

Crime and Courts Bill

Fact Sheet: Judicial Appointments and Flexible Judicial Deployment

Clause 18 – Judicial Appointments

Clause 18 and Schedule 13 contain a number of provisions to change the statutory framework for the judicial appointments system. These provisions aim to:

- achieve a better balance between executive, judicial and independent responsibilities in the appointments process; and
- create a more diverse judiciary that better reflects society, whilst preserving the principle of appointment on merit.

What is the current position?

The Constitutional Reform Act 2005 (the “CRA”) sets out the current process for judicial appointments. The CRA established an independent Judicial Appointments Commission (the “JAC”), with responsibility for selecting judges and making recommendations to the Lord Chancellor, who then nominates candidates for appointment. The establishment of the JAC has increased confidence in the appointments system, by making the process more independent and transparent.

A diverse judiciary that reflects the society it serves is important to provide public confidence in the justice system. Whilst some progress has been made, particularly at lower levels of the judiciary, the current level of diversity does not reflect our diverse society.

What are the proposed changes?

The Government is committed to further improving the judicial appointments process and increasing the diversity of the judiciary in line with the above aims. The Government launched a public consultation in November 2011 entitled “Appointments and Diversity: A Judiciary for the 21st Century” which closed in February 2012. We received 96 responses to the consultation from a range of interested organisations and individuals. Generally, respondents showed support for the overall framework of judicial appointments as introduced by the Constitutional Reform Act 2005, but agreed that there is scope to rebalance some responsibilities. The consultation responses also made clear that there is no single solution to the issue of judicial diversity, and most of the diversity measures that were proposed received strong support.

Currently, the CRA prescribes that the Supreme Court must consist of 12 justices. However, this makes for an inflexible system, requiring a cohort of 12 judges even though the full complement of 12 judges may not always be required. Part 1 of Schedule 13 to the Bill amends the CRA to remove the requirement for a fixed number of Supreme Court judges, replacing it with a provision for a maximum number of 12 judges expressed in terms of full-time equivalents to take account of part-time working. Removing this requirement will give greater flexibility for the Court to operate below the mandatory level of 12 justices. The Bill also removes the disincentive to the appointment of part-time judges in the Supreme Court by providing for the maximum number of Supreme Court judges to be calculated on the basis of full-time equivalents.

Part 1 also removes elements of detail of the appointment process from primary legislation and provides for new regulation making powers to provide for the detail of the process to be set out in secondary legislation. This will provide greater flexibility for making changes to the process without the need for legislation, whilst ensuring points of principle remain on the face of the Constitutional Reform Act 2005. These regulations will need to be agreed with the President of the Supreme Court and will need to be agreed by Parliament.

Part 1 makes provisions regarding the selection process for Supreme Court judges, specifically the requirements in relation to the composition of selection commissions for Supreme Court appointments. These changes are intended to help achieve a balance between judicial, independent and executive roles, and to reduce the risk that candidates are appointed based on a likeness to the members of the selection panel.

To promote greater diversity within the judiciary, Part 2 of Schedule 13 makes a number of changes. First, it removes the disincentive to the appointment of part-time senior judges by providing for the existing statutory limits on the number of High Court judges and judges of the Court of Appeal to be calculated on the basis of full-time equivalents. Second, it applies the principle of the Equality Act 2010 “tipping point” positive action provisions to judicial appointments so that preference may be given to a candidate from an under represented group where two candidates are essentially indistinguishable on merit. It also introduces a new statutory duty for the Lord Chancellor and Lord Chief Justice to take such steps as they consider necessary to encourage judicial diversity.

The number of JAC commissioners and detailed requirements relating to the composition of the JAC are currently prescribed in the CRA. Part 3 of Schedule 13 to the Bill amends the CRA to allow the number and composition of JAC Commissioners to be determined by secondary legislation.

The CRA provided for a greater separation of powers between the executive and judiciary, and transferred many of the Lord Chancellor’s judicial responsibilities to the Lord Chief Justice. Consistent with this approach, it is now considered appropriate to transfer his selection decision for the appointment of judges below the High Court to the Lord Chief Justice, which Part 4 of Schedule 13 gives affect to. The Bill also transfers the selection decisions for Magistrates from the Lord Chancellor to the Lord Chief Justice.

Part 4 also provides for the transfer of certain selection decisions to the Senior President of Tribunals, namely for appointments to the First-tier Tribunal and Upper Tribunal. For those appointments that are confirmed by Her Majesty The Queen, the Lord Chancellor will retain responsibility for formally writing to Her Majesty, once the Lord Chief Justice and Senior President of Tribunals have completed their steps in the process.

Part 4 also removes elements of detail of the appointment process from primary legislation and provides for new regulation making powers to provide for the detail of the process to be set out in secondary legislation. This will provide greater flexibility for making changes to the process without the need for legislation, whilst ensuring points of principle remain on the face of the Constitutional Reform Act 2005. These regulations will need to be agreed with the Lord Chief Justice and will need to be agreed by Parliament.

Part 4 introduces a Judicial Appointments Commission process for appointing deputy High Court judges and for authorising Circuit judges and Recorders to sit in the High Court. This is an important reform to increase transparency to these appointments.

Part 4 also allows the appointment of certain judicial offices not requiring a legal qualification to be removed from the JAC's remit by Order. The Part also provides for the functions of the Senior President of Tribunals and Heads of Division to be delegated by the Lord Chief Justice, with the agreement of the Lord Chancellor, when the post is vacant or the serving office holder is incapacitated.

Part 5 of schedule 14 provides for an alternative judge to be nominated to take on the functions of a Head of Division in the event that the Head of Division is incapacitated or their office is vacant.

As of April 2000, appointments to the office of Assistant Recorder (fee-paid judicial office holders with a fixed term of appointment) were no longer made, with all subsequent appointments being made to the office of Recorder. Part 6 of Schedule 13 accordingly abolishes the office of Assistant Recorder.

Clause 19 – Deployment of the Judiciary

Clause 19 and Schedule 14 provide for greater flexibility in the deployment of members of the judiciary across the courts and tribunals service. This will enable the more efficient and effective transaction of courts and tribunals business by making the best use of the judicial resources available.

What is the current position?

Deployment is the term that describes the process of how judicial resources in the courts and tribunals are utilised. Assignment is the term (used mainly in the tribunal system) that describes the process of how tribunal judges and members are deployed. Section 7 of the CRA outlines in broad terms that the Lord Chief Justice is responsible for the “maintenance of appropriate arrangements” for the deployment of judges in courts within England and Wales. Similarly, Part 2 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) specifies that the Senior President of the Tribunals has the function of assigning judges and members to the chambers of the First-tier Tribunal and Upper Tribunal.

Currently, in the tribunals the scheme of assignment is in part specified by the TCEA and supplemented by a policy which the Senior President of Tribunals is required to publish. Within the court system the deployment scheme is largely uncodified. Each piece of legislation dealing with court jurisdiction (for example the Senior Courts, County Court and Magistrates’ Court), specifies which judicial office holders may sit in that court and their deployment to that court is managed by the Lord Chief Justice through his section 7 CRA power.

What are the proposed changes?

The clause 19 and provisions in Schedule 14 to the Bill expand the judicial office holders that are capable of sitting in each court or tribunal. The attached table illustrates the changes to be made to each court or tribunal (outlining in the last column any changes to the deployment process).

Ministry of Justice
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Court or Tribunal	Judges added by Schedule 14	Process added by Schedule 14
Court of Appeal (Criminal Division)	Circuit Judge	Concurrence of the Judicial Appointments Commission
High Court	Senior President of Tribunals Circuit Judge Recorder Upper Tribunal Judges Employment Tribunal Presidents	No process for Senior President of Tribunals. All other judges may only be requested from pool selected by the JAC.
Crown Court	Senior President of Tribunals First-tier Tribunal Judge Upper Tribunal Judge District Judge Deputy District Judge Employment Tribunal Judge	No new process
Magistrates' Court	Master of the Rolls Ordinary Judge of the Court of Appeal Senior President of Tribunals First-tier Tribunal Judge Upper Tribunal Judge Senior High Court Masters High Court Masters District Judge Deputy District Judge Employment Tribunal Judge	No new process
First-tier Tribunal	Deputy Circuit Judge Recorder Senior High Court Masters High Court Masters Deputy District Judge Deputy District Judge (Magistrates' Court) Assistant Judge Advocate General	No new process
Upper Tribunal	Lord Chief Justice of England and Wales Master of the Rolls President of the Queen's Bench Division President of the Family Division The Chancellor of the High Court Deputy Judge of the High Court The Judge Advocate General	No new process
Employment Tribunal	Lord Chief Justice of England and Wales Master of the Rolls President of the Queen's Bench Division President of the Family Division The Chancellor of the High Court Deputy Judge of the High Court	No consent required for the Lord Chief Justice of England and Wales. No new process for all remaining judges.

	Recorder Deputy District Judge (Magistrates' Court) Deputy District Judge Senior High Court Master High Court Master The Judge Advocate General Assistant Judge Advocate General	
Employment Appeals Tribunal	Senior President of Tribunals Deputy judge of the High Court Judge Advocate General Circuit Judge Upper Tribunal Judge District Judge District Judge (Magistrates' Courts)	No new process