

When I review judicial prospects with my mentee there are precious few entry-level judicial appointments to apply for. The recent Deputy District Judge (Magistrates' Courts) competition attracted over 1,100 candidates for 18 posts. The only other competition this year is for the Valuation Tribunal. The competition is ferocious. Even if every person who is appointed is from a BAME background and/or a woman, it will barely register in percentage terms.

Instead, by far the largest tranche of appointments is by way of 'expressions of interest' (EOI) which means that we are recruiting from the existing pool of the judiciary. This will inevitably increase the age profile of the judiciary year on year and may cause problems for those unable to travel for caring or other reasons to take up new posts. At a recent seminar of mentors a number observed the difficulty when people may be appointed to a particular circuit or region and find themselves sitting a hundred miles or more from home and personal responsibilities.

I have two additional appointments by way of EOI. Any number of tribunal judges hold at least two judicial offices. In the past couple of years I have written around 200 references for EOI competitions.

Supporting career development and progression from within the existing cohort of judges is a laudable objective but so also is increasing the diversity of the judiciary. Is the current balance right?

### Conclusion

Being DCRJs and mentors is an immense privilege and in our own very small way we aspire to make a difference. As I say, I hope that when I am replaced I am not replaced by another me – or as someone else more eloquently said:

'It may be hard for an egg to turn into a bird: it would be a jolly sight harder for it to learn to fly while remaining an egg. We are like eggs at present. And you cannot go on indefinitely being just an ordinary, decent egg. We must be hatched or go bad.'<sup>2</sup>

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<sup>1</sup> Judicial Diversity Statistics 2016.

<sup>2</sup> CS Lewis.

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# A judiciary to reflect the society it serves

**DIVERSITY** By **Lori Frecker**



Improving judicial diversity has always been at the core of the Judicial Appointments Commission's work. The JAC was established in 2006 to make the judicial appointments process transparent and accountable. In addition to our statutory duty to select the most meritorious candidates, we must also 'have regard to the need to encourage diversity in the range of persons available for selection'.

Greater diversity brings enormous benefits, including a broader range of experience and perspectives to the bench. It is important for maintaining public trust and confidence that the judiciary reflects the people it serves.

Promoting diversity is embedded throughout our processes in three key ways, by:

- Targeted outreach.
- Ensuring the selection process is fair and transparent.
- Working with partners to break down barriers.

**The Judicial Appointments Commission (JAC) selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals with UK-wide jurisdiction. The JAC is an independent body and was set up on 3 April 2006 to select candidates for judicial office on merit, through fair and open competition.**

## Outreach

Effective, targeted outreach is important to encourage applications from a wide field of candidates.

When selection exercises are launched, we notify the legal professions, diversity groups and judicial organisations so that they can inform their members. All vacancies are advertised on the [JAC website](#) and included in our monthly newsletter, *Judging Your Future*, which has over 11,000 subscribers. We also publicise vacancies on social media through Twitter and LinkedIn.

We have almost 60 case studies in which judges from different tribunals and courts, and a wide range of backgrounds, talk about why they chose to apply for judicial appointment, how they found the selection process and what their roles involve. These case studies provide important role models, particularly for those from under-represented groups. They can have a significant impact by demonstrating to candidates that 'someone like them' can become a judge.

JAC Commissioners and staff also speak at events and seminars run by our partners in the Judicial Office and the legal professions in order to encourage candidates and raise awareness about how to apply. This year we have taken part in events and workshops run by the Judicial Office, the Law Society and the Bar Council, as well as workshops aimed at candidates from under-represented groups that are run jointly by the legal professions.

## Fair and transparent processes

Gone are the days of the 'tap on the shoulder' and 'knowing the right people' as a means of appointing judges. Candidates are now appointed through fair and open competition.

The JAC's selection process is extremely competitive. The average ratio of applications to recommendations is seven to one, and in some selection exercises it is much higher. In a recent exercise for fee-paid judges of the Upper Tribunal (Immigration and Asylum Chamber), we received 147 applications for 20 posts.

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How do we ensure selection processes are fair, open and transparent when dealing with thousands of applications each year?

Details about each stage of the selection process are published on the JAC website before each exercise is launched. There are videos and written guidance as well as a dedicated information page for each vacancy that explains eligibility criteria and other details about the role. This means that candidates from all backgrounds can find out what is involved in the process and the criteria that they must meet to apply.

Competency frameworks are used throughout the selection process to assess whether candidates meet the requirements for each role. Using competencies helps to ensure fair and accurate selection because candidates are assessed against clear criteria. A bespoke competency framework is designed for each type of role, aligned with the Judicial Skills and Abilities Framework. Candidates are asked to demonstrate the required competencies when they apply.

We have introduced a second stage of shortlisting, such as a written or telephone assessment, in some recent large exercises. Second-stage shortlisting reduces candidate numbers more gradually and increases the certainty in the quality of those progressing to the next stage by assessing a broader range of skills. For smaller exercises, usually those involving more senior full-time roles, a sift process may be used that considers candidate self-assessments, references or submissions of recent work. Shortlisted candidates are invited to interview at selection day, which may include situational questions, a presentation or a role play.

All selection materials are developed with judges and reviewed by JAC staff and subject-matter experts to ensure that they will not have an adverse impact on any particular group. The JAC Advisory Group, which includes representatives from the judiciary and the legal professions, also provides advice and guidance during the development of selection exercise materials.

We follow independent, expert guidance on the structure and content of qualifying tests and other materials. We also carry out dry runs with mock candidates to test the selection materials and ensure that they are fit for purpose, making any necessary adjustments. We also consider reasonable adjustments for disabled candidates and candidates with a short-term injury or temporary illness, to ensure that they are not disadvantaged by the selection process.

### Breaking down barriers

It is important that all partners in the judiciary and legal professions continue work to break down barriers to increasing the diversity of the judiciary. The Judicial Diversity Forum meets quarterly to discuss measures aimed at improving judicial diversity and to monitor progress against a single action plan for doing so. The JAC chairs the forum, which comprises the legal professions, judiciary, Judicial Office and the Ministry of Justice.

The JAC commissioned research into barriers to application in 2008 and again in 2013. It identified the factors that discourage under-represented groups, such as those from Black, Asian and minority ethnic (BAME) backgrounds, women, solicitors, those with disabilities and others from applying for judicial appointment. The barriers identified included a lack of diverse role models and the limited availability of flexible working. Several provisions of the Crime and Courts Act 2013 were aimed at addressing these, including the extension of salaried part-time working to the High Court and above, flexible deployment of judges and the equal merit provision.

*The EMP will not solve the issue of increasing judicial diversity on its own. It is, however, making a positive contribution alongside the other efforts of the JAC, the legal profession, government and the judiciary.*

### Equal merit provision

The equal merit provision (EMP) enables the JAC to choose a candidate on the basis of diversity where two or more candidates are assessed as being of equal merit.

The JAC launched its EMP policy on 1 July 2014 following a public consultation in which 69% of respondents supported the application of the EMP.

The EMP policy is currently applied to the protected characteristics of race and gender, and used at the final decision-making stage of the selection process. It is used only where two or more candidates are judged by the Commission to be of equal merit when assessed against the advertised requirements for a specific post, and there is clear under-representation in respect of race or gender in the relevant level of the judiciary. The latter is determined by reference to national census data and judicial diversity data from the Judicial Office.

From 1 July 2014 to 31 March 2016, 21 recommendations were made as a result of using the EMP policy.

The EMP will not solve the issue of increasing judicial diversity on its own. It is, however, making a positive contribution alongside the other efforts of the JAC, the legal profession, government and the judiciary.

### Looking ahead

As Orla Kilgannon-Avant pointed out in her recent article (*Tribunals*, Spring 2016), tribunals are more diverse than the courts. This is just one reason why we welcome more flexible deployment of judges between courts and tribunals, which also provides more opportunities for career development.

The JAC is not complacent and recognises there is more to do to increase judicial diversity. In 2015–16, 9% of JAC selections were BAME individuals; we want to improve that. We also want to see more candidates applying from different professional backgrounds, such as academia and the public sector.

Diversity is improving across the judiciary with faster progress in some areas than others. Last year, 45% of the JAC's recommended candidates were women. Recent statistics published by the Judicial Office show that 46% of tribunal judges are women and 12% are BAME. They also showed that the younger cohorts of judges are more diverse, a positive indicator for the future. We want the judiciary to reflect the society it serves and will continue to work with the government, judiciary and legal profession to ensure further progress is made.

Lori Frecker is Head of Equality and Diversity at the JAC

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## Cognitive biases: 15 more to think about

DECISION MAKING By Leslie Cuthbert



In Lydia Seymour's article in the Spring 2014 edition of *Tribunals*, she explained about a key unconscious bias known as 'confirmation bias'. In the Autumn 2015 edition, I then described about the risks involved in being overconfident. However, these are only two of the many cognitive biases that exist. Here are 15 other common cognitive, or unconscious, biases that we are all prone to falling foul of whether as witness, party or decision-maker.

- 1) **Anchoring.** This involves people being over-reliant on the first piece of information that they receive. For example, if deciding how much money to award if initially given the sum of £10,000 the average amount awarded is likely to be higher than if the initial sum requested was £3,000.
- 2) **Availability heuristic.** People overestimate the importance of information that is available to them. We judge the probability of events by how quickly and easily examples come to mind. For example, are people with mental illness more likely to be the perpetrators or victims of violence? Because of media stories we are more likely to initially believe the former when in fact the latter is true statistically.
- 3) **Bandwagon effect (or herd effect).** The probability of one person adopting a belief increases based on the number of people who hold the belief. If other members of the tribunal speak first and are in agreement, the last person to speak may just go along with the view already expressed to fit in or look like they know what they are doing.
- 4) **Blind-spot bias.** Failing to recognise your own cognitive biases or considering yourself less biased than others is a bias in itself! For example, I have an appraisal which says I ask inappropriate questions, I believe it to be wrong preferring to focus on the fact that I've never received a complaint about my questioning.
- 5) **Choice supportive bias.** When you choose something you tend to feel positive about it even if that choice has flaws and you remember your choice as better than it actually was. For example, when a decision you have been involved in is overturned on appeal you are sure that the appeal body has not taken into account all of the factors you did and so your decision was the better one.
- 6) **Clustering illusion.** This is the tendency to see patterns in random events. For example, fluctuations in the stock market price of shares where we ignore differences in data but stress similarities.

*Failing to recognise your own cognitive biases or considering yourself less biased than others is a bias in itself!*