

## Professor Kate Malleson

### 'If not now, when?'

The announcement that Lord Justice Thomas has been appointed the next Lord Chief Justice ends speculation that the new head of the judiciary in England and Wales might be a woman. Three candidates had emerged as frontrunners – Lord Justice Thomas, Lord Justice Leveson and Lady Justice Hallett. [The Times](#) notes that 'In what has been a closely fought contest, Sir John has pipped Lady Justice Hallett and Lord Justice Leveson to the post.'

We will never know how the appointment panel reached its decision. But one important question is whether it might have decided differently if [schedule 13 of the Crime and Courts Act 2013](#) had already been in force. This states that the so-called 'tipping' or 'tie break' provisions of [s.159 Equality Act 2010](#) can apply in the judicial appointments process. These allow employers who are assessing two equally well-qualified candidates to appoint the candidate from an under-represented group, such as a woman. Being 'pipped to the post' might be thought of as exactly the sort of situation which s.159 was designed for.

But when the legislation was going through Parliament it was suggested that the provisions were intended to be applied in the case of 'essentially indistinguishable' candidates. If this definition is adopted then it is hard to see how it will ever be applied in relation to senior judicial appointments and it certainly wouldn't have been used in this case. All three candidates were highly qualified but as would be expected of those with over 30 years experience as lawyers and judges, they brought with them a different range of skills and experiences. Lord Justice Thomas is better known internally within the judiciary for his effectiveness as President of the Queen's Bench Division, while Lord Justice Leveson and Lady Justice Hallett have experience gained from their outward facing work as respective chairs of the [press regulation](#) and [7/7 London Bombing](#) inquiries.

Lord Justice Thomas is clearly well qualified for the post. But we can legitimately question why, given the pressing need to improve diversity in the judiciary, the presence of a highly qualified female candidate whom many regarded as the front runner was not seen as a god sent opportunity to show the commitment of the senior judges to change. And responsibility for the failure to change the composition of the judiciary must rest with the judges themselves because they, ultimately, still dominate the judicial appointments process, particularly in relation to the most senior appointments.

The dreary statistics about the proportion of women in the judiciary and the glacial pace of change are well known. The position of women in the Supreme Court (1 of 12) near the bottom of the international league table should be a source of national shame. The position on the Court of Appeal (4 of 35) and the High Court (18 of 108) is little better. The Crime and Courts Act 2013 is the latest in a long line of provisions designed to promote diversity in the judiciary. It tinkers around the edges, for example by placing the Lord Chief Justice and the Lord Chancellor under [a duty to take steps to encourage diversity](#) as the judicial appointments commission has been since it was set up in 2006.

The one note of dissent on the Delegated Legislative Committee that brought the Act into force this month was from the Conservative MP, Douglas Carswell: 'the regulations

do not alter the fact that it will be members of the judicial elite deciding who should be among their number.' Little will change unless and until there is real determination amongst that judicial elite to prioritise the need for greater diversity.