EXPLANATORY MEMORANDUM TO

THE JUDICIAL APPOINTMENTS REGULATIONS 2013

2013 No. [DRAFT]

THE SUPREME COURT (JUDICIAL APPOINTMENTS) REGULATIONS 2013

2013 No. [DRAFT]

THE JUDICIAL APPOINTMENTS COMMISSION REGULATIONS 2013

2013 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Judicial Appointments Regulations 2013 set out details of the selection process to be followed when selecting a person to be the Lord Chief Justice, a Head of Division, the Senior President of Tribunals or a Lord Justice of Appeal and also details of the selection process to be followed by the Judicial Appointments Commission when it is selecting for appointment to specified judicial offices (including puisne judges of the High Court) and also when it is selecting for membership of the pool for requests under section 9(1) of the Senior Courts Act 1981 (assistance with business of the Senior Courts).

2.2 The Supreme Court (Judicial Appointments) Regulations 2013 set out details of the selection process for the appointment of Supreme Court Justices, including the composition of selection commissions.

2.3 The Judicial Appointments Commission Regulations 2013 set out the composition of the Judicial Appointments Commission including the number of Commissioners, the process for their selection and their eligibility to become a Commissioner or Chairman.

3. Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Crime and Courts Act 2013 has moved the procedural detail of the selection for specified judicial appointments from the face of the Constitutional Reform Act 2005 (CRA) and replaced it with regulation making powers. Those aspects of the Constitutional

Reform Act 2005 that deal with important elements of principle remain on the face of primary legislation.

4.2 As well as moving the procedural detail into secondary legislation we have made some changes to the selection processes to help achieve the appropriate balance between executive, judicial and independent responsibilities in judicial appointments, to encourage judicial diversity, whilst ensuring the Lord Chancellor retains Parliamentary accountability for the overall process. However, the processes largely reflect those originally set out in the CRA.

5. Territorial Extent and Application

5.1 All three instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Lord Chancellor has made the following statement regarding Human Rights:

In my view the provisions of The Judicial Appointments Regulations 2013, The Supreme Court (Judicial Appointments) Regulations 2013 and The Judicial Appointments Commission Regulations 2013 are compatible with the Convention rights.

7. Policy background

7.1 The main reason behind these changes is to increase flexibility by providing for the detail of the selection processes applicable to various judicial appointments to be set out in secondary legislation. Previously, primary legislation would have been needed to make even minor changes to the selection process. The selection processes set out in the Regulations and those relating to the composition of the Judicial Appointments Commission are closely modelled on those that were previously set out in the CRA.

7.2 The Crime and Courts Act 2013 also aims to address the balance between judicial, independent and executive roles in the judicial appointment process by transferring the power to appoint certain judges below the High Court from the Lord Chancellor to the Lord Chief Justice and Senior President of Tribunals. The Judicial Appointment Regulations 2013 make appropriate changes to the selection process to enable selections to be accepted, rejected or reconsidered by the office responsible for making the appointment. There are also changes to the requirements for consultation during the selection process, which now includes the Lord Chancellor for appointments to the Court of Appeal and above to ensure the Executive has an appropriate level of input in that process. The Regulations also introduce a consultative role for the First Minister of Wales in the process for appointing the Lord Chief Justice

7.3 The Regulations also aim to increase the diversity of persons selected for judicial office. Detailed changes in the Judicial Appointment Regulations 2013 include that selection panels for the most senior appointments (including Lord Chief Justice, Heads of Division and Lord Justices of Appeal) must now consist of an odd number of members

and not less than five with increased lay membership to prevent judges appointing in their own image.

7.4 The Supreme Court (Judicial Appointments) Regulations 2013 set out the composition of selection commissions for Supreme Court appointments, including the requirement to include at least one serving judge of the Supreme Court, at least one non-legally qualified member and at least one member of the Judicial Appointments Commission, Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. Having only one serving judge of the Supreme Court on the commission is intended to help guard against any perception of judges appointing in their own image and was also a recommendation of the Advisory Panel on Judicial Diversity[1].

7.5 These Regulations also introduce a change to the selection process for appointing the President of the Supreme Court, by ensuring that the chair will be a lay member instead of a judicial office holder. However, the overall selection process largely reflects that previously set out in the CRA, for example the role of the Lord Chancellor and options he has in making the selection decision are unchanged.

7.6 The Judicial Appointment Regulations 2013 also introduce changes to the process for the identification of judicial office holders and practitioners to be authorised under section 9(1) of the Senior Courts Act 1981 to sit as Deputy High Court judges. The changes introduce a new Judicial Appointments Commission owned process which will apply existing open and transparent merit based processes to these selection exercises.

7.7 The Crime and Courts Act 2013 provides that the number of Commissioners of the Judicial Appointments Commission who are judicial office holders must be less than the number of Commissioners who are non-judicial office holders to guard against any perception of judges appointing in their own image and thus contributing to the broader aim of encouraging judicial diversity. The Judicial Appointments Commission Regulations 2013 set out the number and detail of the new composition drawing very closely on the provisions previously set out in the CRA, reflecting the same overall balance of judicial, legal and lay representation on the Commission. However, there are changes to the required qualifications for some of the Commissioners. For example, there is now a requirement to have a senior tribunal judge as a Commissioner (reflecting the large number of tribunal appointments made by the Commission) and no longer a requirement for there necessarily to be a Commissioner who is a serving magistrate (reflecting the fact that the Judicial Appointments Commission do not undertake magistrate appointments). The process for the selection of Commissioners is based very closely on the existing process as set out in the Constitutional Reform Act, with only minor technical changes.

Consolidation

7.7 Not applicable.

[1] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf

8. Consultation outcome

8.1 In 2010 the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, made a number of recommendations aimed at increasing the diversity of the judiciary and legal professions. Following this report, the Ministry of Justice issued a public consultation entitled 'Appointments and Diversity: A Judiciary for the 21st Century', which launched in November 2011 and closed on 13 February 2012. The consultation focused on delivering changes to the statutory and regulatory frameworks for judicial appointments, and implementing measures to increase the diversity of the judiciary, based on the Advisory Panel's recommendations.

8.2 Running concurrent to the Ministry of Justice's consultation, the House of Lords Constitution Committee carried out an inquiry into the judicial appointments process. The Committee's report[2] addressed many of the proposals contained within the Ministry of Justice's consultation and their recommendations were considered when the Ministry of Justice developed proposals to be taken forward (the proposals requiring legislative change were subsequently included in the Crime and Courts Bill).

8.3 The Ministry of Justice received 96 responses to the consultation[3] from a range of interested organisations and individuals including members of the judiciary and the legal professions.

8.4 The Government response to consultation[4] set out the main changes outlined above and now contained within the three sets secondary regulations. Additionally, all three sets of Regulations were shared with Parliament during the course of the Crime and Courts Act 2013. Furthermore, the Judicial Appointments Regulations 2013 and the Judicial Appointments Commission Regulations 2013 have been agreed by the Lord Chief Justice before being laid and The Supreme Court (Judicial Appointments) Regulations 2013 have been subject to agreement by the President of the UK Supreme Court.

9. Guidance

9.1 The Ministry of Justice does not intend to issue guidance to accompany these three sets of regulations. In conjunction with Her Majesty's Courts and Tribunals Service, the Judicial Appointments Commission and Judicial Office a number of internal workshops have been held to discuss and agree the new operational processes required.

10. Impact

10.1 The impact on business, charities or voluntary bodies is none.

10.2 The impact on the public sector is none.

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[2] http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf
[3] https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011
[4] https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011/results/response-consultation-appointments-diversity.pdf

10.3 An Impact Assessment has not been prepared for these instruments; however an Impact Assessment[5] was prepared for the Ministry of Justice's public consultation on Judicial Appointments and Diversity and also for the provisions included in the Crime and Courts Bill (now Crime and Courts Act 2013).

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Review of the success of the changes contained within these three sets of Regulations will take place as part of the ongoing wider monitoring of the cost, speed, quality and perception among key groups of the appointments process.

12.2 The majority of the changes to the judicial appointments process delivered through the Crime and Courts Act 2013 arose from the report of the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger. As part of the work to implement the recommendations arising from that report, the Ministry of Justice joint-chairs the Judicial Diversity Taskforce, together with other key stakeholders to the judicial appointments process. The Taskforce publishes an annual progress report every September, and the progress and effectiveness of these changes will be reflected within that annual report. This report will be available from the Ministry of Justice website when published.

12.3 The Ministry of Justice will continue to monitor and evaluate 'what works' in improving judicial diversity and strengthening the appointments process. The Ministry of Justice will continue to work together with the Judicial Office of England and Wales and the Judicial Appointments Commission to collect and share diversity data, enabling the development of a baseline against which progress can be measured. The Ministry of Justice will also work closely with the Judicial Appointments Commission, Judicial Office and legal professions to ensure where possible that data is collected and published reflecting all of the protected characteristics detailed within the Equality Act 2010.

12.4 The principles that will underpin any review are that the appointments process must: fully respect and maintain the independence of the judiciary; hold appointment on merit at the heart of the process; deliver openness and transparency throughout the process and create a more diverse judiciary that is reflective of society and appointed on merit.

13. Contact

Graham Mackenzie at the Ministry of Justice Tel: 0203 334 3853 or email: graham.mackenzie@justice.gsi.gov.uk can answer any queries regarding the instrument.

[5] https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011/results/judicial-appointments-diversity-ia.pdf