

CRIME AND COURTS ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Courts and Justice

Schedule 13: Judicial appointments

Part 4: Judicial appointments: selection, and transfer of powers of Lord Chancellor

355. *Part 4* provides for responsibility for certain decisions in relation to judicial appointments to be transferred from the Lord Chancellor to the Lord Chief Justice and Senior President of Tribunals. It also makes amendments to the CRA in relation to the processes for selecting persons for appointment to judicial office.
356. The Lord Chief Justice will acquire the power to appoint persons to a number of courts-based judicial offices below the High Court and will acquire the power to decide upon selections made by the JAC in relation to appointments to a number of other courts-based judicial offices where Her Majesty The Queen makes the appointment. The Lord Chancellor will retain the power to decide upon selections by the JAC, or selection panel, in relation to appointments to the High Court and above and will retain the power to appoint in relation to a number of other courts-based judicial offices.
357. In relation to those offices where the Lord Chief Justice will, in future, have the power to appoint, most if not all of those offices are held by the holders on a renewable fixed-term basis. The power to extend, or to refuse to extend, such fixed-term appointments will be retained by the Lord Chancellor.
358. The Lord Chancellor will retain overall responsibility and accountability for judicial terms and conditions of appointment and service.
359. The Senior President of Tribunals will acquire the power to appoint persons as judges or other members of the First-tier Tribunal, other members of the Upper Tribunal, Chamber Presidents and Deputy Chamber Presidents of the First-tier Tribunal or the Upper Tribunal and deputy judges of the Upper Tribunal. The Senior President of Tribunals will also acquire the power to decide upon selections made by the JAC in relation to appointments as judges of the Upper Tribunal for which Her Majesty The Queen has the power to appoint.
360. Where any of the offices for which the Senior President of Tribunals will, in future, have the power to appoint are held by the holder on a renewable fixed-term basis, the Lord Chancellor will retain responsibility for the extension of (or refusing to extend) such fixed-term appointments. The Lord Chancellor will retain power to remove a person from office and, again, the Lord Chancellor will retain responsibility for judicial terms and conditions of appointment and service.
361. *Paragraph 29* amends Part 1 of Schedule 14 to the CRA (appointments by Her Majesty) so as to transfer responsibility for deciding upon selections made by the JAC in relation

to certain judicial appointments from the Lord Chancellor to the Lord Chief Justice or the Senior President of Tribunals. *Paragraph 30* makes consequential amendments to paragraphs 1(2)(d) and 1(3) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007.

362. *Paragraph 32* amends section 21 of the Courts Act 1971 which deals with the appointment of Recorders who are fee-paid Crown Court and county court judges who hold office for a renewable fixed-term. Section 21(3) deals with the terms of appointment of a Recorder. Subsection (3)(c) provides that the terms of appointment must specify the circumstances in which the Lord Chancellor may either terminate the appointment or decline to extend the term of the appointment. The power to renew or refuse to renew the fixed-term appointments of these judicial offices will remain with the Lord Chancellor and not be transferred to the Lord Chief Justice. *Sub-paragraph (3)* inserts a new subsection (8) to provide that subject to the preceding provisions of section 21 a person holds and vacates office as a Recorder in accordance with the terms of the person's appointment and those terms are to be such as the Lord Chancellor may determine. *Sub-paragraph (3)* also inserts a new subsection (9) into section 21 which enables the Lord Chief Justice to nominate a senior judge to exercise functions under section 21(4) or (4C).
363. *Paragraph 34* relates to the appointment of deputy Circuit judges by the Lord Chief Justice. *Paragraph 34(3)* amends section 24(1)(a) of the Courts Act 1971 to transfer the power to appoint persons as deputy Circuit judges from the Lord Chancellor to the Lord Chief Justice, but any decision to appoint a person must be made with the concurrence of the Lord Chancellor (reversing the current roles). *Paragraph 34(5)* inserts new subsections (5A) to (5D) into section 24 of the Courts Act 1971 to provide for the circumstances in which a deputy Circuit judge may be removed from office by the Lord Chancellor (new section 21(5A)), the extension of a deputy Circuit judge's fixed-term of appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice, or the Lord Chief Justice's nominee, that may be required by the terms and conditions of appointment and service (new section 21(5B) and (5C)), and the determination of other terms of appointment by the Lord Chancellor (new section 21(5D)).
364. *Paragraph 35* amends section 91 of the Senior Courts Act 1981, which deals with the appointment of deputy and temporary Masters, Registrars etc. of the High Court. *Paragraph 35(2)* amends section 91(1) to transfer to the Lord Chief Justice (from the Lord Chancellor) the power to appoint such office holders. *Paragraph 35(3)* substitutes section 91(1ZA) to provide that the Lord Chief Justice cannot appoint a holder of relevant office (as defined in section 91(1ZC)) as a deputy Master etc without the agreement of the Lord Chancellor. *Paragraph 35(4)* inserts new subsections (6A) to (6D) into section 91 to provide for the circumstances in which a deputy or temporary Master etc. may be removed from office by the Lord Chancellor (new section 91(6A)), the extension of a deputy or temporary Master's etc. fixed-term appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice (or the Lord Chief Justice's nominee) that may be required by the terms and conditions of appointment and service (new section 91(6B) and (6C)), and the determination of other terms of appointment by the Lord Chancellor (new section 91(6D)).
365. *Paragraph 35(5) to (7)* make consequential amendments to the CRA and Tribunals, Courts and Enforcement Act 2007.
366. *Paragraph 36* amends section 102 of the Senior Courts Act 1981 which provides for the appointment of deputy district judges for the High Court. *Sub-paragraph (2)* amends section 102(1) to allow the Lord Chief Justice (rather than the Lord Chancellor) to appoint persons as deputy district judges. *Sub-paragraph (3)* amends section 102(1B) so that the Lord Chief Justice cannot appoint without the agreement of the Lord Chancellor a person who holds the office of district judge or a person who ceased to hold the office of district judge within two years ending with the date when the appointment takes effect. *Sub-paragraph (4)* inserts new subsections (5ZA) to (5ZE) into section 102

to provide for the circumstances in which a deputy district judge may be removed from office by the Lord Chancellor (new section 102(5ZA)), the extension of a deputy district judge's fixed-term of appointment by the Lord Chancellor (with any agreement of the Lord Chief Justice (or the Lord Chief Justice's nominee) that may be required by the terms and conditions of appointment and service) (new section 102(5ZB) and (5ZC)), the determination of other terms of appointment by the Lord Chancellor (new section 102(5ZD)) and the delegation of the Lord Chief Justice's functions under section 102 (new section 102(5ZE)). *Paragraph 36(5) and (6)* make consequential amendments to the Senior Courts Act 1981 and the CRA as a result of the above changes.

367. *Paragraph 37* makes similar provisions to those outlined above, but in relation to deputy district judges for the county court, by amending section 8 of the County Courts Act 1984.
368. *Paragraph 38* makes like provisions for Deputy District Judges (Magistrates' Courts) by amending section 24 of the Courts Act 2003.
369. *Paragraph 39* amends section 10 of the Courts Act 2003 and provides for the Lord Chancellor's powers of appointment in respect of lay justices (magistrates) to be transferred to the Lord Chief Justice. The appointments themselves will, as now, continue to be made in the name of Her Majesty The Queen. *Sub-paragraph (3)* inserts a new section 10(1A) to provide that a lay justice is to hold and vacate office in accordance with terms of appointment as determined by the Lord Chancellor. *Sub-paragraph (4)* inserts a new section 10(2ZA) to provide that the Lord Chief Justice must ensure that arrangements for the exercise (so far as affecting any local justice area) of functions under subsection (1) include arrangements for the consulting of persons appearing to the Lord Chief Justice to have special knowledge of matters relevant to the exercise of that function in relation to that area. *Sub-paragraph (6)* inserts a new section 10(6A) to enable the Lord Chief Justice to nominate a senior judge (as defined by section 109(5) of the CRA) to exercise his power to appoint lay justices.
370. *Paragraph 40* introduces a requirement into section 94A of the CRA for the Lord Chancellor and the Lord Chief Justice to seek the concurrence of the other before making certain judicial appointments, selection for which is not undertaken by the JAC.
371. *Paragraph 41* amends Part 2 of Schedule 14 to the CRA so that the transfer of the power to appoint in relation to particular courts-based judicial offices from the Lord Chancellor to the Lord Chief Justice is reflected in that Schedule.
372. *Paragraphs 42 and 43* amend the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to confer upon the Senior President of Tribunals (in place of the Lord Chancellor) the power to appoint Chamber Presidents for the First-tier Tribunal or the Upper Tribunal.
373. *Paragraph 44(1)* introduces a new subsection (1A) into section 8 of the 2007 Act, which restricts the power of the Senior President of Tribunals to delegate his power to appoint judges and other members to the First-tier Tribunal to a Chamber President of a chamber of the Upper Tribunal. *Paragraph 44(2)* amends section 8(2) of the 2007 Act in order to detail which functions the Senior President of Tribunals may not delegate. *Paragraph 44(3)* inserts new section 46(7) into the 2007 Act to provide a definition of 'senior judge' for the purposes of Schedules 2 to 4 to that Act in relation to refusals to extend fixed-term appointments.
374. *Paragraph 45(2)* amends Schedule 2 to the 2007 Act to confer on the Senior President of Tribunals the power to appoint judges and other members of the First-tier Tribunal. *Paragraph 45* further amends Schedule 2 to set out the grounds on which the Lord Chancellor may remove from office judges and other members of the First-tier Tribunal appointed on a fee-paid basis, and makes provisions regarding the extension of fixed-term appointments by the Lord Chancellor (with any agreement of a senior judge (as

defined under section 46(7)), or a nominee of a senior judge, that may be required by the terms and conditions of appointment and service).

375. *Paragraph 46* makes similar provisions in relation to the appointment of other members of the Upper Tribunal by amending Schedule 3 to the 2007 Act, and also confers upon the Senior President of Tribunals the power to appoint deputy judges of the Upper Tribunal by way of amendment to paragraph 7(1) of Schedule 3.
376. *Paragraph 47* amends Schedule 4 to the 2007 Act to transfer certain functions from the Lord Chancellor to the Senior President of Tribunals in relation to the appointment of Chamber Presidents and deputy Chamber Presidents. *Sub-paragraph (14)* inserts new paragraph 5A into Schedule 4 to provide for the removal of Chamber Presidents and deputies from office by the Lord Chancellor and extensions of their appointments where they are fixed-term appointments by the Lord Chancellor (with any agreement of a senior judge (as defined under section 46(7)), or a nominee of a senior judge, that be required by the terms and conditions of appointment and service).
377. *Paragraph 48(2)* substitutes a new section 94B(1)(b) of the CRA to provide that for certain appointments (where section 94B applies) the Lord Chancellor and the Senior President of Tribunals are not to make an appointment (or recommendation for appointment) without the concurrence of the other.
378. *Paragraph 49* makes consequential amendments to Part 3 of Schedule 14 to the CRA to reflect the transfer of the Lord Chancellor's power to appoint in relation to certain tribunals-based judicial offices to the Senior President of Tribunals.
379. *Paragraph 50* amends section 50 of the Equality Act 2010 to amend the definition of "public office" so as to bring into its scope those judicial offices for which the Lord Chief Justice and the Senior President of Tribunals will, in future, have the power to appoint. It will therefore be unlawful for the Lord Chief Justice or the Senior President of Tribunals to discriminate against, harass or victimise persons who are, or wish to be, appointed to those judicial offices for which the Lord Chief Justice and the Senior President of Tribunals will have the power to appoint.
380. *Paragraph 51* makes consequential amendments to section 51 of the Equality Act 2010.
381. *Paragraph 52* amends section 9 of the Senior Courts Act 1981 so that requests may only be made to a Circuit Judge, Recorder or Tribunal judge to sit in the High Court if they are a member of a pool selected by the JAC for such purposes.
382. *Paragraph 53* repeals several sections of the CRA, and inserts a new section 94C into that Act. The new section 94C will require the Lord Chancellor to make regulations with the agreement of the Lord Chief Justice to:
- (a) make further provision about the process to be applied where the Lord Chancellor has requested the JAC to select persons for appointment as a High Court judge or to one of the offices listed in Schedule 14 to the CRA or to a pool mentioned in the amendment made by *paragraph 52*. Although the JAC will have the power under section 88(1) of the CRA to determine the selection process to be applied by it, the regulations may make further provision about the entire process;
 - (b) make further provision about the membership of the selection panels convened for selecting persons for appointment as Lord Chief Justice, Heads of Division, Senior President of Tribunals or ordinary judges of the Court of Appeal;
 - (c) make further provision about the process to be applied in a case where such a selection panel is required to be convened.
383. The regulations must also secure that in every case there must come a point where a selection by the JAC or selection panel is accepted. New section 94C(2) sets out what the regulations may in particular provide for. Notably, such regulations may give functions to the Lord Chancellor including the powers to require a selection

panel to reconsider a selection or any subsequent selection, and to reject a selection. Furthermore, under these regulations the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals (depending upon who has the power to decide upon a selection by the JAC) could be given power to reject or require reconsideration of initial or subsequent selections by the JAC made on a request under section 87, and to require reconsideration by the JAC of a decision where a selection process has not identified candidates of sufficient merit.

384. *Paragraphs 54 to 80* provide for other changes to be made to the CRA in relation to selection processes and complaints about the selection/appointment process. Paragraph 55 amends section 66(1)(a) of the CRA so that before issuing any guidance to the JAC about selection procedures the Lord Chancellor must now obtain the agreement of the Lord Chief Justice.
385. *Paragraph 58(2)* inserts new subsections (1A) to (1D) into section 70 of the CRA, setting out requirements in relation to the composition of selection panels for selecting persons for appointment as Lord Chief Justice or Heads of Division. Similarly, sections 75B and 79 are amended (*paragraphs 60(2) and 63(2)*) to set out requirements for the composition of selection panels for selecting persons for appointment as the Senior President of Tribunals and ordinary judges of the Court of Appeal, respectively. The new subsections notably require that the panel must consist of an odd number of members and not less than five, that at least two members must be non-legally qualified (which may be defined in regulations made under new section 94C), that at least two must be judicial members and that at least two must be members of the JAC.
386. *Paragraph 64(4)* provides for the Lord Chancellor, by order and after consulting the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland, to provide that section 85 of the CRA does not apply to appointments to an office listed in Schedule 14 to the CRA that is specified in the order. In essence this will provide that certain offices may be removed from the scope of the JAC. Those offices may only be those that do not require particular legal qualifications.
387. *Paragraph 65* amends section 86 of the CRA, in relation to the duties to make appointments or recommendations for appointment.
388. *Paragraph 66* amends section 87 of the CRA. *Sub-paragraph (2)* inserts new subsection (1A) which provides that the Lord Chancellor may request the JAC to select a person for membership of a pool from which requests may be made under section 9(1) of the Senior Courts Act 1981 to assist with the business of certain courts.
389. *Paragraph 67* makes consequential amendments to section 88 of the CRA, which deals with the selection process. It includes an amendment to section 88(4) to provide that only one person may be selected in relation to each request for a person to be selected for membership of a pool for the purposes of section 9(1) of the Senior Courts Act 1981.
390. *Paragraph 68* substitutes a new section 94 into the CRA. If the Lord Chancellor gives the JAC notice of a request which the Lord Chancellor expects to make under section 87, the JAC must seek to identify persons it considers would be suitable for selection on the request. The Lord Chancellor, however, may with the agreement of the Lord Chief Justice make regulations about how the JAC is to comply with this duty. *Paragraph 69* provides further detail and consequential amendments to section 95 of the CRA regarding the Lord Chancellor's power to withdraw or modify a request made under section 69, 78 or 87 of the CRA or paragraph 2(5) of Schedule 1 to the 2007 Act.
391. *Paragraph 70* makes consequential amendments to section 97(1) and (4) of the CRA.
392. *Paragraphs 71 to 77* make consequential amendments to sections 99 to 105 of the CRA which concern complaints about the selection/appointment process, including referrals to the Judicial Appointments and Conduct Ombudsman ("Ombudsman"). *Paragraph 71* incorporates a definition of "LCJ complaint" and "SPT complaint"

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into section 99 of the CRA, and *paragraph 72* imposes a duty upon the Lord Chief Justice and Senior President of Tribunals to investigate complaints made to them. *Paragraphs 73 to 75* concern the duties of the Ombudsman to investigate complaints and submit reports to the Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor. *Paragraph 78* amends section 144(5) of the CRA to add to the list of orders and regulations that are subject to the affirmative resolution procedure. *Paragraphs 79 and 80* make further consequential amendments to the CRA.