

**Court Service  
Public Consultation Exercise  
on the Establishment of the  
Lay Magistracy in  
Northern Ireland**

**Reply form to aid public consultation on  
persons eligible to be Lay Magistrates in  
Northern Ireland\***

Consultee Details:

**Name:**

**Organisation** (*if applicable*)

**Organisation Position** (*if applicable*)

**Contact Details:**      **Address**

**Telephone**

**Fax**

**e-mail**

**How to complete this reply form:**

- Consider the draft Order and Policy
- Consider the draft Order and Policy against the questions
- For those elements of the draft Order and policy where you identify a potential impact on yourself or your group, please provide details in the relevant space, using extra sheets if required
- If you have any difficulties completing this questionnaire, help is available by telephone at 02890 328594 and ask for the Consultation Coordinator

\* Northern Ireland Court Service  
Draft Lay Magistrates (Eligibility)(Northern Ireland) Order 2004 and Policy  
Reply form to aid public consultation on policy screening in accordance with  
section 75 of The Northern Ireland Act 1998

### Question 1

Is there any evidence that you or your group have different needs, experiences, issues and priorities in relation to this particular draft Order or policy?

*(Please tick relevant box)*

No

*Please go to next question*

Yes

*Please complete box below*

Remarks:

*Please enclose additional sheet if necessary*

### Question 2

Is there an opportunity to better promote equality of opportunity or better community relations by altering any parts of this draft Order or policy?

*(Please tick relevant box)*

No

*Please go to next question*

Yes

*Please complete box below*

Remarks:

*Please enclose additional sheet if necessary*

### Question 3

Have you or your group had prior contact with the justice system in respect of the proposed duties of Lay Magistrates, these being

- Youth Courts hearing criminal cases involving young persons
- family proceedings courts dealing with civil issues relating to the welfare, care, protection, and custody of children
- appeals from Youth Courts
- ex parte applications such as emergency protection orders or recovery orders
- special courts where a person is brought before a court for the first time
- the issuing of summonses and warrants

*(Please tick relevant box)*

No  *Please go to next question*

Yes  *Please complete box below*

If yes please state in what capacity:

*Please enclose an additional sheet if necessary*

#### Question 4

Do you agree that those listed in the draft Order as ineligible, when considered against the criteria as set out in the explanatory note, should save in exceptional cases be ineligible for appointment as a Lay Magistrate?

Comments:

*Please enclose additional sheet if necessary*

#### Question 5

Do you agree that those listed in the policy as ineligible, to avoid a situation arising where the office or occupation of that individual could create a conflict of interest with the duties of a Lay Magistrate, should save in exceptional circumstances be ineligible for appointment as a Lay Magistrate?

Comments:

*Please enclose additional sheet if necessary*

### Question 6

Are there any particular parts of the draft Order or policy that create difficulties for you or your group?

*(Please tick relevant box)*

No  *Please go to next question*

Yes  *Please complete box below*

If yes please specify:

*Please enclose additional sheet if necessary*

### Question 7

Apart from the reduced consultation period of 8 weeks rather than 12 has this consultation been carried out in accordance with the criteria contained in the Cabinet Office Guidelines?

*(Please tick relevant box)*

No  *Please go to next question*

Yes  *Please complete box below*

Remarks:

*Please enclose additional sheet if necessary*

## Question 8

Are there any other comments in relation to the draft Order or policy that you would like to make?

*(Please tick relevant box)*

No  *Please go to next question*

Yes  *Please complete box below*

Comments:

*Please enclose an additional sheet if necessary*

The NI Court Service welcomes your views, comments and experiences in relation to this draft Order or policy.

Thank you for taking the time to complete this reply form, if you have any other comments you would like to make please use the space below:

Please return the completed reply form to:

Northern Ireland Court Service

Information Centre

Windsor House

Bedford Street

BELFAST

BT2 7LT

informationcentre@courtsni.gov.uk by Monday 2nd February 2004

## **Explanatory Note for Public Consultation Exercise for Lay Magistrates**

### **Executive Summary**

#### **Background**

The Belfast Agreement in 1998 provided for a wide-ranging review of criminal justice. The Review Report, published in March 2000, stated that the aims of the criminal justice system are to: -

- deliver a fair and impartial system of justice to the community,
- be responsive to the community's concerns and encourage community involvement where appropriate,
- have the confidence of all parts of the community, and
- deliver justice efficiently and effectively

The Review made a series of recommendations to increase the involvement of lay people in the justice system. In broad terms the Review recommended that existing members of the Lay Panel could elect to transfer to the new post, following the completion of any necessary training. Currently in Northern Ireland there are two distinct categories of lay people involved in the justice system. These are the members of the Lord Chancellor's Youth and Family Proceedings Courts Lay Panel (Lay Panel) and Justices of the Peace (JPs). The most common functions performed by JPs within the criminal justice system are signing summonses and affidavits, issuing warrants and sitting in special courts where a person is brought before a court for the first time on remand. They also perform civic and ceremonial duties. The work of the Lay Panel is predominantly within the Youth and Family Proceedings Courts in relation to the care, protection and welfare of children.

#### **Review Recommendations**

One of the Review's recommendations was the creation of a new judicial post of Lay Magistrate, which would be created by relieving JP's of their criminal justice functions and amalgamating these with the functions currently performed by the Lay Panel. The duties of Lay Magistrates will be:-

- sitting with a Resident Magistrate in Youth Courts hearing cases in criminal matters involving young persons,
- sitting with a Resident Magistrate in Family Proceedings Courts dealing with civil issues relating to the welfare, care, protection, and custody of children
- sitting with a county court judge as an assessor in appeals from youth courts
- dealing with certain ex-parte applications, such as Emergency Protection Orders or Recovery Orders
- presiding in special courts where a person is brought before a court for the first time, and

- hearing complaints with a view to issuing summonses and warrants

## **Legislation**

The Justice (NI) Act 2002 ('the Act') established primary legislation for the implementation of the recommendations of the Review. The Act details a framework for eligibility for appointment to the office of Lay Magistrate. In particular, it provides for a requirement to undertake the necessary training within one year of appointment and basic eligibility criteria that must be met to be considered for appointment. The criteria are: -

- residence – s/he should reside or work in, or within a prescribed distance of, the County Court division to which the appointment relates,
- holding of an office or occupation – s/he, or a person related to or otherwise connected with him/her should not hold an office or occupation of a prescribed description, or have been selected as a candidate for election to a prescribed body,
- bankruptcy – a bankruptcy order should not have been made against him/her or his/her estate sequestrated or a composition or arrangement made or a trust deed granted for his/her creditors, or
- criminal convictions – s/he should not have been convicted of a prescribed offence.

The Act also states that the Lord Chancellor may make further provision about eligibility for appointment as a Lay Magistrate. The draft Lay Magistrates (Eligibility) (NI) Order 2004 (the Order) will make further provision in relation to the 'prescribed residence, offices or occupations and criminal convictions' referred to above. The underpinning policy document sets out the policy on the appointment of individuals whose work may be or perceived to be incompatible with the duties of a Lay Magistrate.

## **The Consultation Exercise**

The Government is committed to consulting the public on policies, and also in this instance the draft Eligibility Order, and using the responses to develop more informed and focused decisions. The draft Order and policy, which are the subject of this consultation exercise, seek to highlight those offices or occupations, either paid or voluntary, which may give rise to a concern of real or perceived conflict of interest.

## **Appointment of Lay Magistrates in Northern Ireland**

The draft Order and policy have been compiled in such a way as to make as wide a range of individuals eligible for appointment as a Lay Magistrate as possible. The Government is consulting on the draft Order and policy in relation to those who are ineligible to be Lay Magistrates under the proposals. In Northern Ireland the Lord Chancellor will appoint on merit, those candidates who have been successful in an open and transparent recruitment and selection process.

The draft Order sets out the offices and occupations held by individuals, and in certain circumstances their spouse, partner or close relative, that are deemed to present a real or perceived conflict of interest, when assessed against the considerations described below. In considering those who should be ineligible for appointment the Lord Chancellor has had regard to

- the perceived authority, influence and profile of the individuals within the listed bodies and their connection with the criminal justice system.
- the interface and association of organisations closely related to and involved in the criminal justice system, and
- the size of the jurisdiction.

The Lord Chancellor will only appoint those who are listed as ineligible in the Order where there is an overwhelming basis to support the view that no perception of conflict of interest would arise. The Lord Chancellor retains discretion in an exceptional circumstance to appoint persons otherwise regarded as ineligible. In such circumstances the candidate must support the application by which he should be regarded as exceptional.

Those offices and occupations that are not included in the draft Order, but contained in the policy document, are those which may warrant careful examination or necessitate safeguards or restrictions being imposed upon the individual Lay Magistrate, to minimise the risk of a conflict of interest arising.

Taking account of consultation responses, the draft Order will be subject to Affirmative Resolution in due course. The policy will also be placed in the library of each House at the same stage.

The Northern Ireland Court Service welcomes views on the contents of the draft Order and policy and in particular on the matters set out in the questionnaire. A reply form is appended to assist you when responding.

APPOINTMENT OF LAY  
MAGISTRATES IN NORTHERN  
IRELAND

ELIGIBILITY POLICY

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## **1. Introduction**

1.1 This document sets out the policy concerning eligibility for appointment as a Lay Magistrate<sup>1</sup> in Northern Ireland and accompanies the draft Lay Magistrates (Eligibility) (Northern Ireland) Order 2004 “the draft Order” (Annex B). The policy concerning recruitment and selection of Lay Magistrates will be set out in a separate document. Where possible, the policy aligns with the non-statutory arrangements published by the Department for Constitutional Affairs in England and Wales for the appointment of magistrates<sup>2</sup> (the nearest equivalent post in England and Wales) by the Lord Chancellor’s Advisory Committees<sup>3</sup> to ensure a consistency of approach and practice. Where there has been a divergence in policy, we have taken account of the small size of Northern Ireland both geographically and demographically, in comparison to the size of the jurisdiction of England and Wales. Criteria employed in determining whether a category should be included in the scope of the draft Order and supporting policy has been to balance factors such as the nature and level of influence or authority that the specified occupation or office has in its involvement in the justice system with the desire to open eligibility for appointment as far as possible.

1.2 Annex C sets out the rationale for offices and occupations prescribed in the draft Lay Magistrate (Eligibility) (Northern Ireland) Order 2004, which would generally render a candidate ineligible for appointment to the office of Lay Magistrate, unless the Lord Chancellor otherwise determines. In respect of the categories contained in the draft Order, it would be unlikely that such a person would be appointed as a Lay Magistrate. Candidates may however make a case on the basis of their particular circumstances, which will be considered before a decision is made upon eligibility.

1.3 Annex D sets out the rationale for offices or occupations that could render a candidate ineligible for appointment where such a role could create a perception of conflict of interest. In these circumstances, each case will be assessed on an individual basis. Candidates may make a case on the basis of their particular circumstances, which will be considered before a decision is made upon eligibility.

## **2. Background**

2.1 The Report of the Review of the Criminal Justice System in Northern Ireland endorsed the continued involvement of lay people in the criminal

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<sup>1</sup> The term ‘Lay Magistrate’ refers to the office of Lay Magistrate in Northern Ireland.

<sup>2</sup> The term ‘magistrate’ refers to the office of magistrate (otherwise known as justice of the peace) in England and Wales.

<sup>3</sup> Directions for Advisory Committees on Justices of the Peace, Department for Constitutional Affairs, 1998 – currently being revised.

justice system and recommended the creation in Northern Ireland of a new office of Lay Magistrate which would be empowered to fulfil a number of judicial functions.

2.2 The Justice (Northern Ireland) Act 2002<sup>4</sup> (“the Act”) provides for the creation of this office. Under section 9 of the Act, the Lord Chancellor is required to appoint Lay Magistrates to each of the 7 county court divisions in Northern Ireland. Section 10 provides for certain functions of justices of the peace to transfer to Lay Magistrates. Section 11 provides for the functions of lay panellists to be discharged by Lay Magistrates.

### **3. The duties of Lay Magistrates**

3.1 These include:

- Sitting, with a Resident Magistrate, in Youth Courts hearing cases in criminal matters involving young persons;
- Sitting, with a Resident Magistrate, in a Family Proceedings Court dealing with civil issues relating to the welfare, care, protection and custody of children;
- Sitting, with a county court judge, as assessors in appeals from Youth Courts;
- Dealing with certain ex parte applications such as Emergency Protection Orders or Recovery Orders;
- Presiding in special courts where a person is brought before a court for the first time; and
- Hearing complaints with a view to issuing summonses and warrants.

### **4. Appointment of Lay Magistrates**

4.1 Recommendation 69 of the Report of the Criminal Justice Review envisages the development of a judiciary that is as reflective of Northern Ireland society, in particular by community background and gender, as can be achieved consistent with the overriding requirement of merit.

4.2 Lay Magistrates will be appointed strictly on **merit** in line with competence based selection criteria. Candidates will be required to possess six key personal qualities: good character; understanding and communication; social awareness; maturity and sound temperament; sound judgment; and commitment and reliability. Issues such as personal conduct and conflicts of interest will also be looked at.

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<sup>4</sup> Justice (Northern Ireland) Act 2002 (c.26)

4.3 The appointment process will encompass the principles of **equal opportunities and equality**. An essential consideration, therefore, will be to encourage applications for appointment from all sections of society in Northern Ireland. The Lord Chancellor will appoint a Lay Magistracy which appears to him to be best qualified regardless of gender, ethnic origin, marital status, sexual orientation, age (see below), political opinion, religion, with or without dependants, and subject to the physical requirements of office, disability<sup>1</sup>.

4.4 While respecting the confidentiality of individual candidates, the appointment process will be **transparent and open** in order to encourage public confidence in the procedures that support the final selection of Lay Magistrates.

## **5. General eligibility considerations**

### **Age**

5.1 The statutory retirement age for Lay Magistrates is 70. As the term of appointment is five years<sup>2</sup>, the Lord Chancellor will not normally appoint a candidate over the age of 65. This is seen as the maximum age where it is possible to allow the individual to sit for a sufficiently long time and to achieve a return on the investment in training.

### **Health**

5.2 The Lord Chancellor will not appoint people whose health prevents them from carrying out the range of duties required. He will, however, welcome applications from people with a disability who are able to carry out the range of lay magisterial duties, either unassisted or with the benefit of certain reasonable adjustments made to court premises or working/sitting arrangements in accordance with section 6 of the Disability Discrimination Act 1995<sup>3</sup>. The policy aims to find ways in which a candidate with a disability, who has been found personally suitable, can be appointed.

### **Personal Conduct and Conflict of Interests**

5.3 Lay Magistrates are expected to have personal integrity, enjoy the respect and trust of others, and the confidence of the public.

5.4 The Act provides statutory bars to appointment in certain circumstances, for example where a person holds a particular office or occupation, or where he has been declared bankrupt or convicted of a

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<sup>1</sup> These categories are set out in s.75 of the Northern Ireland Act 1998 (c.47)

<sup>2</sup> Appointments are renewable

<sup>3</sup> The provisions on access to premises will be fully in force in October 2004

criminal offence punishable by a sentence of imprisonment. In addition to these, the Government takes the view that certain other offences might act as a bar to appointment (see below) and that, where a candidate has an association with another part of the criminal justice system which would cast doubt on his independence<sup>4</sup>, this should also be considered.

5.5 A robust, yet fair, selection policy will be operated which will consider candidates against the categories prescribed in the draft Order, and determine whether there is anything in the information provided by the candidate that could be perceived as a conflict of interest. In *Lawal v Northern Spirit Ltd* (HL, 19 June 2003) (Annex A) the House of Lords ruled that no person should sit in a judicial capacity in circumstances which would lead an objective onlooker with knowledge of all the material facts reasonably to suspect that the person might have a conflict of interest. Candidates will be asked to declare on their application form, and at interview, whether there is “anything in your private or working life, or in your past, or to your knowledge in that of your family or close friends, which, if it became generally known, might bring you or the lay magistracy into disrepute or call into question your integrity, authority or standing as a Lay Magistrate”. Criminal record checks will also be carried out.

## **6. Eligibility**

6.1 Section 9(4) and (5) of the Act provides:

“(4) The Lord Chancellor may by order make further provision about eligibility for appointment to be a Lay Magistrate.

(5) The provision which may be made by an order under subsection (4) includes (in particular) provision that a person may not be appointed to be a Lay Magistrate –

a. If he does not reside or work in, or within a prescribed distance of, the county court division to which the appointment relates,

b. If he, or a person related to or otherwise connected with him in a prescribed manner, holds an office of a prescribed description, has an occupation of a prescribed description or has been selected as a candidate for election to a prescribed body,

c. If a bankruptcy order has been made against him, or his estate has been sequestrated, or he has made a composition or arrangement with, or granted a trust deed for, his creditors, or

d. If he has been convicted of a prescribed offence, unless the Lord Chancellor otherwise determines in the case of a particular person”.

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<sup>4</sup> References throughout the document are to the masculine, for ease of reading, however all references should be interpreted as being to both genders

6.2 The draft Order (Annex B) covers the circumstances which, subject to the statutory discretion given to the Lord Chancellor in section 9(5) of the Act, will act as a bar to appointment. These are:

- Residence,
- The holding of a prescribed office or occupation (by the candidate, his spouse, partner, or close relative), or where the candidate, his spouse or partner previously held a prescribed occupation,
- Bankruptcy, and
- Certain criminal convictions.

### **Residence**

6.3 Article 2(a) of the draft Order provides that, subject to the statutory discretion, the Lord Chancellor will not appoint people as Lay Magistrates in Northern Ireland if they do not live, or work, in or within 15 miles of the county court division to which they wish to be appointed. It is desirable that Lay Magistrates live in Northern Ireland. The rationale for this is that they will be readily available to sign summonses and other emergency orders presented to them by the Police Service for Northern Ireland (“PSNI”), which by their nature, are often required outside office hours.

6.4 Where a person’s residence in Northern Ireland is temporary, by virtue of his occupation, it would not be practicable to appoint him as he would be unlikely to be able to make the required commitment to time and training.

6.5 In England and Wales, magistrates must live within 15 miles of the commission area to which they want to be appointed or within 15 miles of its boundaries<sup>5</sup>. The Courts Bill, upon enactment will, however, remove this statutory residence requirement and the arrangements will be similar to those proposed for Northern Ireland in that magistrates will be assigned to a local justice area, either close to where they live or where they work.

### **Holding of an office or occupation**

6.6 Again, subject to the Lord Chancellor’s statutory discretion, there are a number of offices or occupations, which will act as a bar to appointment, as they could give cause for concern about the perceived impartiality of the candidate (Article 2(b)-(h) of the draft Order). The nature of the work of some candidates would bring them before youth or family proceedings courts in a particular capacity, or would cause them to have regular contact with offenders. An example of this would be a police officer who, if appointed,

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<sup>5</sup> Justices of the Peace Act 1997 (c. 25), s.6

could be seen to be siding with those bringing a case to court when sitting in his capacity as Lay Magistrate. Such a candidate may therefore be perceived as not being an independent and impartial adjudicator and this could cause concern about an individual's right to a fair trial.

6.7 It is not possible to prescribe all the occupations which could be perceived to undermine judicial independence or impartiality, for example one employee of an organisation, a lawyer, may be responsible for bringing prosecutions to the magistrates' courts while another, a computer programmer, may have no connection with the administration of justice at all.

6.8 Therefore, the information provided by each candidate will be considered, both on the application form and at interview, bearing in mind the prescribed categories in the draft Order, to determine whether there is anything which could be perceived to call into question their integrity, authority or standing as a Lay Magistrate.

6.9 Consideration will also be given to the occupations of the spouse or partner of the candidate, and his close relatives<sup>6</sup>. For example, where a candidate is married to a police officer, this could result in a perception of conflict of interest.

6.10 Annex C gives more detail on the offices or occupations generally deemed ineligible by virtue of the draft Order and the position regarding spouses, partners or close relatives of candidates. Annex D sets out examples of other posts or positions which might render the candidate ineligible for appointment, if it was likely that the candidate's occupation or office could create the perception of a conflict of interest.

6.11 As noted above, the Lord Chancellor has a statutory discretion to waive the eligibility criteria in particular cases. This will be carried out on his behalf, to determine whether there are exceptional circumstances outweighing the likely perception that the candidate's occupation or his relationship with a person makes the appointment inappropriate. If such a candidate is recommended, the reasons for doing so will be provided in writing, to the Lord Chancellor. Where appropriate, approval in writing may be sought from a candidate's employer for them to become a Lay Magistrate while continuing in their employment: this letter will be forwarded to the Lord Chancellor with the recommendation for appointment.

6.12 In order to determine whether an office, occupation or activity would render the candidate ineligible for appointment as a Lay Magistrate, all relevant matters will be considered, including:

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<sup>6</sup> These terms are defined in Article 1(2) of the draft Order

- The exact nature of the work or duties undertaken by the candidate to establish his level of involvement in the administration of justice;
- The location at which his duties are carried out – if he appears before the courts or works in court buildings, his duties may be limited to a particular county court division, and this may therefore make him eligible to sit as a Lay Magistrate in another county court division;
- Where the candidate is the spouse, partner or close relative of a person deemed ineligible for appointment by virtue of the draft Order, the exact occupation of the ineligible person, the nature of the relationship and the degree of contact will be looked at. For example, the relative may fall into the category of being a “close relative” but the applicant may have absolutely no contact with him. Conversely, the relative may not be close, but the applicant may have daily contact with him.

### **Bankruptcy**

6.13 Subject to the statutory discretion, an un-discharged bankrupt will not be appointed as a Lay Magistrate (Article 2(i) of the draft Order) as this person may not command the confidence of the public. In the case of those who have been declared bankrupt in the past (in any part of the United Kingdom) but are now solvent, the circumstances surrounding the bankruptcy, when the bankruptcy was declared, the extent to which creditors were paid (particularly if they were local), and whether there is likely to be any adverse reaction if that person is appointed as a Lay Magistrate will be considered. If it is decided to recommend a candidate who has been bankrupt, reasons for doing so will be provided in writing, with the submission to the Lord Chancellor. If a candidate is, or was, the director of a company that was wound up, information about the case may be sought from the Insolvency Service.

### **Criminal convictions**

6.14 Subject to the statutory discretion, the draft Order provides that persons who have been convicted of an offence punishable by a term of imprisonment (including suspended sentences) will generally not be appointed (Article 2(j) of the draft Order). Candidates will be asked, on the application form, to disclose whether they have at any time been convicted or cautioned in Northern Ireland or elsewhere of any offence, and the sentence or other penalty that was passed (whether suspended or not) and it will be considered whether these would impact on their eligibility. Candidates for judicial appointments are not protected by the Rehabilitation of Offenders (Northern Ireland) Order 1978 (by virtue of Article 2(1) of the Rehabilitation of Offenders (Exceptions) (Northern Ireland) Order 1979, which requires that all convictions be disclosed when applying for posts concerning the administration of justice.) Therefore, any convictions which might otherwise be regarded as ‘spent’ should be declared.

6.15 The Police Service for Northern Ireland will be asked to complete a security check on all candidates proceeding to interview. These details, along with the candidate's own declaration on the application form, will be available to the interview panel. This will allow the issue of convictions to be explored at interview. Before deciding whether or not to recommend a candidate for appointment, following interview, the following factors will be considered:

- Whether the conviction falls within Article 2(j) of the draft Order;
- The number of offences;
- The nature and seriousness of the offences;
- When the offences were committed (and the age of the applicant at the time);
- The penalties imposed; and
- Any extenuating circumstances.

6.16 If a candidate with a criminal conviction is recommended, the reasons for doing so, will be provided, in writing, with the submission to the Lord Chancellor together with a comprehensive note of the circumstances of the offences and the exceptional reasons for recommending such a candidate. In considering offences outside Article 2(j) of the draft Order, the Lord Chancellor will not generally appoint:

- A person who is a persistent offender;
- A candidate who has incurred six penalty points or more for one offence within the twelve months prior to appointment;
- A candidate who has accumulated nine penalty points or more from offences where three points were imposed in respect of each offence within the twelve months prior to appointment;
- A candidate who has been disqualified from driving for less than twelve months will not generally be recommended for appointment for at least the next five years;
- A candidate who has been disqualified from driving for twelve months or more will not generally be recommended for appointment for at least the next ten years.

6.17 If a candidate fails to disclose an offence, this will raise a question on his honesty and integrity. The candidate will be asked to explain his omission before deciding on the issue.

6.18 Candidates are required to give details of pending criminal proceedings and should inform the appointing authority of the offence with which they have been charged and, if known, an indication of the date when the case might be heard. Candidates who become subject to criminal proceedings must inform the appointing authority immediately of the nature

of the offence and an indication of when and where the case might be heard. It is important, under these circumstances, that candidates inform the appointing authority of the outcome if their case is heard at any time while their application for appointment is under consideration or if they are successful in gaining a post.

## ANNEX A

### LAWAL -v- NORTHERN SPIRIT LIMITED [2003] UKHL 35

#### SUMMARY

In *Lawal v Northern Spirit Ltd* one of the barristers who was presenting a case against Mr Lawal (on behalf of Mr Lawal's employer) before the Employment Appeals Tribunal (EAT) had previously sat in the capacity of part-time judge alongside one of the lay members who was hearing the appeal in that case.

Mr Lawal complained that this constituted a violation both of his right to a hearing by an impartial tribunal under Article 6(1) of the European Convention on Human Rights and of his common law right to have his appeal decided by an unbiased judge.

The House of Lords ruled that, although no bias actually occurred in the *Lawal* case, what had happened could undermine public confidence in the system and should therefore be discontinued. In their Lordships' opinion, restrictions should be introduced on part-time judges appearing as counsel before a panel of the EAT consisting of one or two lay members with whom they have previously sat.

This principle will equally apply to the eligibility of persons to be lay magistrates, in the sense that no person should sit in a judicial capacity in circumstances which would lead an objective onlooker with knowledge of all the material facts reasonably to suspect that the person might be biased.

# Lawal (Appellant) v. Northern Spirit Limited

HOUSE OF LORDS SESSION 2002-03  
[2003] UKHL 35

on appeal from: [\[2001\] EWCA Civ 1218](#)

## APPELLATE COMMITTEE

LAWAL (APPELLANT)

v.

NORTHERN SPIRIT LIMITED

ON

THURSDAY 19 JUNE 2003

ORDERS OF REFERENCE, ETC.

DIE MERCURII 13> NOVEMBRIS 2002

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

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DIE MARTIS 18> FEBRUARII 2003

Lawal (Appellant) v. Northern Spirit Limited (England)—The appeal of Adekunle Adejare Lawal was presented. The respondents having notified their intention not to enter appearance, it was ordered that Standing Order V (*Security for costs*) be dispensed with. It was further ordered that the statement and appendix be prepared in consultation with the appellant by the *amicus curi*' nominated by Her Majesty's Attorney General; and that, in accordance with Standing Order VI, the statement and appendix be lodged on or before 1st April

DIE MARTIS 1> APRILIS 2003

Lawal (Appellant) v. Northern Spirit Limited—The appeal was set down for hearing and referred to an Appellate Committee.

DIE MARTIS 29> APRILIS 2003

Lawal (Appellant) v. Northern Spirit Limited—The petition of the Lord Chancellor's Department praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

Appeal Committee—The 43rd Report from the Appeal Committee was agreed to and the following Order was made—

Lawal (Appellant) v. Northern Spirit Limited—That the petition of the Lord Chancellor's Department that they might be heard or otherwise intervene in the said appeal be allowed.

MINUTES OF PROCEEDINGS

DIE JOVIS 8> MAII 2003

*Present:*

L. Bingham of Cornhill	L. Millett
L. Nicholls of Birkenhead	L. Rodger of Earlsferry
L. Steyn	

The Lord Bingham of Cornhill in the Chair.

The Orders of Reference are read.

The Committee deliberate.

Counsel and Parties are called in.

Mr A. Lawal appears in person as the appellant.

Mr J. Cavanagh QC appears for the Lord Chancellor's Department, in intervention.

Miss Sarah Moore appears on behalf of Her Majesty's Attorney General as *amicus curi'*.

Mr Lawal indicates that he is content that Miss Moore should address the Committee.

Miss Moore heard.

Mr Lawal heard.

Mr Cavanagh heard.

Miss Moore heard in reply.

Mr Lawal further heard.

Further and fully heard.

Bar cleared; and the Committee deliberate.

A draft Report is laid before the Committee by the Lord Steyn.

The Report is considered and agreed to, *nemine dissentiente*.

*Ordered*, That the Lord Steyn do make the Report to the House.

*Ordered*, That the Committee be adjourned *sine die*.

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# 41st REPORT

from the Appellate Committee

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[19 June 2003]

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## ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill (Chairman), Lord Nicholls of Birkenhead, Lord Steyn, Lord Millett and Lord Rodger of Earlsferry) have met and have considered the cause *Lawal v. Northern Spirit Limited*. We have heard the appellant in person and counsel on behalf of the Lord Chancellor's Department in intervention. We have heard counsel on behalf of Her Majesty's Attorney General as *amicus curi'*.

1. This is the considered opinion of the Committee.

### *I. The Issue.*

2. The issue in this appeal is whether, in circumstances in which a Queen's Counsel appearing on an appeal before the Employment Appeal Tribunal ("EAT") had sat as a part-time judge in the EAT with one or both of the lay members (called the "wing members") hearing that appeal, the hearing before the EAT was compatible with Article 6 of the European Convention on Human Rights and the common law test of bias. It is not suggested that there was actual bias. The question is whether in the view of a fair-minded and

informed observer there was a real possibility of subconscious bias on the part of the lay member or lay members.

3. The question is important because the current practice of the Lord Chancellor's Department is to appoint leading counsel, who are Recorders and who have experience of employment law, to sit as part-time judges in the EAT. They undertake to sit at least 20 days a year. Until called in question in the present case, it was thought that there were no restrictions on the freedom of such individuals to appear as counsel before the Tribunal of which they are part-time members. The challenge before the House, as it was before the EAT and the Court of Appeal, is not tied to the particular circumstances of the case. Indeed, the House has before it only the bare facts as incorporated in the issue outlined. The attack is on the system. If it is well founded the current practice must come to an end.

## *II. The case before the Employment Tribunal.*

4. Given the systemic issue involved, it is possible to summarise the background briefly. The appellant brought a claim for racial discrimination on the ground of the failure of his employers to produce a reference following the termination of his employment. The employers put forward a substantive defence. The Employment Tribunal dismissed the case on the grounds that the Race Relations Act 1976 only gives rights to *current* employees. In so deciding the Employment Tribunal followed a decision of the Court of Appeal in *Adekeye v Post Office (No. 2)* [1997] IRLR 105, the correctness of which was subsequently the subject of an appeal heard by the House of Lords in *D'Souza v London Borough of Lambeth* [\[2003\] UKHL 33](#).

## *III. The case before the EAT.*

5. Initially the appellant raised before the EAT the broader contention that it was objectionable in principle for the EAT to hear argument from one of its own members. Once it became clear that the Recorder had previously sat with one of the wing members the broader question was no longer pursued before the EAT and the Court of Appeal. The issue became confined to the particular systemic challenge described.

6. On 10 October 2001 the appeal came before the EAT. The Recorder, who had previously sat with one of the lay members of the EAT then sitting, appeared as counsel for one of the parties. The appellant raised the so-called Recorder objection. Without ruling on the objection the tribunal adjourned the appeal to be heard before a tribunal differently constituted. On 18 December 2001 a tribunal chaired by Lindsay J heard the appeal. He sat with two wing members with whom the Recorder had not sat. Strictly, the Recorder objection no longer arose. But the tribunal was rightly anxious to determine the point of procedural principle. The tribunal heard the procedural issue first. It reserved its decision on this point. But the tribunal proceeded to hear the substantive appeal. In a reserved decision the EAT dismissed the procedural objection on the ground that in the eyes of a fair-minded observer who had considered the facts "there is no real possibility that the

Employment Appeal Tribunal is biased where the only objection is that either one or both of the lay members hearing an appeal have previously sat with a Recorder who, as counsel, is appearing for a party in that appeal": [2002] IRLR 228, 235 at para 34. In respect of the substantive appeal the tribunal held that it was bound by the decisions of the Court of Appeal in *D'Souza* and *Adekeye* and accordingly dismissed the appeal.

#### *IV. The Court of Appeal.*

7. On appeal to the Court of Appeal it was agreed to hear the Recorder objection first. The reason for this course was that the case of *D'Souza* was then pending in the House of Lords: the decision in that case was likely to be determinative of the substantive issue. (The House has recently given its decision in *D'Souza* [\[2003\] UKHL 33](#)). By a majority the Court of Appeal dismissed the appeal on the Recorder objection: [2002] EWCA Civ 1218; [2002] ICR 1507. Lord Phillips of Worth Matravers MR and Mummery LJ gave the judgments of the majority. Pill LJ gave a dissenting judgment.

8. The essential thrust of the reasoning in the Court of Appeal must be identified. Giving the first judgment, Mummery LJ concluded (para 20):

"The Recorder objection amounts to no more than an assertion that a lay member might possibly be more disposed to accept the submissions of one party's legal representative than those of the other side, as a result of the professional experience of having sat on the tribunal with him in his capacity as a part-time judge. That is merely a speculative and remote possibility based on an unfounded and, some might think, condescending assumption that a lay member sitting with another judge on the hearing of an appeal cannot tell the difference between the impartial decision-making role played by a tribunal panel of a judge and two lay members and the adversarial role of the partisan advocates appearing for the parties."

The Master of the Rolls expressed his agreement with this view as follows (para 50):

". . . there are no grounds for doubting the capacity of a lay member of an Employment Appeal Tribunal to reach a decision uninfluenced by the fact that he has, on a previous occasion, sat with the advocate for one of the parties, in a judicial capacity. Lay members normally serve on the Tribunal for many years, once appointed. They will have experience of some of those who appear before them, and they are likely to be those who appear often in that forum, occasionally sitting as judges. They will rightly perceive them as advocates who occasionally sit as judges, not as judges who occasionally stand down to act as advocates. It is not reasonable to apprehend that the lay member will, even subconsciously, react more favourably to such an advocate

than to one who does not sit part-time in the Tribunal."

The Master of the Rolls added a qualification. He said [para 52]:

"... A recorder agrees to sit at least 20 days in the year. There is no maximum to the days that he can sit, if so requested. I consider that there would be more substance to the concerns raised by Mr Lawal if, in this specialised Tribunal, advocates were requested to sit with a frequency that might lead lay members to view them as judges, appearing part-time as advocates, rather than the reverse."

9. Pill LJ thought that a part-time judge who subsequently appears as an advocate "is likely to be treated by lay members with an additional degree of authority" (para 36). He explained (para 39):

"The fair-minded and informed lay observer will readily perceive, I have no doubt, the collegiate spirit in which the Appeal Tribunal operates and the degree of trust which lay members repose in the presiding judge. It is in my judgment likely to diminish public confidence in the administration of justice if a judge who enjoys that relationship with lay members, with the degree of reliance placed on his view of the law, subsequently appears before them as an advocate. The fair-minded observer might well reasonably perceive that the litigant opposed by an advocate who is a member of the Tribunal and has sat with its lay members is at a disadvantage as a result of that association. A litigant's doubt about impartiality . . . would, for the reasons given, be a legitimate doubt. In my view, the procedure does not inspire public confidence."

These contrasting views reflect the essential terrain of the debate before the House.

#### *V. The Appeal to the House.*

10. By leave given by an Appeal Committee the appellant appealed to the House of Lords. As before the EAT (chaired by Lindsay J), and in the Court of Appeal, counsel acting as *amicus curi*' argued the case for the appellant, and counsel for the Lord Chancellor's Department put forward the case for maintaining the status quo. The appellant added brief supplementary observations. The respondent had no interest in the proceedings and was not represented. But in the result the House has had the advantage of full adversarial argument by counsel appearing as *amicus curi*' and counsel for the Lord Chancellor's Department.

#### *VI. Part-time Judges and Lay Members of the EAT.*

11. In order to make a judgment on the issues the way in which the system

operates must be described. In 2000 the Lord Chancellor, pursuant to section 24 of the Employment Tribunals Act 1996, appointed five Queen's Counsel, who were already Recorders, to be part-time judges of the EAT. The present position is that there are nine such part-time judges. They all have experience of employment law. As in the case of full-time judges of the EAT, part-time judges normally sit with two lay members both at preliminary hearings and on full appeals. At present the terms of appointment of part-time judges do not place any restriction on them appearing as counsel in the EAT. No criticism is made, or can be made, of the conduct of the Recorders who relied on the view, supported by the Lord Chancellor's Department, that they were under no restriction. They were all entitled to act on the current understanding.

12. The function of the EAT is to hear appeals on questions of law from Employment Tribunals: section 21(1) of the Employment Tribunals Act 1996. What may amount to a question of law in this context is not narrowly circumscribed. For example, the question whether there was evidence on which an Employment Tribunal could have come to a certain conclusion may depending on the setting be a question of law: *Harvey on Industrial Relations and Employment Law*, Vol. 5, para 1630. On all matters which may properly come before it the EAT acts by a majority: the judge may be outvoted by the two lay members on the question of law involved.

13. The laymen sitting on a particular tribunal are all experienced in industrial relations. The judge, or part-time judge is normally assisted by two lay members: one from a panel drawn from employers and one drawn from a panel drawn from employees: see section 22(2) and section 25 of the Employment Tribunals Act 1996. The wing members are never lawyers and have no legal training. On the other hand, their standing is high: it is currently the highest judicial appointment open to a person who holds no legal qualification.

#### *VII. The test for bias.*

14. In *Porter v. Magill* [2002] 2 AC 357 the House of Lords approved a modification of the common law test of bias enunciated in *R v Gough* [1993] AC 646. This modification was first put forward in *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700. The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In *Porter v Magill* Lord Hope of Craighead explained:

"102. . . . The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to

resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726-727:

'85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Magill v Porter* has at its core the need for "the confidence which must be inspired by the courts in a democratic society": *Belilos v Switzerland* (1988) 10 EHRR 466, at para 67; *Wettstein v Switzerland* (Application No. 33958/96) para. 44; *In Re Medicaments*, at para 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* (2000) 200 CLR 488, 509, at para 53, by Kirby J when he stated that "a reasonable member of

the public is neither complacent nor unduly sensitive or suspicious".

*X. The analogies and their weight.*

15. One does not come to the issue with a clean slate. On the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem. For present purposes three analogies in ascending order of importance can be considered. First, the current Terms and Conditions governing the appointment of Recorders, published in December 2002, contains the following restriction (para 26):

"A Recorder who is an MP, Parliamentary candidate or local Councillor should not sit as a Recorder within their own constituency or the area covered by the council."

While such a case is very different from the one before the House, the reason for the restriction is instructive. The rationale must be to protect public confidence in the integrity of the administration of justice. Section 38(1) of the Solicitors Act 1974 is also instructive. It provides that "it shall not be lawful for any solicitor who is one of the justices of the peace for any area . . . to act in connection with proceedings before any of those justices as solicitor . . . of any person concerned in those proceedings." Where the area is divided into petty sessional divisions the restriction does not apply to proceedings before justices acting for a petty sessional division for which the solicitor does not ordinarily act. Again, the purpose must be to guard against the erosion of public confidence in the administration of justice.

16. The second analogy is somewhat closer to what is under consideration in the present case. Paragraph 30 of the Policy, Procedure & Terms and Conditions of Service of Recorders published in April 2002 provides:

". . . In particular, [a barrister or solicitor advocate] should not in any circumstances appear in any court before a jury which includes persons who were members of a jury panel serving at that court when they sat there as a Recorder, or vice versa."

Paragraph 23 of the Recorder Terms and Conditions published in December 2002 fleshed out this specific restriction into a more general principle. It reads as follows:

"The governing principle is that no person should sit in a judicial capacity in any circumstances, which would lead an objective onlooker with knowledge of all the material facts reasonably to suspect that the person might be biased. As a general rule, therefore, a barrister or solicitor advocate ought not to sit as a Recorder or to appear in a Magistrates' Court, County Court or a High Court or Crown Court centre if he or she is liable to be embarrassed in either capacity by doing so."

It is, however, not in doubt that the specific prohibition previously published

is comprehended under the general principle and remains in full force. This prohibition appears to contemplate the possibility that a member of a jury who has served at a court at which the Recorder was the presiding judge would have looked to him for directions (including directions on the law) and viewed him with a degree of deference and respect, and that that previous relationship may cause such a jury member to accord to the Recorder's submissions, when he subsequently appears before him as an advocate, with an additional degree of influence.

17. The comparison between, on the one hand, a member of the jury and a presiding judge and, on the other hand, a lay member of the EAT and the presiding judge is clearly far from exact. Yet there are similarities between the two, namely, that neither the jury member nor the wing member is legally qualified and that both necessarily look to the judge for guidance on the law when adjudicating on the case before them. The rule of practice applicable in criminal trials is designed to avoid a situation similar to that which exists in the present case, namely that lay individuals participating in the administration of justice should not have the added burden of having individuals whom they have come to regard as judges appear before them as advocates advancing arguments on behalf of a particular party. It is true, of course, that unlike the relationship between the jury member and the presiding judge, the lay member and the judge of the EAT are colleagues sharing a professional relationship. Counsel appearing as *amicus curi*' has, however, pointed out that this factor may cut both ways: whilst it may lessen the impact of the influence exerted by the EAT judge over a wing member it creates a collegiate relationship between them, which is not present in the relationship between the jury member and the presiding judge, and which may be no less worrying in the eyes of the fair-minded observer. Finally, this rule of practice cannot be dismissed as a rule adopted out of an abundance of caution. In *R v Hoyland-Thornton* [1984] Crim LR 561 the Court of Appeal Criminal Division (Lord Lane LCJ, Mustill and Otton JJ) treated a breach of the rule as a material irregularity in a criminal trial and declined to apply the proviso. The conviction was quashed. The court took the view that the position where prosecuting counsel was addressing jurors whom in the past he had directed on matters of law in his capacity as a part-time judge must never be allowed to occur.

18. The third analogy is the most important. It relates to the Terms and Conditions of Service and Terms of Appointment of Part-Time Chairmen of Employment Tribunals. The edition of October 2000 provides (para 16):

"... in order to ensure that there are no allegations of bias, no part-time Chairman may ... appear as an advocate before any employment tribunal in the whole of [the] region [to which they have been assigned to sit as a Chairman]."

A similar restriction appears in the edition of September 2001, at para 16, and the edition of March 2003, at para 15. The restriction applies equally to barristers and solicitors appointed as Chairmen of Employment Tribunals. Counsel for the Lord Chancellor's Department sought to counter the

persuasive force of this analogy in two ways. He suggested that the rule was simply adopted out of abundance of caution. This contention is not supported by the language of the documents and the settled general restrictive rule which it imposes. Counsel also relied on an observation of Lindsay J (EAT judgment, at para 33(8)) that the rule was made applicable to barristers because it was thought "invidious to have different rules for the two branches of the profession". This is an unconvincing explanation: it is more likely that the general rule was introduced because it was considered necessary.

## *XI. Conclusions.*

19. Counsel for the Lord Chancellor's Department argued that the central fallacy in the argument of the *amicus curi'* on unconscious bias is that the wing members are unable to differentiate between the neutral judicial function and the partisan advocacy function. That is, however, to put her argument higher than she in fact put it: the threshold is only a real possibility of unconscious bias. Counsel for the Lord Chancellor's Department acknowledged that a legally qualified judge, when sitting judicially, is likely to have particular influence upon the lay members because the role of the EAT is to determine questions of law. But counsel submitted that it does not mean that the wing member will assume that any submissions made by the part-time judge are necessarily right. Again, that is putting the test higher than it need be put. Counsel emphasised in detail the very high calibre and standing of wing members of the EAT. On this aspect his submissions can readily be accepted. He also submitted that, if the appeal is allowed, Recorders may decline to serve as part-time judges in the EAT, and that the EAT may lose the services of part-time judges who are expert in the field of employment law. This is a realistic possibility. But counsel readily accepted that, if the present practice is in breach of the principle laid down in *Porter v Magill*, it cannot continue.

20. The correct analysis is as follows. One starts by identifying the circumstances which are said to give rise to bias. In the present case the evidence is limited to the facts set out at the beginning of this opinion, namely that a Queen's Counsel appearing on an appeal before the EAT had sat as a part-time judge in the EAT with one or both lay members hearing the appeal. In such cases there may be substantial variations in the extent to which the part-time judge and the wing members had sat together in the EAT and how recently. These differences are, however, not material. The House must concentrate on a systemic challenge and apply a principled approach to the facts on which it is called to rule.

21. The principle to be applied is that stated in *Porter v Magill*, namely whether a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge. The observer may also be

credited with knowledge that a Recorder, who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve. Despite the differences between the two cases, the observer is likely to attach some relevance to the analogy because in both cases the judge gives guidance on the law to lay men. But the observer is likely to regard the practice forbidding part-time judges in the Employment Tribunal from appearing as counsel before an Employment Tribunal which includes lay members with whom they had previously sat as very much in point. The Editor of the Industrial Relations Law Review has argued "that a rule to the same effect is even more necessary in the EAT": [2002] IRLR 225. In favour of this view there is the fact that the EAT hears only appeals on questions of law while in the Employment Tribunal the preponderance of disputes involve matters of fact. The observer would not necessarily take this view. But he is likely to take the view that the same principle ought also to apply to the EAT.

22. In the EAT Lindsay J was alive to the possibility that "some . . . practices will fall prey to increasing sensitivity" (para 33(10)). What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps "be expected to be aware of the legal traditions and culture of this jurisdiction" as was said in *Taylor and Another v Lawrence and Another* [2003] QB 528, per Lord Woolf CJ, at pp 548-549, at paras 61-64. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J he would be "neither complacent nor unduly sensitive or suspicious": compare also [2002] IRLR 225 (second col.).

23. The current President of the EAT (Lindsay J), a former President of the EAT (Mummery LJ) and the Master of the Rolls, a judge with special knowledge of the judicial system, took a different view. Nevertheless, on this point we find ourselves in agreement with Pill LJ, who also has great experience in the EAT. Like Pill LJ in the Court of Appeal we consider that the present practice in the EAT tends to undermine public confidence in the system. It should be discontinued. It follows that the present practice in the EAT should be assimilated to that in the Employment Tribunal by introducing a restriction on part-time judges appearing as counsel before a panel of the EAT consisting of one or two lay members with whom they had previously sat.

#### *XI. The outcome.*

24. On the facts of the present case the rule was not breached. The EAT presided over by Lindsay J contained no lay members with whom the Queen's Counsel had sat. On the other hand, Mr Lawal has succeeded on the issue of principle raised by the Recorder objection.

#### *Recommendation*

25. In these circumstances we would allow the appeal to the extent of declaring that the appellant was entitled to succeed on the Recorder objection and remit the matter to the Court of Appeal to rule on the substantive issue taking into account the decision of the House in *D'Souza* [\[2003\] UKHL 33](#). We so recommend.

DRAFT STATUTORY RULES OF NORTHERN IRELAND

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**2004 No.**

**JUSTICE**

**Lay Magistrates (Eligibility) (Northern Ireland) Order 2004**

*Made*

*2004*

*Coming into operation in accordance with  
Article 1(1) of this Order*

The Lord Chancellor, in exercise of the powers conferred on him by sections 9(4), (5) and (6) of the Justice (Northern Ireland) Act 2002 <sup>(a)</sup> and of all other powers enabling him in that behalf, hereby makes the following Order, a draft of which has been approved by each House of Parliament:

**Title, commencement and interpretation**

**1.** -(1) This Order may be cited as the Lay Magistrates (Eligibility)(Northern Ireland) Order 2004 and shall come into operation on the day after the day on which it is made.

(2) In this Order –

“close relative” means, in relation to a particular person, the father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law or step child of that person and any such relative of a person who is a partner of that person;

“partner” means, in relation to a particular person, another person (whether of a different sex or the same sex) who is not a close relative; but with whom that person is living in an enduring family relationship;

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<sup>(a)</sup> 2002 c.26

## **Eligibility of persons for appointment as Lay Magistrates**

2. Unless the Lord Chancellor otherwise determines in the case of a particular person, no person shall be appointed to be a Lay Magistrate –

(a) if he does not reside or work in, or within 15 miles of, the county court division to which the appointment relates;

(b) if he is -

(i) a member of the Police Service of Northern Ireland<sup>(a)</sup>,

(ii) a member of the Police Service of Northern Ireland Reserve<sup>(b)</sup>,

(iii) the Police Ombudsman for Northern Ireland<sup>(c)</sup>,

(iv) the Director, Deputy Director, or Assistant Director of the Assets Recovery Agency<sup>(d)</sup>,

(v) the Director, or Deputy Director of Public Prosecutions for Northern Ireland<sup>(e)</sup>,

(vi) a member of Her Majesty's Regular Armed Forces,

(vii) a probation officer<sup>(f)</sup>,

(viii) a traffic warden<sup>(g)</sup>;

(c) if he is the spouse or partner of -

(i) a member of the Police Service for Northern Ireland,

(ii) a member of the Police Service for Northern Ireland Reserve,

(iii) the Police Ombudsman for Northern Ireland,

(iv) the Director, Deputy Director, or Assistant Director of the Assets Recovery Agency,

(v) the Director, or Deputy Director of Public Prosecutions for Northern Ireland,

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<sup>(a)</sup> Established by section 1(1) of the Police (Northern Ireland) Act 2000 (c.32)

<sup>(b)</sup> Established by section 1(3) of the Police (Northern Ireland) Act 2000

<sup>(c)</sup> Established by section 51 of the Police (Northern Ireland) Act 1998 (c.32)

<sup>(d)</sup> Established by section 1 of the Proceeds of Crime Act 2002 (c.29)

<sup>(e)</sup> Appointed under Article 4 of the Prosecution of Offences (Northern Ireland) Order 1972 (1972 No.538 N.I.1)

<sup>(f)</sup> Appointed under Article 5 of the Probation Board (Northern Ireland) Order 1982 (S.I.1982/713)

<sup>(g)</sup> Appointed under section 71 of the Police (Northern Ireland) Act 2000

- (vi) a member of Her Majesty's Regular Armed Forces,
  - (vii) a probation officer or a traffic warden who (in each case) performs his duties in the same county court division as that to which the appointment may be made;
- (d) if he is a close relative of -
- (i) the Director, Deputy Director, or Assistant Director of the Assets Recovery Agency,
  - (ii) the Director, or Deputy Director of Public Prosecutions for Northern Ireland,
  - (iii) a member of the Police Service for Northern Ireland, a member of the Police Service for Northern Ireland Reserve, or a probation officer who (in each case) performs his duties in the same county court division as that to which the appointment may be made;
- (e) if he, his spouse or partner is a former-
- (i) member of the Police Service for Northern Ireland,
  - (ii) member of the Police Service for Northern Ireland Reserve,
  - (iii) Police Ombudsman for Northern Ireland,
  - (iv) Director, Deputy Director, or Assistant Director of the Assets Recovery Agency,
  - (v) Director, or Deputy Director of Public Prosecutions for Northern Ireland,
- unless a period of more than two years has elapsed since that person ceased to have such an occupation;
- (f) if a bankruptcy order has been made against him or his estate has been sequestrated or he has made a composition or arrangement with, or granted a trust deed for, his creditors; or
  - (g) if he has been convicted of an offence punishable by a term of imprisonment.

## EXPLANATORY NOTE

*(This note is not part of the Order)*

Under section 9(1) of the Justice (Northern Ireland) Act 2002 the Lord Chancellor is required to appoint persons to be Lay Magistrates for each county court division in Northern Ireland.

This Order provides that, unless the Lord Chancellor otherwise determines in the case of a particular person, a person will not be eligible for appointment as a Lay Magistrate if -

- (1) he does not reside or work in (or within 15 miles of) the county court division to which the appointment relates (Article 2(a));
- (2) he is the holder of a specified office or has a specified occupation (Article 2(b));
- (3) certain persons related to or connected with him hold a specified office or have a specified occupation (Article 2(c) and (d));
- (4) he or certain persons related to or connected with him have held a specified office or specified occupation in a preceding two year period (Article 2(e));
- (5) a bankruptcy order has been made against him or his estate has been sequestrated or he has made a composition or arrangement with, or granted a trust deed for, his creditors (Article 2(f)); or
- (6) he has been convicted of an offence punishable by a term of imprisonment (Article 2(g)).

## **ANNEX C**

### **OFFICES AND OCCUPATIONS PRESCRIBED IN THE DRAFT LAY MAGISTRATES (ELIGIBILITY) (NORTHERN IRELAND) ORDER 2004**

Where possible, this policy aligns with non-statutory arrangements published by the Department for Constitutional Affairs (“DCA”) for the appointment of magistrates in England and Wales. Where there has been a divergence in policy, the rationale is explained. Divergence has been necessary with regard to certain occupations and offices to take account of Northern Ireland as a geographical entity and also its small size as a jurisdiction.

The draft Order sets out the offices and occupations held by individuals, and in certain circumstances their spouse, partner or close relative, that are deemed to present a real or perceived conflict of interest, when assessed against the considerations described below. In considering those who should be ineligible for appointment the Lord Chancellor has had regard to

- The perceived authority, influence and profile of the individuals within the listed bodies and their connection with the criminal justice system;
- The interface and association of organisations closely related to and involved in the criminal justice system; and
- The size of the jurisdiction.

#### **1. MEMBERS OF PARLIAMENT**

The following office holders are disqualified:

- Members of the UK Parliament;
- Members of the European Parliament;
- Members of the Northern Ireland Assembly;
- Members of the Irish Parliament;
- Members of the Scottish Parliament;
- Members of the National Assembly for Wales;
- Prospective candidates for election to any of the above Parliaments or Assemblies; and
- Persons employed as paid agents of political parties seeking representation in any of the above Parliaments or Assemblies.

There is a need to ensure a separation of powers between the legislature and the judiciary, and for this reason, MPs, prospective candidates for election and their paid agents are ineligible for appointment as Lay Magistrates in Northern Ireland. Members of Parliaments often sit on Boards and committees which have a role in formulating and shaping policy which may eventually impact on the administration of justice. In addition, MPs may

become aware of issues or personalities at a constituency level which could, in theory, come before them in court if appointed.

In England and Wales, MPs, prospective candidates for election, and their agents may be appointed to a petty sessions area outside their constituency. This would not be feasible in Northern Ireland as the jurisdiction is much smaller. Also, because of the nature of the political situation in Northern Ireland, MPs and MLAs often attract a high public profile and it is considered that their appointment as Lay Magistrates would create the potential for the perception of a conflict of interest.

## **2. THE POLICE SERVICE OF NORTHERN IRELAND (“PSNI”)**

Members of the PSNI, the PSNI Reserve and their spouses or partners are disqualified from appointment. Where the candidate is a former police officer, or the spouse or partner of a former police officer, the candidate may only be appointed if two years or more have elapsed since that employment was held. Widows or widowers of police officers are eligible for appointment and are not subject to this time limit. Close relatives of members of the PSNI or PSNI Reserve may be appointed to a different county court division to the one in which the officer serves.

A police officer’s role is inextricably linked to the prosecution side of the administration of justice in Northern Ireland. It would therefore be inappropriate for them to be appointed given their association with the prosecuting authorities.

Similar considerations will apply to members of other police forces and whilst it is impossible to be entirely prescriptive in this area, as a matter of policy the disqualifications outlined above will also extend to other ‘police officers’ for the same reasons (i.e. the close link with investigatory and prosecutorial functions.)

In England and Wales, the Lord Chancellor will not appoint serving police officers or their spouses or partners. Close relatives of police officers may be appointed to a different petty sessions area to the one in which the officer or employee works.

## **3. THE NORTHERN IRELAND POLICING BOARD**

The Northern Ireland Policing Board is an independent public body made up of 19 political and independent members with a remit to secure for all the people of Northern Ireland an effective, efficient and impartial police service which has the confidence of the whole community. The Board’s work covers the actions of everyone who works for the Chief Constable – police

officers, police support staff and traffic wardens. The Board also has other specific responsibilities, including: overall accountability for police effectiveness in tackling crime; reviewing trends in police recruitment; monitoring of under-represented communities in the PSNI; appointing independent community observers to the police selection process; and appointing senior police officers and senior civilian employees of the PSNI.

Members of the Northern Ireland Policing Board and their spouses or partners are disqualified from appointment. Where the candidate is a former member of the Policing Board, or the spouse or partner of a former member, the candidate may only be appointed if two years or more have elapsed since the person held office. Employees of the Policing Board and their spouses or partners are disqualified from appointment. No restriction is placed on the eligibility of close relatives of members or employees of the Policing Board.

In England and Wales there is no automatic bar to appointment.

#### **4. DISTRICT POLICING PARTNERSHIPS (“DPPs”)**

District Policing Partnerships are partnerships between the District Council and representatives of the local community. The role of a DPP is to consult with the community, establish, in conjunction with the local district commander of the PSNI, policing priorities and monitor police performance against the local policing plan. DPPs also act as a general forum for discussion and consultation on matters affecting the policing in the district.

Members of the District Policing Partnerships are disqualified from appointment. Their role involves them working closely with the local district commander of the PSNI on matters concerning local policing. It is considered that to ensure perceptions of independence that members of DPPs should be disqualified.

Spouses or partners of members of the DPPs may be appointed to a different county court division to the one in which the member serves.

There is no equivalent in England and Wales.

#### **5. THE POLICE OMBUDSMAN FOR NORTHERN IRELAND**

The office of Police Ombudsman provides an independent and impartial police complaints system for the people and police in Northern Ireland. The office investigates complaints about police behaviour but not complaints against traffic wardens or civilian employees of the PSNI. The Ombudsman employs investigating officers who have full police powers whilst investigating complaints, and who may be called upon to give evidence in court.

The Police Ombudsman for Northern Ireland, his or her spouse or partner and his or her close relatives are all disqualified from appointment. A former Police Ombudsman, his or her spouse or partner may be considered for appointment if a period of two years or more has elapsed since the person held office.

Employees of the Police Ombudsman for Northern Ireland and their spouses or partners are also disqualified. No restriction is placed on the appointment of close relatives of employees, or on the appointment of former employees or their spouses or partners.

The Police Complaints Authority Chairman, Chief Executive and members of staff in England and Wales do not have the same powers as the Police Ombudsman for Northern Ireland or her staff. They are not disqualified in England.

From 1 April 2004, a new Independent Police Complaints Commission will replace the Police Complaints Authority in England and Wales and will have the powers to investigate complaints separately from the police. It is not considered appropriate in Northern Ireland for the Ombudsman and his or her spouse or partner or close relative to be a Lay Magistrate at this stage. This is to ensure that there is no perception of conflict of interest. The policy in Northern Ireland is more restrictive because of the high profile attached to the Police Ombudsman and her investigating officers, and the public perception of their role.

## **6. THE ASSETS RECOVERY AGENCY (“ARA”)**

The ARA was established under the Proceeds of Crime Act 2002 to co-ordinate activity across the UK in recovering the proceeds of unlawful conduct. Its remit includes: supporting the police, customs and other agencies in financial investigations; investigating cases leading to post-conviction confiscation orders and/or applying to the courts for such orders; enforcing certain confiscation orders; using a new power of “civil recovery” in the High Court for the recovery of the proceeds of unlawful conduct; using powers of taxation where there are reasonable grounds to suspect that there is income, gains or profits resulting from criminal conduct; and seeking and executing requests for international assistance in obtaining restraint and confiscation. The employees of the ARA include financial investigators, lawyers and casework administrators. Police and customs officers may also be seconded to the agency. Investigating officers have full police powers whilst on duty and can apply to the courts, including justices of the peace, for various disclosure, search and seizure orders.

The Director, Deputy or Assistant Director of the ARA, his spouse or partner and his close relatives are disqualified from appointment. Where the candidate is a former Director, Deputy Director, or Assistant Director or the spouse or partner of a former Director, Deputy Director or Assistant Director he may only be appointed if two years or more have elapsed since the person held office. Employees, or persons seconded to ARA, and their spouses or partners are disqualified from appointment (close relatives, however, are eligible). Former employees and the spouses or partners of former employees are eligible if a period of two years or more has elapsed since that position was held.

These posts are akin to police investigating posts and the role that the ARA performs could create a perceived conflict of interest in relation to the duties of a Lay Magistrate.

## **7. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NORTHERN IRELAND**

The role of the Director of Public Prosecutions for Northern Ireland is to provide an independent, fair and effective prosecution service in Northern Ireland. His functions include: responsibility for the prosecution of all indictable offences and for such summary offences as he considers should be dealt with by him; representations to the court in relation to applications for bail; representing the Crown in any appeal; and prosecuting certain offences on behalf of government departments. The Director, and Deputy Director, have a province-wide remit and are responsible to, and under the direction of the Attorney General. The Justice (Northern Ireland) Act 2002 provides for the creation of a new public prosecution service, built upon the existing Department of Public Prosecutions, which will undertake all prosecutions currently carried out by the police. Members of staff of the Department of Public Prosecutions, which includes Assistant Directors, are generally allocated to a particular circuit office (which has a specific geographical jurisdiction) and deal with proceedings in that area.

The Director and Deputy Director, their spouses or partners and their close relatives are disqualified from appointment. Where the candidate is a former Director or Deputy Director, or the spouse or partner of a former Director or Deputy Director, the candidate may only be appointed if two years or more have elapsed since the person held office.

Members of staff of the Department of Public Prosecutions in Northern Ireland, and their spouses or partners, are disqualified from appointment. Close relatives may be appointed to a different county court division to the one in which the employee works. Where the candidate is a former member of staff, or the spouse or partner of a former member of staff, the candidate

may only be appointed if two years or more have elapsed since he, or his spouse or partner, held that employment.

In England and Wales, members of staff of the equivalent organisation, the Crown Prosecution Service, are disqualified. The Director of Public Prosecutions in England and Wales would be covered by restrictions placed on members of staff. Spouses, partners or close relatives of members of staff are disqualified from the same petty sessions area in which the member of staff works.

The policy applied in Northern Ireland is slightly more rigorous (in that spouses or partners are disqualified) because of the potential for perceived conflict of interest given the proximity of the role within the prosecution side of the administration of justice.

## **8. HER MAJESTY'S REGULAR ARMED FORCES**

Members of HM's Regular Armed Forces and their spouses or partners are disqualified from appointment. No restriction is placed on the appointment of close relatives or former members (or their spouses or partners).

In England and Wales, members of HM Forces (excluding the Territorial Army) are not normally eligible unless they are able to give an assurance that there is no realistic prospect of them being posted abroad in the near future. The Advisory Committee will seek written confirmation of this from the candidate's commanding officer. The spouse or partner may also be disqualified if they intend to move with the serving member to another posting abroad.

The policy in Northern Ireland aligns broadly with England and Wales but takes account of several differences: members of HM Forces (with the exception of the Home Service Battalions of R.I.R) are generally posted to Northern Ireland on short tours of duty (and would therefore be unable to make the required commitment to time and training). The army in Northern Ireland also undertakes a policing role in support of the PSNI. It would therefore be inappropriate to appoint members of HM Forces given the potential for perceived conflict of interest which might arise.

## **9. NORTHERN IRELAND PRISON SERVICE**

Northern Ireland Prison Service staff and their spouses or partners are disqualified from appointment (this includes prison officers and administrative staff). Where the candidate is a former member of staff of the Prison Service, or the spouse or partner of a former member, the candidate may only be appointed if two years or more has elapsed since that

employment was held. There is no restriction on the appointment of close relatives of Prison Service staff.

This is in line with England and Wales, where the Lord Chancellor will not generally appoint a person, or their spouse or partner, who is employed in a penal establishment, by an organisation which is contracted to carry out work in such an establishment, or who is involved in the transport of prisoners. Such a person would, however, be considered if their duties and the place in which they are performed are not incompatible with those of a magistrate.

## **10. YOUTH JUSTICE AGENCY**

The Youth Justice Agency (“the Agency”) replaced the Juvenile Justice Board with effect from 1 April 2003. The Agency provides three main services:

- Community services – the Agency operates a network of child centred services, in partnership with other agencies, which work with and support young people involved in crime or at risk of involvement in crime;
- Youth conferencing – this service brings together the offender, the offender’s family, the police, the victim (if they so wish) and other professional people to develop a plan of action tailored to the individual circumstances of the offence and the offender;
- Custodial services – the Agency provides custodial facilities for children referred to it by the courts.

Members of staff of the Agency and their spouses or partners are disqualified from appointment. Where the candidate is a former member of staff of the Agency, or the spouse or partner of a former member, the candidate may only be appointed if two years or more has elapsed since that employment was held. There is no restriction on the appointment of close relatives of members of staff.

Restrictions also apply in England but in Northern Ireland the disqualification is wider than in England. It will extend in Northern Ireland to all members of staff, as the work of the Youth Justice Agency is so closely linked to young offenders (who appear before the youth courts, in which Lay Magistrates would adjudicate.) It would be inappropriate to appoint given the role of the Agency and the potential for perceived conflict of interest with the duties of a Lay Magistrate.

## **11. NORTHERN IRELAND COURT SERVICE**

The Northern Ireland Court Service is the Secretary of State for Constitutional Affairs department in Northern Ireland and facilitates the conduct of the business of courts, and certain tribunals, throughout the jurisdiction. Northern Ireland Court Service staff are generally disqualified from appointment. Spouses, partners or close relatives of members of staff may be appointed to a different county court division to the one in which the member of staff works.

In England and Wales, magistrates' courts staff and relatives employed in the magistrates' courts service and magistrates' court committee staff will not generally be appointed to a court covered by the committee of which the person is a member. Relatives may be appointed to the court at which the member of staff works, however the Advisory Committee will give this careful consideration and will seek clearance from the Chairman of the Magistrates' Courts Committee under which the candidate is employed.

## **12. PROBATION BOARD FOR NORTHERN IRELAND**

The Probation Board for Northern Ireland ("PBNI") has the status of a non-departmental public body with appointments being made to the Board by the Secretary of State for Northern Ireland. The Board employs probation officers (who are trained social workers), probation service officers (unqualified workers who are mainly employed in the community service order scheme) and probation community officers (who are youth and community trained and involved with community development). The main activities of the PBNI are the supply of information to the courts through pre-sentence reports, the supervision of offenders made subject to community disposals, and the provision of social welfare services in prisons.

Members of the PBNI and their spouses or partners are disqualified from appointment. There is no restriction placed on the appointment of Board members' close relatives, or on the appointment of former Board members or their spouses or partners.

Members of staff of the PBNI are disqualified from appointment. Their spouses, partners or close relatives may be appointed to a different county court division to the one in which the member of staff works. There is no restriction on the appointment of former members of staff or their spouses or partners.

Board members and members of staff of PBNI are involved in developing and operating policies relating to the supervision of offenders in the community and the reduction of re-offending. Members of staff work

closely with the courts and offenders, and would have access to information on offenders throughout the jurisdiction. The appointment of Board members or members of staff of PBNI could give cause for concern over the perception of their impartiality.

In England and Wales, there are 42 regional probation boards, each being part of the National Probation Service. Members of a probation board may be appointed but should step down from proceedings for prosecution for breach of community penalties if deemed necessary. Probation officers and probation assistants are disqualified. Their spouse or partner is also disqualified from appointment to the same petty sessions area in which the probation officer or assistant carries out his duties.

### **13. PRACTISING BARRISTERS OR SOLICITORS**

Practising barristers or solicitors in Northern Ireland are disqualified from appointment. No restrictions are placed on the eligibility of spouses, partners or close relatives of practising barristers or solicitors, or on the appointment of former barristers or solicitors, their spouses or partners.

In England and Wales barristers and solicitors may be appointed as magistrates, however the Advisory Committee will place a number of restrictions on the matters they can adjudicate on, for example they should not adjudicate on any matter that involves their law firm and they should refrain from any professional activities that might create confusion between their position as a legal professional and as a magistrate or suspicion that influence or favour may be as a result of their official position.

The policy in Northern Ireland differs in that practising barristers and solicitors are disqualified. The rationale behind this is the small jurisdiction and the size of the legal profession compared to England and Wales. Solicitors and barristers may travel to all courts throughout Northern Ireland and could be well known to those appearing before them if they were eligible to sit as a Lay Magistrate. This could lead to a perception that counsel appearing before a Lay Magistrate, who was himself a practising solicitor or barrister, may present a case differently than if the Lay Magistrate was not legally qualified. In addition, the appointment of legal professionals as Lay Magistrates contradicts the concept of lay involvement.

### **14. GUARDIANS AD LITEM**

Guardians ad Litem are appointed by the courts in specified family proceedings and adoption proceedings and their role is to represent the child before the court, safeguarding their interests and ensuring that their wishes or feelings are made clear to the court. Guardians ad Litem are qualified social

workers with considerable experience of child care matters and a sound understanding of family law.

Guardians ad Litem and their spouses or partners are disqualified from appointment. No restriction is placed on close relatives, former Guardians ad Litem or their spouses or partners.

The equivalent office in England and Wales is the children's guardian. There is no bar to the appointment of a children's guardian as a magistrate, however the Department of Constitutional Affairs consider that it would be inappropriate for them to appear before their own Bench. If the guardian did not actually appear before that Bench, but had dealings with that court, then it would be inappropriate for the guardian to serve on the family panel.

In Northern Ireland, the bulk of a Lay Magistrate's work will be in the family court. The rationale behind the difference in policy with England and Wales is that Guardians ad Litem would appear regularly before the family courts in Northern Ireland and in theory could find themselves appearing before their own Bench. The disqualification is extended to all county court divisions as the remit of Guardians ad Litem extends throughout Northern Ireland.

## **15. COURT SECURITY OFFICERS**

Court security officers may either be designated members of the Northern Ireland Court Service or persons employed as such by private companies. Their powers and duties include: searching persons in, or entering, courthouses; excluding or removing persons from courthouses; restraining persons in courthouses to maintain order; and seizing and retaining certain specified articles. The role of court security officer involves a very close connection with the courts and persons appearing before the courts. They also have certain "police type" powers within the court environment.

Court security officers are disqualified from appointment. Their spouses, partners or close relatives may be appointed a different county court division to the one in which the court security officer carries out his duties.

In England and Wales, the guidance applies to security officers in general (defined as a person whose job is to ensure the security of another person or a building). When considering applications from candidates who are security officers, the exact nature of the work, the place at which it is carried out, the likelihood of the candidate having to appear as a witness before the Bench to which appointment may be made, and the public perception of such a person sitting as a magistrate should be borne in mind.

The Lay Magistrates (Eligibility) (Northern Ireland) Order 2004 is restricted to court security officers only as the exclusion of all security officers would be unnecessarily restrictive. However applications from security officers (other than court security officers as specified in the Order) will be carefully considered, and will take into consideration the exact nature of a candidate's employment.

## **16. SUMMONS SERVERS AND PROCESS SERVERS**

Summons servers are appointed to a particular petty sessions district in Northern Ireland and can serve summonses relating to proceedings being brought in that district or on a defendant or witness residing in that district. Process servers are appointed for each county court division. They serve copy civil bills and endorse particulars of service on the original civil bill.

Summons and process servers are appointed by the Northern Ireland Court Service and are disqualified from appointment as the role that they discharge involves a close connection with the business of the courts and a knowledge of persons appearing before the courts. Their spouses, partners or close relatives may be eligible for appointment to a different county court division to the one in which the summons or process server is employed.

In England and Wales, the guidance makes no reference to the eligibility of summons or process servers.

## **17. STORE DETECTIVES**

Store detectives are disqualified from appointment. Their spouses or partners may be appointed to a different county court division to the one in which the store detective is employed. No restriction is placed on the eligibility of close relatives. Store detectives may use a citizen's power of arrest to detain a person suspected of shoplifting and will often be called upon to present evidence to the court.

In England and Wales, the Lord Chancellor will not appoint store detectives.

## **18. TRAFFIC WARDENS**

Traffic wardens come under the direction of the Chief Constable of the PSNI and are appointed by the Northern Ireland Policing Board. The criminal courts deal with the enforcement of on-street parking and traffic wardens may be required to write statements or reports to be presented in court and to attend court to give evidence. Traffic wardens are based in police stations

throughout Northern Ireland and operate in a particular PSNI district command unit.

Traffic wardens are disqualified from appointment because the role that they discharge involves a close association with the police and the courts. The spouse or partner of a traffic warden may be eligible for appointment to a different county court division to the one in which the traffic warden works. There is no restriction on the eligibility of close relatives of traffic wardens, former traffic wardens, their spouses or partners.

In England and Wales, the Lord Chancellor will not appoint a traffic warden or their spouse or partner. Close relatives may be appointed to a different petty sessions area from the one in which the traffic warden works. The policy in Northern Ireland is less restrictive as the spouse or partner of a traffic warden may be appointed, albeit to a different county court division. A general disqualification of the spouses or partners of traffic wardens would be unnecessarily restrictive.

## **ANNEX D**

### **POSTS, OR POSITIONS, WHICH COULD RENDER A CANDIDATE INELIGIBLE FOR APPOINTMENT**

As discussed in paragraph 6.7 of the policy document, it is not possible to prescribe all the occupations which could be perceived to undermine judicial independence or impartiality. This Annex sets out occupations or posts which, depending on the nature of the duties, could render a candidate ineligible for appointment as a Lay Magistrate. Each application will be considered on its own merits and assessed to establish if a conflict of interest or potential perception of conflict exists. Where a new post or position is established subsequent to the issue of this document, the same general guidance will be followed to determine each case upon an individual basis.

In order to determine whether an office, occupation or activity would fall into this category, each application will be examined and all relevant matters considered to establish the candidate's level of involvement in the administration of justice, including:

- The exact nature of the work or the precise nature of the duties; and
- The location at which his duties are carried out.

Where possible, efforts will be made to put in place safeguards to avoid a conflict of interest arising. For example, a Lay Magistrate will be required to declare an interest and step down in a particular case in which they have prior knowledge, or it may be possible to transfer the Lay Magistrate to another county court division, subject to the residency requirement.

Examples of occupations or posts requiring close examination include:

#### **1. CIVIL SERVANTS**

A number of civil servants closely linked with the administration of justice are already disqualified by virtue of the draft Order. Certain members of staff of other government departments may be disqualified if their responsibilities are incompatible with those of a Lay Magistrate. Civil servants may be employed within departments of the Northern Ireland Executive, or within a central government department (such as the Northern Ireland Office) or within executive agencies. Civil servants may also be seconded from departments to public bodies.

There are a large number of government departments in Northern Ireland who may bring prosecutions directly to the magistrates' court and the civil servants who would deal with these proceedings may be so closely

linked to the administration of justice as to make it inappropriate to appoint them to be Lay Magistrates. Each application will be considered on its own merits to determine whether the appointment of such a person could lead to a real or apparent danger of conflict of interest, however it would be unnecessarily restrictive to disqualify all the staff of that Department.

Examples of departments or public bodies who regularly bring prosecutions to the courts include:

- Benefit Investigation Service of the Department for Social Development;
- Fraud and Prosecutions Branch of the Department of Health, Social Services and Public Services;
- Driver and Vehicle Testing Agency;
- Car Park Enforcement section of the Department for Regional Development;
- HM Customs and Excise;
- Trading Standards Service of the Department of Enterprise, Trade and Investment;
- Health and Safety Executive
- Northern Ireland Housing Executive;
- Fisheries Conservancy Board;
- Equality Commission.

There are also a number of public bodies closely linked with the justice system in Northern Ireland. Some of these are already disqualified by virtue of the draft Order, (for example the Youth Justice Agency, the Northern Ireland Policing Board, the Probation Board for Northern Ireland and the Police Ombudsman) however the staff of some other public bodies may appear before the court or may hold high profile appointments. In some cases the role discharged could create a perceived conflict in relation to the duties of a Lay Magistrate. Examples of these would include the Health and Safety Executive, the Northern Ireland Human Rights Commission, the Life Sentence Review Commissioners, the Parades Commission and the Equality Commission.

The appointment of civil servants as magistrates is not incompatible with Article 6 of the European Convention of Human Rights as long as there is a separation of powers between the Executive and the judiciary. Advice will be given to civil servants, following appointment, that they should not sit on any cases involving a department of the Northern Ireland Executive or a central government department having a function in Northern Ireland, other than the Department of Public Prosecutions. It is not possible to be entirely prescriptive and civil servants sitting as Lay Magistrates should use their discretion to excuse themselves from hearing cases in which there may be a real or apparent conflict of interest.

## **2. LOCAL GOVERNMENT**

In Northern Ireland there are 26 local authorities made up of city councils, borough councils and district councils. In general, the powers and functions of all 26 authorities are the same. These are by no means as extensive as those given to local authorities in England and Wales (education and housing for example remain with central government in Northern Ireland). They do, however, have responsibility for, amongst other things, environmental health, noise, nuisances, consumer protection, litter prevention, the enforcement of building regulations and the licensing of street trading. Some members of staff of these local authorities may therefore deal with the enforcement of fines and penalties, and could appear before the magistrates' courts.

Employees of a local authority, appointed as Lay Magistrates, should not sit in any proceedings brought by, or against their employer. It is not possible to be entirely prescriptive and Lay Magistrates should use their discretion to excuse themselves from hearing cases in which there may be a real or apparent conflict of interest. This guidance would also apply to councillors, however their circumstances may merit closer consideration as they may have a higher profile in the community. There is no overwhelming reason why spouses or partners of councillors or employees of local authorities should be disqualified, but again each case will be considered on its own merits.

## **3. SERVING AND FORMER MEMBERS OF THE JUDICIARY**

Under section 9(12) of the Justice (Northern Ireland) Act 2002, the Lord Chief Justice, Lords Justices of Appeal, judges of the High Court and county court judges may exercise any function of a Lay Magistrate in relation to any matter arising within any county court division. Serving members of the judiciary are not disqualified by virtue of the draft Order, however it is not anticipated that there will be any degree of interest given that these persons already hold paid judicial office. Former members of the judiciary are eligible for appointment, however each case will be considered to determine whether a period of more than 2 years should elapse between the candidate giving up judicial office and being appointed as a Lay Magistrate.

The spouse or partner of a serving member of the judiciary, or a close relative, should be appointed to a different county court division to the one in which the member of the judiciary is assigned where possible. They may not sit together in the same court as this could create the potential for a perceived conflict of interest.

#### **4. SHERIFFS**

Sheriffs are appointed, by the Secretary of State for Northern Ireland, to each city and county with a term of office of one year. The duties of a sheriff are mainly civic and ceremonial: attending civil functions, deputising for the Mayor at certain functions, and greeting members of the Royal Family or Heads of State when visiting the county on official business.

The Sheriff also has a number of functions when High Court judges sit at a Crown Court venue in their county (with the exception of Belfast where the Crown Court is in continuous session). On these occasions, the Sheriff will normally receive the High Court judge when he arrives at the courthouse and escort him to his chambers. The Sheriff will sit on the Bench with the judge on the first day of the sitting, and on subsequent days at the discretion of the judge (such requests are extremely rare). The Sheriff also offers to host a luncheon on the first day of the sitting. If the judge agrees, the sheriff may, as his discretion, invite guests to the function and invitations are normally sent to: the High Court judge, the county court judge for the division, any district judge or Resident Magistrate who may be sitting at the courthouse on that day, the PSNI Commander for the area, the Commanding Officer of the army regiment stationed in the area, the Commanding Officer of the Royal Irish Regiment for the area, senior and junior counsel for the prosecution and defence, and the circuit Assistant Director for the Department of Public Prosecutions.

A Lay Magistrate can undertake the office of Sheriff, however he may not sit as a Lay Magistrate in the county court division for which he is sheriff during his term of office.

#### **5. SOCIAL WORKERS AND SOCIAL CARE WORKERS**

Social workers, and social care workers, are mainly employed in Northern Ireland by Health and Social Services Trusts, but there are also a number employed by probation offices, charities, and voluntary organisations. Social care workers differ from social workers in that they do not have a recognised professional social work qualification. In order to determine whether a social worker or social care worker is eligible for appointment, the candidate's precise duties should be considered. Social workers whose duties result in them having a significant level of contact with those who have appeared, or are likely to appear, in the court to which they might be appointed, may be ineligible for appointment. However it may be possible to appoint them to another county court division providing that they meet the residency requirement.

## **6. EDUCATION WELFARE OFFICERS**

Education welfare officers help parents to ensure that their children of school age attend school regularly. Where they are unable to facilitate a change in the child's behaviour, resulting in his regular attendance at school, they may apply to the court for an order to compel the child to attend or may prosecute the parent or carer. If proceedings are necessary, the education welfare officer will write background reports on children whose parents are taken to court, prepare the case and give evidence in court.

In considering an application from an education welfare officer, it may be necessary to consult the candidate's Chief Education Welfare Officer or Chief Executive of the Education and Library Board or other similar official for the area to ascertain if there is any possibility of conflict between the candidate's role and the duties of a Lay Magistrate.

## **7. PERSONS UNDERTAKING A VISITING ROLE TO POLICE STATIONS OR PRISONS**

### **a. Custody Visitors**

The Independent Custody Visiting Scheme is run by the Northern Ireland Policing Board. Custody visitors are volunteers from the local community who, as part of a team called a custody visiting team, visit police stations unannounced to observe, comment and report back to the Policing Board on how people, held in custody, are being looked after by the police. Custody visitors can visit designated police stations equipped with a custody suite and may also now visit persons detained under the Terrorism Act 2000. The Policing Board recommends that custody visitors must have no direct involvement in the criminal justice system as this helps to maintain their independence.

Candidates who undertake lay visiting to a police station will only be eligible for appointment if they undertake to give up this voluntary work on appointment. Confirmation of this will be sought from the candidate following appointment. The appointment of candidates who undertake this role may create the potential for a perceived conflict of interest as they may also come into contact with persons who may later appear before them.

## **b. Board of Visitors**

The Prison Act (Northern Ireland) 1953 provides for the appointment of a Board of Visitors for each prison. At least two of the visitors are required to be Justices of the Peace (under the Justice (Northern Ireland) Act 2002 this function will remain with Justices of the Peace and will not transfer to Lay Magistrates). The function of the Board of Visitors is to visit prisons or juvenile justice centres. They can hear complaints or requests from prisoners, ensuring that they are dealt with in the appropriate manner, and may discuss matters of a sensitive or personal nature.

Membership of a board of visitors will not disqualify a candidate but advice will be given, following appointment, about the propriety of adjudicating on certain cases. Members should not sit on any case arising from offences committed in, or originating in, the establishment for which they are Board members. They should also not adjudicate on prisoners who are known to them.

## **8. CHARITIES OR VOLUNTARY ORGANISATIONS WITH A CLOSE CONNECTION TO THE ADMINISTRATION OF JUSTICE**

There a number of charities and voluntary organisations which help people affected by crime, or offenders. Their employees or volunteers may find that their duties could make them ineligible for appointment as they could lead to a perception of conflict of interest. Examples of these organisations include:

### **a. Victim Support**

Victim Support currently runs a Witness Service, based in Laganside Courts Complex in Belfast, where staff and volunteers provide support and information about the court process to witnesses, victims and their families before, during and after the trial (where children are witnesses, the NSPCC is the lead agency – see below). By April 2005, this service will be extended to adult witnesses in all criminal courts in Northern Ireland.

A candidate who performs voluntary work for a witness support scheme at a court in the same county court division to which they are seeking appointment, will only be appointed if they undertake to give this work up on appointment (Confirmation of this will be sought from the candidate following appointment). Membership of a witness support scheme outside the county court division to which they are seeking appointment, or carrying out other work for a victim support scheme, will not render the candidate ineligible but advice will be given to the candidate, following appointment, about the propriety of adjudicating on particular cases.

**b. National Society for the Prevention of Cruelty to Children (“NSPCC”)**

The NSPCC specialises in child protection and the prevention of cruelty to children. Its work includes community based child protection teams who investigate abuse, and provide counselling and support to parents and children. One of the areas which would bring them into contact with the courts is the child witness scheme, where they help children develop the confidence they need when giving evidence in court and explain the procedures and language used in court.

The Report of the Review of the Criminal Justice System in Northern Ireland recommended the roll out of the child witness scheme to all criminal court venues in Northern Ireland, including youth courts and this is now being implemented.

In deciding whether a candidate who is an employee of the NSPCC is eligible, the nature of the work, any requirement to attend courts, the frequency of attendance, and the likely perception of such an appointment will be considered. If appointed, employees must not adjudicate on child cruelty cases.

**c. Northern Ireland Association for the Care and Rehabilitation of Offenders (“NIACRO”)**

NIACRO is a voluntary organisation which works closely with adult and young offenders and with the families of offenders and prisoners. It also supports the development of holistic resettlement programmes for offenders to reduce the risk of re-offending in the future.

The work of NIACRO employees or volunteers may bring them into contact with offenders. Therefore the precise nature of their duties and the level of contact they have with persons who may appear before the youth court must be considered. A similar charity, to which this policy will apply, is Extern which works to rehabilitate persons affected by crime, by running hostels for people returning to the community following a criminal conviction and offering training for ex-offenders and probationers who have completed a prison sentence or community service. Similarly, persons who undertake prison after care work for other organisations will also warrant careful consideration.

**d. Appropriate Adults**

Appropriate adults are volunteers called to police stations to act in support of either a juvenile detainee or a detainee who may be mentally

disordered or otherwise mentally vulnerable. The Report of the Review of the Criminal Justice System in Northern Ireland recommended that those who volunteer to act as appropriate adults should receive training by a wide range of agencies, including training on the needs of those who have learning or other disabilities, who are suffering from a mental disorder, children's rights, and broad human rights awareness.

There is no bar to the appointment of a person who acts as an appropriate adult, although he may not adjudicate in the case of a person for whom he has acted. He may sit in the youth court if he either does not act as an appropriate adult in his own county court division, or if he sits in the youth court in a different county court division to the one in which he carries out his voluntary duties, provided he fulfils the residency requirement. This is because he would have to stand down when a person he had dealt with came before the court, and the probability of this happening would be high due to the frequency with which he would deal with youths questioned by the police.

## **9. OTHER CHARITIES AND ORGANISATIONS**

Staff or volunteers for a number of other charities and organisations may have reason to appear before the court or deal closely with one or more of the groups on which Lay Magistrates may adjudicate, such as children. Each application will be considered on its own merits to determine whether there could be any conflict between a candidate's duties or their voluntary work and the role of a Lay Magistrate. Examples of these bodies include:

### **a. Ulster Society for the Prevention of Cruelty to Animals ("USPCA")**

The USPCA employs welfare officers who investigate alleged cases of cruelty and bring prosecutions to court. When recommending employees of the USPCA, the level of conflict that may arise, particularly if the employee is required to attend court will be determined. If appointed, such employees must not adjudicate on animal cruelty cases, or appear before their own court.

### **b. Area Child Protection Committees ("ACPC")**

Each Health and Social Services Board in Northern Ireland has an ACPC which determines the strategy for safeguarding children and develops policies and procedures. The ACPC is a multi-agency forum made up of members from the main statutory and voluntary agencies involved in child protection in the Board's area.

There is no bar to the appointment of members of the ACPC, and they may adjudicate in the family proceedings court, however it would be prudent for them to disclose their potential interest to the parties in every case on

which they sit and invite the parties to waive any objection. If the parties did not waive the objection, then the Lay Magistrate would be required to stand down from the case.

**c. Children’s Commissioner for Northern Ireland**

The aim of the Commissioner is to safeguard and promote the rights and best interests of children and young persons. His work can be grouped under three main headings: promoting children’s rights, complaints and legal action, and research and inquiries. The Commissioner can deal with individual complaints from children and young people, or their parents or guardians, about government services which impact on those aged under 18. Where appropriate, he can start or take over legal proceedings on behalf of a child or young person if a general principle is at stake. The Commissioner may also undertake formal or informal inquiries (during formal inquiries he may summons witnesses, obtain documents and enter premises). Employees of the Children’s Commissioner may be appointed as Lay Magistrates however they must not sit in any proceedings in which they have prior knowledge.

**d. Relationship and personal counsellors**

Organisations such as Relate offer counselling or support to couples and families, particularly those who are separating or divorcing to resolve disputes. The Samaritans and other personal counselling organisations provide confidential emotional support for people who are experiencing feelings of distress or despair.

Membership of a personal counselling organisation does not disqualify a candidate from appointment, however advice will be given, following appointment, about the propriety of adjudicating on particular cases. Candidates undertaking work as a mediator or a Relate counsellor have direct contact with clients who may later appear in a family proceedings court. Consequently they may not be appointed to serve in the county court division in which they mediate or counsel.

**e. Citizens Advice Bureaux (“CAB”)**

The Citizens Advice Bureau offers free, confidential, impartial and independent advice on areas such as debt and consumer issues, benefits, housing, legal matters, employment, and immigration. Advisers can help fill out forms, write letters, negotiate with creditors and represent clients at a court or tribunal.

Volunteering for a CAB will not render a candidate ineligible, however the precise nature of their duties will need to be determined to ensure they are compatible with those of a Lay Magistrate. Advice will also be given,

following appointment, about the propriety of adjudicating on particular cases.

**f. Advice Centres and Community Groups**

There are a large number of community based advice centres throughout Northern Ireland, both formal and informal. The role of advice centres is to encourage and support community development by providing a wide range of programmes including community resource and support, social inclusion, welfare rights and advocacy, community relations and community leadership.

There is no bar to the appointment of candidates who are members of advice centres and community groups, however the aims and objectives of the group will need to be considered to ensure that candidates are appointed who will not have the potential for a perceived conflict of interest. Advice will be given, following appointment, on the propriety of adjudicating on particular cases.

**g. Crime Prevention Panels and Neighbourhood Watch**

Candidates who are members of a Crime Prevention Panel, a Neighbourhood Watch, or a group carrying out a similar function, may continue to work with these bodies in their own personal capacity. Advice will be given, however, not to allow themselves to be put in a position of defending or explaining the sentencing policy of the courts. They will also be advised not to associate with any remarks of the Crime Prevention Panel criticising any aspects of the administration of justice.