

Litigation Committee response to the Judicial Appointments Commission's consultation paper on diversity consideration where candidates are of the "equal merit" provision

1. The City of London Law Society (the "CLLS") represents approximately 14,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.
2. The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Summary

3. The Committee's response to the Consultation Paper (the "Paper") overall is simple: as the introductory section of the Paper makes clear: the provisions of the Crime and Courts Act 2013 ("CCA") clarify that the Judicial Appointments Commission's duty "to make selections 'solely on merit' does not prevent it from selecting one candidate over another for the purposes of increasing judicial diversity where there are two candidates of equal merit" [emphasis added].
4. In summary, the Committee's view is that while a broader selection process may usefully be employed to increase the population from whom the final selection may be made, that final selection must be made "solely on merit", and an appointment in favour of a particular candidate on the basis of improving diversity can only be made either if that candidate is the best on merit, or is of "equal [top] merit" with another candidate.

Question 1: Do you agree with this approach to the application of the "equal merit" provision?

5. On a preliminary point, there is a distinction to be made between the "equal merit" provision and the approach to applying it laid out in paragraph 34 of the Paper and referred to in this question. Questions 2, 3 and 4 blur this distinction in the Committee's view.

6. The "equal merit" provision means that where two candidates are of equal merit the final selection can be made on the basis of improving diversity.
7. "This approach" to the application of the equal merit provision is understood (paragraph 34) to be looking slightly below what would otherwise be the "cut-off line" for the purposes of identifying the group of candidates who are demonstrably more meritorious than other candidates further down the list; these could then be included in the group from whom the final selection might be made.
8. The Committee does not understand how "in practice candidates above and below the 'cut-off' might be of 'equal merit' ". Candidates either are of equal merit (or are perceived to be), or they are not.
9. The Committee can see that there may be advantages in opening up the interview process by looking "below the line" to assemble short-listed candidates. However, under the requirements of the CCA, an eventual appointment can only be made on the basis of diversity where there are two (or more) candidates of genuine "equal merit". At the stage of final selection therefore there can be no "dipping below the line".

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

10. See above. In the Committee's view, increasing the population from whom selection is to be made with a view to improving diversity should only be used at the short-listing stage. It does not have any application at the final selection stage for the reason explained.

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

11. The answer to this surely depends upon where the greatest need is, according to the available statistics. The Paper states that the Commission could only be confident that reliable data was available in relation to gender and ethnicity. These are in any event the most obvious areas where improvement is (urgently) needed. If the policy is to achieve a broader diversity, which in principle the Committee supports, further data will need to be collected.

Question 4 Do you believe the Commission should not apply the "equal merit" provision, and if so why not?

12. No, but we need to be clear what applying the "equal merit" provision means. The Committee can support the approach suggested in paragraph 34 of the Paper at the short-listing stage, but does not believe that a policy of looking "below the line" at final selection stage is coherent, or compliant with the CCA.

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**THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE**

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