

## Guidance on JAC's approach to diversity and equal merit

1. This guidance describes the approach by which the Commission will decide whether to apply statutory equal merit provisions<sup>1</sup> during a selection process, for the purpose of supporting greater judicial diversity. The guidance applies to all JAC selection exercises, up to and including the High Court and Upper Tribunal.
2. The Commission will consider relying on statutory equal merit provisions with respect to the protected characteristics of race and gender only at this time, but will keep this under review. When applying the policy to the characteristic of race, the Commission will limit the definition to the categories of white and black, Asian and ethnic minority (BAME).
3. In all instances where the Commission, or group of Commissioners acting on its behalf, rely on an equal merit provision, they must be satisfied that:
  - (i) the candidates about whom a decision is being taken are of equal merit
  - (ii) the particular protected characteristic (gender and/or race) is under-represented in the judiciary as a whole or at the relevant level of the judiciary and
  - (iii) reliance on an equal merit provision is a proportionate means of achieving the aim of enabling persons with the relevant protected characteristic to join the level of the judiciary for which selection is being made

### Steps taken in advance of a selection exercise

4. Prior to each selection exercise, published data showing the diversity of the judiciary as a whole and at a particular level, along with the 2011 Census, Detailed Characteristics, Office of National Statistics mid-2017 estimates (or the latest updated population estimates), will be used to determine whether under-representation exists in the judiciary as a whole or at the level of the judiciary for which selection is being made.<sup>2</sup> Only where this data shows that there is under-representation of one or both of the characteristics of race and/or gender, will the Commission consider giving priority to candidates of equal merit with a relevant protected characteristic.
5. Individual selection exercise material will include information notifying candidates if the JAC has formed the view that under-representation exists in the judiciary as a whole or at the level of the judiciary for which selection is being made so that candidates are aware of the possibility that the Commission may rely on an equal merit provision in cases where there are candidates of equal merit. The material will also include the data on which this view has been formed and an explanation to candidates about the potential use of the race and gender

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<sup>1</sup> Section 159 of the Equality Act 2010 and section 63(4) of the Constitutional Reform Act 2005.

<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 post(s).

diversity data they submit alongside their application form in the shortlisting and selection decisions.

### **At the shortlisting stage(s)**

6. At the beginning of each shortlisting exercise, the preferred number of candidates to shortlist will be identified. This number will be the shortlisting cut-off line.
7. The Commission will take the following approach at shortlisting stages. If:
  - the shortlisting cut-off line falls between 2 or more candidates assessed by the Commission as being of equal merit and
  - there are candidates with relevant under-represented protected characteristics in the group of candidates who are assessed to be of equal merit<sup>3</sup>then the Commission will consider whether or not to give priority to the candidate(s) with those characteristics when deciding which candidates go through to the next stage of the exercise.
8. When shortlisting is by online qualifying test, potential 'zones' of equal merit will occur where 2 or more candidates have the same overall score from the test. Where the shortlisting cut-off falls within such a zone, the Sub-committee will consider whether or not to give priority to the candidate(s) with a relevant under-represented protected characteristic.
9. When shortlisting follows a paper sift or a telephone assessment, potential zones of equal merit will occur where the panels have assessed 2 or more candidates as having (a) the same overall spread of grades for individual competencies/skills and abilities, and (b) the same overall band. Where the shortlisting cut-off falls within such a zone, the Sub-committee will consider whether or not to give priority to the candidate(s) with a relevant under-represented protected characteristic.
10. The decision whether or not to give priority to the candidate(s) with a relevant under-represented protected characteristic will be made by a group of 3 Commissioners, including at least one judicial Commissioner and one lay Commissioner acting on behalf of the Commission (the Sub-committee). This group will usually be made up of the Assigned Commissioner and 2 other Commissioners.
11. The Sub-committee will consider whether, and will need to be satisfied that:
  - (i) the candidates about whom a decision is being taken are of equal merit
  - (ii) the particular protected characteristic (gender and/or race) is under-represented at the relevant level of the judiciary and
  - (iii) reliance on an equal merit provision in the shortlisting exercise being conducted is a proportionate means of achieving the aim of increasing judicial diversity within the judiciary as a whole or within the level of judiciary for which selection is being made.
12. To enable the Sub-committee to take that decision, they will be provided with the following:
  - published data from the Judicial Office presenting the current diversity of the judiciary as a whole or the relevant level of the judiciary in respect of race and gender
  - published ONS data
  - each candidate's score or grades from the shortlisting tool applied at that stage of the exercise, and any evidence used to inform the assessment of candidates at that stage

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<sup>3</sup> The relevant characteristics are gender and race.

- any other relevant material

13. Where it would be impracticable due to numbers to take all candidates of equal merit with relevant under-represented protected characteristics through to the next stage, the Sub-committee may give priority to the candidate(s) with the relevant under-represented protected characteristic which is least well represented in the judiciary as a whole or the level of the judiciary for which selection is being made.

#### **At the final decision-making stage**

14. The Commission will take the following approach at the final decision-making stage.

15. Final decisions on who to select to recommend for judicial appointment are made by the Commission sitting as the Selection and Character Committee. Potential zone(s) of equal merit will occur where the panels have assessed 2 or more candidates as having the same overall spread of grades for individual competencies/skills and abilities, and the same overall band. Where the cut-off line for final recommendation falls within such a zone, the Selection and Character Committee will consider whether or not to give priority to the candidate(s) with a relevant under-represented protected characteristic.

16. Each candidate will be considered on an individual basis by the Committee before it decides whether any of the candidates are, in their assessment, of equal merit. These decisions are based on all the evidence assessed by the panels, and provided through statutory consultation, on candidates' skills, experience and expertise relevant to the published criteria for the post.

17. Where 2 or more candidates under consideration for a vacancy are judged by the Selection and Character Committee to be of equal merit, the Commission may give preference to the candidate(s) with relevant protected characteristics which are least well represented within the judiciary as a whole or the level of judiciary for which they are being recommended for appointment.

18. In addition to being satisfied that the candidates about whom a decision is being taken are of equal merit, the Selection and Character Committee will consider whether, and will need to be satisfied that:

- (i) the particular protected characteristic (gender and/or race) is under-represented within the judiciary as a whole or at the relevant level of the judiciary and
- (ii) reliance on an equal merit provision at the final-stage of the selection exercise being conducted is a proportionate means of achieving the aim of increasing judicial diversity within the judiciary as a whole or within the level of judiciary for which selection is being made

19. To enable the Selection and Character Committee to consider whether the requirements for giving preference to candidate(s) with relevant protected characteristics are satisfied, they will be provided with the following information:

- published data from the Judicial Office presenting the current diversity of the judiciary as a whole or the specific level of the judiciary in respect of race and gender
- published ONS data
- the panels' assessment of each candidate for consideration, and any evidence used to inform the final assessment of candidates, including responses to statutory consultation
- any other relevant material

20. Where the Selection and Character Committee has assessed 2 or more candidates as being of equal merit, it may be unable to choose between 2 or more candidates on the basis of their relevant protected characteristics, for example if they are both white men. The Committee will invite those candidates to a second interview; and then decide which of the candidates is the stronger candidate for appointment. Dates for second interviews will be published on the information page for the relevant selection exercise.

### **Collection and monitoring of diversity data**

21. The Commission will rely on the diversity monitoring data provided by candidates when applying this policy. If a candidate does not provide diversity data, it may not be possible for the Commission to put them forward on the basis of improving diversity, if they are assessed as of equal merit at any stage of the selection exercise as outlined above.

22. 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**

23. The Commission will report annually on the application of this guidance. The guidance will be kept under regular review.

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