are no longer appointed to circuits, breakdowns of gender diversity by sitting-day, broken down by courthouse or circuit, will be published.

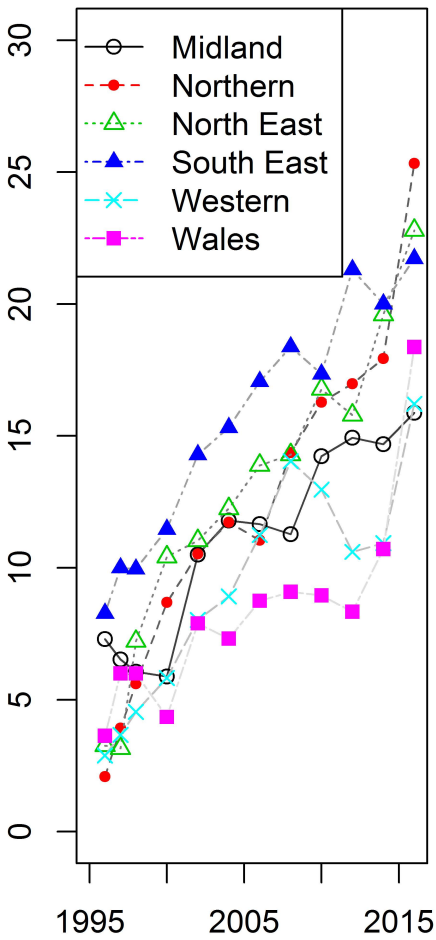
Recorders



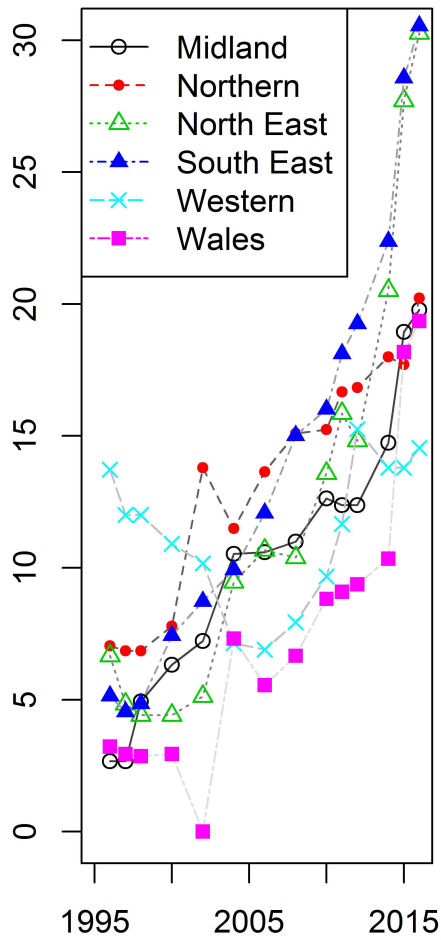
Circuit Judges



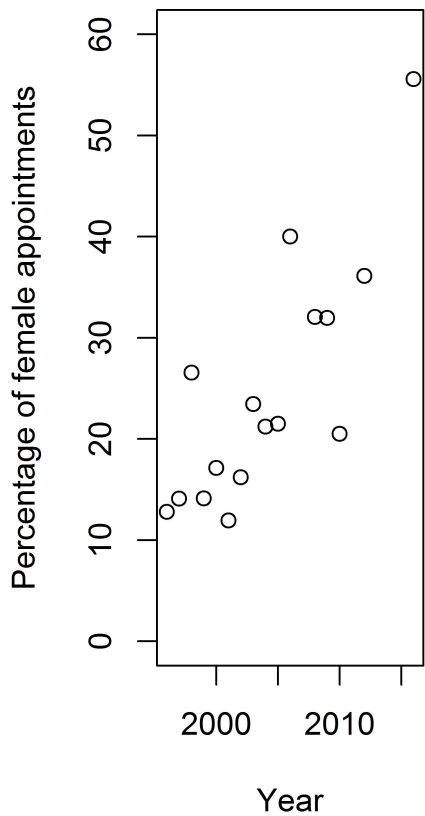
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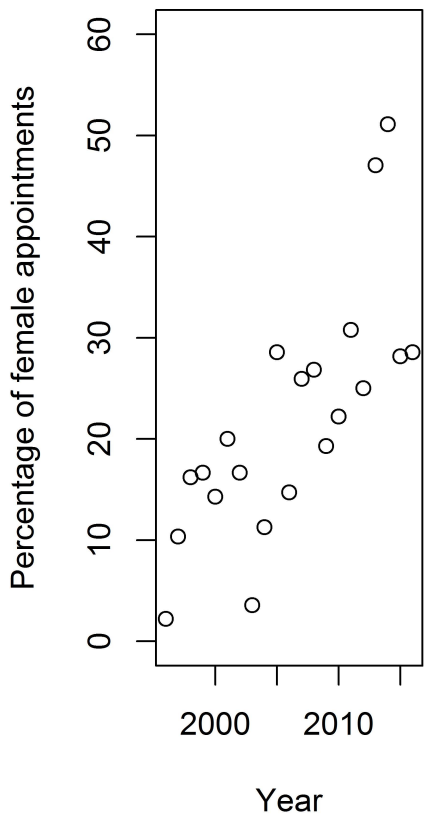
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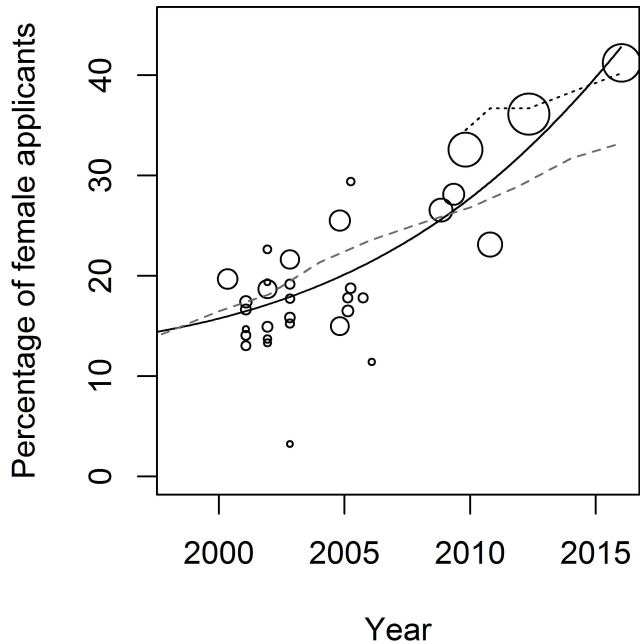
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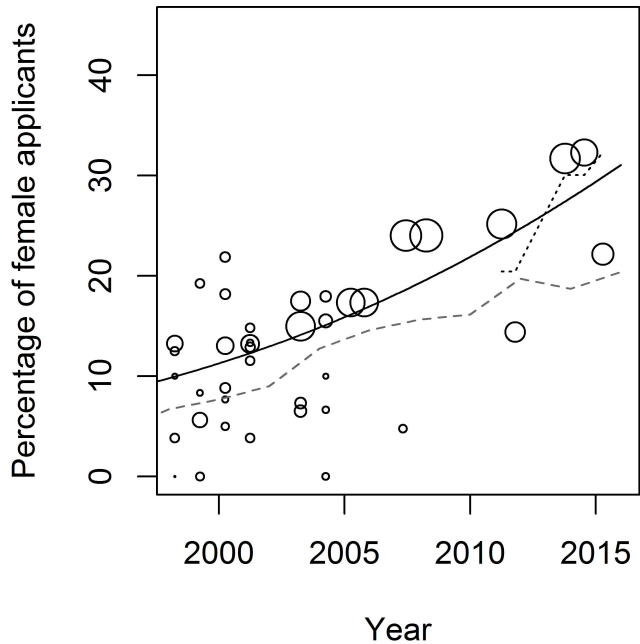
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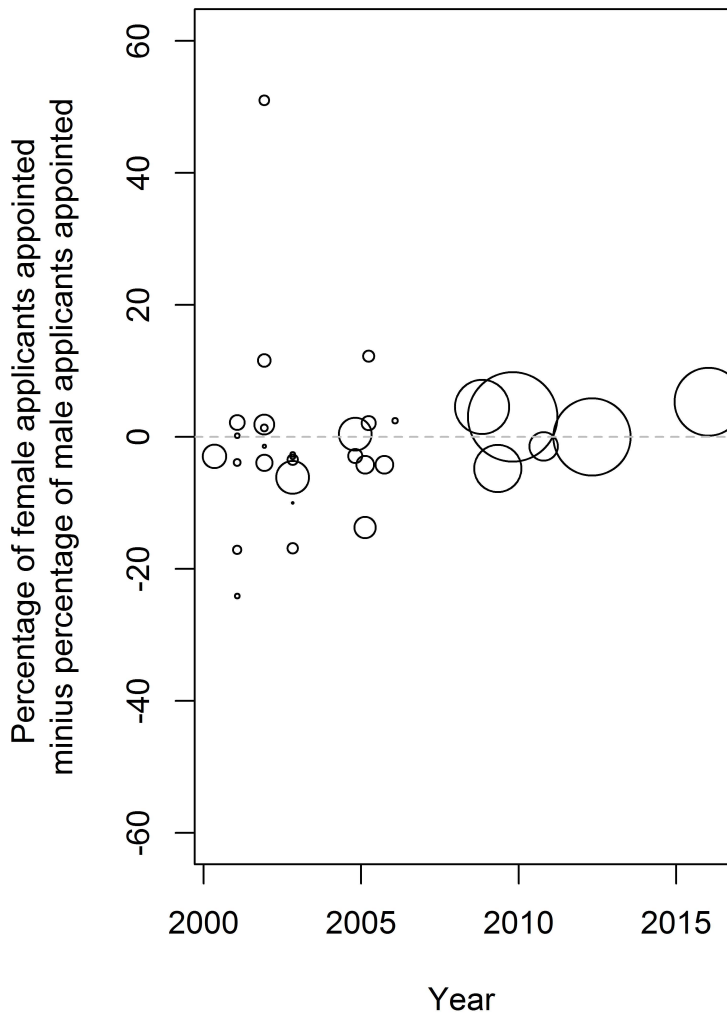
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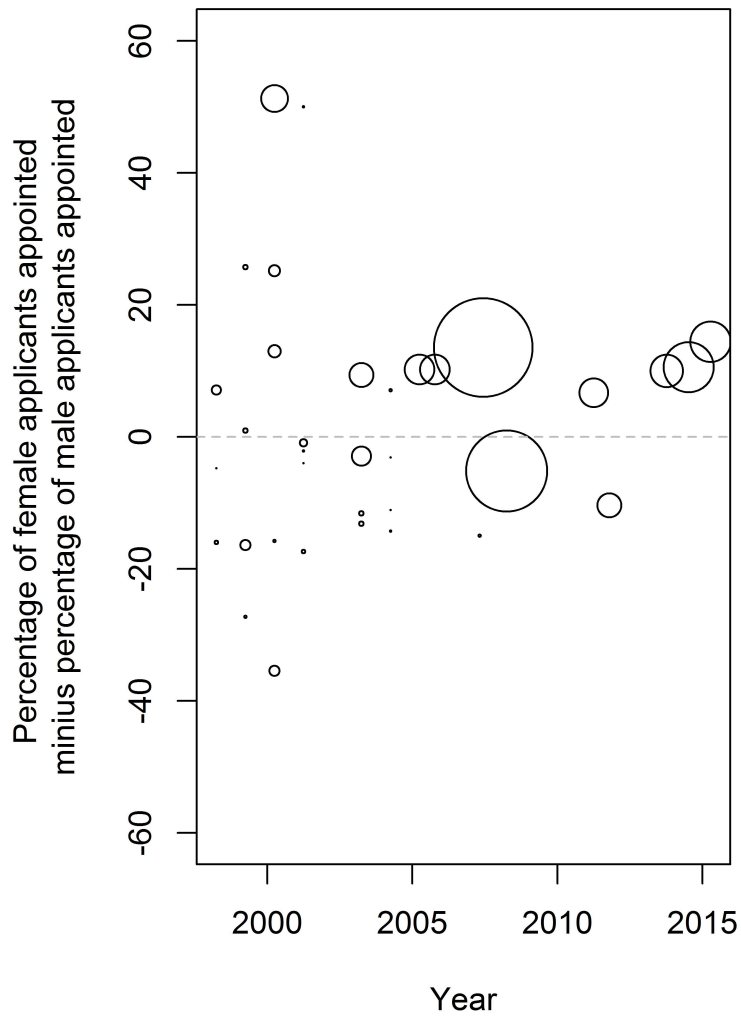
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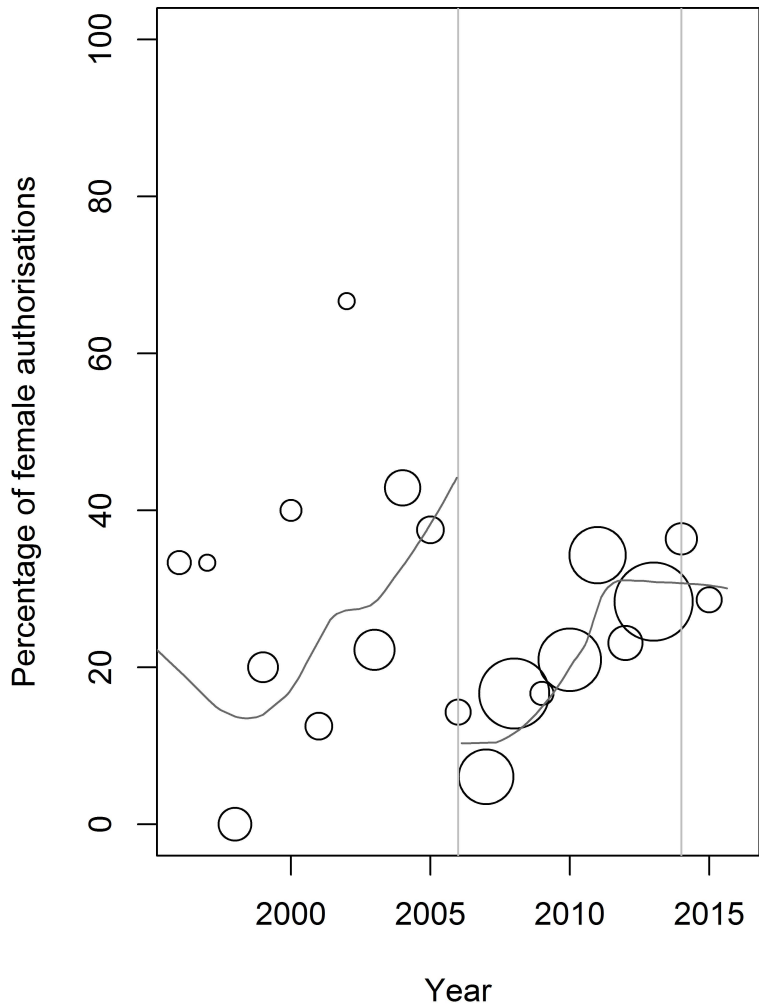
Recorders



Circuit Judges



**s 9(1)
Authorisations**



s 9(4) Appointments

