UKSC Justices Appointments Commissions
Equal Merit Provision policy

General Introduction

UKSC Justices appointments commissions, like others, are 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 27 of the Constitutional Reform Act 2005 by the Crime and Courts Act 2013 (CCA) will be applied by such Commissions.

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 in May 2012). That consultation was informed by a House of Lords Constitution Committee report on *Judicial Appointments.*[2]

Schedule 13, Part 2, to 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 9 of Schedule 13 clarifies that making selections "solely on merit" (as provided for by section 27 (5) 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.

In particular, the Act amends section 27 of the Constitutional Reform Act 2005 (CRA) by inserting a new subsection (5A) which provides that:

> "Where two persons are of equal merit –
>
> (a) Section 159 of the Equality Act 2010 (positive action: recruitment etc.) does not apply in relation to choosing between them, but
>
> (b) Part 5 of that Act (public appointments etc.) does not prevent the commission from preferring one of them over the other for the purpose of increasing diversity within the group of persons who are the judges of the Court."

How UKSC appointment commissions will apply the Equal Merit Provision

1.   The policy will be followed in all selection exercises launched after 1 January 2017.

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[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/

2.	Where a 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.

3.	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 that commission. This decision will be based on all the evidence gathered throughout the selection process.

4.	A commission will consider race and gender only at this stage. When applying the provision to the characteristic of race, a commission will limit the definition to the two categories of white and BAME.

5.	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 protected characteristics which are least well represented among the judges of the Court.

At the shortlisting stage/s of a selection exercise

6.	In order to achieve at earlier stages of the selection process similar benefits to those of the EMP, 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 merit

then the commission will increase the number of candidates going through to the next stage so that all candidates of equal merit go through to the next stage.

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