JUDICIAL
APPOINTMENTS
COMMISSION

Equal Merit Provision

Response to JAC Consultation

Changes to the Judicial Appointments process resulting from the Crime and Courts Act 2013

Response to consultation on diversity considerations where candidates are of equal merit

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1 About the consultation

An online consultation '*Diversity considerations where candidates are of equal merit'* was launched on 17 May 2013 and closed on 5 August. The Commission received 53 responses from a range of interested organisations and individuals. The responses have been carefully considered in the development of the Commission's policy for the application of the Equal Merit Provision (the provision). The application of the provision, together with the other measures included in the Crime and Courts Act 2013 (CCA), could make a positive contribution to the issue of increasing judicial diversity.

This document summarises the responses to the consultation. An Equality Impact Assessment on the Commission's policy has been completed and is published on the Commission's website alongside this document.

2 The Crime and Courts Act provisions

The CCA received Royal Assent on 25 April 2013. The CCA implements a number of recommendations of the Lord Chancellor's Advisory Panel on Judicial Diversity, and was introduced following a Ministry of Justice consultation on *Appointments and Diversity: A Judiciary for the 21st Century*[1] (published May 2012). That consultation was informed by a House of Lords Constitution Committee report on *Judicial Appointments*.[2]

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 CCA 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—

[1] https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011
[2] http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/publications/previous-sessions/Session-2010-12/

(a) the group of persons who hold offices for which there is selection under this Part, or
(b) a sub-group of that group."

3 Summary of responses

Of the 53 responses received, 49 provided responses to the individual questions posed, with four replies explaining why they were unable to provide a response. With the exception of table 1 below, this summary is in respect of the 49 substantive responses which addressed the proposals. Responses were received from the judiciary, representative legal bodies, diversity groups within the professions and beyond, and academics. Table 1 below illustrates the distribution of the responses.

Table 1

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

4 Responses to specific questions

Q1) The basic approach to the application of the "equal merit" provision

1. The "equal merit" provision in the CCA is enabling; that is it makes it clear that the Commission's duty to make selections 'solely on merit' does not prevent it from selecting a candidate on the basis of improving diversity where there are two candidates of equal merit.

2. The Commission has considered how this might work in practice. Taking a specific selection exercise, a list of candidates would be prepared solely on the basis of merit. There would necessarily be a "cut-off" point relating to the number of vacancies. This would be the point at which all posts would be filled - for example the Commission might prepare a list of 100 candidates it considered to be selectable for appointment, and if it were only asked to fill 50 posts a "cut-off" line would be drawn beneath the 50th candidate, with the candidate sitting at the 51st position not recommended for appointment. While this provides a clear decision, in practice candidates above and below the "cut-off" might be of equal merit; particularly in larger exercises.

3. On the assumption that the Commission is able to identify more than the required number of selectable candidates for an exercise, the proposition is that it should look slightly above the "cut-off" line, and slightly below it and identify the size of the zone of equal merit, where candidates within the zone deemed to be of equal merit but *demonstrably more meritorious* than candidates below the lower limit of the zone. There might be a dozen candidates within that zone, or there might be none at all, depending on detailed analysis of the information gathered on those individuals during the selection process. The Commission could then select one

4. The zone may equally consist of two candidates, potentially more likely within a smaller exercise, and the provision would allow the Commission to identify which candidate would enhance the diversity of the group of people who hold office for which there is a selection. Priority may therefore be given to the candidate(s) with declared protected characteristics which are least well represented in the office (group) to which they are being recommended for appointment.

Question 1: Should the Commission take this approach to the application of the "Equal Merit" provision?

Out of 49 responses, 25 supported this approach to the application of the provision (this figure includes a respondent who answered 'yes' but with reservations and two responses that called for a wider approach as detailed below).

The main views expressed were that the approach seemed pragmatic, fair, and sensible, allowing the Commission to continue to achieve the required standard whilst meeting the objective of a more diverse judiciary. Weighting of different criteria was also considered important. Several respondents made the point that candidates will have different strengths and weaknesses in relation to the appointment criteria and any consideration of merit should take into account the relevant facts of their competence, ability, experience and any former qualifications that may be relevant to the particular office.

The two responses that supported a wider interpretation of the zone suggested the Commission should start by identifying all those who satisfy the merit criteria and then of those, the ones that satisfy 'diversity' should be selected.

Ten responses supported the application of the provision but not the zone. These respondents generally thought that candidates within the zone were not truly of equal merit (for example candidates at the top and bottom of the zone may not be considered equally meritorious). These comments were generally linked to a concern that the provision would result in a dilution of the merit principle and would not represent a zone that consisted of candidates who all have equal skills to offer.

Of the 24 responses that did not support the zone approach, 14 did not think the Commission should apply the provision at all. Their reasoning generally fell into two categories, namely that two or more candidates will not be of equal merit, and that any application of the provision is deeply patronising to under-represented groups.

Based on the analysis of the responses the Commission will consider the application of the provision to all exercises and in doing so identify a zone. For some exercises that zone will contain no candidates, for others the zone may contain two or more candidates assessed by the Commission as equally meritorious.

Q2) Application of the "equal merit" provision at different stages

5. There is a question as to whether the "equal merit" provision should be applied once – at the final selection stage of an exercise - by the Commission's Selection and Character Committee, or whether there is an argument for it to be used more than once. For example, while there will be a clear "cut-off" point at the final selection stage, perhaps with a zone of equal merit as described above, there is potential for this to arise also at the shortlisting stage. The situation could arise where the Commission receives, for example, 1,000 applications for a selection exercise. If it is asked to make 100 selections the Commission would normally invite around 250 candidates to interview. Following shortlisting (either by qualifying test or paper sift) there will be a "cut-off" point around the 250th candidate, and it therefore follows that there would be a similar zone of equal merit around the "cut-off" point in the same way as there would at the final selection stage as described above. There is therefore a question as to whether the "equal merit" provision should be applied at the shortlisting, as well as the final selection, stage.

Question 2: Should the "equal merit" provision be used more than once in the selection process, perhaps at the shortlisting and final selection stages?

Out of the 48 responses to this question, 24 supported its application at more than one stage, (this number includes three respondents who thought that it should be used at as many stages as possible, and one who thought that it should be applied at all stages where there is personal contact). Positive comments included the views that if judicial diversity is to be addressed, all points of recruitment need to be used to help eliminate any bias towards recruiting in ones own image and to eliminate barriers to reaching interviews; that the shortlisting processes are competence based and consequently a sound basis for undertaking a qualitative assessment of merit; and the premise that there may be candidates who exhibit different strengths and weaknesses (but still be considered of equal merit) is relevant to shortlisting and final selection stages.

Out of the 24 responses to this question who did not support the application at more than one stage, 11 did not support the application of the provision at all, and others felt that equal merit could only be determined at the end of the process when all evidence was available for a full assessment to be made, and that if used at more than one stage it may cumulatively appear to resemble a bias. One respondent thought that it should only be used at the shortlisting stage, and one respondent thought that "the Commission is not entitled to ease its very heavy workload by applying the statutory provision in this way".

Based on the analysis of the responses the Commission will apply the provision once in the selection process, at the final selection stage.

Q3) To which groups of people should the "equal merit" criteria be applied?

6. The CCA provides for the "equal merit" provision to be used for the purpose of increasing judicial diversity within the group of persons who hold office for which there is a selection or a sub-group of that group. However it does not define any specific groups of people within the group of those applying for office to whom the

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

The Commission needs to decide whether it should apply the CCA "equal merit" provision in relation to all or some of these categories of people in relation to its selection activities.

7. In the event that the Commission does decide to apply the "equal merit" provision, there may be some practical difficulties in deciding to which groups of people it should be applied. For example, application of the provision relies on the availability of reliable data about the characteristics of candidates and the diversity of a particular office or sub-group of that office for which there is a selection to demonstrate that a candidate has a protected characteristic that is under-represented. Without reliable data it would be unfair and open to challenge for the Commission to make selection decisions based on application of the "equal merit" provision. The "equal merit" provision would be considered on an exercise by exercise basis; the information pack for each exercise would include the diversity details of the particular bench or jurisdiction where the vacancies exist and how the provision might be applied to that exercise.

8. At present the Commission could only be confident that reliable data is available in relation to the race and gender of candidates and of judges already in post. In our consultation we indicated the Commission was minded to consider applying the provision only in relation to race and gender. The Commission has made no decision about whether it would be appropriate, even if reliable data could be obtained, to extend the "equal merit" provision to any other protected characteristic.

Question 3: To which group(s) of people should the Commission apply the "equal merit" provision?

This question received a significant amount of comment – see table 2 below.

Ten respondents supported the application to 'ALL' the listed protected characteristics. They generally recognised the limitations of data but strongly urged all parties to work towards better data as a matter of urgency. It was felt that limiting the application to a smaller number of characteristics could be seen as unfair and unprincipled.

In addition to the respondents who supported the application to 'ALL' the listed protected characteristics, the categories of race and gender also received a high level of support from the respondents who did not think the equal merit provision

should apply to ‘ALL’ protected characteristics. The category of gender received 27 positive responses and race received 26. All other characteristics received five or fewer positive responses.

Table 2

Group	Number of Respondents who supported the application of the provision to these groups	Comments
ALL	10	• Race and gender are the two areas for which the judiciary is most criticised for not being representative • Cannot apply if data insufficient to prove underrepresentation • Should be applied on an individual competition basis • Care needed about what information is included in exercise material – may risk discouraging applications from certain groups • Any other than the first three groups listed would require the Commission to explore information of a highly intrusive and personal nature • Should not include dynamic factors • Concerns if groups are prioritised – whilst good data is needed, certain characteristics are highly sensitive and the risk is that priority will be accorded to those easy to identify • Limit to two groups not principled and has potential to undermine other important diversity goals, for example a woman or a BAME candidate could be appointed above a disabled candidate if data insufficient to apply the provision to the latter category • Provision could attract criticism for being unfair/unlawful if all groups not included • Need to look at barriers/insurmountable hurdles candidates face • Should add socio-economic background
Respondents were invited to indicate all groups that they thought should be included. Of those who did not support the application of the provision to 'ALL' groups with protected characteristics, the following categories received a positive response:		
Race	26	
Gender	27	
Age	3	
Disability	5	
Sexual orientation	5	
Religion and belief	0	
Gender reassignment	2	
Marriage and civil partnership	1	
Pregnancy and maternity	3	
Other	3	

One common theme was the concern that 'diversity' is seen as the driver rather than 'equality'. One respondent commented that -

> "We believe it is vital that the diversity agenda is not reduced to the limited goal of appointing 'single axis' diversity candidates, e.g. more white, middle-class, able-bodied, heterosexual women, or more men who share all the characteristics of the traditional incumbents other than their ethnic or sexual minority background.

Neither would it be appropriate to engage in invidious comparisons between diversity characteristics to decide which was 'most' under-represented."

Two respondents commented that it will shine a light on Commission processes and discussed the need for more certainty of the criteria that individual roles require. It was also suggested by a few respondents that the application of the provision would need to be time limited, for example if women represented 50% of the judiciary then the provision should no longer be considered. The Commission's published policy makes clear that women and BAME candidates will only be considered if under-represented at the level of the existing vacancies, and if no under-representation can be demonstrated then the provision will not be used.

There was general concern about the lack of robust data, particularly in relation to sexual orientation and disability. It has been suggested that, in the absence of data for these two groups, the Commission should look to other data sources, such as census data, to extrapolate a figure that could be used to demonstrate under-representation. However an initial exploration undertaken by a Ministry of Justice statistician suggested that extrapolation may not demonstrate an under-representation of those two groups in the judiciary when compared with census data.

Based on the analysis of the responses the Commission will apply the provision to the protected characteristics of gender and race.

Q4) A decision not to apply the "equal merit" provision

9. Parliament has made provision for the application of "equal merit" considerations, as part of the selection process, reflecting a largely positive response to both the Ministry of Justice consultation and the House of Lords Constitution Committee inquiry. However, some may take the view that the Commission should not apply the provision to its processes.

Question 4: Do you believe the Commission should *not* apply the "equal merit" provision?

Table 3

Should	Should not	Did not provide a response to this question
34	14	1

Out of 49 responses, 34 supported the application of the provision and 14 did not think the Commission should apply the provision at all. One of the 49 responses one did not respond to this specific question.

Based on the analysis of the responses and the change in legislation the Commission will apply the equal merit provision to all selection exercises.

5 Summary table (figures calculated as a percentage of responses out of the 49 responses that provided a substantive answer)

Table 4

Question	Proportion of respondents who agreed	Proportion of respondents who disagreed
Q1 – the 'zone' approach	51%	49% (20% supported the provision but did not support the 'zone approach' and 29% did not support the provision at all)
Q2 – more than one stage	49%	49% (27% supported the provision but only applied at the end of the selection process and 22% did not support the provision at all)
Q3 – To which group(s) of people should the Commission apply the "equal merit" provision?	Race: 73% Gender: 76% Age: 27% Disability: 31% Sexual orientation: 31% Religion and belief: 0% Gender reassignment: 25% Marriage and civil partnership: 23% Pregnancy and maternity: 27% Other: 27% (This represents the proportion of respondents who thought the equal merit provision should be applied to each characteristic as one of any combination of characteristics)	13% of respondents did not want the provision to apply to any characteristic
Q4 – Should the Commission apply the provision	69%	29%