



JUDICIARY OF
ENGLAND AND WALES

**Address by the Rt Hon Lady Justice Arden DBE to the Chancery Bar
Association**

**Diversity in the appointment of Queen's Counsel and judges:
what does the future hold?**

12 January 2007

I am delighted to be asked to chair this meeting of members of the Chancery bar, particularly those who are interested in applying for silk in the recently announced competition for 2007, and to have this brief opportunity to address it.

This is only the second year of operation of the new system for the appointment of Queen's Counsel. The system is evolving. There have been several changes, and we are all extremely grateful to Baroness Butler Sloss for generously agreeing to attend this meeting to help answer some of the queries.

The old system for the appointment of silks was abolished in 2003. So, before the new system was introduced, there was a period of about two years in which no one could apply for appointment as Queens Counsel. In the first year of the new system the applicants would include not only people who had become ready to take silk in the preceding year, but also applicants who had been unable to take silk in the period when no system was available. On this basis the expectation was that there would be a larger number of women silks than they had been in the last year of the old system. In point of fact, as regards women silks practising at the Chancery bar, the result was extremely disappointing. There was not a single woman practising at the Chancery bar in Lincoln's Inn who was appointed Queen's Counsel in the new scheme's first year of operation. That was not the only disappointing thing to happen for women. There were as I understand it a small number of established women juniors who decided to leave the bar and so they were lost to the profession.

There were other disappointments for the progression of senior women at the Bar. In the period from October 2005 to date there has not been a single appointment of a woman to the High Court bench. Before October 2005, there were several women appointed. From 1999 to 2005, Baroness Butler Sloss was the first, and only, woman Head of Division, and I would like to pay tribute to all the work that she has done to help women in the professions and on the bench both before and after her appointment as President of the Family Division.

The surprising thing is that there has been this notable lack of progress for women at a time when there is considerable pressure for diversity in the profession and on the bench. The Lord Chancellor is known to support diversity. In his Harry Street lecture last October he stressed that diversity and quality go together. He said that there were insufficient female judges and insufficient judges from minority ethnic

communities, meaning (as he put it) insufficient in the sense that there were people of quality from these groups were simply not being appointed and insufficient in the sense that the judges as a group are not in his opinion representative of the communities they serve. More recently the Equal Opportunity Commission has reported that are 78 "missing" women among the 194 senior judges and that it will take about 40 years for women to reach an equal number to that of men on the bench.

The reasons for appointing women to silk are similar to those for appointing women to the High Court Bench. Women bring new perspectives to bear as well as their intellectual skills and knowledge of the law. They have different life experiences. They have in some respects different approaches. Of course, appointment must be solely on merit, but merit should take into account the different but equal kinds of contribution that women can make. They challenge the male white male majority about their views and assumptions. The process of decision-making and thus the development of the law are thereby enriched. Moreover, a society that is sincerely committed to equality, which is at the heart of human rights, will want to see that there equal opportunities for appointment to both men and women. The promotion of women also helps to show that although women were formerly excluded from holding high positions in society, they are now included in it. What I have said about women applies equally to members of minority ethnic communities, to the financially disadvantaged and to all other minority groups in society.

Opening up the appointment to silk and appointment to the High Court bench to persons from minority groups, including women, is also important as part of the process of modernising the profession and modernising the judiciary. Court dress is often discussed these days. I am very grateful for all the work that has been done and hope that it will be possible for judges in some cases at least to be relieved of the burden of wearing wigs. But removing wigs from the heads of judges can also be seen as a bit like changing the position of the deckchairs on the Titanic. It does not alter the reality of the composition of the judiciary. It remains largely drawn from one section of society. The same is true but to a lesser extent of the higher echelons of the bar. To my mind the professions and the judiciary would look and be more modern and up-to-date if they were diverse in terms of their composition. Dispensing with wigs will only be the first to stage in any process of modernisation.

I have no doubt that any woman at the Bar who has come to the age where she can apply for silk has had a hard struggle and many disappointments. There are many women who have been lost to the professions and in due course to the bench, in some cases because of these difficulties.

However we do not need to be wholly despondent. It is important to recall that the system of judicial appointments is undergoing radical change. As from April 2007, the new Judicial Appointments Commission, chaired by Baroness Prashar, will be selecting the names of candidates to be placed before the Lord Chancellor for recommendation for appointment to the High Court bench. Importantly, the Judicial Appointments Commission, like the panels for selecting silks, will have the benefit of assistance from lay members, and some of the members will be women. This should help prevent the appointment of persons in the image of those already in office, a process sometimes disrespectfully referred to as "cloning".

I am hopeful that the new Judicial Appointments Commission will lead to a more diverse judiciary and that by so doing it will set the tone for all senior appointments in the professions as well as on the bench. I feel sure that it will set high standards.

In my view, things are going to change in the right direction.

I therefore urge all who are qualified to make an application for silk this year, whether you come from a minority group at the bar or not. I appreciate that the process is extremely burdensome. It includes for instance, a self-assessment form. Some women find this more difficult than men. A possible reason for this may possibly be that given in a letter to the Financial Times this week. This referred to the report of a psychologist, Adrian Furnham. He found that men tended to overestimate their own IQs and talents. This may give them false confidence in the process such as applications for silk.

Whether or not this is so, as of April there will be a gender equality duty on all public authorities. This may well require account to be taken in the appointment process of the fact that women and men are different in what they do and how they present themselves. For example, for various reasons male barristers probably get more opportunities to appear in big cases in the higher courts than women. Where this happens, then, as the Chief Justice of Canada has said, the problem for women is not so much the problem of the glass ceiling as the problem of the sticky floor. The fact that a person does less court work, and another member of the bar does more advocacy is not necessarily a reflection of talent because for example, many women prefer to do advisory work. To operate totally fairly, an appointments system needs to make some adjustment for the differences between the majority of the profession and minority groups.

Before any adjustment can be made to take account of the fact (if it is so) that women appear in fewer large cases than men in the appellate courts, there needs to be some research done by a specialist Bar associations into the differences between the type of work done by men and the type of work done by women. In Australia in the summer of this year there was much discussion about a report that showed that women tended to get far fewer briefs in the appellate courts than men. This appears to happen even though many large Australian law firms in the principal cities have equality codes for briefing both men and women counsel. My firm view is that the Chancery Bar should do some similar research.

I wish all who apply good luck in their applications. If you are successful, you will find that silk holds the key to a new professional career and a renewed sense of professional fulfilment and satisfaction. That key will unlock many doors, including be a door to possibly sitting as a deputy High Court judge. I regard sitting as a deputy High Court judge, if that is what you would like to do, as the gateway to the bench for most Chancery practitioners. But not everybody can be successful this year. If you are unsuccessful I hope that you will not be too disappointed and in particular that you will not become one of the statistics who leaves the bar. You have nothing to lose by applying. I trust that the Chancery bar in particular will have better result this year. For the women members of the Bar who apply, I would urge each of them to have the confidence to believe that: cometh the hour, cometh the *woman*.

It has been a great pleasure to address you. Thank you.