



Review of Statutory Consultation

Final Report

1st March 2022

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Executive Summary

- 1.1 Statutory consultation is currently a legal requirement and one aspect of the selection exercise process for judicial appointment. It requires the JAC to seek comments on candidates from someone who has held the office candidates are applying for, or someone who has other relevant experience. The Judicial Appointments Commission (JAC) was asked to give evidence to the Justice Select Committee on 29th June 2021, to address judicial diversity and the appointments process. It was announced that there would be an independent review of the approach to statutory consultation. Work Psychology Group (WPG) were appointed to conduct the review.
- 1.2 The objectives of the work captured in the Terms of Reference¹ provided to WPG were: 1) To review the approach to statutory consultation (within the statutory framework). 2) To examine whether statutory consultation responses received by the JAC are considered appropriately and whether the statutory consultation process impacts disproportionately on recommendations for appointment for any group.² 3) To consider whether improvements could be made to the way in which statutory consultation is commissioned, responses compiled and considered; and to make recommendations on the available evidence.
- 1.3 As independent reviewers it is important to highlight that the JAC has been supportive in providing all relevant data and evidence to deliver this review with a view to addressing all the issues identified.
- 1.4 The methodology for the review took a mixed-methods approach. Part one of our review involved a qualitative approach including a systematic desk review of evidence packs and stakeholder interviews. Part two of our review involved descriptive and qualitative analysis to investigate the existing data on the demographics of candidates included in this review, and to explore potential differential impact on demographic sub-groups.
- 1.5 This report presents the findings of the review. The following information was provided by the JAC and included in the scope of the review:
 - One evidence pack containing background material about the statutory framework, process outline, standard commissioning materials (letters, guidance); Work to agree and refresh guidance in 2019; Website content and messaging to candidates. WPG also reviewed the 'live' JAC website using links provided in the evidence pack, for additional background material.

¹ [Judicial Appointments Commission: review of statutory consultation – Judicial Appointments Commission](#)

² *This will also include a review of the operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels for the most senior judicial appointments (for England and Wales): Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lord and Lady Justices of Appeal.*

- Evidence packs were provided by the JAC in relation to five recent exercises where statutory consultation was sought (including consultation responses, selection panel reports, Selection and Character Committee (SCC) minutes, recommendation reports to the Appropriate Authority).
- Interviews with stakeholders including Commissioners, senior Judiciary, the Bar Council, the Law Society and CILEX.
- One evidence pack was provided by the JAC in relation to the operation of consultation (statutory and non-statutory) and what was undertaken by the statutorily constituted selection panels for the most senior judicial appointments.
- Five data files with demographic information about candidates for selected exercises where statutory consultation was sought: 035 - s9(1) authorisation to act as Judges of the High Court, 024 - Deputy High Court Judge, 020 - High Court, 009 - Salaried Judge of the First Tier Tribunal, 033 – Recorder, were provided to WPG by JAC. The demographic categories included in the data provided were Gender, Ethnicity, Disability, Professional Background, and progression group (progression group is defined in 4.4).

1.6 Following a review of the evidence available, the conclusions and considerations are provided in the context that statutory consultation is a legal requirement, and we have provided areas to consider for the future.

1.7 **Conclusion 1: The operation of statutory consultation is generally consistent within an exercise; however, it varies between exercises and the way information about candidates is gathered and amalgamated can vary depending on the method employed by the named statutory consultee.** Based on our desk review of the evidence packs for the five specific exercises identified we conclude that overall, the process of arranging and conducting statutory consultation is consistent for all candidates involved in a particular exercise. The SCC consider comments in a consistent manner for all candidates within an exercise, only changing the grading by the panels in respect of mixed or negative statutory consultation comments. However, our desk review demonstrated that the process of managing statutory consultation requests sent by the JAC to JO differs by exercise. For 020 High Court exercises, the Heads of Divisions private offices play a central role in supporting the statutory consultees, whereas for the 033 Recorder exercise, the pre-appointments team (JO) works with the SPJ's office to collate comments. The pen-portraits are provided to statutory consultees by the JAC and are based on information provided by candidates. Our desk review revealed that background information about candidates is not always captured in the pen portrait, this was noted for the s9(1) exercise. Therefore, highlighting another inconsistency in the process. Our desk review and interviews with judges revealed that statutory consultees confidentially sub-consult with others to gather information about candidates they do not know. The interviews with the judges demonstrated that some statutory consultees would share the JAC and JO guidance with those they sub-consult, whereas others do not. The method of collating of comments received from other judges can vary from structured to unstructured approaches, and our desk review revealed no specific guidance from JO to judges on the process of collating of comments from other

consultees, but reference is made to seeking third party comments is in the current JAC/JO guidance which is sent by the pre-appointments team (JO).

- 1.8 **Conclusion 2: The JAC guidance emphasises the need for objective, evidence-based statutory consultation comments however, the evidence-base for comments received is mixed.** Our desk review of the evidence packs for the five specific exercises identified³, revealed that notable importance is placed on the need for statutory consultation comments to be evidence-based. For example, all five evidence packs demonstrated that JAC and JO guidance is provided to statutory consultees, which places emphasis on the need for comments to be objective and evidence based. There was evidence of efforts by the JAC to improve the evidence base of the statutory consultation, such as the inclusion of evidence-based feedback examples in the guidance and more recently changes to the High Court proforma to support standardisation and generation of the comments. However, from the qualitative analysis of the interviews with judges the findings suggest this guidance could be further improved by detailing more specifically what qualifies as appropriate evidence. It was evident that the newly introduced proforma used for the 020 High Court exercise aided in the collection of evidence-based comments, allowing information on a candidate to be collated into one document. However, our desk review revealed that statutory consultation comments vary in their evidence-base, with some demonstrating clear evidence and others more focused on comments on candidates' suitability. In addition, in the 020 High Court exercise, panel members were found to scrutinise the statutory consultation comments provided to ensure they were evidence-based.
- 1.9 A qualitative analysis of the interview data revealed that some legal representative bodies do not perceive statutory consultation to be evidence-based, rather they perceive them to be unsubstantiated, unfair and highly subjective. Currently, legal representative bodies are not privy to the joint JAC, and JO guidance provided to consultees, which places emphasis on evidence-based comments.
- 1.10 **Conclusion 3: There is an absence of statutory consultation comments for some candidates and this impacts on the consistency, reliability, and the perceived fairness of the process.** Our desk review of evidence packs revealed that not all candidates receive statutory consultation comments when sought, with several reasons being given for this, for example some candidates are unknown to the named statutory consultee. Therefore, statutory consultation comments are used to support the selection decisions of some candidates but not others which could differentially impact on candidates. The JAC guidance and our qualitative analysis of the interviews with the Assigned Commissioners established that when statutory consultation is not available, the candidate should be neutral on this piece of evidence. Our desk research illustrated that in a small number of cases a negative statutory consultation comment, can have a negative outcome on an applicant's success, whereas the absence of statutory consultation

³ 024 - Deputy High Court Judge, 020 High Court Judge, 035 s9(1) Authorisations to Act as Judges of the High Court, 033 Recorder and 009 Judge of the First Tier Tribunal.

comments for another applicant in the same exercise has no impact on the decision. This is more apparent in exercises where statutory consultation happens after the Selection Day where only negative comments or mixed comments are reviewed by the SCC, and the selection panel do not have sight of the comments.

- 1.11 **Conclusion 4: The timeframes for statutory consultees to gather and return feedback about all candidates can be practically challenging and this can influence the quality and quantity of evidence gathered.** Based on our desk review of the evidence packs related to the five specific exercises⁴ where statutory consultation was sought, it is possible to conclude that the process of statutory consultation has challenging timeframes, especially for high volume exercises. Our desk research revealed that in some cases deadlines to return statutory consultation comments were missed, and the original timeline for statutory consultation had to be extended. The time allowed for the statutory consultation process varied across the different selection exercises for example in the 020 High Court exercise the original timeframe was four weeks. A qualitative analysis of the interview data revealed that some judges find statutory consultation very demanding, impractical, poorly timed and will work long hours in order to meet the timelines. Some judges explained that when acting as statutory consultees, they are having to seek comments for large volumes of candidates. A qualitative analysis of the interview data revealed that sometimes judges are asked for input by statutory consultees within tight timeframes, and they might need to conduct searches for further evidence by seeking the views of others. Therefore, it can be concluded that the practicalities of time pressure, and the process of sub-consulting, could be impacting on the quality of comments delivered, especially in high volume exercises.
- 1.12 **Conclusion 5: Statutory consultation comments received before a Selection Day can support the selection panel with making recommendations about candidates, but candidates are not given the opportunity to directly refute comments.** Our desk review of evidence packs revealed that when statutory consultation comments are sought before a Selection Day (as is applicable for salaried exercises), the comments can be considered by the interview panel and areas of development need can be included in the interview to probe further. There was good evidence of how this was appropriately integrated into the selection interview, but also evidence of variability of how chairs of panels used the statutory consultation information. Some interrogated and sifted the evidence and then integrated findings into interview questions in relation to relevant skills and abilities, whereas others preferred to review afterwards or let the SCC consider it. Statutory consultation comments are not shared directly with the candidate and as such that there is no opportunity to directly respond to and/or refute negative comments. This could potentially impact on the fairness of the process for a candidate.
- 1.13 **Conclusion 6: The process of gathering, using and weighting statutory consultation comments in the selection process, is not transparent to some judges and legal representative bodies.** Our desk review of

⁴ 024 - Deputy High Court Judge, 020 High Court Judge, 035 s9(1) Authorisations to Act as Judges of the High Court, 033 Recorder and 009 Judge of the First Tier Tribunal.

evidence packs demonstrated that the operation of statutory consultation is explained in the job advert. However, the qualitative analysis of the interview data revealed that some judges are unclear about how and when their statutory consultation comments are used to make decisions about candidates. Legal representative bodies also reported that they are not aware of how and when comments are used to make decisions about candidates.

1.14 Conclusion 7: There are mixed views in support of keeping the statutory consultation comments confidential. Based on the qualitative analysis of the interview data gathered from interviews with judges, some judges are strongly in support of the maintenance of the confidentiality of the statutory consultation comments written about candidates. The reason for maintaining confidentiality was reported by judges as allowing for open and honest sharing of information about candidates. However, it was acknowledged by some judges and some legal representative bodies that the confidentiality of comments leads to a perception of lack of transparency around the statutory consultation process, particularly where there is a perceived lack of information around how statutory consultation evidence is gathered and integrated into the decision-making process (see conclusion 6).

1.15 Conclusion 8: Based on the data included in the review, there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group. Descriptive analyses found across the four exercises where statutory consultation takes place before Selection Day, the profile of the population who were recommended was very representative of the overall sample invited to the selection process. It is not possible to determine how statutory consultation directly impacts individuals from different demographic groups with the data provided because statutory consultation is considered as part of the selection process, alongside other data to make a decision. Descriptive analyses of earlier stages of the process might provide further insight into the impact of group differences. For the 033 - Recorder exercise, statutory consultation is sought after Selection Day, on those candidates deemed as being suitable for selection. The descriptive analyses showed that the majority of individuals were recommended by the Selection and Character Committee. Findings from the qualitative analyses of matched cases, found the evidence-base of statutory consultation comments was mixed across and within cases, and it is not possible to draw a firm conclusion of differences in the pattern of the quality of statutory consultation comments between demographic groups.

Our overview for options to consider on next steps include:

1.16 Consideration 1: There is a need to address the inconsistency in the process of collating evidence on candidates, which may be differentially impacting candidates. The method by which statutory consultees gather and amalgamate information about candidates is inconsistent and is left to the choice of the consultee. There is a need to review the practice of sub-consulting, when a statutory consultee consults others, which potentially impacts the reliability of the information gathered due to differing approaches used. A consideration is whether additional guidance can be introduced to recommend how information

about candidates should be sought and collected by named statutory consultees. The JO process of managing statutory consultation requests could be reviewed to explore how they ensure consistency between exercises. This could help reduce variability in how the information about candidates is synthesised and thereby enhance standardisation.

- 1.17 **Consideration 2: Improving the objectivity and evidence-based feedback on all exercises.** Whilst our desk analysis revealed that importance is placed on evidence-based statutory consultation comments in the JAC's guidance, there are areas for improvement across exercises, as not all comments were evidence-based. The 020 High Court exercise uses a proforma which was found to be relatively more effective and could be introduced for other exercises. The guidance, while available, is perceived as 'generic', and examples could be more tailored to specific exercises and requirements of the role. The review highlighted some good examples of where judges had organised workshops locally to improve the quality and evidence base of the statutory consultation comments they received. To support named statutory consultees going forward, the JAC might wish to consider whether training could be delivered at the start of a selection cycle, for peers to discuss and work through some examples of appropriate evidence-based comments.
- 1.18 **Consideration 3: The absence of (or very limited) information for some candidates needs to be addressed to support fairness and 'level the field' for all.** Our desk review of evidence demonstrates that considerable effort goes into seeking statutory consultation comments and yet there remains a proportion of candidates that do not receive them or who receive limited comments. Our desk research revealed that for the salaried exercises (020 High Court and 009 Judge of the First-Tier Tribunal) and some other exercises (s9(1) authorisation and 024 Deputy High Court Judge) where the process is that statutory consultation is sought before a Selection Day, the majority (80% - 90%) of candidates shortlisted received statutory consultation comments. For the fee-paid exercise (Recorder 033), where statutory consultation is sought after Selection Day, less than half of candidates received statutory consultation comments. A qualitative analysis of the comments also highlighted that not all candidates receive the same volume of comments or level of detail. The impact of the absence of information for some candidates cannot be directly quantified but there is a perception that this could impact on the fairness of the process.
- 1.19 **Consideration 4: Can more support be built into the process to allow statutory consultees to have sufficient time to provide comments?** Based on the interviews, there is a perception that there is often insufficient time allocated for consultees to provide statutory consultation comments. There may be alternative approaches to support this such as the introduction of dedicated time slots for statutory consultees (especially in high volume exercises) to complete comments, carefully scheduling statutory consultation around other commitments and more support to the consultees so that the process is felt to be more manageable. Other approaches might include introducing a minimum ratio of statutory consultees to candidates which could reduce the burden especially in high volume exercises, mitigating against the time pressure and the potential impact on quality. These are possible interventions; however, they may not provide the improvements required particularly if there are an increasing number of

exercises in the future. The evidence suggests that the current approach may not be practically fit for purpose for the future. Given this, a re-purposing of the statutory consultation could deliver efficiencies and achieve legal requirements set in statute (see Consideration 7).

- 1.20 **Consideration 5: Review the need for confidentiality of the comments written about candidates.** Whilst many consultees appreciate that confidentiality encourages frank and honest comments to be provided, for the unselected candidates, there may be concerns regarding the transparency of the process, which might lead to perceptions of unfairness. If there is value in confidentiality and it is to remain, it needs to be communicated why this is the case. Being clear and transparent on the rationale and value, the type of evidence gathered and how it is used (rather than the comments themselves) could help support better understanding and acceptance of this element of the process.
- 1.21 **Consideration 6: More specific guidance and communication to be provided with regards to how evidence is collated, weighted and used in the process.** Although the process of statutory consultation is communicated in the job advert, qualitative analysis of interview data suggested that the process of statutory consultation is unclear to candidates. Therefore, increased signposting and highlighting of the information provided to candidates could improve the perceived transparency of the process. Work is required to communicate to legal representative bodies (and candidates) the requirement of evidence-based comments within the statutory consultation and clarifying what good and appropriate evidence looks like. Communicating what guidance is already in place to support the generation of evidence-based comments should be considered. Can improvements be made to the process of excluding non-evidenced based comments before reaching either the panel interviews or the SCC? Further guidance to consultees about exactly how their comments were subsequently used to make selection decisions would be desirable. In addition, providing consultees with summary feedback on their comments might help to improve engagement, combining this with the continual improvement of the process including better communication to candidates and other stakeholders.
- 1.22 **Consideration 7: Potential for re-purposing statutory consultation to further support equal opportunity for all candidates.** A key issue emerging from the findings is having limited or no information on some candidates (compared to others) may differentially impact some candidates and thereby the fairness of the current process. Several considerations in dealing with this issue require further review including the potential for re-purposing the statutory consultation to better support the aims of the JAC. Firstly, for salaried selection exercises, the introduction of specific guidance for a candidate on how to improve their profile before applying for a role could give candidates the opportunity to present appropriate evidence for their application (thus, in principle, 'levelling the field'). If such an approach were considered, it would be important that all candidates in a given exercise are afforded equal opportunity. Secondly, for large fee-paid selection exercises, introducing statutory consultation before Selection Day would enable the selection panel to probe on areas of development appropriately and give candidates the opportunity to respond to issues raised in statutory consultation comments. While it is understood that this may not be a practical option for all exercises (particularly the high-volume exercises) due to the method by which

statutory consultation is currently gathered and collated, changes to this method of statutory consultation may help to support this. Thirdly, for both salaried and fee-paid exercises, introducing mandatory detail in the pen portrait or introducing a candidate-prepared professional experience portfolio (based on CV information containing appropriately verifiable evidence) could give less ‘well-known’ candidates more opportunity to demonstrate their professional experience (e.g., notable judgments) and thus, consultees more information about where statutory consultation could be reliably sought. This would enable candidates to be more active participants in the process and could therefore help deal with the existing absence of evidence for some individuals. Finally, for high volume fee-paid exercises, a different approach to statutory consultation could be considered, given that for entry level posts they predominantly include candidates who do not hold a judicial appointment and therefore statutory consultation comments are more likely to be limited or absent. Any change to the process will need to be carefully considered by the JAC, seeking legal advice as required to ensure the process fulfils the statutory duty placed on the JAC whilst considering any legal risks. Interviews highlighted that legal representative bodies have recently commissioned legal advice on the issue of statutory and non-statutory consultation and raised a concern that statutory consultation as currently used is at risk of having a discriminatory impact. Whilst this does not constitute an agreed legal position, a review of any legal risks should be conducted and whether potential re-purposing (or not) of the statutory consultation could address this concern.

Overall Recommendations

- 1.23 **Recommendation 1:** For exercises where statutory consultation takes place before a Selection Day, address all issues raised in the considerations section above. This includes, addressing inconsistency in the process, improving the quality of statutory consultation comments, addressing the absence of statutory consultation comments for some candidates, building more time into the process, reviewing the need for confidentiality and providing more specific guidance.
- 1.24 **Recommendation 2:** Explore the potential for change to the statutory consultation process for large fee-paid exercises, where statutory consultation is sought after Selection Day. Consider whether the effort required to gather and review Statutory Consultation after a Selection Day really adds value, given that our findings suggest a large absence of (or very limited) information available for some candidates.
- 1.25 **Recommendation 3:** On the basis of the data in the exercises examined, there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group⁵. The JAC to continue to review the number of individuals from each demographic sub-group at all stages of the selection process to identify any significant change in proportions.

⁵ Selection process here means selection day, interview or paper sift

2 About Work Psychology Group

- 2.1 Work Psychology Group (WPG) are an independent, evidence-based consultancy who engage with organisations at a strategic level to translate the latest research into effective, innovative and sustainable solutions. Our principal business activities are services relating to selection and assessment, individual and organisational development, and evaluation. Our psychologists are uniquely skilled in these areas and are committed to working in partnership with clients to ensure our knowledge and expertise can be applied to meet the needs of individual organisations.
- 2.2 WPG has substantial expertise in the design, development and evaluation of selection and assessment tools and methodologies, including job analysis, role profiling and competency modelling. Of relevance to this review, our previous work regularly involves the evaluation of both physical and remote selection methods for high stakes selection, for example in medicine, finance and professional services. We have substantial experience and expertise in validating the impact of different selection methods within the political and public-sector sphere, similar to the JAC context.

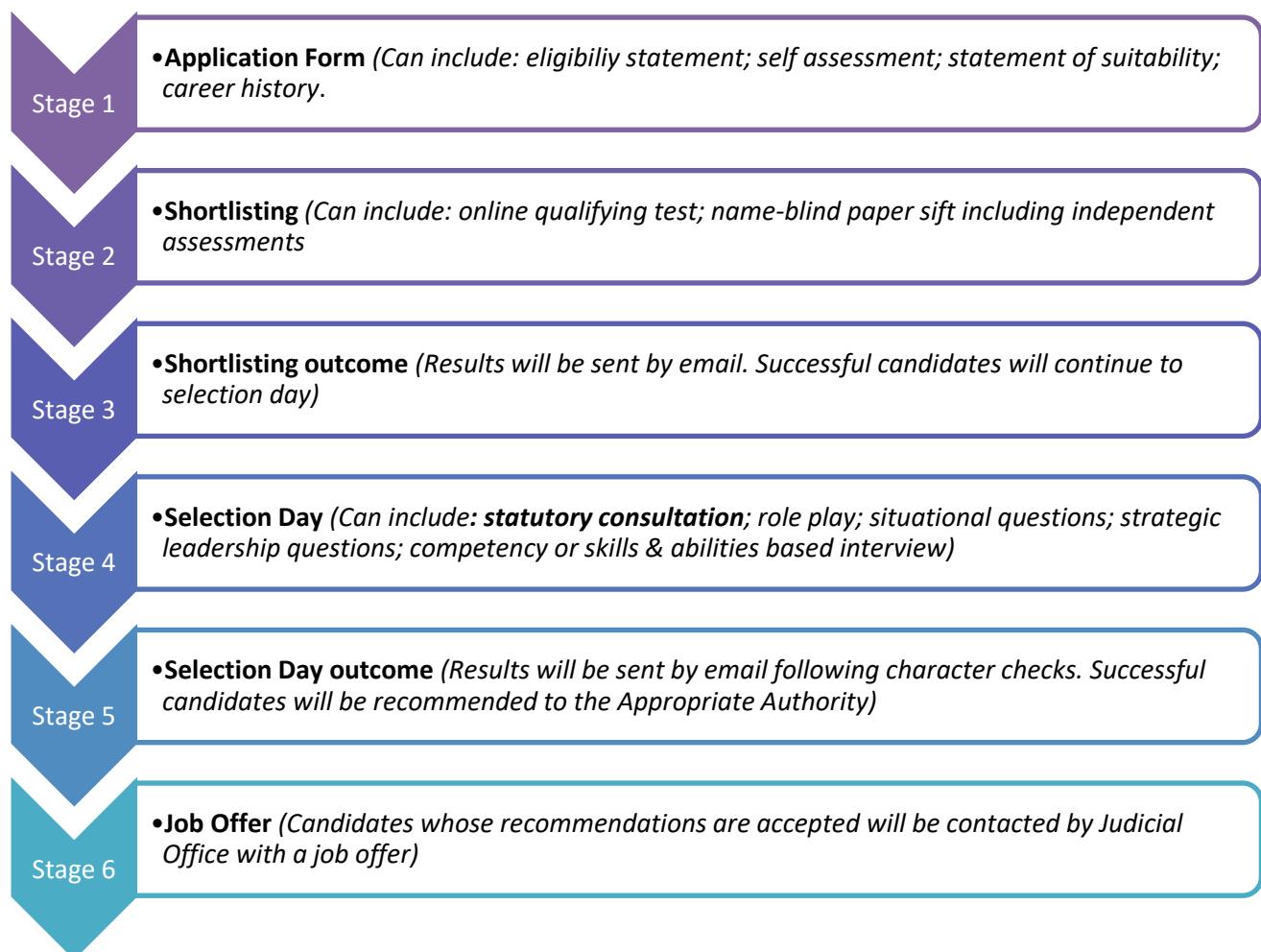
3 Scope of the Work

Background & Context

3.1 The Judicial Appointments Commission (JAC) selects candidates for judicial office in England and Wales, and for some tribunals with UK-wide powers. The JAC has a statutory duty to select people for judicial appointment only on merit and who are of good character, in line with section 63 of the Constitutional Reform Act 2005. It also has a statutory duty to attract diverse applicants from a wide field, and fairness, transparency and diversity considerations are core to their selection processes.

3.2 The JAC selection process is unique due to multiple reasons. First there is a high volume of applicants for a small number of prominent and 'lifelong' positions. Additionally, the roles are high profile with high stakes, and have a strong public interest. The selection processes used for these roles are subject to high levels of scrutiny, with far reaching consequences for poor quality hire.

Figure 1. Typical JAC selection process.



3.3 Of particular note for the context of this review, is the unique situation of statutory consultation being a legal requirement for the JAC and one aspect of the selection process for judicial appointment.⁶ For any high stakes selection into the professions, in the UK or internationally, there would normally be several stages or elements to the selection process. However, in our experience of selection and assessment internationally, there is no other process that we know that has such a legal statutory requirement. As independent reviewers of this part of the selection process, we are able to review the process and approach, and provide conclusions and considerations, but would like to acknowledge the highly unusual statutory context. This provides additional complexities to be considered when reviewing against best practice in selection.

3.4 The JAC was asked to give evidence on diversity initiatives within the appointment process, to the Justice Select Committee on Tues 29th June 2021. In giving evidence, Lord Ajay Kakkar, Chair of the Judicial Appointments Commission (JAC), announced to the Justice Select Committee <https://parliamentlive.tv/event/index/e8ff2ceb-443d-4ce8-9510-9372bdaf5637> that there would be a review of the approach to statutory consultation.

3.5 In September 2021, WPG were commissioned by the JAC to conduct an independent review of statutory consultation, in line with the terms of reference for the review.

Overview of Statutory Consultation

3.6 The law [Section 88(1) of the Constitutional Reform Act, and Regulation 30 of the Judicial Appointments Regulations 2013] requires the JAC to consult a “statutory consultee” before making a recommendation for appointment. Statutory consultation is carried out unless the JAC Chairman and the Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) agree in advance to waive it. This is the case in almost all non-legal exercises run by the JAC as the candidates are unlikely to be known by the statutory consultee.

3.7 The timing of statutory consultation will be discussed and approved through the planning of each exercise with agreement from all delivery partners and the Assigned Commissioner. The approach to the timing of statutory consultation will largely depend on the type of role, the size of the exercise and the number of candidates applying for the role. For each selection exercise, the information page published on the JAC’s website will set out the named statutory consultee for that exercise and the stage of the selection process when comments will be sought.

3.8 For salaried selection exercises, consultation will usually take place before Selection Day depending on the number of vacancies/ forecast applicants. This is to assist the Selection Day panel in their assessment and questioning of the candidates at Selection Days and will be taken into account along with all the other forms of evidence at this stage.

3.9 The common process for large fee-paid exercises run by the JAC, such as Recorder, is that statutory consultation is sought after Selection Day, on those candidates assessed as being suitable for selection. This is due to the large numbers of candidates involved in the process and to make best use of judicial

⁶ [Statutory consultation – Judicial Appointments Commission](#)

time. Any information received from the statutory consultee is carefully considered by the Selection and Character Committee alongside the totality of evidence received from candidates through the selection process. However, each exercise is different, and its processes are dependent on the needs of the exercise against resourcing and other limitations.

3.10 The process for the most senior appointments (Court of Appeal, Heads of Division, Senior President of Tribunals, and Lord Chief Justice) is laid out in regulations, specifically, the Judicial Appointments Regulations 2013. For each exercise the Lord Chancellor writes to the Chairman of the JAC to convene a panel for appointment, which is, usually, chaired by the Lord Chief Justice with the membership of the panel described in the regulations. The exercises are run independently from the JAC, with a panel secretary appointed to assist the panel to fulfil its functions. The JAC does provide Commissioners to sit on the selection panel, including the Chairman of the JAC. Each senior appointment panel must decide on the process, but it must be open, transparent and fair.

Terms of Reference & Project Scope

3.11 The objectives of the work captured in the Terms of Reference⁷ provided to WPG were 1) To review the approach to statutory consultation (within the statutory framework). 2) To examine whether statutory consultation responses received by the JAC are considered appropriately and whether the statutory consultation process impacts disproportionately on recommendations for appointment for any group⁸. 3) To consider whether improvements could be made to the way in which statutory consultation is commissioned, and responses compiled and considered; and to make recommendations.

The full terms of reference for the review included a review of:

- commissioning guidance for statutory consultation commissioned by JAC and extent to which guidance facilitates objective and evidence-based feedback.
- statutory consultation responses and extent to which they are evidence-based and objective.
- the approach of statutory consultees where they seek evidence from other judges, what guidance is provided, whether requests are only going to those likely to have relevant knowledge, and that candidate confidentiality is given sufficient weight.
- the extent to which judges seek information on candidates, or just share any relevant information they already have.

⁷ [Judicial Appointments Commission: review of statutory consultation – Judicial Appointments Commission](#)

⁸ *This will also include a review of the operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels for the most senior judicial appointments (for England and Wales): Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lord and Lady Justices of Appeal.*

- how statutory consultees consider and bring together information in their response where it has come from multiple judges on multiple candidates.
- Whether candidates have an opportunity to rebut adverse comment on them in statutory consultation responses, and if so how (including in relation to transparency) this is done.
- The impact of the statutory consultation process on a candidate's application, and whether there is a disproportionate impact at any stage of each competition.
- The impact of the absence of any statutory consultation responses for candidates, and whether this disproportionately impacts on the success rate.
- Selection and Character Committee (SCC) consideration of statutory consultation at the final decision-making stage.

3.12 The scope of work was defined by the Terms of Reference and the documents and resources made available to WPG for the review. This included seven evidence packs provided to WPG by JAC, as part of our desk review, WPG led virtual interviews with members of the senior Judiciary, JAC Assigned Commissioners and legal representative bodies, and five data files containing candidate demographic information (see methodology section for more detail).

3.13 Five recent exercises where statutory consultation was sought were selected as a representative sample to be included in the review. These five exercises were: 020 - High Court and 009 – Judge of the First Tier Tribunal as examples of salaried exercises; 024 – s9(4) Deputy High Court Judge and 035 - S9(1) authorisations as examples of fee-paid exercises. All four of these exercises had statutory consultation completed ahead of Selection Day. The fifth exercise was 033 - Recorder, as an example of a large fee-paid exercise with statutory consultation completed after Selection Day. (See Appendix 1 for a summary of exercises).

3.14 The operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels for the most senior judicial appointments (for England and Wales), was also included in the review.

4 Methodology

4.1 The methodology for the review took a mixed-methods approach. Part one involved a qualitative approach including a systematic desk review of evidence packs and Stakeholder interviews. The qualitative approach enabled a review of the statutory consultation process, to address the key review questions outlined in the Terms of Reference . Part two of our review focused on one aspect of the Terms of Reference⁹. It involved descriptive and qualitative analysis to investigate the existing data on the demographics of candidates included in this review, and to explore potential differential impact on demographic sub-groups.

Data available

4.2 Seven evidence packs were provided to WPG by JAC, to be included as part of our desk review:

- One evidence pack containing background material about the statutory framework, process outline, standard commissioning materials (letters, guidance); Work to agree and refresh guidance in 2019; Website content and messaging to candidates. WPG also reviewed the 'live' JAC website using links provided in the evidence pack, for additional background material.¹⁰
- Five evidence packs in relation to five recent exercises where statutory consultation was sought (including consultation responses, panel reports, Selection and Character Committee (SCC) minutes, recommendation reports to the Appropriate Authority). These five exercises were: 020 - High Court, 024 – s9(4) Deputy High Court Judge, 035 - S9(1) authorisations, 033 – Recorder and 009 - Judge of the First Tier Tribunal (see Appendix 1 for detail about number of candidates in each exercise). The content of the evidence packs for each exercise varied and table 1 below summarises the content available in each evidence pack.
- One evidence pack in relation to the operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels for the most senior judicial appointments (for England and Wales). This evidence pack included the operational process of statutory consultation and non-statutory consultation process involved in the appointment of the most senior judicial appointments. This pack did not include any information about candidates, e.g., statutory consultation comments or any other outcome data.

⁹ [Judicial Appointments Commission: review of statutory consultation – Judicial Appointments Commission](#)

¹⁰ [Vacancies – Judicial Appointments Commission](#)

Table 1. Review of the content evidence packs similarities and differences¹¹

	024 Deputy High Court Judge	020 High Court Judge	009 Judge of the First Tier Tribunal	033 Recorder	S9(1) 035 authorisations
Statutory consultation invitations/request letters	✓	✓	✓	✓	✓
Pen portfolios for each candidate.	✓	✓	✓	✓	✓
JAC statutory consultation guidance	✓	✓	✓	✓	✓
Statutory consultation comments received for each cand.	✓	✓	✓	✓	✓
Panel chair reports (for each cand. – amalgamation of all info from SD and stat con comments)	✓	✓	✓	✓ - only available for 2 candidates whose grades were amended at SCC.	✓
Extract from paper to SCC; minutes from SCC meeting	✓	✓	✓	✓	✓
Areas to probe in interview	✗	✓	✗	n/a	n/a

¹¹ Note: Areas to probe in interview have been marked as 'Not Applicable' for the 033 Recorder and S9(1) 035 Authorisations exercise as the former exercise obtains Statutory Consultation after Selection Day and interviews (and therefore Statutory Consultation comments cannot be probed at interview), and the latter is a purely paper-based assessment with no interview element. A table outlining areas raised in Statutory Consultation to probe in interview are not provided for panel members in 024 Deputy High Court Judge and 009 Judge of the First Tier Tribunal.

Panel member/chair feedback re. stat con	✓	✓ - a brief summary of a panel member's feedback included.	✓	✓	✓
Operational colleagues' feedback re stat con	✓	✓	✓	✓	✓

4.3 **18 WPG led virtual interviews** were also conducted as part of the review. The list was provided by the JAC in consultation with JO.

The interviewees were from the following groups:

- 12 Senior Judiciary (referred to as judges) - Judges had experience of the five specific exercises identified or previous experience of other exercises.
- Three JAC Assigned Commissioners – Assigned Commissioners had experience of at least one of the five specific exercises identified for review.
- Three legal representative bodies (from the Law Society; Bar Council; CILEX). – Legal representative bodies had some understanding of statutory consultation and/or experience of non-statutory consultation.

4.4 Five data files with demographic information about candidates for selected exercises where statutory consultation was sought: 035 - s9(1), 024 - Deputy High Court Judge, 020 - High Court, 009 - Judge of the First Tier Tribunal, 033 – Recorder, were provided to WPG by JAC. The demographic categories included in the data provided were Gender, Ethnicity, Disability, Professional Background, and progression group. The progression groups consisted of two main status categories, recommended versus not recommended. Recommended were the most meritorious candidates who were recommended to the appropriate authority to fulfil the vacancy request. Not recommended were candidates deemed 'selectable' but were not as meritorious as the top candidates, or those who are currently deemed 'not presently selectable' by the selection panel. Some candidates fit into 'other' progression group which included candidates who are rejected or withdrawn on other grounds e.g., character, as described in the Good Character Guide on the JAC website¹², before a decision on merit was taken.

¹² <https://judicialappointments.gov.uk/guidance-on-the-application-process-2/good-character/good-character-guidance/>

Framework for evaluation

4.5 In evaluating selection systems and methods, there are well established criteria to aid systematic reviews. For this review we adapted Patterson et al.'s (2018)¹³ framework for evaluating selection methods. Table 2 outlines three overarching categories and five sub-categories of evaluation criteria most relevant to the scope of the review. The key questions from the Terms of Reference, addressed by each evaluation criteria have been noted in the last column.

Table 2. Framework and criteria to guide the independent review of the JAC statutory consultation process

Category	Evaluation Criteria	Evidence available	Key questions addressed
Accuracy and effectiveness	Evidence of reliability	<ul style="list-style-type: none"> Qualitative data from interviews with judges and Assigned Commissioners Desk review of five specific exercise evidence packs and most senior appointment evidence pack Desk review of background information evidence packs 	<ul style="list-style-type: none"> <i>Commissioning guidance for statutory consultation commissioned by JAC and extent to which guidance facilitates objective and evidence-based feedback.</i> <i>The extent to which judges seek information on candidates, or just share any relevant information they already have</i> <i>How statutory consultees consider and bring together information in their response where it has come from multiple judges on multiple candidates.</i> <i>SCC consideration of statutory consultation at the final decision-making stage</i> <i>The approach of statutory consultees where they seek evidence from other judges, what guidance is provided, whether requests are only going to those likely to have</i>

¹³ Patterson, F. (2018). Designing and Evaluating Selection and Recruitment in Healthcare. In *Selection and Recruitment in the Healthcare Professions* (pp. 1-26). Palgrave Macmillan, Cham.

			<i>relevant knowledge, and that candidate confidentiality is given sufficient weight.</i>
	Evidence of content validity	<ul style="list-style-type: none"> Qualitative data from interviews with judges and Assigned Commissioners Desk review of five specific exercise evidence packs Desk review of background information evidence packs 	<ul style="list-style-type: none"> <i>Statutory consultation responses and extent to which they are evidence-based and objective.</i>
	Fairness	<ul style="list-style-type: none"> Qualitative data from interviews with judges and Assigned Commissioners Desk review of five specific exercise evidence packs Desk review of background information evidence packs 	<ul style="list-style-type: none"> <i>The impact of the statutory consultation process on a candidate's application, and whether there is a disproportionate impact at any stage of each competition.</i> <i>The impact of the absence of any statutory consultation responses for candidates, and whether this disproportionately impacts on the success rate.</i> <i>Whether candidates have an opportunity to rebut adverse comment on them in statutory consultation responses, and if so how (including in relation to transparency) this is done</i>
Implementation issues	Practicality & efficiency	<ul style="list-style-type: none"> Qualitative data from interviews with judges and Assigned Commissioners Desk review of five specific exercise evidence packs 	<ul style="list-style-type: none"> <i>How statutory consultees consider and bring together information in their response where it has come from multiple judges on multiple candidates.</i> <i>The extent to which judges seek information on candidates, or just share any relevant information they already have</i>

		<ul style="list-style-type: none"> • Desk review of background information evidence packs 	
Stakeholder acceptance and feedback	Positive Stakeholder perceptions	<ul style="list-style-type: none"> • Qualitative data from interviews with judges, legal representative bodies and Assigned Commissioners • Desk review of five specific exercise evidence packs • Desk review of background information evidence packs 	<ul style="list-style-type: none"> • <i>Commissioning guidance for statutory consultation commissioned by JAC and extent to which guidance facilitates objective and evidence-based feedback</i> • <i>Statutory consultation responses and extent to which they are evidence-based and objective.</i> • <i>Whether candidates have an opportunity to rebut adverse comment on them in statutory consultation responses, and if so how (including in relation to transparency) this is done.</i>

Application of the evaluation framework in the review

The evidence was reviewed against the framework in the following way:

4.6 Accuracy and Effectiveness:

- Evidence of reliability – focuses on investigating if the statutory consultation process is consistent in how it assesses candidates.
- Evidence of content validity - focuses on investigating whether the statutory consultation assesses what it claims to assess. Statutory consultation comments have been reviewed for evidence-base against the objective methodology: ORCE (Observe, Record, Classify & Evaluate) to observe and assess candidate performance.¹⁴
- Fairness - based on implementation of valid selection criteria and the accurate and standardised administration of the process.

4.7 Implementation issues:

- Practicality & efficiency – assesses whether the statutory consultation process can be implemented effectively within the organisation, and whether adequate training is provided to key panel members and staff on the implementation of the process.

4.8 Stakeholder acceptance and feedback:

- Stakeholder acceptance and feedback – this refers to the extent to which key Stakeholders (judges, JO staff, panel members) react positively to the statutory consultation method for a particular exercise. Since legal representative bodies are involved in the most senior appointments, but not in the salaried or fee-paid exercises, their comments are not captured under this section and are instead incorporated as additional themes.

Desk research method

4.9 The first stage of our desk review involved two WPG organisational psychologists reviewing the background information evidence pack and the content of the evidence packs provided, relating to the five exercises identified by the JAC where statutory consultation was sought.

4.10 The second stage of our desk review involved two WPG psychologists independently reviewing the five evidence packs against the evaluation framework to review best practice, and to also address the key review questions outlined in the Terms of Reference. Thematic qualitative analysis was conducted to review the qualitative data provided by the JAC.

4.11 The third stage of our desk review involved a senior psychologist quality assuring the qualitative review and thematic analysis. This involved ensuring themes were appropriately clustered.

4.12 The final stage of our desk review involved synthesising the information to review the quality of the statutory consultation process against the evaluation framework.

¹⁴ https://ptc.bps.org.uk/sites/ptc.bps.org.uk/files/guidance_documents/assessment_and_development_centres1.pdf

4.13 An additional desk review was conducted by one psychologist of the operation of consultation (statutory and non-statutory) for the most senior judicial appointments. The findings from this review are reported in a separate section of the report.

Interview method

4.14 Interview schedules were designed with questions focussed on one of the five exercises identified by the JAC where statutory consultation was sought. The schedules were sent to the JAC and JO for review and sign-off. WPG made required updates to the schedule following this review ahead of conducting interviews with Stakeholders.

4.15 JO were invited to be present for the interviews with the relevant judges. Each interview lasted approximately 45 minutes, and a short briefing document was provided to Stakeholders prior to the interview to allow them to reflect on the question areas. During the interview Stakeholders were reassured of anonymity. Detailed notes were recorded against the question areas during the interview. Any participant information was anonymised to ensure that no participant or specific roles are identifiable in the notes or reporting.

4.16 Thematic qualitative analysis was conducted on the interview scripts to review the quality of statutory consultation, focussed on identifying the themes in relation to the five exercises identified by the JAC where statutory consultation was sought, and general themes about statutory consultation.

Analysis of demographic data

4.17 The first stage of our analysis of the demographic data involved descriptive analyses. The number and proportion of candidates in each demographic sub-group was examined and the data was then split by progression group (recommended versus not recommended). This initial stage of our analyses provided us with an overview of the data available and was used to inform our subsequent qualitative analysis approach.

4.18 The second stage of our analysis of demographic data involved selecting demographic cases using a matched case sampling approach. The demographic data was organised by progression group (non-recommended versus recommended). Then, for each progression stage in turn, the same number of cases were randomly selected from each demographic sub-group (e.g., 5 men and 5 women). This process was repeated for each of the five exercises. See table 3 below for an illustration of the cases selected from the non-recommended progression group.

4.19 The final stage of our analysis of demographic data involved qualitatively analysing the quality of the statutory consultation comments for each set of matched cases selected in the second stage. The quality of the statutory consultation comments was evaluated against the JAC guidance. This involved reading the statutory consultation comments and comparing the quality of the evidence provided between sub-groups e.g., men versus women, to determine any notable difference in the quality of statutory consultation comments based on demographic sub-groups. The statutory consultation comments were then reviewed by a second WPG psychologist to ensure reliability and quality assurance of results.

4.20 Due to the small sample size of candidates within the demographic categories (less than 100 per sub-group), detailed statistical analyses could not be conducted to explore any statistical significance of the diversity outcomes in exercises where differences have been highlighted. In addition, even if more data had been provided, it would not be possible to determine how statutory consultation directly impacts individuals from different demographic groups because statutory consultation is considered as part of the selection process, alongside other data to make a decision.

Table 3. Number of cases selected from non-recommended progression group.

Exercise	Disability	Gender	Ethnicity	Professional Background
035 - s9 (1)	4 Yes 4 No	5 Male 5 Female	5 White 5 BAME	1 Solicitor 1 Barrister 0 Other
024 - Deputy High Court Judge	2 Yes 2 No	5 Male 5 Female	5 White 5 BAME	2 Solicitor 2 Barrister 0 Other
020 - High Court	2 Yes 2 No	2 Male 2 Female	1 White 1 BAME	2 Solicitor 2 Barrister 0 Other
009 - Salaried Judge of the First Tier Tribunal	5 Yes 5 No	5 Male 5 Female	5 White 5 BAME	1 Solicitor 1 Barrister 1 Other

5 Triangulation of Findings

Part One: Desk Research and Interview

- 5.1 The WPG team consisted of five psychologists who met to discuss and triangulate findings from our desk review and interviews. This involved reviewing the emerging themes related to answering the key questions. Recurrent themes from the two data sources that were related to the statutory consultation were identified and are detailed alongside the accompanying evidence.
- 5.2 As the process for the exercises differ slightly relevant themes specific to each of the exercises will be commented on separately.
- 5.3 General themes from the findings, specific to no particular exercise, have been reported together.
- 5.4 The findings from the review of the sixth evidence pack, in relation to the operation of consultation (statutory and non-statutory) for the most senior judicial appointments are reported separately, at the end of this section of the report.

020 High Court Judge exercise

Accuracy and effectiveness

Evidence of reliability

- 5.5 **Consistency:** The information provided in the evidence pack demonstrated that the process of requesting, amalgamating, and providing statutory consultation to inform Selection Day was **consistent** for all candidates in 020 High Court exercise. In particular, three main areas of consistency were observed in relation to the process and guidance provided to all consultees involved, the consistency in which comments were gathered, and the consistency in how comments were collated and provided to the panel for use during Selection Day.
- 5.6 In relation to the consistency of the JAC guidance and process by which statutory consultation was requested, the 020 High Court Judge evidence pack documented that there was a named statutory consultee for this exercise. The named consultee sought comments from all relevant Heads of Divisions and provided additional comments regarding the named statutory consultee's own knowledge about the candidate, or comments on the statutory consultation received for the candidate. Within the evidence pack for the exercise, the process is clearly described and articulated within the documentation and guidance provided to statutory consultees to ensure those involved in the process are clear on what is required. This was supported in the interviews conducted, with one judge commenting that "*the guidance is excellent. I'm fine with what is provided. It is plain on how to use it and what to do once you have provided it.*" The evidence pack outlines that a letter was sent to the statutory consultees requesting statutory consultation in relation to all 22 candidates invited to Selection Day interviews. An identical version of the letter was also sent to five other consultees by the statutory consultee requesting statutory consultation comments for the 22 candidates. Each consultee was provided with the same information, which included: the vacancy request, the full list of candidates shortlisted for interview with a brief pen portrait, an example of the statutory consultation request form, and the JAC statutory consultation guidance (outlining

the statutory consultation general *Purpose, Approach, Use and Confidentiality*), thus demonstrating the consistency of the process by which statutory consultation was requested and guidance was provided. The consistency of the process was also noted in an interview with a judge, who spoke about how the guidance documentation is sent to others who are involved in providing comments when the statutory consultee needs to consult others “*the criteria which I have to apply is passed on by my office, to those I consult, so that they understand what it is I’m asking them for. They need to know what I need in order for me to provide to the JAC what they’re asking me to do.*”

- 5.7 A review of the process map provided by JO also outlined the steps involved in collecting statutory consultation comments for the 020 High Court Judge exercise. However, for most of the consultees the process map showed that they consulted other people to provide comments on the candidates, which included other judges who may have known the candidate and were able to provide comments. There is evidence to suggest that as part of the process, guidance documents and a letter were sent to those who are consulted to provide statutory consultation comments, however there is no evidence in our desk review of whether the guidance is passed on or followed.
- 5.8 One of the main factors which appears to have ensured the consistency of the statutory consultation process relates to the introduction of the pro-forma template at the start of 2021, which ensures a high level of consistency in gathering and documenting statutory consultation comments received. The pro-forma was introduced with the “*aim of providing more detail on candidates, including areas to probe at interview*”. Additionally, it was found to be beneficial in allowing consultees to capture the statutory consultation comments in a consistent and standardised way for each candidate. This was supported in the feedback provided by the JAC operational colleagues who were involved in this exercise, “*it became apparent that we may need to consider an alternative approach that increased the chances of seeing a consistency of approach and more uniformity re. the types of evidence being put forward by individual consultees*”. The effectiveness of the introduction of the pro-forma document was also referenced in an interview with a judge, “*for the High Court there is a template provided which has a number of boxes in it and I think that is very useful because it means that for each candidate there is an orderly presentation of information about the specific matters. I would provide the number of days they have sat, the areas they have sat, and I do think that is useful information for the JAC.*” Additionally, our desk review of the ‘*JO Stat Con Info*’ document included comments from JO on specific exercises as part of the statutory consultation review. One comment referenced that “*this was the first time the proforma had been used in a SC. The proforma allowed all information on a candidate to be collated into one document.*” However, there were some concerns raised in comments provided by JO about the introduction of the pro-forma regarding the risk of human error when information is copied and pasted to and from the pro-forma, for example when “*copying information to Excel to seek comments from Leadership Judges) particularly in a time pressured environment*”. This has been flagged as a risk by JO, which should continue to be monitored and managed to ensure no instances of human error can impact the reliability of the process. Overall, the evidence regarding the introduction of the pro-forma template was highly positive, as discussed via the JAC operational colleagues, interviews with judges, and comments from JO. The review of the 020 High Court exercise evidence packs also demonstrated consistency in the way in which the statutory consultation comments were collated and provided to the panel members for use at the Selection Day. A statutory consultation grid was prepared for the panel members, which included statutory consultation areas to

probe at the interview. From our desk review, there was evidence that all 22 candidates who were shortlisted to attend the Selection Day had areas highlighted to be probed during the interview.

5.9 **Whether language supports objective/evidence-based feedback:** Language which supports and encourages objective/evidence-based feedback is present within both the JAC guidance provided to consultees and within the pro-forma template. Regarding the JAC guidance document, it outlines that it would be most helpful if statutory consultees could *“give us factual information we would otherwise lack; set out the evidence for what supports or calls into question the panel’s evaluation; found your comments on evidence not assertion or rumour”*. Additionally, the pro-forma template includes language requesting for comments that are evidence-based, *“The panel will be most assisted by evidenced based material as opposed to general assertion”*, with a number of sections outlined to be completed.

Evidence of Content validity

5.10 Evidence from our desk research demonstrated that the quality of the statutory consultation comments for the O20 High Court Judge were largely evidence based and related to the role requirements. This was supported by the feedback from the JAC operational colleagues which stated that, *“the panel and Assigned Commissioner commented on the improvement in how evidence based the consultation comments were. All of the consultation material was provided to the panel and the SCC.”* Furthermore, comments in the extract from the paper to the SCC were made relating to the quality of the statutory consultation comments, *“The statutory consultation comments were, on the whole, fulsome and well-evidenced and provided the panel with insightful evidence which greatly assisted their decision making. The panel reflected that the presentation and the quality of the commentary was demonstrably improved and was almost entirely evidence and example based”*.

5.11 Our desk review revealed evidence-based examples of statutory consultation comments, for example, explaining that a candidate carefully analysed over thirty thousand pages of documentary evidence, and presented the case concisely based on their knowledge of the evidence over the course of the 18-week hearing. However, our desk review also highlighted instances of poorly evidence-based statutory consultation comments, for example, where a candidate’s advocacy has been described as lacklustre but adequate (without mention of what factors of the candidate’s performance contributed to this judgement), and no further comments are provided about the candidate’s abilities and qualities when sitting as a judge.

Fairness

5.12 **Impact of limited statutory consultation comments:** All 22 candidates received statutory consultation comments, and in all but two cases, the comments were probed and borne out at Selection Day. For the two candidates whose statutory consultation comments were not probed at the Selection Day, the panel noted that the candidate had not received many statutory consultation comments (suggesting that the candidate is not well-known) and/or if only historic examples were provided. Therefore, there were some differences between candidates, in terms of the volume and quality of statutory consultation comments obtained. When statutory consultation comments were not borne out at Selection Day for a candidate, our desk review demonstrates that the panel are mindful of this and view all pieces of evidence on balance.

Independent Review of Statutory Consultation

For example, in the assessment of one candidate, the panel noted that this candidate received “*some negative evidence*” which was probed at interview and they “*answered any concerns raised in the statutory consultation*”; the panel were “*mindful that this candidate received fewer comments than others and at least two of the examples cited were historic...the panel considered this evidence very carefully*” taking into account their assessment of the candidate during the situational questioning and interview, and that the candidates answers “*were clear, logical and well-reasoned...crisp and succinct*” and viewed this candidate as a borderline outstanding candidate for appointment. Therefore, it was demonstrated that there were no candidates who had their grade changed due to limited statutory consultation comments.

5.13 **Impact of negative statutory consultation comments:** Our desk research revealed that the nominated statutory consultee was of the view that two candidates ought not to be recommended, however during the Selection Day the concerns that were raised in the comments were probed by the panel and it was concluded that the candidates should be recommended for the O20 High Court Judge position. The appointability of these candidates was further discussed at the SCC meeting and, while taking into consideration the mixed/negative statutory consultation comments alongside all other assessment information, the SCC recommended both candidates for appointment: “*The SCC further noted that mixed comments were received about two of the candidates being recommended, in each case suggesting that a s9(4) Deputy High Court Judge role might be more appropriate. The SCC noted that, in each case, the concerns raised by the statutory consultation comments had been thoroughly probed at interview and that the panel had been satisfied that they provided no reason not to recommend these two candidates for immediate full-time positions. The SCC agreed with this assessment*”. This suggests that negative statutory consultation comments do not mean that a candidate cannot be considered appointable if they perform well during assessment and demonstrate their suitability for appointment during the Selection Day. If the panel are satisfied that the areas of concern have been addressed or they have provided evidence to the contrary, our desk review demonstrates that a candidate can still be successful and recommended for appointment, “*At Selection Day the candidate’s performance in the situational questioning and his evidence at interview overcame the [named consultee’s] lack of support*”.

5.14 **Impact of positive statutory consultation comments:** From our desk research, it appears that panel members consider all elements of the selection process when deciding on the candidate’s overall recommendation. The panel summary reports in the evidence pack outlines whether the statutory consultation comments received for each candidate were positive, negative, or mixed. In addition to this, it is detailed whether the statutory consultation comments are supported in other selection elements. Based on all of the data available regarding the candidate’s performance, a selection decision is then made. Our desk research demonstrated that positive statutory consultation comments can confirm the panel members’ assessment of the candidate and support the overall recommendation for appointment, “*In the statutory consultation the candidate receives strong support and is endorsed as an outstanding candidate by [consultees]. At Selection Day, as regards legal and judicial skills in particular, the interview bore out the strong support in the independent assessments and statutory consultation, and the evidence he gave for leadership was excellent*”.

Implementation issues

5.15 **Use of statutory consultation at the Selection Day:** Our desk review of the evidence pack demonstrated that any statutory consultation comments which highlighted areas of concern regarding a candidate's suitability were probed further during the Selection Day. The panel reports provided in the 020 High Court Judge evidence packs were reviewed and showed that a summary of each candidate's performance was provided by the panel, which included information from the independent assessments, evaluation following sift, written work, overall summary of evidence pre-Selection Day, evaluation following Selection Day including performance on the situational questions, interview and an overall summary, which took all elements from the selection process into consideration.

5.16 A review of the panel's overall summary on each candidate demonstrated that the panel had carefully considered the information provided for each candidate, including consideration of the comments received as part of the statutory consultation and where this has been probed further as part of the Selection Day. For some candidates, concerns that were raised within the statutory consultation comments were probed at the interview and evidence from the candidate's performance at the Selection Day supported the concerns raised in the statutory consultation. For example, within the overall summary for one candidate, the statutory consultation comments received noted doubts in the candidate's suitability for appointment to the High Court bench due to prior instances where the candidate was described as having a tendency to escalate tensions, rather than to diffuse them, and that the candidate may lack the judgement or other skills suitable for an appointment to the High Court bench. It was noted by the panel that the candidate did not perform well on the interview and situational questioning during Selection Day. Other panel reports suggest that statutory comments were probed at the interview, however there was no evidence from the performance of the candidate at the Selection Day to support the concerns raised within the statutory consultation, or evidence that was on the contrary to contradict the comments. For example, in the statutory consultation comments received for one candidate, it was expressed that the candidate may struggle to approach some cases with an open mind; the evidence pack noted that this was probed thoroughly by the panel at interview, and the panel felt satisfied that any concerns related to this had been addressed. Additionally, the panel noted that the candidate was able to discuss more recent roles where they were able to demonstrate their skills, which was noted to have not been addressed in the statutory consultation for this candidate. Overall, it was evident throughout our desk review that the panel members involved in the 020 High Court Judge exercise considered all evidence presented throughout the selection process comprehensively in order to make a decision on each candidate's overall suitability, without relying on a single piece of evidence to inform the overall recommendation.

5.17 Our desk review of the evidence provided for the 020 High Court Judge exercise demonstrated that the statutory comments were used to inform the probes that would be used by the panel at the Selection Day. This is evidenced within the 020 High Court Judge evidence pack, where a statutory consultation grid was prepared for the panel members, which includes areas to probe during the interview for each candidate based on the candidate's statutory consultation that had been received. Feedback from JAC operational colleagues involved in the 020 High Court Exercise suggest that panel members involved in this exercise meet ahead of the Selection Day to decide what areas to probe each candidate on, based on statutory consultation comments: *"Unlike on other JAC exercises the review and consideration of the stat con is allocated a whole day panel meeting in the timeline ahead of the Selection Days commencing. The Head*

of Senior Appointments briefs the Chair and Assigned Commissioner in advance of that meeting and subsequent to that meeting prepares a stat con grid for the Selection Day period which details which elements of the stat con are going to be probed by which element of the Selection Days (i.e., either SQs or the interview) and which panel member is going to take the lead in probing said areas". This appears to be unique to the High Court Judge exercise, where panel members have a whole day panel meeting to discuss how the statutory consultation comments are going to be used during the Selection Day.

Practicality & efficiency

Time Requirements: The request for statutory consultation comments was made on the 22nd of February 2021 and the JAC requested that the statutory consultation comments be returned, with final comments by 19th March 2021 (4 weeks later). This deadline was not met, and the comments were received by the JAC on the 29th of March 2021.

Stakeholder acceptance and feedback

5.18 Our desk research demonstrated that Stakeholders that WPG had received evidence from and who were involved in the exercise were clear on the process for gathering statutory consultation comments for the 020 High Court Judge exercise. Feedback received from JAC operational colleagues who were involved in the implementation of the pro-forma commented on the improvement of the process with the introduction of the pro-forma to collect comments: "*making the request for information uniform across the divisions via the pro-forma, resulted in a better presentation of the evidence which in turn made it easier for the panel to ascertain areas of strength and weakness, and there was more consistency in terms of the evidence being put forward*". The process for the 020 High Court Judge exercise appeared to be followed correctly, which was commented on by JAC operational colleagues: "*the process was followed correctly in accordance with what was agreed with the Board on 10 September 2020 and the Senior Judiciary and the JO in the planning stages of the exercise*".

5.19 **Confidentiality of Process:** The importance of ensuring that statutory consultation comments are confidential was highlighted within the guidance document that is sent to the statutory consultees by the JAC, which states that information provided about candidates must be kept confidential and undisclosed. Analysis of the interview scripts highlighted the importance of keeping comments confidential from the candidates, with one judge commenting that: "*What you want in stat con is for those judges to be frank and honest about the candidate. If it is known that this will be shared with the candidate, then they may be reluctant to be less frank or forthright about what they think about the candidate*" and "*certainly it would be very damaging for the candidate. Think of people in practice, they may not have told their Head of Chambers or their Clerk, and if they applied and didn't get through, that would be very damaging to them and would deter people from applying. It would also, I think, cause people a lot of embarrassment and have a very undesirable effect.*"

009 Judge of the First Tier Tribunal exercise

Accuracy and effectiveness

Evidence of reliability

5.20 Our desk research of the 009 Judge of the First Tier Tribunal evidence pack demonstrated that the statutory consultation process was generally consistent for the majority of the 120 candidates for whom statutory consultation was requested. Due to an administrative error, four of the 120 candidates were missed in the original statutory consultation request, which resulted in the request being made at a later date. However, it was evident that the same process for requesting statutory consultation comments for the four additional candidates was consistent with the original request. There was a named statutory consultee for the Judge of the First Tier Tribunal exercise. The exercise pack showed that the JAC sent a letter to the consultee, notifying them of the request for statutory consultation, initially for 116 candidates and later the additional 4 candidates. The request included the vacancy request, list of the candidates who had applied for the exercise, brief pen portraits for the candidates and the statutory consultation guidance. The guidance document included detailed information regarding the purpose, approach, use and confidentiality of statutory consultation, which is consistent with the guidance documents provided for those involved in statutory consultation for other exercises. The guidance document states that: *"All comments are thoroughly considered and need to be based on evidence, rather than on reported knowledge"* and asks those providing statutory comments to *"give us factual information we would otherwise lack; comment on behaviour and any concerns about suitability; if you think a candidate not presently selectable, we need clear reasons; found your comments on evidence not assertion or rumour"*.

5.21 The evidence pack demonstrated that the named statutory consultee, consulted the views of others to provide comments on the candidates. The views of Senior Judiciary, as well as local Leadership Judges were also sought. As outlined in the statutory consultation covering letter sent by the JAC, the guidance stated that *"If you turn to others with perhaps a deeper, more recent or more developed knowledge of a candidate, do please include their input in your response. We welcome it. And please show them the guidance – we are keen to make life as straightforward as possible for all who help us"* which demonstrates a consistent process for collating statutory comments. However, there is no evidence in our desk review of whether the guidance is passed on or followed.

5.22 Statutory consultation was sought for all 120 candidates ahead of Selection Day. Comments for 97 candidates were received and no comments were received for 23 candidates. 11 of the candidates with no comments did not have current judicial roles. The evidence pack for the 009 Judge of the First Tier Tribunal exercise included the panel chair assessment reports for the candidates that attended the Selection Day, which included details of the candidate's statutory consultation and an overall summary of the candidate's performance, including any considerations of comments received in the statutory consultation. For example, one panel chair's assessment report included the overall summary for one candidate: *"In reaching its conclusions the panel took account of all sources of evidence including statutory consultation. At selection day this impressive candidate performed strongly in both situational questioning and interview, giving well-chosen examples which, he developed to a high standard, and eclipsing the conclusions reached at sift."* The inclusion of the panel chair assessment reports enabled the impact of statutory consultation comments to be tracked within our desk review.

5.23 **Data Gathering Approach:** Feedback from the operational colleagues involved in the Judge of the First Tier Tribunal exercise highlighted that the statutory consultation comments received from the statutory consultee were collated into a word document by the JAC and provided to the interview panels as part of their panel packs: *"The contents of statutory consultation were considered by interview panels as part of the body of evidence supplied by, and about, each candidate"*. The evidence packs demonstrated that the panel received the statutory consultation comments ahead of Selection Day to be used to inform the interview probes at the Selection Day. From the panel reports it is evident that within the overall summary for each candidate, the panel commented on the candidate's performance at the Selection Day against the skills and abilities measured, alongside evidence from other elements of the selection process such as the self-assessment and statutory consultation. However, qualitative analysis of the feedback received from the panel members/chairs highlighted some inconsistencies with how the statutory consultation comments were used as part of the Selection Day. Some panel members/chairs suggested that they did not use the statutory consultation comments to probe the candidates: *"the comments are made in confidence and therefore cannot be put directly to the candidates. Making any inferences from the comments [is] unfair to the candidates,"* whereas others commented on how they used statutory consultation comments to probe candidates: *"negative comments were used to frame questions and probing from which further evidence could be gathered."*

Evidence of content validity

5.24 **Evidence based statutory consultation:** Feedback from the panel members/chairs involved in the 009 Judge of the First Tier Tribunal exercise suggested that the quality of the statutory consultation comments received was often variable with some comments lacking in evidence, whilst some had more detailed evidence that could be used to probe the candidates at the Selection Day: *"Some stat con comments were unsubstantiated and appeared prejudiced (e.g. has not served their time in current post so were necessarily unsuitable for the role applied for, or the applicant was deemed too young by the consultee) and a few were properly substantiated with detailed evidence or hinted at for example problematic relationships with colleagues"* and *"as usual, the comments were very mixed – some fair and evidence-based, but some extremely brief or mainly assertion"*. Our desk review showed that some statutory consultation comments were evidence-based, very detailed and thorough, for example, one candidate received a detailed statutory consultation comment outlining that the candidate sat on 20 sessions and adjourned 16 cases (which meant the adjournment rate was 31%, much higher than the regional and national adjournment rates), and that there were instances where the candidate demonstrated inefficiencies relating to their work. Contrastingly, there were other statutory comments received which were vague and lacking evidence in relation to the candidate's work. For example, another candidate received a comment which noted that they were well-prepared, works hard, and is keen to succeed in their role, however, did not include detail regarding what specific actions or evidence have led to this conclusion about a candidate.

5.25 In an interview with a judge, a view was proposed regarding a lack of objectivity regarding statutory consultation comments provided: *"It's subjective rather than objective."*. However, the evidence packs demonstrate that panel members are aware of unsubstantiated comments and view them as *"irrelevant to the exercise"*, as noted in the panel member/chair feedback survey. Additionally, it was noted that the

statutory consultation did not act as a single source of evidence to determine the panel's overall conclusions (whether comments were positive or negative). The evidence packs also noted that no issues appeared to have been raised to the JAC at the time of the exercise regarding the standard of statutory consultation comments, which was highlighted in the feedback provided by the JAC operational colleagues: "*I do not recall any concerns being raised by [omitted] about information that had been received or queries from the panel in respect of information supplied*".

Fairness

5.26 **Weight given to statutory consultation:** Qualitative analysis of the interviews suggested that the weight given to the statutory consultation was not clear. This was supported by one judge who was interviewed and has been a sub-consultee in the Judge of the First Tier Tribunal exercise, who commented that "*it is not clear to me what weight the JAC gives to the statutory consultation. I give my opinion and I never receive a response. I don't know who reviews it.*"

5.27 **Impact of mixed or negative statutory consultation comments:** Our desk research highlighted that following Selection Day, there were four candidates who received negative or mixed statutory consultation comments and were discussed at the SCC meeting. A review of the extract of the SCC minutes demonstrated that following a review of the comments for each candidate, the overall decision for all four candidates remained unchanged. In all cases, the SCC did not believe that the comments were sufficiently evidenced: "*The SCC agreed that the negative comments were not sufficiently well evidenced and therefore that the candidate's overall selectable assessment should remain unchanged*" and for one candidate it was felt that the concerns within the statutory consultation comments "*would have been probed by the panel who assessed the candidate as overall selectable*". Therefore, from the evidence reviewed the comments did not change the recommendation made at Selection Day, with three candidates being assessed as "overall selectable" and one candidate remaining "overall strong". Additionally, the panel member/chair feedback demonstrated evidence to suggest that mixed or negative statutory consultation does not have a strong impact on candidate grades. For instance, when asked whether they believed that negative statutory consultation responses impacted on the grades given to candidates by the panel, it was commented, "*Not really. Most statutory consultation contains far too little specific evidence to have any impact on the grades. However, on the few occasions where it is specific, it gives us an opportunity to check whether we too saw that weakness during our assessment and to consider whether and how it should affect our grade(s)*" and "*No, negative comments were used to frame questions and probing from which further evidence could be gathered, but a negative comment did not of itself determine the panel outcome*". This suggests mixed or negative statutory consultation comments did not have a big impact on candidate's grades.

5.28 **Impact of absence of statutory consultation:** 23 candidates did not receive statutory consultation comments; 11 of which did not have current judicial roles. In instances where a candidate did not receive any statutory consultation comments, our desk review demonstrated that the statutory consultee made explicit statements to reinforce that the absence of comments should not negatively impact a candidate's application. For instance, in the statutory consultation response received by the named statutory consultee in the Judge of the First Tier Tribunal exercise, it was stated that "*No negative inference should*

be drawn from those where no comment has been provided". The panel summaries of candidates demonstrated that the absence of statutory consultation comments appeared to have a neutral effect, with panel members only using the evidence available from the Selection Day to make a decision against the different skills and abilities measured. Some candidates with no comments were deemed as "strong" whilst others were deemed "not currently selectable" based on performance at Selection Day and taking in consideration the other evidence available pre-Selection Day. Analysis of the panel member/chair feedback highlighted that one panel member/chair felt that the absence of statutory consultation comments for some candidates could potentially have a negative impact: "*I still have a concern that having stat con does not help with a level playing field; some candidates have no previous judicial experience so cannot receive it*". One judge raised concerns about the fairness of statutory consultation for those who have not received any comment compared to those who received negative comments: "*those with no statutory consultation comments, we don't know them at all, and they may be awful, but we have no idea. Those with negative statutory consultation comments may be terrible but we know them, and I get to say that. It is fair that I can say that they are not suitable, and we don't want them to progress, but it is unfair compared to those who have none. Part of the process is to weed down as much as possible, but those with negative feedback are at a disadvantage, as we do not know about those without any and they could be equally as bad, but we don't know*". Similarly, it may also be possible that those with very positive statutory consultation comments may have an unfair additional advantage over other candidates with no statutory consultation comments. An example of the impact of very positive statutory consultation comments has been discussed in section [5.49](#).

5.29 **Perception of weighting of statutory consultation:** Analysis of the qualitative feedback provided by panel members/chairs suggested that panel members had differing perceptions on the use of the statutory consultation to affect a candidate's overall grade. One panel member/chair suggested that they could use the statutory consultation to adjust a candidate's overall grade when considered alongside other evidence: "*it gives us an opportunity to check whether we too saw that strength too during our assessment and to consider whether and how it should affect our grade(s)*". However, other panel members/chairs felt that statutory consultation should not be used to impact on a candidate's overall grade: "*I am not aware of any other senior appointment processes that allows for a non-transparent information gathering exercise from people who have not been trained in competence-based selection exercises to interfere with a robust merit-based selection process*".

Implementation issues

Practicality & efficiency

5.30 **Time requirements:** Statutory consultation for the Judge of the First Tier Tribunal exercise was requested on the 27th of July 2020, with a deadline for returning the statutory consultation comments by 10th August 2020. The evidence pack demonstrated that this deadline was met. As highlighted in [5.20](#), due to an administrative error, four candidates were missed from the original statutory consultation requests. The **Independent Review of Statutory Consultation**

requests for comments for these four candidates took place before the Selection Day and the JAC consulted the statutory consultee on the 2nd and 22nd October 2020. Responses were received in relation to all four candidates by the 29th of October 2020.

Stakeholder acceptance and feedback

5.31 **Perceived effectiveness of the process by Stakeholders:** From our desk research, it appears that those involved in requesting and providing statutory consultation were clear on the process, which was followed and received within the requested deadline. Feedback received from JAC operational colleagues involved in the Judge of the First Tier Tribunal exercise suggested that there are some misconceptions about the use of statutory consultation and a lack of trust in the process from some external audiences as explained by one operational colleague *“I regularly encounter false perceptions about stat con. While I am confident in the lines that we use to explain the need for the process and its requirements in statute, the fact that it continues to arise as a topic where current and potential applicants have concerns is a challenge. We are always able to clearly explain the process at events, but this experience does suggest to me that there is a lack of confidence and trust in the process from some external audiences”*.

024 Deputy High Court Judge/S9(4) – exercise

Accuracy and effectiveness

Evidence of reliability

5.32 **Consistency.** The information provided in the 024 Deputy High Court Judge evidence pack demonstrated that the process of requesting statutory consultation was consistent for all candidates in the exercise. The exercise pack documented that statutory consultation requests were sent to three Heads of Divisions, in relation to all 108 candidates. Each statutory consultee was provided with the same information - the full list of candidates with a brief pen portrait, details of the candidate's preferences for their first or second choice division, an example of the statutory consultation request form, and a copy of the statutory consultation guidance.

5.33 The evidence packs also demonstrated that there was consistency in the guidance provided to all statutory consultees regarding what information is required for the statutory consultation process. In particular, the guidelines outlined the statutory consultation's general *Purpose, Approach, Use* and *Confidentiality*. However, while our desk review demonstrated that the guidance provided to all statutory consultees was consistent, there were mixed views emerging from interviews with judges regarding whether the guidance was clear. Positive comments commended the clarity of the guidance, "*The guidance is excellent, I'm fine with what is provided. It is plain on how to use it and what to do once you have provided it*". However, other judges provided comments suggesting that the guidance was limited, "*To be absolutely honest with you, I don't think it's very useful at all and that's the feedback we get from our judges*", with the main issue being that the guidance was viewed as "*too generic*" and that it would be most helpful for the guidance to be tailored to the individual competitions, "*for example, in high level competitions, you are looking more at judgement, but some jurisdictions or jobs require much more ability to handle litigants in person*". It was also suggested by judges and Assigned Commissioners that the planned use of the pro-forma template in the next Deputy High Court Judge assessment cycle (as was used in the 020 High Court exercise 2021), will greatly enhance the process by providing more specificity and structure for the requirements of statutory consultation, "*for High Court, there is a template provided which has a number of boxes in it and I myself think that is very useful because it means that for each candidate, there is an orderly presentation of information about the specific matters*", and "*we are trying to run [Deputy High Court and High Court Judge] very similarly, this time round [re: High Court] we had a single response and a much more templated, clearer structure and it worked much better as a result*".

5.34 Statutory consultation was sought for all candidates attending the Selection Day; however, comments were not provided for a proportion of candidates. Out of the 108 candidates whom statutory consultation was sought, 97 candidates received comments and 11 candidates received no comments.

5.35 **Whether language in the guidance supports objective/evidence-based feedback:** The guidance provided by the JAC outlines that "*All comments are thoroughly considered and need to be based on evidence, rather than on reported knowledge*" and that statutory consultees are asked to "*found your comments on evidence not assertion or rumour*". This understanding was reiterated in interviews with judges, where it was noted that the necessity for evidence-based statutory consultation comments was clear, "*it has been made clear time and time again by the JAC that what they're looking for is evidence, not anecdote*".

However, one interviewee noted that the importance of evidence-based statutory consultation comments could be given more emphasis in the guidelines, “*The only thought I have on this goes back to the guidance, whether by putting it in capitals or bold that, for it to be useful, it has to be evidence-based...emphasise that it is evidence-based*”.

5.36 **Data gathering approach:** Our desk research of the 024 Deputy High Court Judge evidence pack demonstrated that the 3 named statutory consultees each sought comments from judges who they viewed were relevant to the candidates and their application. In the responses received from the statutory consultees, it was noted that comments were sought from a wide range of other consultees to provide comments on the candidates.

5.37 Qualitative analysis of the interviews identified that those who are consulted by the statutory consultees are provided with the same JAC guidance, “*That's the information that I get and the criteria which I have to apply is passed on by my office to those I consult so that they understand what it is I'm asking them for...if they provide information I don't need or don't want then that's not going to help...they need to know what I need in order for me to provide to the JAC what they're asking me to do. And that's how the process works*” and “*they get the JAC guidance letter to explain what it is we're looking for and we wait for them to respond*”. Where little is known/no comments are received about a candidate, this is made clear in the statutory consultation that is returned back to the JAC.

5.38 When amalgamating comments received from various consultees in relation to a candidate, our desk research suggests that all comments received are provided to the JAC, along with the statutory consultees' own comments, if the candidate is known to them. In the interviews with judges, when they shared their experiences of statutory consultation more generally, it was found that a small level of questioning or querying of some comments may occur by the statutory consultee, “*...if anything was put on from people on my level, I wouldn't edit it. But stuff that comes up to us, yes if it looks odd or doesn't seem to be of quality, that may not be of any use to the statutory consultee, then I may go to that judge and ask, 'where did this come from, can you expand'*”. Additionally, another judge also commented that they may also provide some judgement on the comments received, and flag any comments that look problematic, before providing these onto the JAC, “*My role then is just to review the comments, I wouldn't delete any because it's up to the selection panel to make of the comments what they will, but I will highlight any that cause any concern. That's my practice. So, for example, in one exercise recently, candidate 19 had these negative comments made about them, however I would ask the panel to note they appear to be unevidenced or seem anecdotal*”.

Evidence of content validity

5.39 Our desk review demonstrated that the statutory consultation comments received for the 024 Deputy High Court Judge exercise tended to be evidence-based overall, however there were some instances of descriptive or anecdotal comments. Evidence which suggested that the statutory consultation comments were evidence-based was found in the operational colleague feedback, which stated that, “[they] did not need to go back to the Judiciary to request further statutory consultation, nor were there significant concerns from the Assigned Commissioner, the panels and the Head of Senior Appointments as to the

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quality and objectivity of the comments...Those who were known had mostly good, well exemplified evidence". Additionally, it is viewed that the quality of the statutory consultation comments received has improved over the years. In particular, panel members commented that their "impression is that the quality of stat con has improved over the four years I have been a JAC commissioner. There is less anecdotal or outdated material". These findings were reinforced in interviews with judges, "I have noticed in more recent stat cons...there has been more thoughtful contributions".

5.40 However, there is also evidence to suggest that some statutory consultation comments were less evidence-based and more descriptive or anecdotal. For instance, in the panel feedback presented in the evidence pack, it was noted that, "*there were some anecdotal observations and some comments that the candidate was not deemed ready based on length of/type of experience*" and "*They were not always evidence-based (although some were, which was useful). Some were brief and essentially descriptive, which neither added to nor subtracted from the panel's assessment*".

5.41 Through our desk review of the evidence pack, there were examples of evidence-based statutory consultation comments found. For example, one consultee provided a statutory consultation comment which detailed the nature and number of times the candidate has appeared before them, the projects which the candidate has worked closely with the consultee on, and observations of the candidate's written work, to be able to conclude that the candidate is knowledgeable about the specific area of law which was discussed, the candidate is organised and keeps to deadlines, has precision in writing, and is a helpful and attentive colleague.

5.42 Our desk review also revealed some comments which were more limited in their evidence-base. For example, a comment was provided about a candidate, suggesting that the candidate may not fully think through their ideas and finish off their submissions, and may not fully consider the consequences of what they are saying, however the consultee did not provide further detail as to the occasions of evidence which support these statements.

5.43 In enhancing the content validity and quality of the statutory consultation comments, interviews with judges revealed evidence of locally organised training sessions for those involved in providing statutory consultation. For example, a Presider related to the 024 Deputy High Court Judge exercise had discussed an independently organised training day with Leadership Judges from their 3 jurisdictions from which statutory consultation would be sought (Family, Civil, and Crime). During this training day, they discussed the JAC guidance, compared and contrasted (anonymised) examples of good and bad statutory consultation comments, discussed what constitutes as 'evidence', and discussed how a consultee may be able to draw together feedback for a candidate even if they have not spoken to the candidate directly.

5.44 Therefore, while there has been effort by the JAC and those locally to improve the evidence-based nature of the statutory consultation, the quality of the comments received still appears mixed, as examples of non-evidenced, anecdotal statutory consultation comments remain present.

Fairness

5.45 **Weight given to statutory consultation comments:** Review of our desk research does not provide explicit information regarding how statutory consultation comments are weighted against other information when informing selection decisions. In an interview with a judge related to the 024 Deputy High Court

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Judge exercise, it was noted that the weighting given to statutory consultation can be variable. Additionally, it was noted that some comments may carry more weight than others, depending on who provided the comments, “*certain judges can carry more clout, senior judges will carry more weight when it comes to their comments*”. While explicit information regarding how statutory consultation is weighted when informing selection decisions is not available, our desk review suggests that the panel and SCC are careful to consider all candidate information comprehensively. For instance, the evidence packs demonstrated that when statutory consultation comments of concern about a candidate are received, panel members seek to sufficiently probe this information with candidates during Selection Day to inform their judgement of the candidate. For example, it was noted that for one candidate, negative comments were received regarding his commitment and ability to fulfil the required number of sittings. However, the panel reports noted that “*the concerns were tested by the selection panel at interview*” and the panel assessed this candidate as strong overall. In another example, another candidate received negative comments in regard to aspects of the candidate’s personality and other comments which noted the candidate’s unsuccessful performance in a previous exercise. However, our desk review identified that the “*panel took account of these points when formulating interview questions and did not find that these concerns were born out by the evidence on the Selection Day*”. Ultimately, this candidate was marked as ‘outstanding’, and the SCC recommended that the candidate progress. Therefore, our desk research demonstrates that, while explicit information regarding how statutory consultation is weighted against other selection information has not been presented, it is clear that the panel nevertheless take a comprehensive account of all information gathered about a candidate when grading candidates on their appointability. Additionally, our desk review demonstrates that receiving negative statutory consultation comments does not necessarily ensure a negative outcome for the candidate, provided that any concerns can be addressed at Selection Day or interview, and the candidate performs well on other selection assessments.

5.46 **How comments are probed during interview:** As discussed in the previous section [5.45](#), our desk review demonstrates that statutory consultation comments are used to help inform and formulate interview questions during Selection Day. However, some interviewees suggested mixed evidence and understanding regarding how or whether this is carried out. For instance, an Assigned Commissioner related to the Deputy High Court Judge exercise stated, “*For S 9(4) (and High Court Judge), stat con comments were available to the panel before interview so that areas can be probed, and we can ensure the candidate is really being fairly dealt with*”. However, another judge interviewed commented, “*I can't recall a single interview I have been on where the stat con has been put to the candidate to respond to negative stat con*”. It was suggested that this may be due to the use of a highly structured interview format during the interview portion of the Selection Day, whereby following a standardised interview format with the same or similar questions across all candidates may be encouraged, “*what I hear from colleagues who sit on panels, they try to make interviews the same for everybody and that becomes the level playing field*”. Additionally, when discussing the likelihood of providing honest statutory consultation comments, there was evidence of mixed understanding as to whether probing candidates on areas of concern from the statutory consultation is possible, “*if we knew that the feedback [which] got back to the JAC was going to be probed at interview and [candidates] would get the chance to answer it...I would suspect people would feel more confident saying things they really notice*”.

5.47 Regarding the transparency of statutory consultation comments, it was acknowledged during interviews that transparency was not possible in the sense that statutory consultation comments could not be provided back to the candidate, as this breaches the process' confidentiality. Additionally, further reasoning was provided which justified maintaining the confidentiality of withholding the comments provided in statutory consultation from the candidates. For example, if negative comments were obtained for the candidate and this was made known to the candidate, this may *“undermine the confidence of the candidate”* and can impact their subsequent performance on Selection Days.

5.48 **Impact of absence of statutory consultation comments:** A count of the statutory consultation comments demonstrated that 11 out of 108 candidates did not receive statutory consultation comments. Due to this small sample of candidates who have an absence of comments, it is not possible to draw quantitative conclusions regarding what the impact of an absence of statutory consultation comments is on a candidate's selection outcomes. However, qualitative analysis from the interviewees has suggested a mixed effect. For example, in an interview with an Assigned Commissioner, it was commented, *“it's neutral because it's never held against anybody. But how can it be neutral when someone else has fantastic stat con and someone has none? We can't make up positive comments or evidence that isn't there, but it is obviously...a candidate with no stat con, no one will hold it against them, but that absence is obviously going to be to the candidate's detriment if the person next door has fantastic stat con as well as everything else being fabulous”*. Additionally, in an interview with a judge, it was suggested that there may be a tendency for 'positivity-bias' in the statutory consultation comments being provided for candidates, *“we will say to a particular Leadership Judge at a centre, 'we have this person and want them to work at your Court' and they'll say 'oh no not him, he is absolutely hopeless, he always leaves early, never does his box work, is rude to the staff, not collegiate...' and yet when we asked for stat con for that competition, nobody has said any of it...[there's] a natural reluctance because most of us don't want to spoil others' chances”*, and *“the vast majority of stat con we send back is positive, glowingly positive”*. Therefore, it is difficult to ascertain the impact of an absence of statutory consultation comments on candidate outcomes as there is a possibility for an absence of comments to have both a positive and negative impact on a candidate's outcome (depending on if there would have been positive or negative things being said about the candidate). It can, however, be concluded that the statutory consultation process does not generate the same amount of information on each candidate, which may represent a source of unfairness in the process, as noted in an interview with a judge, *“it may be one judge who knows something about an individual, and another case [where] no one will know that person, and I can see potentially some unfairness there, but it's a matter of chance and there's nothing we can do about that”*.

5.49 **Impact of positive statutory consultation:** There is mixed evidence regarding the impact of positive statutory consultation comments on candidate outcomes. From the panel member feedback presented in our desk review and interviews with Assigned Commissioners, it was suggested that positive statutory consultation comments did not have a disproportionately large impact on candidate outcomes. For instance, when interviewing Assigned Commissioners related to the Deputy High Court Judge exercise, it was stated that the impact of *“positive comments if everything else is strong will not have a huge impact”*. Panel member feedback from the evidence pack also stated that positive statutory consultation comments only impacted on the grades given to candidates *“when it provided additional relevant information”* and

that “*very positive stat con did not outweigh poor performance in the role play, or the evidence gained at interview*”.

5.50 **Impact of negative statutory consultation:** Our desk review demonstrates that negative statutory consultation comments do not appear to disproportionately impact on candidate outcomes. For instance, in the extract from the paper to the SCC, 18 candidates were discussed who were graded by the panel as ‘strong’ or ‘outstanding’ following Selection Day, however, received mixed or negative statutory consultation comments. All of these candidates were recommended to progress by the SCC after careful consideration of each candidate’s full set of statutory consultation comments received and the panel assessments. Further, when three JAC panel members/chairs were surveyed regarding their views on whether negative statutory consultation responses impacted the grades given to some candidates, it was commented that “*only when it provided additional relevant evidence*”, “*not especially, but it identified areas to be probed at interview and our grades reflected the answers we received*”, and “*in high-level terms, I don’t think they did, e.g. very positive stat con did not outweigh poor performance in the role play or the evidence gained at interview*”.

Stakeholder acceptance and feedback

5.51 On the whole, our desk research demonstrated that the panel members/chairs viewed the statutory consultation process to be effective. Feedback from the three JAC panel members/chairs surveyed noted that they were given clear guidance regarding how statutory consultation was to be used in the process. Additionally, interviews with Assigned Commissioners stated that the process was held to a very rigorous standard, “*Procedurally, it was very sound, very tight, done by the book, on both sides I would say*”. The statutory consultation was also described as ‘essential’ in assisting the panel to better probe candidates during their interview.

5.52 **Perception of weighting of statutory consultation:** Qualitative analysis of the interviews suggests that there is scope to increase the clarity of the perceptions and understanding of how the statutory consultation is weighted or both those within and outside of the Judiciary. For example, it was mentioned in an interview with Presiders, “*not knowing quite how it’s used or what weight it’s given...I don’t really know...I know because I read the stuff and what the Judiciary says, and it says it’s all taken into account*”, suggesting that information regarding the weighting of the statutory consultation within the process is not widely known by individuals within the Judiciary. Relatedly, it has been suggested in interviews that there is scope to increase the communication and information provided about the statutory consultation candidates applying for judicial roles. For example, in an interview with an Assigned Commissioner, it was suggested that “*there should be nothing secretive around it...the whole process should be completely transparent and completely open*”. Additionally, it was noted that it would be most beneficial for any increased transparency to be accompanied with increased communication, “*you can find everything on the website, but people aren’t aware of it; they don’t read it. So better communication, leading to better transparency*”.

Implementation issues

Practicality & efficiency

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5.53 **Time requirements:** Statutory consultation for 024 Deputy High Court Judge took place prior to Selection Day. As noted in the 024 Deputy High Court Judge evidence pack, the requests for statutory consultation comments were made to the relevant Heads of Division on 1st December 2020 and the JAC requested a response by 22nd December 2020; an agreed extension to the deadline was made for the 11th of January 2021. In the interviews conducted with judges, it was noted that requests for an extension in the deadline for providing statutory consultation are frequently made by statutory consultees due to the high demands of obtaining and collating statutory consultation comments. For example, it was mentioned that *“sometimes there isn’t a sufficient time provided between the date when the request is made, and the answer is asked for...it’s a big job and perhaps more time to enable us to do it would mean I don’t have to ask for an extension which I have to do from time to time”*.

5.54 **Confidentiality of process:** The process remained entirely confidential. In interviews with judges and Assigned Commissioners, the confidentiality of the process was noted as a necessity in order to allow those providing statutory consultation comments to be open and honest and for the process to work effectively, *“There are benefits of a frank assessment by a judge of a future judge. It needs to be kept confidential”*. Additionally, in considering the very high stakes nature of many of the judicial appointments, confidentiality for those providing statutory consultation comments was further described as a necessity by Assigned Commissioners and judges alike.

035 Authorisations to Act as Judges of the High Court/S9(1) exercise

Accuracy and effectiveness

Evidence of reliability

5.55 Our desk research of the Authorisations to Act as Judges of the High Court evidence pack demonstrated that the statutory consultation process was generally consistent for the majority of the 62 candidates whom statutory consultation was requested. Due to limited comments originally received for a proportion of candidates, an additional statutory consultation request for more comments was sent for 26 candidates, following the first round. The s9(1) authorisations exercise pack demonstrated that statutory consultation requests were sent to four statutory consultees in relation to the 62 candidates. Each statutory consultee was provided with the same information, that being: the skills and abilities selection criteria, the vacancy request, the full list of candidates with a brief pen portrait, an example of the statutory consultation request form to be completed for all candidates, a copy of the statutory consultation guidance.

5.56 Qualitative analysis of interviews with judges related to the s9(1) authorisations exercise suggested that there is a perceived lack of transparency regarding some elements of the process of statutory consultation, *“The difficulty is no one truly knows what the JAC does with statutory consultation...Would [stat con] put you through? I have no idea how it’s dealt with”*. When asked about potential improvements that could be made related to increasing transparency for candidates, it was suggested that candidates should be *“told what the process is...no one explained it when I went through...my view is the more transparency, the better. Keep references confidential but at least know how it works”*.

5.57 Statutory consultation for the s9(1) authorisations exercise in particular forms a very important part of the selection process, due to the fact that this is a purely paper-based assessment. Statutory consultation was sought for all candidates prior to the paper-based assessment. Therefore, measures were taken to ensure enough statutory consultation comments were sought that were of good quality for all candidates to help inform selection decisions. In particular, the additional request for statutory consultation comments for those candidates who received limited comments in the first instance ensured sufficient statutory consultation comments of appropriate quality were obtained. Our desk research of the background information revealed that for some candidates, the pen portraits varied in quality and quantity and in some cases.

JAC Guidance

5.58 **Clarity of language used:** Based on the JAC panel member/chair feedback presented in the s9(1) authorisations evidence pack, it was demonstrated that both of the individuals surveyed felt that they were given clear guidance regarding how the statutory consultation was to be used in the process.

5.59 **Specificity of requirements:** Similar to other exercises which have been reviewed in our desk research, the s9(1) authorisations evidence pack demonstrated that consistent guidelines were provided by the JAC to all statutory consultees regarding the statutory consultation process and what is required. In particular, the JAC guidance was provided to each statutory consultee outlining the *Purpose, Approach, Use* and *Confidentiality* of the statutory consultation process. Additionally, the use of the tailored pro-forma template in this exercise was found to be helpful in order to *“streamline submissions and increase the quality and consistency of the evidence”*. Operational colleagues, however, suggested that the guidance needed to be more specific as the quality of statutory consultation comments received were not to the

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ideal standard, “*there needed to be more guidance for the consultees as often requirements were too short, or assertion based for the panel to gain any meaningful evidence*”.

5.60 **Data gathering approach:** Our desk research of the s9(1) authorisations evidence pack demonstrated that the four named statutory consultees each sought comments from judges who they viewed were relevant to the candidates and their application. For example, regarding one candidate, a statutory consultee noted that it was not possible to make a fair evaluation of the candidate as the consultee did not have any information about the candidate; to accompany this, another statutory consultee had sought comments from others, who had in turn consulted other judges, in order to provide relevant and comprehensive comments for the candidate.

Evidence of content validity

5.61 **Whether language supports objective/evidence-based feedback:** In addition to the guidance provided by the JAC which outlines that “*All comments are thoroughly considered and need to be based on evidence, rather than on reported knowledge*” and that statutory consultees are asked to “*found your comments on evidence not assertion or rumour*”, the template provided further guidance in ensuring statutory consultation comments were evidence-based, “*The panel will be most assisted by evidenced based material as opposed to general assertion*”. Additionally, the template included brief instruction that was tailored to the s9(1) authorisations exercise, “*This is a paper-based exercise and there will not be an opportunity to probe this evidence at an interview. The panel would therefore be grateful for specific references to judgements/decisions and case management skills as well as personal qualities*”. Panel member feedback presented in the evidence packs also noted that the template was helpful as it “*encourages respondents to provide examples, which is useful*”.

5.62 **Evidence-base of consultee comments:** In the first instance, the quality of statutory consultation comments for the s9(1) authorisations exercise appeared to be weaker than what is considered ideal, as noted in multiple sources presented in the s9(1) authorisations evidence pack, “*The statutory consultation responses received for a number of candidates were shorter and less well evidenced than we would have hoped since all candidates are judicial office holders*”, panel feedback, “*In the main they were consistent, but sometimes brief with limited or no examples*”, and operational colleagues feedback, “*The initial comments received were insufficient in several ways and this applied to around 50% of candidates (33/61). Some candidates received no comments; some candidates received comments which were not evidenced; and one consultee commented only on the ability of candidates to sit in a particular division, which was not appropriate given it was a non-jurisdictional competition*”.

5.63 However, this was addressed by an additional request for statutory consultation. In particular, it was stated that, “*We were alive to this being a paper-based exercise and the panel having no scope to test and probe candidates at an interview and were keen to provide the panel with as broad an evidence base as was possible. Therefore, the Head of Senior Appointments wrote to the statutory consultees again on 17 June 2021 requesting further comments on 26 candidates*”.

5.64 In WPG’s independent review of the s9(1) authorisations evidence pack, evidence of both evidence-based and non-evidence-based comments were found. In an example of an evidence-based comment, one consultee provided a comment which detailed evidence of observing the candidate’s accurate and closely

analysed legal lectures on circuit for the Judicial College, the candidate's ability to deal with multiple complex matters on a regular basis which require rapid assimilation of large amounts of information, and the candidate's demonstration of teamworking in assisting colleagues during the shift to electronic working over the course of the pandemic. Contrastingly, instances of non-evidence based statutory consultation comments were also found, for example, which include assertions where the consultee may not believe a candidate's application to be 'ready' for the role, however, does not include further detail to explain why this is the case,

5.65 **Impact of absence of statutory consultation comments:** Due to the fact that the s9(1) authorisations exercise is a purely paper-based exercise, it was recognised that receiving statutory consultation for all candidates was imperative. Therefore, necessary steps were taken to ensure statutory consultation was obtained for all candidates and no candidates were left with no statutory consultation comments. As mentioned previously, this did require the JAC asking JO to send out an additional request to be sent out by JO, requesting further comments on six candidates who had received no comments in the first instance. However, where statutory consultation comments were absent for particular skills and abilities, qualitative review of the evidence packs does not explicitly suggest a particularly positive or negative impact on candidates; instead, our desk review suggests that an absence of comments in relation to certain skills and abilities provides a neutral impact on candidate grades. In many cases, it appears that if there are no statutory consultation comments for a candidate, the panel retain their initial assessment and grade for a candidate. This was observed throughout the evidence pack; for example, regarding one candidate, *"For Personal Qualities and Working Effectively, the Leadership Judge is unable to comment and there is no evidence provided by the statutory consultation. As such, the panel retained their finding of strong evidence for Personal Qualities and sufficient evidence for Working Effectively"*. Therefore, this suggests that an absence of statutory consultation can have a neutral impact on candidates in the s9(1) authorisations exercise.

5.66 **Impact of positive statutory consultation:** Our desk review demonstrated evidence to suggest that positive statutory consultation comments had a positive impact on candidate grades. In some instances, very positive statutory consultation comments led the panel to conclude a strong assessment of the candidate in a particular area; for example, one candidate received very positive statutory consultation comments relating to Working Effectively, which referenced the candidate's role in developing knowledge and sharing it with others, which led to the panel concluding that the candidate demonstrated strong evidence of this area overall. Additionally, positive statutory consultation comments provided another data point to be used when holistically evaluating a candidate, and in some instances positive comments were found to balance negative information about a candidate. For example, the panel noted strong evidence of the Personal Qualities competency in a candidate's Statement of Suitability, however there were some negative comments within the statutory consultation which suggested that the candidate needed further reflection on judgements. The panel noted that the comments related to the candidate's Legal and Judicial Skills, rather than Personal Qualities and within the statutory consultation comments there were positive comments on the candidate's resilience and ability to cope with pressure. As a result,

the additional comments from the statutory consultation did not affect the panel's finding of the candidate demonstrating strong evidence.

5.67 **Impact of negative statutory consultation:** Our desk research demonstrated that when negative statutory consultation comments were substantial and specific, this altered the assessment of a candidate. For example, for one candidate the panel initially graded this candidate's evidence of Legal and Judicial skills as 'sufficient', with positive support from the Leadership Judge's statement, however, there were specific concerns raised in the statutory consultation comments, which resulted in the panel revising the candidate's overall grading for Legal and Judicial Skills to 'insufficient'. Our desk review also highlighted another example, which saw a candidate initially regarded as 'strong' for Working Effectively by the panel on the basis of their Statement of Suitability, however the statutory consultation comments revealed substantial concerns from different sources, which related to the Work Effectively. As a result, the panel took all of the evidence into account and amended the overall grade for Work Effectively to 'insufficient', despite the panel initially rating the candidate as 'strong'.

5.68 Additionally, our desk research demonstrated that when negative statutory consultation is presented alongside additional negative information, this has a negative impact on candidates as the negative statutory consultation provides further reinforcement of the negative evidence for a candidate. For example, for one candidate, the panel initially graded the candidate as 'sufficient' for Working Effectively, however the panel took into consideration the negative statutory consultation comments regarding the candidate's lack of teamwork and taking all the information into account, the panel assessed the candidate as demonstrating insufficient evidence of Working Effectively.

5.69 **Perception of weighting of statutory consultation:** From our desk research, it is clear that the statutory consultation is taken into account alongside all evidence when the panel and SCC make a judgement regarding selection decisions for candidates. However, explicit instruction about how it is weighted against other criteria is presently unclear or has not been communicated in the evidence packs. From the panel feedback, it was suggested that the statutory consultation had a greater impact on selection decisions in the s9(1) authorisations exercise, compared to other exercises which had a Selection Day for example, "*it had more impact than exercises in which we interviewed candidates*". However, it is not clear explicitly how much more impact the statutory consultation had. From the interviews conducted with judges in relation to the s9(1) authorisations exercise, it again appears that the weighting of the statutory consultation is not known to the statutory consultees; for example, "*[there's a] missing hole, [regarding] how statutory consultation feeds in, how it works...[I have] no idea what happens to the statutory consultation comments*".

5.70 **Weight given to statutory consultation comments:** Panel feedback noted that they were informed that they "*should use SC when consider[ing] the overall band and where relevant explain how we took into account any negative or mixed comments*". When asked if, in high level terms, the panel believed that the statutory consultation responses impacted on grades given to candidates, one panel member commented "*We took it into account in determining the overall grade, together with all other evidence. I don't believe it had a disproportionate impact on grades*". In comparison to other exercises (e.g., High Court and Deputy High Court Judge), the panel commented that the statutory consultation had a greater impact on candidates in this exercise, "*it had more impact than in exercises in which we interviewed candidates*". In

comparison to other selection tools used in this exercise, it is not clear how much weighting is given to the statutory consultation, but only that it is used alongside other candidate information/assessments when making selection decisions, “[the statutory consultation provided] will sit alongside the candidate’s statement of suitability against the skills and abilities criteria, three nominated pieces of written work and a statement of suitability from their Leadership Judge”. However, no other formal or explicit information is provided as to how the statutory consultation is weighted against other selection tools in this exercise.

5.71 **How comments are probed during interview:** As this is a purely paper-based assessment, there is no opportunity for the panel to probe candidates on certain areas raised in the statutory consultation. However, panel members noted that it would have been helpful to have been able to do so, “(in particular) where there were mixed comments (or where comments in stat con contradicted those of the Leadership Judge) it would have been useful to probe particular areas at interview/a Selection Day, rather than rely only on written evidence” and “it was much more difficult to challenge or interrogate the stat con evidence”.

Stakeholder acceptance and feedback

5.72 **Perceived effectiveness of process by Stakeholders:** Feedback from JAC operational colleagues referenced some issues and lessons learned which arose during the implementation of the S9(1) authorisations exercise, both from an operational standpoint and in relation to the statutory consultation comments received. In the operational colleagues’ feedback, it was noted that the pro-forma template used was adopted from High Court and tweaked for this exercise, however, there were some difficulties with this due to the number of drafts it underwent and the associated time pressures, “[the template was] redrafted multiple times and this was done at late notice”. It was noted that for future exercises which utilise a pro-forma template, this will not be the case as the template will be “prepared well in advance in anticipation of the Board approving its use”. Nevertheless, once the pro-forma template was finalised, it was viewed to be very helpful and positive for the panel as it increased the consistency of the presentation of comments and encouraged evidence-based comments, “it is helpful to see all the responses in one place, in a similar format. The template used for the Leadership Judge feedback is very helpful. The stat con comments are brief, but the template encourages respondents to provide examples, which is useful”.

5.73 Our desk review noted that there was a unique issue which occurred during the implementation of the s9(1) authorisations exercise. In the JAC operational colleague feedback, it was noted that “[statutory consultation] comments for one candidate were provided by another candidate. These were removed from the panel packs and JO were reminded that this was a conflict and should not have been included”. This was acknowledged as a fault in the process that the “SET in future will create a conflict tracker to ensure this does not happen again”.

Implementation issues

Practicality & efficiency

5.74 **Time requirements:** Statutory consultation took place prior to the paper-based assessment. The requests for statutory consultation comments were made to the relevant statutory consultees on 12th May 2021

and the JAC requested a response by 10th June 2021. Three of the statutory consultees submitted their statutory consultation by the agreed return date, however *“comments from the fourth consultee were received eight days late”*. An additional request for statutory consultation comments was made on 17th June 2021 for the 26 candidates who had initially received limited statutory consultation comments. Due to the request for further/more expansive comments, there was a delay in receiving full statutory consultation for all candidates, and it was noted in the JAC operational colleagues feedback that *“the team had less time planned to prepare the reading material, but in spite of this the panel received the majority of their reading on time, but we did have to add some comments as they came in”*. Overall, the evidence suggests that, for many Stakeholders involved in the process (including statutory consultees and JAC operational colleagues), the demands and timescales for statutory consultation are highly pressured. It was also noted in the JAC operational colleagues' feedback that one of the statutory consultees had asked to meet with JO to express their concerns, with one point requesting *“if more time could be allowed for statutory consultation”*. Additionally, one interviewee related to the s9(1) authorisations exercise commented, *“I do it in the middle of the night, [there’s] no single extra minute for this process”*.

5.75 **Confidentiality of process:** Overall, the statutory consultation process was kept confidential; this was further reiterated in interviews with statutory consultees related to the s9(1) authorisations process.

033 Recorder exercise

Accuracy and effectiveness

Evidence of reliability

5.76 The information provided in the evidence pack demonstrated that the process of requesting statutory consultation appeared to be consistent for all candidates who were considered meritorious following the Selection Day. As highlighted in the evidence pack, it is common for large fee-paid exercises, such as the Recorder, to request statutory consultation for those candidates considered meritorious after the Selection Day has taken place due to practical considerations. It was noted within the evidence pack that a letter was sent to the named statutory consultee to request statutory consultation comments for 168 candidates. Of these candidates, 167 were considered to be the most meritorious following Selection Day, however there was an additional candidate who had been initially assessed as not presently selectable by the selection panel, but a request for comments on this candidate was also made to the named statutory consultee following the moderation process, as the moderation panel disagreed with the selection panel's decision. As demonstrated in the evidence pack, a letter was sent to the named statutory consultee to request the statutory consultation comments for all candidates, which included: details for the 167 most meritorious candidates and the one additional candidate interviewed, the selection panel reports, JAC letter to all statutory consultees and statutory consultation guidance. The guidance documentation provided by the JAC providing information regarding the purpose, approach, use and confidentiality.

5.77 As evidenced in the response to the statutory consultation request from the named statutory consultee, the views of other consultees were sought to provide statutory consultation comments for all candidates.

5.78 From our desk research, it was evident that statutory consultation comments were only sought for 168 candidates who were considered the most meritorious following interview for the role of Recorder. This includes one candidate who was discussed by the moderation panel and considered meritorious following Selection Day, as outlined in 5.76. The primary reason for requesting statutory consultation after Selection Day as opposed to before in other exercises, is due to practical considerations; as the statutory consultation process is highly demanding and resource-intensive for those involved, it would not be feasible for statutory consultation to be sought for all candidates prior to the Selection Day for a large volume exercise such as Recorder. As a result, statutory consultation comments are not available to panel members to inform interviews as part of the Selection Day, as explained in the panel chair surveys, who were asked to complete a survey to understand their views on the process, "*statutory consultations were not used by the panels in the initial process in the Recorder exercise as it was a large exercise but used subsequently by the Commissioners after successful candidates were recommended by the panels*".

5.79 **Perceived effectiveness of process by Stakeholders who have been involved in the Recorder exercise:** Feedback from JAC operational colleague referenced some challenges with regards to how the statutory consultation comments are received from consultees. The introduction of a template to collect consultee comments was suggested to improve the consistency of the process: "*I think having a template for consultees to complete might make it easier for us to receive fact-based evidence (rather than subjective assertions and opinions).*" It was noted in the review of the evidence pack that the process for statutory consultation was followed correctly on this exercise, in accordance with the operational manual and policy guide.

5.80 Feedback received from the panel chair surveys suggested that the statutory consultation process and some panel chairs were unsure of how the statutory consultation comments received after the Selection Day informed the final selection decisions and how the comments may change the recommendations of the selection panel: “I am unclear as to the exact role of the statutory consultee, and under what circumstances they might overrule the recommendations of the selection panel”.

5.81 **Data gathering approach:** Our desk research of the Recorder evidence pack demonstrated that the statutory consultee sought comments from other judges and Leadership Judges in order to inform their responses. The review of the evidence pack showed that within the statutory consultation cover letter sent by the JAC to the named statutory consultee, it was outlined that other comments can be sought from those who have more knowledge of the candidate than that of the nominated consultee: *“If you turn to others with perhaps a deeper, more recent or more developed knowledge of a candidate, do please include their input in your response. We welcome it. And please show them the guidance – we are keen to make life as straightforward as possible for all who help us”*.

5.82 It was noted in the response from the named statutory consultee that although the views of other judges were sought, there were no statutory consultation comments provided in respect of 87 candidates. The named statutory consultee enclosed a spreadsheet in response to the statutory consultation request and provided additional commentary for 9 candidates who received negative comments from those that had been consulted on. For example, the named consultee had significant concerns about one candidate, based on the concerns that had been consistently raised by those who had been consulted on to provide comments for the candidate.

Evidence of content validity

5.83 **Evidence-base of consultee comments:** Our desk review of the evidence pack demonstrated that the extent to which evidence-based comments were provided for candidates was variable. It was found that evidence-based comments were provided by statutory consultees for some candidates, for example, one candidate was commended for their ability to handle the jurisdiction’s most complex cases, citing a 20-day trial, involving multiple respondents and witnesses and over 2,000 pages of documents that the candidate had handled without difficulty. However, other statutory consultees provided comments that did not relate to the candidate’s performance, for example one comment referenced the extent to which the candidate engaged in daily physical activity as evidence of their perseverance and endurance. Our desk review of the evidence pack demonstrated that the panel chairs in the Recorder exercise were not provided with the candidates’ statutory consultation comments to form part of their assessment of the candidates. However, a survey was sent to the panel chairs involved in the Recorder exercise to gather feedback on their views of the process of statutory consultation more generally, which may also include their experience of other exercises that they have been involved with. In the review of the panel chair surveys outlined in the evidence pack, some comments suggest that the quality of the statutory consultation comments were variable: *“The quality of the stat con responses that we see is very variable. Some is one or two sentences of pure assertion, some makes statements about irrelevant issues such as the frequency of that candidate taking lunch with other judges or their childcare responsibilities, yet some*

has relevant, detailed evidence and even useful statistics on the candidate's performance". Additionally, feedback from the operational colleagues suggested that the use of a template to receive statutory consultation comments could help in improving the quality of comments: "I think having a template for consultees to complete might make it easier for us to receive fact-based evidence (rather than subjective assertions and opinions). There would still be room for additional comments but steering towards evidence would be helpful". While the quality of the statutory consultation comments received for the Recorder exercise was variable, the interviews revealed that the panel are active in making their own judgements about which comments are evidence-based and should be considered, and which are not. For example, "what we're really interested in is something that is evidence-based, so if someone just says, 'they're not quite ready or [I'm] not too sure', to be honest, they are simply ignored. No store is put by that at all". However, there is no evidence to suggest that this is done consistently with all candidates and across panels.

Compared to the other exercises reviewed, our desk review of the Recorder exercise highlighted an increased variability in the statutory consultation comments received, which may be due to increased volume of candidates requiring statutory consultation comments or, candidates less likely to be well known.

5.84 **Weight given to statutory consultation comments:** In the excerpts from the SCC paper within the Recorder evidence pack, it was highlighted that once the statutory consultation comments had been received, the Assigned Commissioner was asked to review the candidates of note. Candidates were split into two batches for consideration by the SCC; one which contained concerns raised about four candidates that were not considered sufficient to lead to a revision of the grading and therefore be recommended, and the second batch contained concerns raised about five candidates which were considered sufficient to warrant a discussion by the SCC on whether they should proceed and be recommended.

Fairness

5.85 **Impact of absence of statutory consultation comments:** As highlighted in 5.82, statutory consultation comments were not provided in respect of 87 of the 168 candidates who were considered meritorious following the Selection Day. Our desk research demonstrated that only candidates who received mixed or negative statutory consultation were reviewed by the Assigned Commissioner in order to decide whether the comments warranted a change in the overall assessment of the candidate. Concerns regarding the potential unfairness of candidates who received no comments compared to those who received negative comments were raised in the feedback from operational colleagues. They explained that the majority of candidates are not known to the consultees, therefore additional information is only available on some candidates. They further suggested that negative statutory consultation could be seen as a candidate being downgraded: "*but candidates who are not known are not subject to the same scrutiny*". This was also referenced in the other exercise that were reviewed, however more candidates are affected in the Recorder exercise due to a larger volume of candidates.

5.86 **Impact of positive statutory consultation:** Our desk research highlighted that 67 of the 168 of candidates received positive comments, which was referenced in the response for statutory consultation letter from

the named statutory consultee: "*I have received positive comments in respect of 67 candidates*". As the statutory consultation process was conducted after the Selection Day for those candidates who were considered meritorious, positive statutory consultation comments appears to confirm that the candidates are suitable for selection and therefore recommended to the SCC, which is referenced in the SCC minutes: "*The SCC then considered the candidates being proposed for immediate appointment to the post of Recorder and agreed to recommend all those candidates who were assessed as overall outstanding, strong or selectable. After taking account of all the evidence, including panel reports, independent assessments and statutory consultation, the SCC agreed to recommend the following 163 candidates, who were all assessed as being overall outstanding, strong or selectable*".

5.87 **Impact of mixed or negative statutory consultation:** As evidenced in the SCC minutes, the SCC reviewed nine candidates who received negative or mixed statutory consultation comments and provided commentary to support the amendment of the recommendation: "*The SCC carefully considered all of the comments and decided that they justified reducing the candidate's grade for "Exercising Judgement" from "strong" to "insufficient" and their overall band from "selectable" to "not selectable". Alternatively, the SCC reviewed the evidence and decided to keep the original recommendation, despite mixed or negative statutory consultation: "The SCC agreed that the statutory consultation comments did not provide justification to amend any of the candidate's individual grades or overall assessment of being a selectable candidate*".

5.88 Our desk review demonstrated that out of nine candidates who were reviewed by the SCC due to negative or mixed statutory consultation comments, only two candidates had their overall assessment changed from "selectable" to "not selectable". In both cases, the statutory consultation comments were considered against the competencies that had been measured at the Selection Day, which resulted in their grade being amended: "*the SCC carefully considered all of the comments and decided that they justified reducing the candidate's grade for "Working and Communicating with Others" from "strong" to "insufficient" and their overall band from "selectable" to "not selectable". Furthermore, there was one additional candidate who had been assessed at the Selection Day as "not selectable", however the moderating panel disagreed with this decision and statutory consultation comments were sought for this candidate. The statutory comments received for this candidate were mixed and the SCC considered all of the information available and agreed that the original assessment of the selection panel of "not selectable" should stand*". This appears to be a unique case within the exercise. The JAC provided further clarification regarding two candidates who were not included in the recommended list in the 033 Recorder evidence pack. It was noted that one candidate required an extra review of their character due to missing information, but was later recommended, and the other candidate did not proceed past SCC due to character, therefore the candidate was not recommended. Therefore, following the SCC, two candidates were not progressed due to mixed or negative statutory consultation comments which were considered against the candidates' skills and abilities measured at Selection Day, one candidate (who was put forward for statutory consultation following the moderation panel's assessment) was not progressed in line with the panel's initial decision,

and one candidate was not proceeded by SCC due to character considerations as described in the Good Character Guide on the JAC website¹⁵...

5.89 **Perceptions of weight given to statutory consultation comments:** Our desk research highlighted that there appeared to be some uncertainty regarding how the statutory consultation was used as part of the selection process. This was referenced in the feedback received in the panel chair surveys: "*It would be helpful if it was clear how it was used by Commissioners and also what weight is given to it. Are there any statistics which show how many decisions were influenced by statutory consultation and if this correlates or not with the selection process and independent assessments?*". One interviewee who has previously been involved in the Recorder exercise suggested that information gained from the statutory consultation following the Selection Day is useful to gain a holistic view of the candidate, however the comments rarely change the recommendation that has previously been made "*if there is a negative statutory consultation it puts a spotlight on that candidate which will then be looked at more carefully but doesn't necessarily, or more often than not, result in the decision changing.*"

Implementation issues

Practicality & efficiency

5.90 **Time requirements:** The JAC sent a letter to all statutory consultees on 3rd June 2021, with a request to return all comments by 24th June 2021. However, the deadline was not met, which was evidenced in the feedback from JAC operational colleagues: "*We agreed to 3 weeks for stat con during the planning process. We agreed the dates to ensure that they did not run into Judicial recess. Despite this, we received a request for an extension, then a second extension, both of which were not met. We finally received it beyond the second extension.*" The desk research found that the extensions were requested by the Presiding Judges because of local pressures, to allow more time to collate all the responses from local leadership judges and, allow the SPJ sufficient time to consider and prepare her response.

¹⁵ <https://judicialappointments.gov.uk/guidance-on-the-application-process-2/good-character/good-character-guidance/>

Additional themes

Increased information, communication, and transparency regarding the statutory consultation process required, to address candidate perceptions.

5.91 A general theme which emerged with interviewees, surrounds increasing the information, communication, and transparency of statutory consultation. In interviews with legal representative bodies, it was noted that the information and understanding surrounding what this part of the selection process involves tends to be less well-understood: *“at each stage of the selection process, you can quite easily identify the benefits of each stage, interviews, competency exercises, background checks, references – [it] is very obvious where the benefits lie. Then you get to the stat con stage and the benefits start becoming more unclear...there could be benefits there, absolutely there could be, but we just don’t know”* and *“[it’s] hazy as to what the process is actually. It has never really been explained. I understand that the Leadership Judges are going to be consulted, Heads of Divisions, depending on the exercise. But that’s as far as most understand about the process”*. In interviews with judges, it was noted that some consultees are unclear how and when their statutory consultation comments are weighted.

5.92 Relatedly, it was noted that lack of understanding of how statutory consultation comments are sought and used, leads to candidate views of statutory consultation being negative. During interviews with legal representative bodies, it was noted that the statutory consultation process can be viewed as *“...anonymous whistle blows”*.

5.93 Therefore, in summary some legal representative bodies view statutory consultation as unclear. In particular, it was suggested that greater clarity would be beneficial with particular regards to: (i) the guidance given to statutory consultees, (ii) the process of statutory consultation, (iii) how statutory consultation is used in the selection process (i.e., whether statutory consultation comments are used to inform interviews/Selection Day), (iv) how statutory consultation is used to inform selection decisions/decision making (i.e. how do the panel take into consideration statutory consultation comments alongside other assessment information? How are statutory consultation comments weighted?), and (v) the value of statutory consultation. It was noted that ensuring these points are made clear to those both within and outside of the Judiciary is important and ensuring that any clarifying information is well communicated to these Stakeholders is imperative in order to address candidate perceptions of the statutory consultation process.

The impact of a statutory consultation on the ability to enhance diversity within the Judiciary.

5.94 An additional theme that has been discussed throughout the interviews relates to the extent to which statutory consultation impedes or enhances the diverse selection of applicants into the Judiciary. In interviews with legal representative bodies, it was generally viewed that statutory consultation can act as a barrier for certain candidates, for instance, candidates coming from certain demographic backgrounds or candidates who may already be limited in the number of judicial appointments that they can apply for. For example, one interviewee commented that there may be a tendency of those providing statutory consultation to have a ‘similar-to-me’ bias: *“There is a general concern with statutory consultation that if you are involving judges, you have a self-selecting body who are replicating themselves in their own image”*. Therefore, this could have a positive impact for candidates from some backgrounds, but a negative impact for candidates from other backgrounds.

5.95 Additionally, during interviews with legal representative bodies, it was noted that candidates who may already be limited in the number of judicial appointments that they can apply for are also likely to view the statutory consultation as a barrier to entry into the Judiciary: “[there are already] perceptions for barriers to judicial appointment...the main one being the limited number of appointments that can actually be applied for. This is seen as just another barrier...it’s just another reason for people to say, it just isn’t worth it”. It was noted that it was the perception of the statutory consultation that is having the most impact on candidate’s intention to apply. For example, in relation to whether certain groups may be more disadvantaged by the statutory consultation than others, one judge commented, “I haven’t seen any evidence to suggest whether the statutory consultation may be disadvantaging particular groups of individuals], but it is the perception [which] is having a chilling effect on the preparedness of people from those communities to apply, or on their experience of the process when they don’t go through”. Therefore, taking these points together, the additional theme which has been raised across the interviews relates to how statutory consultation may impede on efforts to increase diversity in the Judiciary, particularly due to the statutory consultation potentially having an adverse impact on certain candidate’s perceptions of the selection process, impacting their preparedness to apply. In the examples discussed, this may be particularly pertinent for candidates of certain backgrounds who are not ‘similar’ to the judges already present in the judiciary (and therefore may be affected by ‘similar-to-me’ bias) and for those candidates who already perceive a barrier to entry into the Judiciary.

5.96 It was viewed that providing greater information and transparency regarding the purpose, implementation, and value of the statutory consultation process will greatly enhance candidate perceptions of the statutory consultation and intentions to apply, “that’s what it all boils down to, people having a greater understanding of why. Tell us the why and then it’s much more easily accepted and understood. I think that’s what it is, if there was much more information and clarity on why the stage is needed, what’s the value in it and what framework is being used, it becomes less of an issue” and “I think transparency is the thing that would do most to dispel the myths”.

5.97 During interviews with legal representative bodies, it was noted that legal advice has been sought with regards to the lawfulness of statutory and non-statutory consultation. It was noted that there could be a possibility of indirectly discriminating against candidates from certain backgrounds. One interviewee from a legal representative body commented “we wouldn’t do it in employment, so why in the judicial system do we think this is okay”. Further describing it as ‘unlawful’ and ‘highly problematic’ in legal terms.

Lack of fairness for some candidates who receive limited statutory consultation comments.

5.98 It has been recognised across the interviews that the amount of information available in statutory consultation about a candidate can be variable, which could cause a lack of fairness for some candidates. For example, in an interview conducted with a judge, it was commented that, “I think one of the issues which can arise at that stage is it may be one judge knows something about an individual, and another judge will not know that person and I can see potentially some unfairness there but it’s a matter of chance and there’s nothing we can do about that”. This point was also raised in interviews with legal representative bodies, where it was noted that there was “unequal information available for certain information” for certain candidates. Ultimately, some interviewees had the view that the statutory consultation be removed from the selection process, “it has no place and should be abolished, it affects

the perception, has a problem with attracting diverse applicants...[it's] people going behind the wings and saying what do you know about her?". Therefore, it has been suggested that statutory consultation should not be included in the selection process at all, in order to achieve fairness.

Value of statutory consultation and potential for repurposing

5.99 A general theme that emerged during interviews with judges, surrounds the value of statutory consultation. A couple of judges explained that statutory consultation is important to provide evidence on elements of the selection criteria (e.g., integrity or intellect in practice, particularly for more senior roles), that are more difficult to assess effectively in other stages of the selection process. As noted in point 5.96, greater understanding of the value could enhance candidate perceptions of the statutory consultation and intentions to apply.

5.100 Relatedly, it was suggested by some judges that statutory consultation could be repurposed to be used for senior appointments only. It was noted during an interview with a judge, that for senior roles most candidates should be known by the consultee, as the roles require a lot of experience. One judge commented that for very senior roles candidates "*need to have experience, there is no reason why evidence-based judgement can't be done*". In contrast for more junior roles, it was noted that it may not always possible for a statutory consultee to know all candidates. One judge commented about the Judge of the First Tier Tribunal exercise, "*no stat consultees can have an idea about all of these people.*"

5.101 Another judge commented that statutory consultation would be more beneficial if it had a narrow focus on the issue of 'integrity', "*if it was to be used, I would say stat con is invited from any judge who knows any incidents demonstrating serious lack of integrity, and communications will only be considered if evidenced and relating to specific incidents.*"

5.102 Therefore, in summary the feedback from some judges suggests that statutory consultation may have a value when determining the integrity of individuals for senior judiciary roles but less useful when assessing candidates for more junior judiciary roles, that require less experience and where the statutory consultee is less likely to know all candidates.

Statutory Consultation sought before vs after Selection Day

5.103 For salaried exercises where the statutory consultation process takes place before Selection Day, there is evidence that an opportunity to probe candidates regarding any areas of concern is integrated into the overall selection and assessment. However, there appears to be mixed evidence as to the prevalence of this in practice, and whether this may be due in part to the need to maintain a standardised approach when interviewing all candidates. Furthermore, it appears that understanding among the judges interviewed is unclear as to how statutory consultation comments are used to inform Selection Day activities.

5.104 For large fee-paid exercises like the Recorder exercise, the statutory consultation takes place after Selection Day. Therefore, there is no opportunity for panel members to probe candidates in relation to any negative statutory consultation comments received.

5.105 Probing areas of concern raised from earlier stages of the selection process at interview, as well as exploring questionable statutory comments further with those individuals who provided them, appear to be one approach taken for the Recorder exercise, especially as it is understood that statutory consultation prior to Selection Day is not possible due to the very high volume of candidates of this exercise.

5.106 Exercise S9 (1) was a completely paper-based exercise; therefore, there was no opportunity to probe candidates on any areas of concern raised in statutory consultation. However, it was noted that the Head of Senior Appointments wrote to the statutory consultees again requesting further comments on candidates if comments were initially limited. Thus, further exploration of statutory comments was conducted with those who provided comments, when necessary.

Appointment of the most senior judicial posts

The evidence pack for the most senior judicial appointments (for England and Wales) outlines that all exercises from the Court of Appeal and above is not the responsibility of the JAC, but rather individually constituted selection panels, which is described in the Judicial Appointments Regulations 2013. As explained in the evidence pack, the JAC provides secretariat support for these exercises, as well as providing Commissioners to sit on the selection panel. It is therefore the role of the senior appointment panel to decide on the process for each exercise, however the JAC stipulates that it must be *“open, transparent and fair.”* The evidence pack provided details in relation to the operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels, but it did not include any information about candidates, e.g., statutory consultation comments or any other outcome data. Therefore, it was only possible to review the quality of the statutory and non-statutory consultation against the first criteria in the evaluation framework.

Accuracy and effectiveness

Evidence of reliability

5.107 The evidence packs provided by the JAC for the most senior appointments outlines the process for: the Lord Chief Justice (2017), President of the Family Division (2018), President of the Queen’s Bench Division (2019), Chancellor of the High Court (2020), Master of the Rolls (2020), Senior President of Tribunals (2020) and the Lord and Lady Justices of the Court of Appeal (2021). Each exercise is operated by a statutorily constituted selection panel as described in the regulations, each panel designs, prepares and executes the exercise to its wishes. In all senior appointments, the Lord Chief Justice chairs the panel alongside the other panel members. The only exception being to appoint a new Lord Chief Justice when the panel is chaired by the chairman of the JAC. The JAC provides the secretary to the panel alongside other administrative support, including publicising the vacancy as well as providing Commissioners to sit on the selection panel.

5.108 It was highlighted in our desk research that the statutory consultee was consistent for all exercises, which was the Lord Chancellor, with the First Minister of Wales also named as the statutory consultee for the Lord Chief Justice exercise, in addition to the incumbent of the post, where practicable. The other consultees who are consulted are non-statutory consultees and are decided by the selection panel, but this typically consists of Heads of Division, all Supreme Court Justices, Court of Appeal Judges and Heads of Professions (Chair of the Bar Council, President of the Law Society). The JAC received individual consultee comments, which were collated and sent to the panel, and which could be used to explore areas with the candidates that had been highlighted by consultees.

5.109 An internal administrative desk guide for the Senior Appointments was provided, produced by the JAC Head of Senior Appointments in 2017. This is used by the secretariat to the senior appointment panels as a reference document for the selection process as set out in the legislation, and the core principles derived from the legislation. Based on our review of the evidence the process and support offered by the JAC to the panels was consistent, with the decisions on the process for each exercise being decided by the panel.

Part Two: Demographic data

5.110 The descriptive analysis examined the overall demographics for selection exercises 035 - s9(1), 024 - Deputy High Court Judge, 020 - High Court, and 009 - Judge of the First Tier Tribunal, where statutory consultation was considered as part of a selection process. The analysis found that the profile of the population who were recommended was very representative of the overall sample invited to the selection process.

5.111 For the exercises where statutory consultation is sought before Selection Day, it is not possible to determine how statutory consultation directly impacts individuals from different demographic groups with the data provided because statutory consultation is considered as part of the selection process, alongside other data to make a decision.

5.112 For the 033 - Recorder exercise, statutory consultation is sought after Selection Day, on those candidates deemed as being suitable for selection. Therefore, there is no opportunity for panel members to probe candidates in relation to any negative statutory consultation comments received. Our desk research demonstrated that only candidates who received mixed or negative statutory consultation are reviewed by the Selection and Character Committee.

5.113 The descriptive analysis for the 033 - Recorder exercise showed that the majority of individuals were recommended by the Selection and Character Committee. All of those who identified as BAME were recommended, all females were recommended, and the majority of solicitors were recommended. Therefore, for the 033 - Recorder exercises the statutory consultation comments had very little impact on the number of candidates recommended.

5.114 Overall findings from the qualitative analysis of demographic data were mixed across the matched cases selected, and it is not possible to draw a firm conclusion of differences in the quality of statutory consultation comments between demographic groups. However, on the basis of the data included in this review, there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group.

The key themes from the qualitative analyses were:

- The objectivity and evidence-base for statutory consultation comments received in the matched cases reviewed is mixed.
- The operation of statutory consultation is generally consistent within an exercise.
- There is an absence of statutory consultation comments for some candidates.

6 Conclusions and Areas for Consideration

Overview

Statutory consultation is currently a legal requirement and one aspect of the selection exercise process for judicial appointment. The JAC was asked to give evidence to the Justice Select Committee on 29th June 2021, to address judicial diversity and the appointments process. It was announced that there would be an independent review of the approach to statutory consultation. Work Psychology Group (WPG) were appointed to conduct the review.

This report presents the findings of the review. The following information was provided by the JAC and included in the scope of the review:

- One evidence pack containing background material about the statutory framework, process outline, standard commissioning materials (letters, guidance); Work to agree and refresh guidance in 2019; Website content and messaging to candidates. WPG also reviewed the 'live' JAC website using links provided in the evidence pack, for additional background material.
- Evidence packs provided by the JAC in relation to five recent exercises where statutory consultation was sought (including consultation responses, selection panel reports, SCC minutes, recommendation reports to the Appropriate Authority).
- Interviews with stakeholders including Commissioners, senior Judiciary, the Bar Council, the Law Society and CILEX.
- One evidence pack was provided by the JAC in relation to the operation of consultation (statutory and non-statutory) and what was undertaken by the statutorily constituted selection panels for the most senior judicial appointments.
- Five data files containing candidate demographic data for the five recent exercises where statutory consultation was sought, were provided to WPG by JAC. The demographic categories included in the data shared were Gender, Ethnicity, Disability, Current Role, Professional Background and progression stage.

The first part of this review has qualitatively evaluated evidence provided on the approach to statutory consultation against a set of core criteria. The second part of the review involved analysing existing data on the demographics of candidates to explore any differential impact on demographic sub-groups.

As independent reviewers it is important to highlight that the JAC has been supportive in providing all relevant data and evidence to deliver this review with a view to addressing all the issues identified. Following a review of the evidence available, our conclusions and considerations are provided in the context that statutory consultation is a legal requirement, and we have provided what are the areas to consider for the future.

Overall Conclusions

Conclusion 1: The operation of statutory consultation is generally consistent within an exercise; however, it varies between exercises and the way information about candidates is gathered and amalgamated can vary depending on the method employed by the named statutory consultee. Based on our desk review of the evidence packs for the five specific exercises identified we conclude that overall, the process of arranging and conducting statutory consultation is consistent for all candidates involved in a particular exercise. The SCC consider comments in a consistent manner for all candidates within an exercise, only changing the grading by the panels in respect of mixed or negative statutory consultation comments. However, our desk review demonstrated that the process of managing statutory consultation requests sent by the JAC to JO differs by exercise. For 020 High Court exercises, the Heads of Divisions private offices play a central role in supporting the statutory consultees, whereas for the 033 Recorder exercise, the pre-appointments team (JO) works with the SPJ's office to collate comments. The pen-portraits are provided to statutory consultees by the JAC and are based on information provided by candidates. Our desk review revealed that background information about candidates is not always captured in the pen portrait, this was noted for the s9(1) exercise. Therefore, highlighting another inconsistency in the process. Our desk review and interviews with judges revealed that statutory consultees confidentially sub-consult with others to gather information about candidates they do not know. The interviews with the judges demonstrated that some statutory consultees would share the JAC and JO guidance with those they sub-consult, whereas others do not. The method of collating of comments received from other judges can vary from structured to unstructured approaches, and our desk review revealed no specific guidance from JO to judges on the process of collating of comments from other consultees, but reference is made to seeking third party comments in the current JAC/JO guidance which is sent by the pre-appointments team (JO).

Conclusion 2: The JAC guidance emphasises the need for objective, evidence-based statutory consultation comments. However, the evidence-base for comments received is mixed. Our desk review of the evidence packs for the five specific exercises identified¹⁶ revealed that notable importance is placed on the need for statutory consultation comments to be evidence-based. For example, all five evidence packs demonstrated that JAC and JO guidance is provided to statutory consultees, which places emphasis on the need for comments to be objective and evidence based. There was evidence of efforts by the JAC to improve the evidence base of the statutory consultation, such as the inclusion of evidence-based feedback examples in the guidance and, more recently, changes to the High Court proforma to support standardisation and generation of the comments. However, from the qualitative analysis of the interviews with judges, the findings suggest this guidance could be further improved by detailing more specifically what qualifies as appropriate evidence. It was evident that the newly introduced proforma used for the 020 High Court exercise aided in the collection of evidence-based comments, allowing information on a candidate to be collated into one document. However, our desk review revealed that statutory consultation comments vary in their evidence-base, with some demonstrating clear evidence and others more focused on comments on candidates' suitability. In addition, in the 020 High Court

¹⁶ 024 - Deputy High Court Judge, 020 High Court Judge, 035 s9(1) Authorisations to Act as Judges of the High Court, 033 Recorder and 009 Judge of the First Tier Tribunal.

exercise, panel members were found to scrutinise the statutory consultation comments provided to ensure they were evidence-based.

A qualitative analysis of the interview data revealed that some legal representative bodies do not perceive statutory consultation to be evidence-based, rather they perceive them to be unsubstantiated, unfair and highly subjective. Currently, legal representative bodies are not privy to the joint JAC, and JO guidance provided to consultees which places emphasis on evidence-based comments.

Conclusion 3: There is an absence of statutory consultation comments for some candidates and this impacts on the consistency, reliability, and the perceived fairness of the process. Our desk review of evidence packs revealed that not all candidates receive statutory consultation comments when sought, with several reasons being given for this, for example some candidates are unknown to the named statutory consultee. Therefore, statutory consultation comments are used to support the selection decisions of some candidates but not others which could differentially impact on candidates. The JAC guidance and our qualitative analysis of the interviews with the Assigned Commissioners established that when statutory consultation is not available, the candidate should be seen as neutral on this piece of evidence. Our desk research illustrated that in a small number of cases a negative statutory consultation comment, can have a negative outcome on an applicant's success, whereas the absence of statutory consultation comments for another applicant in the same exercise has no impact on the decision. This is more apparent in exercises where statutory consultation happens after the Selection Day where only negative comments or mixed comments are reviewed by the SCC, and the selection panel do not have sight of the comments.

Conclusion 4: The timeframes for statutory consultees to gather and return feedback about all candidates can be practically challenging in some exercises and this can influence the quality and quantity of evidence gathered. Based on our desk review of the evidence packs related to the five specific exercises where statutory consultation was sought, it is possible to conclude that the process of statutory consultation has challenging timeframes, especially for high volume fee-paid exercises. Our desk research revealed that in some cases deadlines to return statutory consultation comments are missed, and the original timeline for statutory consultation had to be extended. The time allowed for the statutory consultation process varied across the different selection exercises, for example in the 020 High Court exercise the original timeframe was four weeks. A qualitative analysis of the interview data revealed that some judges find statutory consultation very demanding, impractical, poorly timed and will work long hours in order to meet the timelines. Some judges explained that when acting as statutory consultees, they are having to seek comments for large volumes of candidates. A qualitative analysis of the interview data revealed that sometimes judges are asked for input by statutory consultees within tight timeframes, and they might need to conduct searches for further evidence by seeking the views of others. Therefore, it can be concluded that the practicalities of time pressure, and the process of sub-consulting, could be impacting on the quality of comments delivered, especially in high volume exercises.

Conclusion 5: Statutory Consultation comments received before a Selection Day can support the selection panel with making recommendations about candidates, but candidates are not given the opportunity to directly refute comments. Our desk review of evidence packs revealed that when statutory consultation comments are sought before a Selection Day (as is applicable for salaried exercises), the comments can be considered by the interview panel and areas of development need can be included in the interview to probe further. There was good evidence of how this was appropriately integrated into the selection interview, but also evidence of variability of how chairs of panels used the statutory consultation information. Some interrogated and sifted the evidence and then integrated findings into interview questions in relation to relevant skills and abilities, whereas others preferred to review afterwards or let the SCC consider it. Statutory consultation comments are not shared directly with the candidate and as such that there is no opportunity to directly respond to and/or refute negative comments. This could potentially impact on the fairness of the process for a candidate.

Conclusion 6: The process of gathering, using and weighting statutory consultation comments in the selection process, is not transparent to some judges and legal representative bodies. Our desk review of evidence packs demonstrated that the operation of statutory consultation is explained in the job advert. However, the qualitative analysis of the interview data revealed that some judges are unclear about how and when their statutory consultation comments are used to make decisions about candidates. Legal representative bodies also reported that they are not aware of how and when comments are used to make decisions about candidates.

Conclusion 7: There are mixed views in support of keeping the statutory consultation comments confidential. Based on the qualitative analysis of the interview data gathered from interviews with judges, some judges are strongly in support of the maintenance of the confidentiality of the statutory consultation comments written about candidates. The reason for maintaining confidentiality was reported by judges as allowing for open and honest sharing of information about candidates. However, it was acknowledged by some judges and some legal representative bodies that the confidentiality of comments leads to a perception of lack of transparency around the statutory consultation process, particularly where there is a perceived lack of information around how statutory consultation evidence is gathered and integrated into the decision-making process (see conclusion 6).

Conclusion 8: Based on the data included in the review, there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group. Descriptive analyses found across the four exercises where statutory consultation takes place before Selection Day, the profile of the population who were recommended was very representative of the overall sample invited to the selection process. It is not possible to determine how statutory consultation directly impacts individuals from different demographic groups with the data provided because statutory consultation is considered as part of the selection process, alongside other data to make a decision. Descriptive analyses of earlier stages of the process might provide further insight into the impact of group differences. For the 033 - Recorder exercise, statutory consultation is sought after Selection Day, on those candidates deemed as being suitable for selection. The descriptive analyses showed that the majority of individuals were recommended by the Selection and Character Committee. Findings from the qualitative analyses of matched cases, found the evidence-base of statutory consultation comments was mixed across and within cases, and it is not possible to draw a firm

conclusion of differences in the pattern of the quality of statutory consultation comments between demographic groups.

Areas for Consideration

While it is acknowledged that significant efforts have gone into improving the process of statutory consultation, in particular in terms of increasing the emphasis on evidence-based comments, a number of challenges remain in improving statutory consultation process and practice. Since statutory consultation is a legal requirement, the JAC need to consider the following to improve fairness, practicality, and transparency.

It is important to note that a number of judges and legal representative bodies reported that statutory consultation should be removed and that 'selection decisions should be based on a meritocratic selection process alone'. Given the varying viewpoints this issue requires further review to satisfy all stakeholders. Our understanding is that the any decisions to remove statutory consultation would need to be considered by the Ministry of Justice and Parliament.

Consideration 1: There is a need to address the inconsistency in the process of collating evidence on candidates, which may be differentially impacting candidates. The method by which statutory consultees gather and amalgamate information about candidates is inconsistent and is left to the choice of the consultee. There is a need to review the practice of sub-consulting, when a statutory consultee consults others, which potentially impacts the reliability of the information gathered due to differing approaches used. A consideration is whether additional guidance can be introduced to recommend how information about candidates should be sought and collected by named statutory consultees. The JO process of managing statutory consultation requests could be reviewed to explore how they ensure consistency between exercises. This could help reduce variability in how the information about candidates is synthesised and thereby enhance standardisation.

Consideration 2: Improving the objectivity and evidence-based feedback on all exercises. Whilst our desk analysis revealed that importance is placed on evidence-based statutory consultation comments in the JAC's guidance, there are areas for improvement across exercises, as not all comments were evidence-based. The O20 High Court exercise uses a proforma which was found to be relatively more effective and could be introduced for other exercises. The guidance, while available, is perceived as 'generic', and examples could be more tailored to specific exercises and requirements of the role. The review highlighted some good examples of where judges had organised workshops locally to improve the quality and evidence base of the statutory consultation comments they received. To support named statutory consultees going forward, the JAC might wish to consider whether training could be delivered at the start of a selection cycle, for peers to discuss and work through some examples of appropriate evidence-based comments.

Consideration 3: The absence of (or very limited) information for some candidates needs to be addressed to support fairness and 'level the field' for all. Our desk review of evidence demonstrates that considerable effort goes into seeking statutory consultation comments and yet there remains a proportion of candidates that do not

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receive them or who receive limited comments. Our desk research revealed that for the salaried exercises (020 High Court and 009 Judge of the First-Tier Tribunal) and some other exercises (035 s9(1) authorisation and 024 Deputy High Court Judge), where the process is that statutory consultation is sought before a Selection Day, the majority (80% - 90%) of candidates shortlisted received statutory consultation comments. For the fee-paid exercise (Recorder 033), where statutory consultation is sought after Selection Day, less than half of candidates received statutory consultation comments. A qualitative analysis of the comments also highlighted that not all candidates receive the same volume of comments or level of detail. The impact of the absence of information for some candidates cannot be directly quantified but there is a perception that this could impact on the fairness of the process.

Consideration 4: Can more support be built into the process to allow statutory consultees to have sufficient time to provide comments? Based on the interviews, there is a perception that there is often insufficient time allocated for consultees to provide statutory consultation comments. There may be alternative approaches to support this such as the introduction of dedicated time slots for statutory consultees (especially in high volume exercises) to complete comments, carefully scheduling statutory consultation around other commitments and more support to the consultees so that the process is felt to be more manageable. Other approaches might include introducing a minimum ratio of statutory consultees to candidates which could reduce the burden especially in high volume exercises, mitigating against the time pressure and the potential impact on quality. These are possible interventions; however, they may not provide the improvements required particularly if there are an increasing number of exercises in the future. The evidence suggests that the current approach may not be practically fit for purpose for the future. Given this, a re-purposing of the statutory consultation could deliver efficiencies and achieve legal requirements set in statute (see Consideration 7).

Consideration 5: Review the need for confidentiality of the comments written about candidates. Whilst many consultees appreciate that confidentiality encourages frank and honest comments to be provided, for the unselected candidates, there may be concerns regarding the transparency of the process, which might lead to perceptions of unfairness. If there is value in confidentiality and it is to remain, it needs to be communicated why this is the case. Being clear and transparent on the rationale and value, the type of evidence gathered and how it is used (rather than the comments themselves) could help support better understanding and acceptance of this element of the process.

Consideration 6: More specific guidance and communication to be provided with regards to how evidence is collated, weighted and used in the process. Although the process of statutory consultation is communicated in the job advert, qualitative analysis of interview data suggested that the process of statutory consultation is unclear to candidates. Therefore, increased signposting and highlighting of the information provided to candidates could improve the perceived transparency of the process. Work is required to communicate to legal representative bodies (and candidates) the requirement of evidence-based comments within the statutory consultation and clarifying what good and appropriate evidence looks like. Communicating what guidance is already in place to support the generation of evidence-based comments should be considered. Can improvements be made to the process of excluding non-evidenced based comments before reaching either the

panel interviews or the SCC? Further guidance to consultees about exactly how their comments were subsequently used to make selection decisions would be desirable. In addition, providing consultees with summary feedback on their comments might help to improve engagement, combining this with the continual improvement of the process including better communication to candidates and other stakeholders.

Consideration 7: Potential for re-purposing statutory consultation to further support equal opportunity for all candidates. A key issue emerging from the findings is having limited or no information on some candidates (compared to others) may differentially impact some candidates and thereby the fairness of the current process. Several considerations in dealing with this issue require further review including the potential for re-purposing the statutory consultation to better support the aims of the JAC. Firstly, for salaried selection exercises, the introduction of specific guidance for a candidate on how to improve their profile before applying for a role could give candidates the opportunity to present appropriate evidence for their application (thus, in principle, 'levelling the field'). If such an approach were considered, it would be important that all candidates in a given exercise are afforded equal opportunity. Secondly, for large fee-paid selection exercises, introducing statutory consultation before Selection Day would enable the selection panel to probe on areas of development appropriately and give candidates the opportunity to respond to issues raised in statutory consultation comments. While it is understood that this may currently not be a practical option for all exercises (particularly the high-volume exercises) due to the method by which statutory consultation is currently gathered and collated, changes to this method of statutory consultation may help to support this. Thirdly, for both salaried and fee-paid exercises, introducing mandatory detail in the pen portrait or introducing a candidate-prepared professional experience portfolio (based on CV information containing appropriately verifiable evidence) could give less 'well-known' candidates more opportunity to demonstrate their professional experience (e.g., notable judgments) and thus, consultees more information about where statutory consultation could be reliably sought. This would enable candidates to be more active participants in the process and could therefore help deal with the existing absence of evidence for some individuals. Finally, for high volume fee-paid exercises, a different approach to statutory consultation could be considered, given that for entry level posts they predominantly include candidates who do not hold a judicial appointment and therefore statutory consultation comments are more likely to be limited or absent. Any change to the process will need to be carefully considered by the JAC, seeking legal advice as required to ensure the process fulfils the statutory duty placed on the JAC whilst considering any legal risks. Interviews highlighted that legal representative bodies have recently commissioned legal advice on the issue of statutory and non-statutory consultation and raised a concern that statutory consultation as currently used is at risk of having a discriminatory impact. Whilst this does not constitute an agreed legal position, a review of any legal risks should be conducted and whether potential re-purposing (or not) of the statutory consultation could address this concern.

Overall Recommendations

Recommendation 1: For exercises where statutory consultation takes place before a Selection Day, address all issues raised in the considerations section above. This includes, addressing inconsistency in the process, improving the quality of statutory consultation comments, addressing the absence of statutory consultation

comments for some candidates, building more time into the process, reviewing the need for confidentiality and providing more specific guidance.

Recommendation 2: Explore the potential for change to the statutory consultation process for large fee-paid exercises, where statutory consultation is sought after Selection Day. Consider whether the effort required to gather and review Statutory Consultation after a Selection Day really adds value, given that our findings suggest a large absence of (or very limited) information available for some candidates.

Recommendation 3: On the basis of the data in the exercises examined, there is no direct evidence that the statutory consultation process impacts disproportionately on recommendations for appointment for any group¹⁷. The JAC to continue to review the number of individuals from each demographic sub-group at all stages of the selection process to identify any significant change in proportions.

¹⁷ Selection process here means selection day, interview or paper sift

Appendix 1

Selection exercise	Vacancy Request	Number of applicants	Number invited to Selection Day interviews	Other notes
024 Deputy High Court Judge S9(4)	Up to 40 for immediate appointment	221	107	Statutory consultation took place before Selection Day.
020 High Court Judge	Up to 17 for immediate appointment	41	22	Statutory consultation took place before Selection Day.
035 Authorisations to Act as Judges of the High Court S9(1)	39	62	N/A	The selection exercise process for this exercise does not include a Selection Day. Statutory consultation took place before Sift.
033 Recorder	70 for immediate appointment, increased to over 100 by the Lord Chancellor.	1044	275	Statutory consultation took place after Selection Day.
009 Judge of the First-Tier Tribunal	50 for immediate appointment	332	116	Statutory consultation took place before Selection Day.

Appendix 2

Scope and Methodology for JAC Review of Statutory Consultation

Review of:

- Commissioning guidance for statutory consultation commissioned by JAC and extent to which guidance facilitates objective and evidence-based feedback.
- Statutory consultation responses and extent to which they are evidence-based and objective.
- The approach of statutory consultees where they seek evidence from other judges, what guidance is provided, whether requests are only going to those likely to have relevant knowledge, and that candidate confidentiality is given sufficient weight.
- The extent to which judges seek information on candidates, or just share any relevant information they already have.
- How statutory consultees consider and bring together information in their response where it has come from multiple judges on multiple candidates.
- Whether candidates have an opportunity to rebut adverse comment on them in statutory consultation responses, and if so how (including in relation to transparency) this is done.
- The impact of the statutory consultation process on a candidate's application, and whether there is a disproportionate impact at any stage of each competition.
- The impact of the absence of any statutory consultation responses for candidates, and whether this disproportionately impacts on the success rate.
- Selection and Character Committee (SCC) consideration of statutory consultation at the final decision-making stage.

Methodology for the above will include:

Desk review (sampling approach) of materials for recent exercises where statutory consultation sought (including consultation responses, panel reports, SCC minutes, recommendation reports to the Appropriate Authority)

Interviews with Commissioners and senior Judiciary, the Bar Council, the Law Society, CILEX, salaried judges on the Advisory Group, and JAC and Judicial Office staff

Additional desk review of the operation of consultation (statutory and non-statutory) undertaken by the statutorily constituted selection panels for the most senior judicial appointments (for England and Wales).