



# Equal Merit Provision

# JAC Equality Impact Assessment

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## **Introduction**

1. The Crime and Courts Act (CCA) received Royal Assent on 25 April 2013. Schedule 13, Part 2, of the CCA provides for measures to promote consideration of diversity in the appointments process. For one of those measures, to be known as the Equal Merit Provision, paragraph 10 of Schedule 13 clarifies that making selections “solely on merit” (as provided for in section 63(2) of the Constitutional Reform Act 2005) does not prevent a candidate being chosen on the basis of improving diversity when there are two candidates of equal merit.

Specifically the Act amends section 63 of the Constitutional Reform Act 2005 (CRA) by inserting a new subsection (4) as follows:

- “(4) Neither “solely” in subsection (2), nor Part 5 of the Equality Act 2010 (public appointments etc), prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within—
- (a) the group of persons who hold offices for which there is selection under this Part, or
  - (b) a sub-group of that group.”

## **Summary**

2. This Equality Impact Assessment has been produced in support of the change in legislation, the subsequent [public consultation](#) regarding the implementation of the Equal Merit Provision, and the publication of the Commission’s policy.

3. We have considered the impact of the new policy against our statutory obligation under the Equality Act 2010 to assess all new or revised policies for fairness in respect of each of the nine protected characteristics.

4. The policy has the aim of advancing equality of opportunity for candidates who are from under-represented groups within the judiciary and therefore has an overall positive impact.

5. The Judicial Appointments Commission (JAC), with others, is committed to increasing the diversity of the judiciary, while continuing to select “solely on merit”.

## **Stakeholder consultation and engagement**

6. The JAC launched an online consultation on the application of the Equal Merit Provision on 17 May which closed on 5 August 2013.

53 responses were received of which 49 provided substantive answers to the questions posed.

The table below lists the breakdown from whom responses were received

<b>Category</b>	<b>Number of Respondents</b>
Judiciary (including representative bodies)	28
Academics	3
Equality and Diversity Organisations	5
Legal professions (including representative bodies)	14
Members of the public/Others	3

Full details of all responses received are set out in the [‘Response to JAC Consultation’](#).

## **Equality duties**

7. The Equality Act 2010 applied a general duty to public authorities to have due regard to the need to –

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are –

- race;
- sex;
- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- religion and belief; and
- sexual orientation.

8. The JAC therefore has a legal duty to investigate how any changes to policy are likely to impact on those with one or more of the protected characteristics and where a potential advantageous or disadvantageous effect is identified.

9. In addition to the requirements set out in the Equality Act 2010, the JAC is also subject to diversity duties as stated in section 64(1) of the CRA.

### **Encouragement of diversity**

10. The Commission, in performing its functions under Part 4 of the CRA, must have regard to the need to encourage diversity in the range of persons available for selection for appointments<sup>1</sup>.

### **Methodology and evidence**

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<sup>1</sup> The new section 63(4) CRA applies to actual selection of candidates, and not merely to their “availability for selection”.

11. In addition to the responses from the consultation, we have also considered the statistical information available.

12. The Judicial Office collects and publishes data on age, race and gender of members of the judiciary.

13. The JAC collects, monitors and publishes data provided by candidates on age, gender, race, disability, sexual orientation and religion and belief. Neither the JAC nor the Judicial Office collects data on marriage and civil partnership, gender reassignment, or pregnancy and maternity.

14. Data from the 2011 Census, Detailed Characteristics, Office of National Statistics (ONS) 2012 will be used to demonstrate under representation.<sup>2</sup>

15. In December 2013, independent legal advice was received on the developing policy, answering specific questions in relation to particular aspects of the policy to confirm the Commission's approach is lawful.

### **The Equal Merit Provision**

#### **The current process**

16. The current JAC selection process requires candidates to complete an application form, including a self assessment, providing evidence to demonstrate the qualities and abilities of the post. Depending on the post that they are applying for they will either be shortlisted by a paper sift (conducted by a panel consisting of independent and judicial members) or candidates will be required to sit an online qualifying test. Those candidates deemed most meritorious at this stage will be invited to a selection day. This will consist of a role-play, situational questions or a presentation depending on the role. All candidates will then take part in an interview which will be conducted by independent and judicial members.

17. The Commission, sitting as the Selection and Character Committee (SCC) will take all the information gathered throughout the selection process and recommend the most meritorious candidates for appointment.

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<sup>2</sup> The data will be drawn from an appropriate age range depending on the post-qualifying experience necessary, and the parts of the UK relevant to the eligibility of the individual posts(s).

18. Diversity currently plays no part in the selection process as candidates' personal details are not provided for consideration by the Commission. The Commission only considers the information before them.

### **The revised process**

19. In the revised process, where the Commission considers two or more candidates to be of equal merit when assessed against the published criteria for each post, it may consider applying the Equal Merit Provision (the provision) as part of the final SCC decision.

20. The provision will *only* be used when two or more candidates are assessed as having the skills, experience and expertise that result in them being considered equal in the assessment of the Commission. This decision will be based on the same evidence that Commissioners already use to make recommendations – evidence of judicial qualities provided in application forms, tests, role plays, interviews, presentations, by referees and statutory consultees; and in character considerations on financial, criminal and professional background matters gathered from self-declaration and checks with professional bodies.

21. The application of the Equal Merit Provision will only be considered where under-representation of diversity characteristics within the judiciary and more specifically at a particular level, can be demonstrated, ensuring the group is not too small to be meaningful. Data showing the diversity of the judiciary at a particular level, and ONS data will be used.

22. The relevant data will be identified at the start of the selection process and the selection material will explain the Equal Merit Provision should the Commission decide to apply it.

### **Implementation**

23. The policy will commence with exercises launching 1 July 2014 onwards following publication of the policy in April 2014 and will apply the provision:

- to the categories of gender and race,
- to the final selection stage of the process, and
- where the Commission considers two or more candidates are of equal merit

when assessed against the published criteria for the post

24. The policy will be reviewed on an annual basis and any future changes to the policy will be subject to a new Equality Impact Assessment.

### **Data collection**

25. The Commission will ensure it continues to collect sufficient data through its diversity monitoring process in such manner as to enable it to be used for the purposes of applying the provision.

26. The Commission will work with the Judicial Office and other key stakeholders to ensure that robust data is available to inform which categories are considered to be under-represented within the area of the judiciary for which we are being asked to recommend candidates.

27. The application monitoring form will be amended to inform candidates that their diversity data will only be made available to the Commission should the Commissioners decide it is appropriate to apply the provision. Candidates will continue to be given the option not to declare their diversity data.

### **Data protection**

28. Candidates will be encouraged to provide accurate information and the JAC will continue to state that the information will be shared with the Judicial Office. A declaration will be added to the end of the diversity monitoring form to enable the candidate to make a positive and truthful declaration in line with the current declaration made by candidates in relation to their character information requested as part of the application monitoring form. The SCC will not have access to their diversity data unless application of the provision is under consideration.

### **Publication of data**

29. The publication of the number of occasions the provision has been used will be published as part of the JAC official statistics which are published twice a year, in June and December, starting in June 2015.

### **Risks**

30. There is a risk that some candidates may feel that they are being discriminated against following the implementation of this policy, either on the basis of a characteristic that is being considered (race or gender) or that they possess a



characteristic that is not being considered e.g. disability. This may result in candidates not applying for posts, potentially leading to a reduction in the number of suitable candidates applying and ultimately the JAC being unable to fill the required vacancies.

31. There is also the possibility that implementing the provision may cause a reduction in the number of candidates completing the diversity data throughout the application process, which would result in a lack of diversity data to enable the provision to be applied to a specific exercise. The JAC will continue to monitor completion rates and assess the robustness of the data provided.

### **Aim of policy**

32. Implementation of the provision will enable the Commission to consider recommending candidates who are of equal merit and possess a specific protected characteristic (race or gender) according to the under-representation in that area. This will contribute to an increase in the diversity of the judiciary alongside other measures in the CCA without undermining the merit principle.

## **Assessment of impacts**

### ***Gender***

	Total in post	Men	Women
All judiciary	9444	6,052(64%)	3,392(36%)
Courts judiciary	3,621	2,742 (75.7)	879 (24.3%)
Tribunals judiciary	5,823	3,310(56%)	2,513(44%)

33. The overall proportion of women in post in the judiciary is only 39% compared to men who make up 61%. While it is more diverse within the tribunal appointments, it is still only a total of 44%. Applying the Equal Merit Provision to selection exercises where it is identified that there is an under-representation of women, would improve the gender balance of the judiciary and therefore have a positive impact on women. It is important to recognise that in some instances; where a woman is appointed rather than a man, this will have an adverse impact to men. To manage this we will make our intentions clear to candidates at the start of the exercise.

### ***Race***

	Total in post	White	BAME	Non declared
All judiciary	9444	7386 (78.2%)	865(9.2%)	1193 (12.6)
Courts judiciary	3,621	2,813 (77.7%)	172 (4.8%)	636 (17.5%)
Tribunals judiciary	5,823	4,573 (78.5%)	693 (11.9%)	557 (9.5%)

34. The tribunal judiciary is more diverse with regard to race than the courts judiciary. 12% of the tribunal judges are from a BAME background compared to only 4.8% of the courts judiciary. The Equal Merit Provision could be applied to selection exercises where it is identified that there is an under-representation of BAME candidates to readdress the balance. To help manage the adverse impact on white candidates, we will make our intentions clear to candidates at the start of the exercise.

### ***Disability***

35. The Judicial Office does not currently publish data on disability of the judiciary. Disability is not currently being considered as a characteristic that will be applied. Candidates will not adversely be affected by gender and race being implemented through this provision.

### ***Gender reassignment***

36. No data is collected by the JAC or the Judicial Office on gender reassignment. We believe that there are no grounds that the implementation of the Equal Merit Provision will adversely affect candidates applying for judicial office.

### ***Marriage and civil partnership***

37. No data is collected by the JAC or the Judicial Office on Marriage and civil partnership. We believe that there are no grounds that the implementation of the Equal Merit Provision to race and gender will adversely affect candidates applying for judicial office.

### ***Pregnancy and maternity***

38. No data is collected by the JAC or the Judicial Office on pregnancy and maternity. We believe that there are no grounds that the implementation of the Equal Merit Provision to race and gender will adversely affect candidates applying for judicial office.

### ***Religion and belief***

39. The Judicial Office does not currently collect data on the religion and belief of the judiciary. We believe that there are no grounds that the implementation of the Equal Merit Provision to race and gender will adversely affect candidates applying for judicial office.

### ***Age***

40. Candidates applying for judicial office are expected to have at least five years PQE. For salaried roles candidates are often required to also have fee-paid experience. This in addition to the fact that candidates often don't consider a judicial post until later in their career has led to a higher number of judges in post aged 50+. From the Judicial Office diversity statistics published in July 2013, 83.4% of the judiciary were aged 50 or over, with only 2.5% aged under 40. Age is not currently being considered as a characteristic to be implemented under the Equal Merit Provision; however we do not believe that candidates will be adversely affected by race and gender being implemented under the Equal Merit Provision.

### ***Sexual orientation***

41. The Judicial Office does not currently collect data on the sexual orientation of the judiciary. We believe that there are no grounds that the implementation of the Equal

Merit Provision to race and gender will adversely affect candidates applying for judicial office.

**Monitoring and evaluation**

42. This policy will be reviewed on an annual basis. The evaluation will take into account the number of occasions that the provision has been applied.