

Equal Merit Provision policy

1. The Judicial Appointments Commission, is committed to increasing the diversity of the judiciary, while continuing to select “solely on merit”.
2. This policy defines the approach by which the Equal Merit Provision (EMP) inserted into section 63 of the Constitutional Reform Act 2005 (CRA) by the Crime and Courts Act 2013 (CCA) will be applied by the Commission.

Crime and Courts Act provisions

3. The CCA received Royal Assent on 25 April 2013. The CCA implements several 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 That consultation was informed by a House of Lords Constitution Committee report on *Judicial Appointments*.²
4. The CCA provides for measures to promote consideration of diversity in the appointments process.³ For one of those measures, 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.
5. Specifically, the CCA inserts subsection (4) into section 63 of the CRA, 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.”

¹ Published May 2012. <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/>

³ Schedule 13, Part 2

How the Commission applies the Equal Merit Provision

6. The provision applies 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 Commission⁴.
7. The provision also applies 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. The provision applies to open section 9(1) exercises. It does not apply to individual authorisations (such as for a Designated Family Judge or a Designated Civil Judge) where a deployment decision has been made following an expression of interest exercise. This is because the JAC authorises the individual, as opposed to recommending the individual for an appointment.
8. The Commission has agreed to apply the policy to the protected characteristics of race and gender only at this stage. When applying the EMP to the characteristic of race, the Commission will limit the definition to the two categories of white and Black, Asian and minority ethnic ('BAME'). This approach is supported by the published data.
9. The following information will be included in individual 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
 - details of how the EMP may be applied in that specific exercise

At the final decision-making stage

10. 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 EMP to make the final selection decisions.
11. The provision will only be used at the final decision-making stage 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.
12. The EMP will only be applied 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 to determine whether under-representation exists at that level⁵

⁴ S70(6) and s79(5) Constitutional Reform Act 2005

⁵ 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).

13. Where two or more candidates are judged to be of equal merit and the EMP is to be used, priority will 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.
14. If the Committee has applied the EMP, it may be presented with a situation whereby it is unable to choose between two or more candidates on the basis of their relevant protected characteristics. For example, two candidates assessed as being of equal merit may both be white men. If this situation arises, the EMP cannot be used to make a selection. Therefore the Committee will invite those candidates to a second interview, to enable it to make a selection decision. Dates for second interviews will be published on the information page for the relevant selection exercise.

At the shortlisting stage/s of a selection exercise

15. In order to achieve similar benefits to those of the EMP at earlier stages of the selection process, the Commission will apply the following process at shortlisting stages. The EMP itself will not be formally applied at the shortlisting stages of a selection exercise. Instead, if:

- two or more candidates are assessed as being of equal merit and
- there are candidates with relevant under-represented protected characteristics in the group of candidates deemed to be of equal merit⁶

then the Commission will increase the number of candidates going through to the next stage. All candidates of equal merit will go through to the next stage. This will have a similar effect to the EMP and ensure that all candidates of equal merit will go through to the next stage, whether or not they possess under-represented protected characteristics.

Collection and monitoring of diversity data

16. The Commission will rely on the diversity monitoring data provided by candidates when applying the EMP. If a candidate does not provide diversity data, it will not be possible for the Commission to apply the EMP to that candidate.
17. The Commission will ensure that the data it collects through its diversity monitoring process is sufficient for the purposes of applying the EMP policy.
18. It is important that all candidates provide accurate information. 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.

Reporting and review

19. The Commission will report the number of instances where an individual has been selected following application of the policy in its annual official statistics. The Commission will not release information on the application of the policy in individual exercises.

⁶ The relevant characteristics are gender and race.

20. The policy will be kept under regular review.