JUDICIAL APPOINTMENTS COMMISSION

Changes to the judicial appointments process resulting from the Crime and Courts Act 2013: Consultation on diversity considerations where candidates are of equal merit

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We are nearing the end of a three-year, AHRC-funded project on "The Politics of Judicial Independence". The judicial appointment process is a crucial limb to our project. We have conducted around 150 interviews with senior judges, politicians, officials and practitioners, including many of those who are most closely involved in the appointment process. In our responses to the questions below, we draw on those interviews as well as other prior research that we have conducted.

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

We welcome the proposal for the JAC to apply the "equal merit" provision. There is significant disagreement about whether candidates can ever be said to be equally qualified—and indeed we disagree amongst ourselves about how often in practice two candidates will ever be truly equal. That said, we agree that the equal merit provision should apply where candidates have different strengths and weaknesses in relation to the appointment criteria so that a selection panel could conclude that they are essentially of equal merit. In such circumstances, a panel would then take diversity into account.

In selection exercises where there are more suitably qualified candidates than there are vacancies, the JAC proposes identifying a zone of equal merit that may include candidates above and below a cut off line that relates to the number of vacancies. The JAC could then select one or more candidates within that zone on the basis of diversity considerations. We agree that this seems a sensible approach. An issue for the JAC to consider is whether there should be a presumption that the equal merit provision will be applied in all competitions except where it is clear that there are insufficient number of appointable candidiates.

The Consultation Paper suggests that where there are candidates of equal merit in respect of whom there are different diversity characteristics under consideration, the JAC should use the equal merit provision after determining which diversity consideration "needed the most attention within the judiciary". The JAC proposes that the equal merit provision will be considered on an exercise by exercise basis, with the information pack for each exercise including the diversity details of the bench or jurisdiction to which the vacancies relates and how the provision might be applied to that exercise. It is not clear to us, however, how the JAC proposes to make the determination as to the area of greatest need. For example, will it take

into account only the current composition of the court or tribunal to which the vacancy relates? Or will it take into account the composition of the judiciary as a whole? It is also not clear whether the JAC intends liaising with other stakeholders when making this determination. Does the JAC anticipate that, prior to issuing a vacancy request, the Lord Chancellor's consultation with either the Lord Chief Justice or Senior President of Tribunals will include discussion of the area of greatest need?

It is important that the JAC maintain and make publicly available data on the use of the equal merit provision, including: (a) the number of occasions the provision is used; (b) the level of appointment at which the provision is used; (c) the stage in the process (e.g. shortlisting and/or the final selection decision); and (d) whether it is used where the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals have rejected or asked for reconsideration of the JAC's selection. This data should be published on the JAC's website and in its annual report.

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

Yes. The premise of the equal merit provision is that there may be candidates who exhibit different strengths and weaknesses in relation to the appointment criteria such that a panel concludes that they are of equal merit. This premise is equally relevant to the two main decision points in the selection process: i.e. shortlisting and the final selection decision. The provision should thus apply at both stages. However, we do not think that it applies to the intermediate "panel assessment" stage.

Selection panels (normally consisting of a lay panel chair, a judicial member and an independent member) prepare shortlists of candidates. Some of our interviewees expressed concern about the quality of the selection panels. We understand that in response to these sorts of concerns the JAC has expended resources on ensuring that the latest cadre of panel members are appropriately trained. If the equal merit provision is to be applied at shortlisting, it is important that the training of panel members covers its intended use in detail.

Question 3: To which groups should the Commission apply the equal merit provision?

We recognize there are practical difficulties relating to the availability of reliable data for certain protected groups. However, the JAC should be more proactive in widening the number of protected groups to whom the provision can apply. This means collecting reliable data on groups other than gender and race. We recognize that data collection on personal issues is problematic—but this is a problem with which many organizations, both in the public and private sectors, are grappling in order to implement important equality and diversity provisions such as s159. The JAC needs to devote more time and resources to being pioneers on such matters, rather than reacting to developments elsewhere. A more proactive and pioneering

approach would be consistent with its statutory duty to promote diversity. Once adequate reliable data is available, as many protected groups as possible should be included in the application of the equal merit provision.

Whatever the JAC decides, we suggest that this issue should be kept under review. The JAC should conduct a formal review after a period of 5 years (which ties in with the period recommended by the House of Lords Constitution Committee for a review of the appropriateness of introducing non-mandatory targets for the JAC to follow).

Question 4: Do you believe the Commission should <u>not</u> apply the equal merit provision, and if so why not?

We welcome the proposal for the JAC to apply the "equal merit" provision.