

WOMEN AT THE BENCH

by Tilly Rubens

Diversity seems to be the buzzword at the Lord Chancellor's Department these days and a quick visit to the LCD website shows that the Department is going to great lengths to be seen to promote women and ethnic minorities in the judiciary. On their website, there are articles on equality of opportunity, monthly updated statistics on the number of women and ethnic minorities entering the judiciary and generally the impression is given that anyone with enough experience should apply. Indeed the motto of the Lord Chancellor's Department up until quite recently was "Don't be shy, apply!"

Is this mere rhetoric or has real progress been made in the number of women lawyers both applying for and sitting on the bench? And what is the position of women solicitors seeking judicial office?

Background

Since the early 1990's, there has been mounting criticism of the inequity of the present judicial appointments system. This has resulted in successive Lord Chancellors commissioning reports to scrutinise the appointments procedure. In 1992 Lord McKay, the then Lord Chancellor, commissioned a report on sex equality at the bar and in the judiciary. This report recommended that judicial vacancies should be advertised, that there should be job descriptions and that specific criteria should be set for judicial appointments - the majority of these recommendations have been implemented. In 1999 Lord Irvine commissioned Sir Leonard Peach to provide a report on silk and judicial office following further criticism from the Law Society, the Association of Women Barristers and senior law figures that the judicial appointments system was still discriminatory and did not facilitate fair treatment of all candidates. This report made a number of recommendations including the establishment of an independent commission to exercise scrutiny over the appointments system. This resulted in the setting up of the Commission for Judicial Appointments, under the auspices of Sir Colin Campbell, which produced its first report in October 2002.

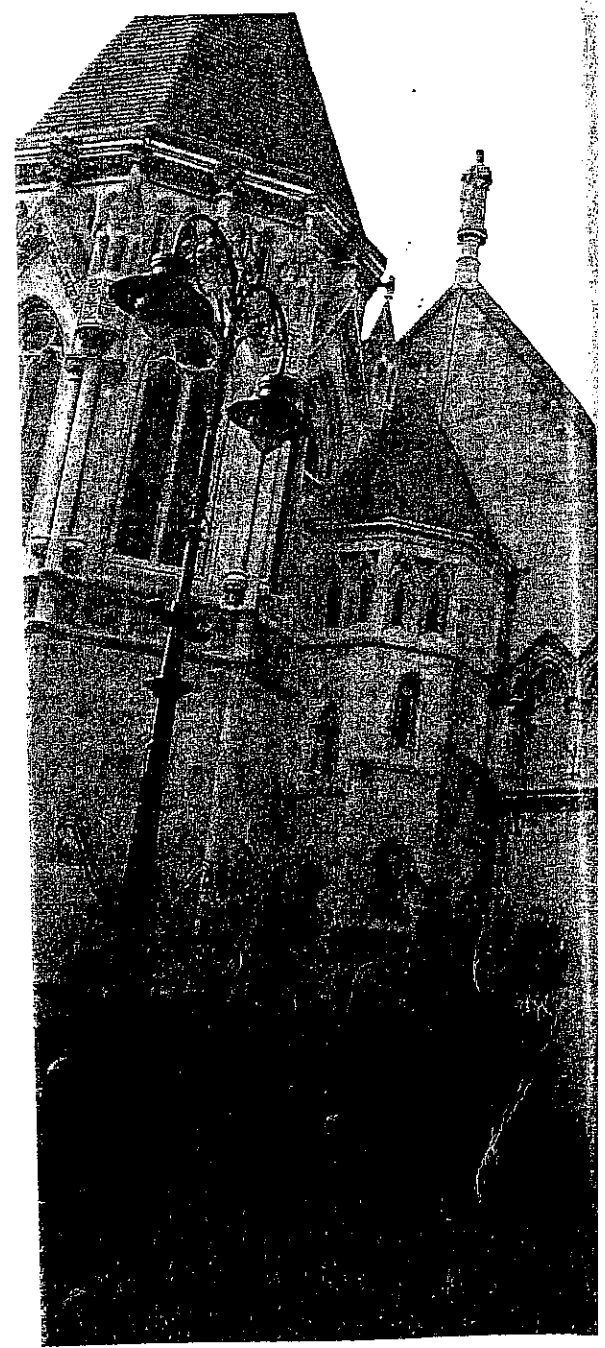
Present Position

The latest figures from the Lord Chancellor's Department show that 31.7% of applicants for judicial appointment in 2001/2 are women compared to 26% in 2000/1. The actual appointment of women judges rose to 34.4% in 2001/2 from 28.1% in 2000/1. Women now make up 21% of deputy district judges, 19% of district judges and 9% of circuit judges. In the criminal courts, 12% of recorders and 17% of recorders in training are women. Though these statistics for the lower courts are encouraging, the picture is bleaker when it comes to the senior judiciary - particularly in the appellate courts. There are still no women Law Lords sitting in the House of Lords (compared to the United States where the first woman judge was appointed to the Supreme Court in 1982). There are only 3 women sitting out of a total of 36 judges in the Court of Appeal and 6 women in the High Court out of a total of 107 judges. Moreover there are presently no women judges

above the rank of circuit judge who were formerly practising as solicitors.

"Secret Sir"

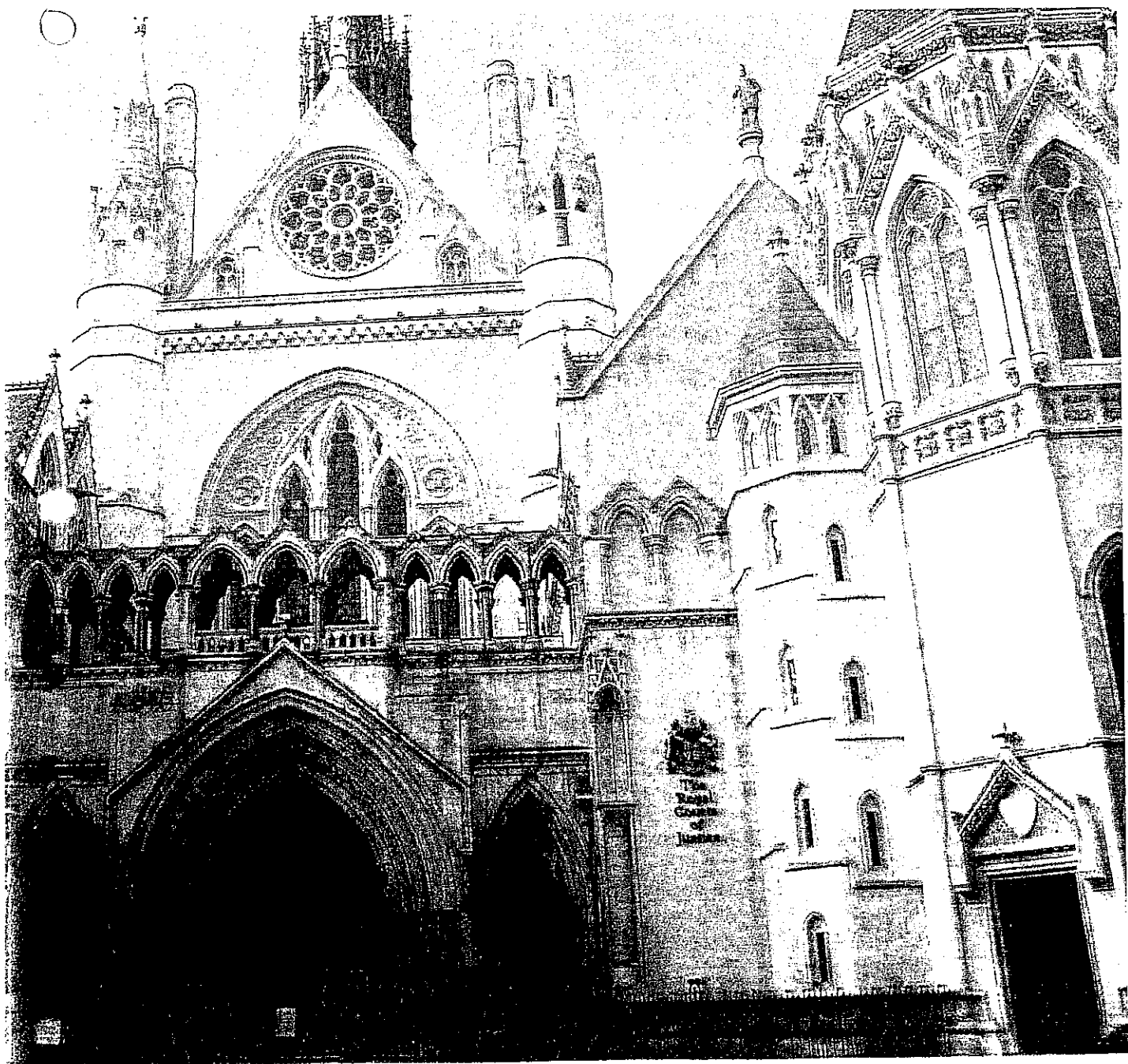
The reasons for the underrepresentation of women in the judiciary are complex. In 2000, Professor Kate Mallison undertook research into the factors influencing the decisions of women, and other underrepresented groups, as to whether they should apply for silk or judicial office. Professor Mallison found that one of the chief criticisms of the present system was the consulta-



tion process more commonly known as "secret soundings". This is the system whereby the views of judges and senior lawyers are sought about the suitability of individual candidates. These comments are confidential and individual applicants do not know which members of the legal community have been consulted on their particular applications. The First Report of the Commission for Judicial Appointments was very critical of this consultation process. The Report found that the quality of many consultation comments was poor, that some did not relate to the criteria given by the Lord Chancellors Department and that many con-

sultees failed to indicate how recent their experience of the candidate was or how well they knew the candidate's work.

There are various reasons to suggest that the consultation process will be particularly unhelpful for female candidates for the Bench. The present judicial establishment is still predominantly white, male and middle class and there is a strong risk of self-perpetuation i.e. male judges choosing other judges with a similar class, background and gender. Moreover the present system is still dependent on candidates being "noticed" and being "known". Senior women lawyers who do not network (for



example because of childcare commitments) will inevitably be at a disadvantage. This means that the present consultation process may fall foul of the Sex Discrimination Act 1975 (SDA), on the grounds that the requirement to be known by consultees will indirectly discriminate against women who tend to be outside traditional networks. Although the appointment of judges has been widely understood to be outside the scope of the Act, it has been argued that the SDA must be read in conjunction with the Equal Treatment Directive (76/207) which provides a framework for securing equality of treatment between men and women in the employment field and requires Member States to legislate accordingly. Some barristers have argued that the Equal Treatment Directive contains no exceptions in relation to judges.

Insufficient Experience?

A further reason for the under-representation of women in the judiciary is the requirement that lawyers must have a minimum of 10 to 15 years legal experience before applying for the Bench. At present there are simply not enough women lawyers with this length of service who could put themselves forward for judicial office. Statistics produced by both the Law Society and the Bar Council show that there is a very high attrition rate among women, on both sides of the profession, as they progress up the legal ladder. In 2001, 55% of new entrants to the solicitor's profession were women. However only 30% of women solicitors had been qualified for more than ten years and only 8% had been qualified for more than twenty years. In 2001, women made up 48% of those called to the Bar but only 14% had over 10 years of legal practice experience.

The LCD have argued that it will only be a matter of time before women "trickle-up" and are appointed to the judiciary in far greater numbers. However it is submitted that this is too simplistic and fails to recognise that there is a real problem with retention in the profession. Research being carried out by the Trainee Solicitor Group, in conjunction with the Association of Women Solicitors, should throw further light on the reasons why women are leaving the profession at an early stage in their career. If this issue is not addressed now, there will not be enough women lawyers of sufficient experience and calibre to become judges in 10 to 15 years.

The Position of Women Solicitors

The position of women solicitors seeking appointment to the Bench seems particularly difficult. It is interesting to note that the majority of the ranks of District and Deputy District Judges are made up women solicitors as opposed to barristers. However women solicitors are not rising to the more senior judicial posts. The LCD has suggested that some solicitors may be restricted by partnership covenants which prevent partners (male or female) from seeking judicial appointment. Economic necessity and the demands of practice may make it very difficult for partners to take days away from the office to sit on the Bench. Other women solicitors may feel that they lack sufficient litigation or advocacy experience. Professor Mallison's research found that some solicitors did not consider themselves qualified for office. There was still a strong perception, amongst the solicitors interviewed, that judicial office was still essentially intended for barristers with strong advocacy practices. Clearly there is a need for the LCD to disseminate information to encourage more solicitors, particularly women, to apply for the bench.

The Way Forward

The main issue now confronting the Lord Chancellor's Department is whether it is possible to continue to reform the present system on a piecemeal basis or whether a more radical overhaul of the judicial appointments system is required. For a long time now there has been a call from many quarters for a Judicial Commission with independent powers of appointment. Various models have been put forward – for example the Commission could include both a lay and a legal element with a broad range of members including judges, lawyers, civil servants and lay people. It could still include some aspect of consultation with senior members of the legal community but preferably with more accountability. However the question remains whether the establishment of a commission would result in more women lawyers both applying for and being appointed to the bench. The main benefit of an independent commission is that less reliance would be placed on the views of the existing judiciary which would in turn reduce the importance of candidates having to be "known". Such a reform could only be beneficial to women applicants.

However it is unlikely that the establishment of an independent judicial commission alone would be sufficient to increase the number of women on the bench. Clearly research must be carried out on the reasons why women are leaving the legal profession before they have acquired sufficient experience and years of service to be able to apply for judicial office. Research also needs to be undertaken on whether more flexible working arrangements are required to attract women candidates. Lord Irvine has himself said that the "judicial appointments system must be flexible enough to take account of career patterns, experience and achievements which may be untypical". It is therefore important that the Lord Chancellor's Department considers women candidates who have taken a career break to look after children, wish to be considered for part-time appointments, come from non-traditional backgrounds such as academia or have gained experience in areas outside of law.

Conclusions

In 1992, Helena Kennedy QC wrote that 30% of the Bench would need to be women before "tokenism ceased to function and a real difference is made". The latest statistics from the Lord Chancellor's Department show that though women do not yet account for a third of the Bench, we are certainly moving towards that figure and the sight of a woman presiding in court is no longer unusual. However Sir Colin Campbell's report highlighted the fact that there are still major obstacles to be overcome in ensuring that the judicial appointments system is both fair and seen to be fair and one of the most pressing matters is the reform of the consultation system. Clearly the time has now come for the LCD to decide whether we need a Judicial Commission, with independent powers of appointment, to ensure real equality of opportunity in appointment to the Bench.



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Judicial Appointments 4th Annual Report 2001 - 2002.