CHANCERY BAR

The Judicial Appointments Commission Consultation Paper CP 01/13: "Changes to the Judicial Appointments process resulting from the Crime and Courts Act 2013. Consultation on diversity considerations where candidates are of equal merit."

Introduction

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

4. This response is the official response of the Association to the Judicial Appointments Commission ("**JAC**") consultation paper CP 01/13: "Changes to the Judicial Appointments process resulting from the Crime and Courts Act 2013: Consultation on diversity considerations where candidates are of equal merit" ("**CP 01/13").**

5. This Response has been produced by Malcolm Davis-White QC, Joanne Wicks QC, Georgia Bedworth, Kavan Gunaratna and Mark West and has been approved by the full Committee.

6. This response should be read together with the previous response of the Chancery Bar Association to Question 14 of the Ministry of Justice Consultation "Appointments and Diversity: A Judiciary for the 21st Century" (reference number: CP19/2011), the relevant response being annexed hereto as Annex 1 ("**ChBA Response 2012**").

Guiding principles

7. We should start by re-iterating the commitment of the Chancery Bar Association, and its members, to the promotion of diversity among members of the judiciary. We recognise the public interest in ensuring that the judiciary is representative of the society it serves.

8. However, for good reason, the overriding requirement for the appointment of members of the judiciary remains merit. Under Section 63(2) of the Constitutional Reform Act 2005, the Judicial Appointments Commission is required to make selections 'solely on merit.' As Lord Sumption has observed, the statutory criteria for appointment "*broadly reflect the criteria which had been applied for years by the Lord Chancellor before 2006.*"[1] To date, diversity amongst judges has been encouraged by attempts to widen the pool from which appointments are made but promotion of diversity has

[1] "Home Truths about Judicial Diversity", Bar Council Law Reform Lecture. 15 November 2012.

not itself been a permitted factor to weigh in the balance when deciding which applicant(s) to appoint or select for judicial office.

9. The Courts and Crime Act 2013 introduces a very limited situation in which the promotion of diversity may become a factor in selecting judges. In brief, it provides that where there are two candidates of equal merit, then at that point the promotion of diversity as an aim may be (but does not have to be) pursued in selecting between the two candidates.

10. The current consultation asks, in essence, whether, and if so how, the JAC should operate this new permissive provision. As we explain below, our concern is that the framers of the consultation seem to envisage the extremely limited new statutory provision as a licence to enable positive discrimination to be pursued more widely than the statute permits and in an ill-defined and untransparent manner.

11. In no order of importance we consider that the following principles should apply in developing any proposals as to whether and how to implement the "equal merit" provision (as defined by CP 01/13 but which we refer to as the "**Diversity Provision**"):

    11.1. any proposals should be lawful;

    11.2. the evidence on which any proposals are based, and against which they are operated, should be transparent and robust;

    11.3. any proposals should themselves be certain and capable of being applied in a transparent manner;

    11.4. any proposals should guard against any risk of dilution of the quality of the judiciary or of creating any perception that it is so diluted;

    11.5. so far as possible, any criteria should be applied consistently and in an objective manner.

The Proposals: Overview

12. In this section we summarise the Association's response to the consultation paper, the details of which are expanded upon later.

13. CP 01/13 deals with the question of whether, and if so how, the JAC might operate the provision introduced by the Courts and Crime Act 2013 ("**CCA**") paragraph 10[2], which modifies the statutory requirement that judicial appointments are made solely on the basis of merit.[3] In essence, the alteration to s63 of the Constitutional Reform Act 2005, which is effected by the CCA, provides that where there are two candidates of equal merit, one candidate may be preferred over the other for the purposes of increasing diversity (in the manner there set out). For convenience we refer to the permissive principle introduced by Schedule 13, paragraph 10 of the CCA as the "**Diversity Provision**" rather than, as does CP 01/13, the "equal merit" provision.

14. It seems to the authors of this paper that what the Diversity Provision requires is obvious. If operated, it requires the grading of applicants for a judicial post solely on merit, without regard to any diversity characteristic, by reference to all the selection processes and criteria applied by the JAC. The Diversity Provision applies only where the result of such grading produces two candidates of exactly equal merit. In those circumstances it operates as a tie-break between the two candidates who are otherwise indistinguishable. In circumstances where the tie must be broken in order to make a decision, the Diversity Provision allows it to be broken by the use of diversity characteristics, thereby promoting the goal of judicial diversity, rather than by the tossing of a coin, or ranking of candidates in alphabetical or seniority order or any other and more arbitrary method of breaking the tie.

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[2] The reference to paragraph 9 at CP 01/13 paragraph 29, which applies to Supreme Court appointments for which the JAC as such does not have responsibility, appears to be a typographical error.

[3] Ignoring, for present purposes, other requirements such as good character.

15. The JAC proposals do not involve the use of the Diversity Provision only as a tie-break between two candidates of equal merit. They confirm the fears expressed in the ChBA Response 2012 that the Diversity Provision would be used so that the judicial appointment system would move from being one based on the principle of appointment of judges solely on merit to one where, in a situation where there are candidates <u>not</u> of equal merit, one candidate, otherwise with lesser merit but with a preferred diversity characteristic, would be appointed over a candidate with greater merit. Having questioned whether there was a need for such a provision, given the absence of any recorded occasion when candidates had been found to have been of equal merit, such that a tie-break of the sort contained in the Diversity Provision was required or even potentially applicable, the ChBA Response 2012 noted:

> "*More fundamentally we are concerned that either in reality or as a matter of perception people will think that, if the proposed amendment is made, from the current position where appointment is "solely on merit", henceforth in a non-equal position one candidate with a protected characteristic is being preferred over a candidate who does not have a protected characteristic and that positive discrimination has been introduced into the selection system. That could in fact be more damaging on an individual basis to those appointed than otherwise* ***and*** *severely risks undermining confidence in the judiciary. Any perception that those with protected characteristics have obtained an appointment otherwise than strictly on merit would also be extremely damaging more generally for the promotion of diversity across the judiciary.*"

16. In the view of the writers of this paper the description of the current appointment process and the key suggested proposals, underlying Questions 1 and 2, leads to the conclusion that the key suggested proposals are in fact unlawful and do not comply with the Diversity Provision of the CCA. Even if

we are not correct about this, we consider them to be objectionable in principle as lacking transparency and likely to be applied inconsistently.

16.1. As regards Question 1:

16.1.1. First, the proposal underlying Question 1 involves the use of diversity purposes in selecting between candidates in circumstances where they are self-evidently not of equal merit because after assessment in accordance with the process and criteria applied by the JAC, those candidates have been determined to be of unequal merit.

16.1.2. Secondly, the proposal underlying Question 1 involves determining a "pool" of candidates which "might be" of equal merit. Assuming that the JAC is tacitly admitting that its current processes are inadequate to place candidates in order of merit, the proposals for identifying a pool of candidates which "might have" equal merit are wholly unexplained and undefined.

16.2. As regards Question 2,

16.2.1. First, the suggestion that the Diversity Provisions can be applied sequentially at different stages of a selection process again involves a mistaken understanding of the law. The law permits diversity purposes to enter the selection process once it is determined that there are two candidates of equal merit. Ex hypothesi it cannot be said at various stages of a selection process before a final assessment of merit has been made, that specific candidates are of "equal merit": quite simply their respective merits/qualities and how they compare are in the process of determination.

16.2.2. Secondly, the proposal underlying Question 2 would involve a wholesale undermining of the validity and the perceived validity of the current merit tests applied by the JAC and which are, apparently, still intended to be the main determinant of "merit".

The New Law: CP 01/13: Part 4, paragraphs 28-30

17. Paragraphs 28 to 30 do not fully and accurately set out or explain the relevant changes to the laws made by the Diversity Provisions. The paper refers to paragraph 9 of Schedule 13 CCA which we take to be a typographical error for paragraph 10.

18. As a general matter, we would note our view that it is desirable that all of the relevant provisions of the CCA which amend judicial appointment processes in any part of the UK should be applied consistently. We are disappointed that the current JAC consultation is not a joint consultation by relevant parties in relation to the operation of the principle that diversity aims can become a factor in judicial appointments where there are candidates of equal merit.

19. The Constitutional Reform Act 2005 ("**CRA**") has to be read with the Equality Act 2005 ("**EA**").

20. Under Part 4 of the CRA, judicial appointments, other than to the Supreme Court, follow on from selection and recommendation by the JAC. The selection process is performed by a selection panel which is a committee of the JAC.

    20.1. Section 62(3) CRA provides that "selection must be solely on merit".

    20.2. In addition, s64 CRA requires the JAC, in performing its functions under Part 4, to have regard to the need to encourage diversity in the range of persons available for selection for appointments, but subject always to the overriding duty to select on merit under s62 CRA.

21. The EA made provision, by Part 5, regarding discrimination in and about the work place. In addition ss158 and 159 make provision regarding positive discrimination. In particular:

21.1. s50 EA (within Part 5) provides, in broad terms, that those selecting or recommending for the filling of a public appointment may not discriminate (positively or negatively).

21.2. Part 11 of the EA contains provisions in s158 and s159 which allow for limited positive discrimination in favour of persons with protected characteristics but subject always to any other provision of law (e.g. that in s62(3) CRA or s50 EA).

22. Paragraph 10 of Schedule 13 CCA (referred to in paragraph 30 CP 01/13) deals with the appointment of judges other than to the Supreme Court. It inserts a new sub-section (4) into s63A CRA. It provides that where two persons are of equal merit then the JAC may select one of them over the other for the purposes of increasing diversity within the group of persons who hold offices for which there is a selection or a sub-group of that group, and that this power overrides s63(2) and Part 5 of the EA.

23. In light of the proposals that there may be pools of people, perhaps as many as 12 if not more, to whom it is proposed the Diversity Provisions might be applied, it is important to note that the wording of the legislation, talking in terms of two candidates of equal merit, does not suggest that Parliament had in mind substantive pools or "zones" of people to whom the provision would be applied. Even if, as a matter of statutory construction, the CCA is to be read as enabling the Diversity Provision to apply even where there are more than two candidates of equal merit (which we question), Parliament clearly did not envisage a process which is anything like the proposal now made by the JAC. Indeed, as we explain below, our understanding is that despite many thousands of judicial appointments, the position has never arisen where there was only one available appointment but two candidates of equal merit.

24. In summary, prior to the coming into force of the relevant provisions of the CCA, the job of the JAC was to encourage diversity by widening the pool of

candidates but selection was always to be solely on merit. After the CCA, the same remains true save in the exceptional case where there are two candidates of equal merit. In such cases the JAC may select by preferring one of such candidates over the other for the purpose of increasing diversity. The relevant diversity sought to be achieved may be among the group of persons holding offices for which there is a selection or a sub-group of that group.

25. We note that the suggestion in CP 01/13 that the Diversity Provision "clarifies" the law. For the avoidance of doubt, we consider that it alters the law to a very limited extent. **However, and** in summary, the Diversity Provision does not, as a matter of law, alter the position that judicial appointment is to be on merit. Only where persons are of equal merit does diversity possibly come into play as a factor determining appointment. At the selection/appointment stage there is no weakening of the merit requirement. As before, only the best qualified amongst those applying will be appointed.[4]

26. We also note that the consultation paper assumes that diversity is limited to protected characteristics. We recognise the relevance of the statutory "protected characteristics". However, to view diversity only through the prism of the protected characteristics may be to take far too narrow a view. For example, there is a widespread acceptance that socio-economic diversity is an important aim to be achieved in the job market and this, of course, is not a relevant protected characteristic.

The current approach

27. As recorded in the description of the current process (Part 2 CP 01/13), it is clear that the JAC process involves it making its own assessment of an individual applicant's merit measured against the set of "Qualities and

[4] We note that the JAC does not apply any minimum merit standard which must in any event be achieved but simply selects by merit from among those who in fact apply. This could weaken the quality of the judiciary if sufficient numbers of applicants were not of high quality. It also in theory means that the quality of those appointed may vary as between different competitions if the applicants sufficiently differ in merit.

Abilities" that it has developed. These qualities and abilities may be adjusted for particular competitions. Having gone through the entire selection process, the JAC will in fact or in reality, have a list of candidates in order of merit, prior to making a recommendation. The JAC will then recommend as appointees the number of candidates which it is required to recommend, taking those selected from the top candidate, the most meritorious candidate, downwards. In the example given in paragraph 33 of CP 01/13 it would have 50 posts to fill and would draw a "cut-off line" under the name of the 50th candidate on the list. The list in question would contain the names of candidates listed in order of merit, as determined following the completion of the entire application process.

28. Although CP 01/13 does not say so, if more than one candidate were considered to be of equal merit then we assume that those persons would be listed in an equal position (say 50th equal) rather than one arbitrarily being placed lower in the list (and therefore of lower merit). That raises the question of what would happen prior to implementation of the CP 01/13 relevant provisions if, taking the example in paragraph 33 of CP 01/13, two persons were rated equally at the 50th position. When the ChBA enquired of this position previously they were informed that this had never happened. As set out in ChBA Response 2012:

> "*We seriously doubt whether two different candidates are ever "equal" or "essentially indistinguishable" .....and suggest that there really is no such case. Indeed, the JAC informed us by email on 31 January 2012 (and this was confirmed by email from the Ministry of Justice on the same day to similar effect) that, to date, it has been able to make all its selections on merit in accordance with its statutory duty and the situation posed in this question has never arisen, even though the Consultation Paper records (at paragraph 16) that since its creation the JAC has made almost 2,500 selections*."

29. We sought an update and further clarification of the position in the light of the current consultation. By e-mail dated 13 June 2013, the JAC confirmed that the situation posed by the Diversity Provision had never arisen, there having been some 3,504 recommendations having been made "up until March 2013".

30. As we see it, the Diversity Provisions of the CCA, would deal with the situation raised by paragraph 28 above of this paper. However, CP 01/13 suggests that those Provisions would permit a wholly different exercise to be carried out. Surprisingly, it seems to suggest the possibility of the Diversity Provisions being applied very widely to a potentially large pool of candidates (i.e. more than two and as many as twelve or more).

The proposed approach

31. As we understand the proposals dealing with the situation where the JAC identifies more than the required number of selectable candidates, they are as follows:-

31.1. The JAC having, at the end of the application process, drawn up its list of candidates in order of merit, then (as now) determines the number of vacancies it is required to recommend candidates for. It draws a line under the candidate who completes that number (e.g. in the example given, candidate 50), the "cut-off line".

31.2. The JAC then looks slightly above the cut-off line and slightly below it to identify a "zone of equal merit", this would be a zone where the persons within it "might be" of equal merit. The bottom of the zone is identified on the basis that those above the lower limit of the zone are "demonstrably more meritorious" than such candidates below the lower limit of the zone. Identification of those within the zone would depend on "a detailed analysis of the information gathered on those individuals during the selection process." The size of the zone would differ from competition to competition depending on the candidates

and the numbers of candidates but while "a narrow zone", it might comprise as many as a dozen candidates (or presumably even more).

31.3. Selection of candidates within the zone might then be carried out on the basis of diversity considerations.

31.4. So far as the manner in which diversity characteristics might be taken into account, the overall proposal is that if one diversity characteristic was to be promoted the JAC would seek to "enhance the diversity of the group of people to which the post was to be appointed". If more than one diversity characteristic was under consideration for promotion, then that area which needed the most attention "within the judiciary" would be used.[5] In determining which diversity considerations to take into account, the JAC would be led by the existence of reliable data and at present considers that it could only have confidence in data relating to gender and ethnicity. It is undecided whether to extend the provision to any other protected characteristic, even if reliable date could be obtained.[6]

The proposed "basic" approach

32. We consider that the proposal to apply diversity considerations to appointment within the pool to be unlawful. Not only that, but it also lacks transparency, objectivity and accordingly any possible consistency of application:

32.1. First, in drawing up its list the JAC has placed the candidates in order of merit, applying the relevant set of Qualities and Abilities. Having made this determination, we do not understand on what rational basis the JAC can discard that determination and decide that a number of those persons may in fact be of equal merit. If a different test of merit produces a different result to that resulting from applying the current test of merit then how valid (in terms of reliability or fairness) is that current test?

[5] CP 01/13 paragraph 35.
[6] CP 01/13 paragraph 38, 39.

32.2. Secondly, it is wholly unclear on what basis and using what test(s), the JAC would determine that, notwithstanding the results of the application of its current merit test, candidates were in fact of equal merit. For example, it is wholly unclear on what basis and using what tests of merit, the size of the zone would be decided.

(a) On the hypothesis set out in paragraph 33 of CP 01/13 the JAC has determined merit. Having done so, what different test of merit will it apply?

(b) The bottom of the zone would, it is suggested, be determined by deciding that those within the zone were "demonstrably more meritorious" than candidates below and falling outside of it. However, this begs the questions as to (i) how the top of the zone is determined, the setting of which will greatly influence the cadre within the zone which is part of the test for the setting of the bottom of the zone and (ii) what is meant (in terms of evidence and quantum) by "demonstrably more meritorious".

(c) Further, from previous comments of commissioners or the JAC, it appears that the potential problem area is the "middle" where candidates are closely bunched together in merit terms. If that is correct, then either the zone will be very large or the "demonstrably more meritorious" will have little real content.

32.3. Thirdly, the proposal is unlawful. It is a pre-requisite to the application of the Diversity Provisions that there are two candidates of equal merit. We have framed paragraphs 32.1 and 32.2 above, on the basis that what is being determined is a pool of individuals each with equal merit. However, that is not what the proposal is stated to be. In terms the basic approach assumes that the Diversity Provision can be applied to a pool of persons which "might" be of equal merit. It does not go so far as to say that the JAC would determine that the

persons within that zone "were" of equal merit. Indeed, the position is worse than that because, as we note in paragraph 32.1 above, the JAC applying its own criteria to assess merit will have determined that the individuals are NOT of equal merit.

33. Although it may be unfair to take an e-mail answer and use it as a considered response to an issue, we consider that the e-mail response dated 13 June 2013 from the JAC in answer to questions raised by us in connection with the preparation of this response, is revealing. Thus it suggests that: *"...a wider range of candidates might be seen as being of equal merit if "solely" is not to be applied to the merit test*". With respect we consider that this displays a basic fallacy. Whether or not candidates are of equal merit or not will **not** depend on whether the Diversity Provision applies or not. The Diversity Provision only comes into operation once it is determined that candidates **are** of equal merit.

34. We deal with the question of how diversity purposes should be taken into account when dealing with question 3.

Application of the Diversity Provision at different stages of the assessment of candidates:

35. The second question in CP 01/13 revolves around the question of whether there is an argument for use of the Diversity Provision at different stages of the assessment of candidates. CP 01/13 gives the example of 1,000 applicants for a selection exercise. The first stage would be to whittle down the number of applicants for further assessment at interview to about 250. That might be done by qualifying test or paper-sift. The question posed is whether the cut-off point around the 250th candidate should not be rigidly applied but whether a zone of "equal merit" could or should be established at about that point.

36. All the same objections that we have raised as regards the basic approach apply equally to this proposal. However, there is a further objection which is that the proposal made in Part 5.2 of CP 01/13 is clearly unlawful for a different reason. The Diversity Provision only applies where there are two candidates of equal merit. There is no question before the assessment process is completed of two persons being determined to be of equal merit for the purposes of selection. The Diversity Provision applies where there are two persons available for selection but only one place available. It does not apply wherever in the course of a selection process (but before it is completed) it might be said that two candidates are (or might be) of equal merit at that stage.

37. Indeed, the logic of the JAC proposals would go further. Logically they lead to the conclusion that, in the example given, as the entire 1,000 applicants "might be of equal merit" (because the test/paper sift is only the first stage of an assessment of merit and candidates might do badly in that but better when at interview etc.), the Diversity Provision could be employed at that stage. We use this example because it demonstrates how the proposals in CP 01/13 simply misinterpret the relevant law as introduced by CCA and amount to a widespread use of positive discrimination and the discarding to large part of the requirement that judicial appointments are made on merit.

38. So far as the issue raised by Part 5.2 of CP 01/13 is concerned, and taking the example used, we have some sympathy with the view that at an early stage of the process a rigid application of a cut off line at candidate 250 is unfair and not conducive to choosing the best candidates on merit. This is primarily because only one (or possibly more, but not all) of the relevant assessments of merit have been applied at that stage. On that basis we can see that a wider "zone of potential equality" of candidates at the relevant point may be more appropriate than, in the example, the drawing of a line under candidate 250.

38.1. However we do not consider that an arbitrary determination by the JAC of how many people it would like to interview, should enable the JAC to limit the number of those within the zone who would go forward to the next stage of the assessment process. All should go forward.

38.2. Further, to use the furtherance of diversity at that stage as the criterion for limiting the number of candidates within the zone as going through to the next stage would be positive discrimination which is in any event simply not permitted as a matter of law.

38.3. We should add that the creation of a "zone of potential equality" creates practical difficulties. The JAC would need to identify transparent and objective measures to be used to identify the zone of potential equality. As not all methods of assessment have been applied at that stage, this would not run up against the logical difficulty identified in paragraph 32.1 above, which arises at once the assessment process is complete. Nevertheless, some of the practical questions that we raise at paragraphs 32.2 above would still apply. Obviously where the sifting mechanism was a test, there would be an ability to look back at the application form and possibly references. However, where the sift was a paper sift it is difficult to see what criteria could be employed to identify a "zone of potential equality" unless, on some scientific basis, it was possible to say that the test was a blunt tool and between a certain range of marks there was a clear zone of potential equality.

38.4. We would like to consider further any suggestions in this regard which we consider should be the subject of further consultation.

Application of diversity considerations

39. There are two issues which arise in this connection, on the assumption that there are candidates of equal merit and insufficient vacancies to appoint all of them:

39.1. the suggestion in CP 01/13 paragraph 35 that the JAC would identify which candidate would enhance the diversity of the group of people to which the post was to be appointed but that if more than one characteristic was under consideration, the area which needed the most attention within the judiciary would be used (the "**Target Group**");

39.2. the question as to which characteristics the JAC would use in seeking to increase diversity ("**Diversity Characteristics**").

40. We note that the suggestion regarding Target Groups appears to involve a mistaken interpretation of the law. The Diversity Provision, where applicable, permits a candidate to be preferred over another of equal merit for the purposes of increasing diversity within "the group of persons who hold offices for which there is a selection ... or a sub-group of that group." The judiciary as a whole is not a group of persons holding office for which there would be a selection. A selection would be for a specific group, say County Court Judges or High Court Judges[7] (we leave aside for present purposes the question of whether, in fact and law the "group" would be narrower in the latter case e.g. to High Court Judges of a particular division). The Diversity Provision permits targeting of the diversity of a sub-group of a group but not a wider group. Accordingly we do not consider that it would be legal for the JAC to look at the judiciary as a whole when considering more than one characteristic (if that is what is suggested). Moreover, such an approach would be likely to be counter-productive in particular situations. It is apparent that the junior ranks of the judiciary are currently more diverse than the senior ranks. If there is a competition for a senior judicial post to which the Diversity Provision applies, then it is appropriate to take equivalent senior judges as the relevant Target Group. To take "the judiciary as a whole" as the relevant Target Group would be to fail to recognise the predominance,

[7] A particular competition may be to fill a particular group of, say, County Court Judges and so it may be that for the purposes of the application of the Diversity Provision the relevant "group" would be narrower than the "groups" we identify by way of example.

for example, of white men amongst the senior judiciary when compared with their more junior counterparts and to treat the senior judiciary as more diverse than it actually is.

41. If what is suggested by CP 01/13 is that, where the candidates have different relevant diversity characteristics, then that will be favoured which within the relevant group (rather than the judiciary generally) needs the most attention, the next issue is what is meant by this concept. If what is meant is that there should be a comparison of (a) the proportion that the number of persons within the group bearing each characteristic with (b) the proportion of persons within the population as a whole bearing that characteristic, such that the largest difference between those two proportions is taken as the relevant characteristic to be furthered, we would not disagree. To take an example (and totally arbitrary figures), if in the group in question, characteristic A was represented by 35% of the group (compared with 50% of the population) and characteristic B by 2% of the Group (compared with 10% of the population), then it would be the candidate with characteristic B that would be furthered. This would be on the basis that the group represented only 20% of the 10% target for characteristic B, compared with characteristic A where the group represented 70% of the 50% target. We consider that, if something else is meant, this needs to be spelled out and consulted upon.

42. We note the possible use of sub-groups. As we discuss further below, this extra factor might be quite important.

43. So far as the question of what diversity characteristics should be furthered, we agree with the suggested approach that the JAC should only act upon the basis of reliable data. We agree that gender and race are characteristics where there is probably sufficiently robust data. However, it is vitally important that the decision as to which characteristics to use is kept under review and amended as and when more robust data becomes available about characteristics other than race and gender. Choosing gender and race as the

only two characteristics relevant to a tie-break situation has the potential to undermine other important diversity goals. For example, if, exceptionally, there were three candidates of equal merit, a black man, a white woman and a disabled white male, the proposal to limit consideration to race and gender would mean choosing one of the first two, whereas the overall goal of diversity might best be promoted by choosing the third.

44. We also consider it important for the JAC to consider the seniority/age profile of appointees when operating the Diversity Provision. We have in mind the situation apparently envisaged by CP 01/13 where (say) gender diversity might be sought to be promoted. We are concerned that if the Diversity Provision was applied frequently and without thought in this context, the result might be a large number of (say) female appointees at a certain level of seniority. That might redress the fact that the group as a whole to which appointments was being made did not reflect diversity within society. However, there would be a danger that (say) in 20 years time, when the current cadre of (on the assumption we have adopted) older, more male dominated and unrepresentative sub-group retired, the group as a whole would become significantly unrepresentative of the diversity of society by there being a disproportionate number of female judges. In short, we consider that the JAC would need to look at the holistic picture in terms of not just the immediate position post the appointments it was making but the long term position and effect of furthering diversity of particular types at this stage.

A decision not to apply the "equal merit" provision?

45. The ChBA 2012 response to the MOJ consultation was essentially against the extension of a Diversity Provision to the appointments process for members of the judiciary. We recognise, however, that if a tie-break situation were genuinely to arise in the future (even though it has never arisen in the past), there must be some means of resolving which candidate should be preferred. It is clearly preferable to resolve that tie-break in a way which promotes the

diversity of the Judiciary rather than, for example, through the toss of a coin, and by enacting the Diversity Provision Parliament has clearly recognised this.

46. We would however repeat out concerns about transparency and how the application of the Diversity Provision would be publicised and what the effect of that Provision might actually be.

Formal Response:

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

No. For the reasons given in paragraphs 17 to 34 above, the approach proposed would be unlawful because it would go beyond the use of diversity characteristics for the purposes of resolving a tie-break between candidates of equal merit and involve the positive promotion of candidates of lesser merit over those of greater merit on the basis of their diversity characteristics. Moreover, the proposals are insufficiently transparent or defined to command public confidence.

If you do *not* agree with this approach to the application of the "equal merit" provision, would you like to recommend an alternative approach?

Yes. Candidates for any post, following completion of the whole selection process, should be placed in order of merit by reference to the selection criteria, wholly without reference to diversity characteristics. If on a robust application of the criteria, it appears that two or more candidates are utterly indistinguishable on merit alone, then they should be shown in the list as being of equal merit (for example: 1. [name]; 2. [name] 3 = [name and name].) Vacancies would be filled from the top of the list. Only if there was a tie between candidates at the relevant cut-off point (for example, if there were 50 vacancies, at the 50th place on the list) would the Diversity Provision apply.

In that event, the Diversity Provision would be applied so as to break the tie between the two equal candidates by considering the characteristics of the specific group of current Judges holding that post (e.g. County Court Judges or High Court Judges) (and possibly a relevant sub-group) against the characteristics of the general population and preferring the candidate who bore the characteristic least well reflected in that judicial group.

Initially the only two characteristics to be utilised would be race and gender but this would be kept under review, as would the seniority profile of the relevant group of the judiciary, so as to avoid future imbalance.

In listing two or more candidates as being of equal merit, the JAC would need to bear in mind that it has apparently managed to fill more than 3,000 vacancies so far without ever finding two candidates who were exactly equal on merits grounds. A sudden jump in findings of equality between candidates would suggest either that the JAC has so far been making arbitrary distinctions between candidates otherwise of equal merit or that the existence of the Diversity Provision was, consciously or subconsciously, influencing the assessment of merit when it ought not to do.

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

No, for the reasons given in paragraphs 35 to 38 above. The JAC cannot determine that candidates are of equal merit until the assessment is complete and use of diversity characteristics to determine applications at any earlier stage would be unlawful. Further, the proposal would undermine public confidence in the validity of the merit tests currently applied by the JAC. However, we have expressed views that a rigid application of a particular method of grading at early stages of the assessment process may profitably be relaxed.

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

We agree that for the moment race and gender should be the two protected characteristics considered by the JAC. However, this decision must be kept under review, for the reasons given in paragraphs 39 to 44 above.

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

No, for the reasons given in paragraph 45 to 46 above.

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