

# Equal Merit Provision

## JAC Policy

## **Judicial Appointments Commission** **Equal Merit Provision policy**

### **General Introduction**

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

This policy defines the approach by which the ‘Equal Merit Provision’ inserted into section 63 of the Constitutional Reform Act 2005 by the Crime and Courts Act 2013 (CCA) will be applied by the Commission.

### **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 21<sup>st</sup> Century*<sup>1</sup> (published in May 2012). That consultation was informed by a House of Lords Constitution Committee report on *Judicial Appointments*.<sup>2</sup>

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 by 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) which provides that neither selection “solely on merit”, nor Part 5 of the Equality Act,

“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.”

### **How the Commission will apply the Equal Merit Provision**

1. The policy will commence with exercises launching 1 July 2014 onwards following publication in April 2014.
2. Individual selection exercise material will include details of available data and how the Equal Merit Provision (the provision) may be applied in that specific exercise.

---

<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011>

<sup>2</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/publications/previous-sessions/Session-2010-12/>

3. Where the Commission considers two or more candidates are of equal merit when assessed against the published criteria for the post, it may use the provision to make the final selection decisions.
4. 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, to be made by the Commission sitting as the Selection and Character Committee, will be based on all the evidence gathered throughout the selection process.
5. The provision will only be considered where under-representation of diversity characteristics within the judiciary can be demonstrated. Published data showing the diversity of the judiciary at a particular level, along with the 2011 Census, Detailed Characteristics, Office of National Statistics 2012 (or the latest updated population estimates), will be used<sup>3</sup>.
6. The Commission has agreed to consider race and gender only at this stage. When applying the provision to the characteristic of race, the Commission will limit the definition to the two categories of white and BAME. This approach is supported by the published data.
7. Where two or more candidates are judged to be of equal merit and the provision is to be used, priority may 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.
8. The Commission will ensure it collects sufficient data through its diversity monitoring process to enable it to be used for the purposes of applying the provision.
9. The provision will apply to all selections for judicial appointments under Part 4 of the CRA, whether recommended for appointment by the Commission “or by a selection panel” for senior appointments (above High Court) as such panels are committees of the Commission<sup>4</sup>. The provision will also apply to the selection of persons for membership of a pool for requests under section 9(1) of the Senior Courts Act 1981 to act as deputy High Court judges.
10. It is important that all candidates provide accurate information, and all selection exercise material will continue to emphasise that the information will be shared with the Judicial Office. A declaration will be added to the end of the diversity monitoring form committing the candidate to make a positive and truthful declaration in line with the current declaration made by candidates in relation to their character information<sup>5</sup>. Should a misleading declaration subsequently be discovered the Commission will work with the Judicial Office and other stakeholders where appropriate, to ensure the necessary course of action is taken.

---

<sup>3</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 post(s).

<sup>4</sup> S70(6) and s79(5) Constitutional Reform Act 2005

<sup>5</sup> Candidates will continue to be given the option not to declare their diversity data

11. The following information will be included in the selection exercise material to enable the Commission to apply the provision:

- published data from the Judicial Office presenting the current diversity of the specific level of the judiciary in respect of race and gender
- published Office of National Statistics data
- an explanation to candidates about the potential use of the race and gender diversity data they submit alongside their application form in the final selection decisions

12. The Commission will report in its six-monthly Official Statistics Bulletins, starting in June 2015, the number of instances where an individual has been selected following application of the policy. The Commission will not release information on the application of the policy in individual exercises.

13. The policy will be reviewed on an annual basis.