

# Section 9(1) Policy

Selection of persons for membership of the pool of judges who are authorised to act as judges of the High Court under s9(1) of the Senior Courts Act, as amended by the Crime and Courts Act 2013

Revised  
February 2021

## Judicial Appointments Commission Section 9(1) Policy

The Judicial Appointments Commission (JAC) is committed to selecting candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates.

This policy defines the process for the selection of candidates for membership to the pool of judges from which requests to act as judges of the High Court are made under section 9(1) of the Senior Courts Act 1981 (SCA), following the legislative changes introduced to the SCA and the Constitutional Reform Act 2005 (CRA) by the Crime and Courts Act 2013 (CCA).

The provision remains for the Lord Chief Justice, after consulting with the Lord Chancellor, to make the temporary appointment of a person as a deputy judge of the High Court to meet an urgent business need in the High Court or Crown Court.<sup>1</sup>

### Crime and Courts Act provisions

The CCA received Royal Assent on 25 April 2013 and the relevant amendments to SCA and the CRA came into force on 1 October 2013. The CCA was introduced following a Ministry of Justice consultation on *Appointments and Diversity: A Judiciary for the 21<sup>st</sup> Century*<sup>2</sup> (May 2012) which was informed by a House of Lords Constitution Committee report on *Judicial Appointments*.<sup>3</sup>

A person requires authorisation under section 9(1) SCA to enable them to assist in meeting the needs of the High Court as determined by the Lord Chief Justice or Heads of Division.

A new section 9(2CA) SCA<sup>4</sup> introduces the requirement that a Circuit Judge, a Recorder or the holder of an office listed in section 9(1ZB) SCA<sup>5</sup> may only be requested to act as a judge of the High Court if the person is a member of a pool for requests. The offices listed in section 9(1ZB) SCA are:

(1ZB) A person is within this subsection if the person —

(a) is a Chamber President, or a Deputy Chamber President, of a chamber of the Upper Tribunal or of a chamber of the First-tier Tribunal,

(b) is a judge of the Upper Tribunal by virtue of appointment under paragraph 1(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007,

(c) is a transferred-in judge of the Upper Tribunal (see section 31(2) of that Act),

(d) is a deputy judge of the Upper Tribunal (whether under paragraph 7 of Schedule 3 to, or section 31(2) of, that Act), or

(e) is the President of Employment Tribunals (England and Wales) or the President of Employment Tribunals (Scotland).]

Section 87(1A) CRA<sup>6</sup> provides for a JAC selection process to operate in relation to membership of a pool for requests under section 9(1) SCA. It is for the Lord Chancellor to

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<sup>1</sup> Section 94AA of the Constitutional Reform Act 2005

<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011>

<sup>3</sup> <https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27202.htm>

<sup>4</sup> Inserted by Schedule 13, Part 4, paragraph 52 CCA.

<sup>5</sup> Inserted by Schedule 14, Part 1, paragraph 1(5) CCA.

<sup>6</sup> Inserted by Schedule 13, Part 4, paragraph 66 CCA.

make a request to the Commission under section 87 CRA to select a person or persons for membership of a pool for requests.

### **Equal Merit Provision**

The CCA also introduced the equal merit provision<sup>7</sup>, meaning where two or more candidates are assessed as being of equal merit, the JAC can select a candidate for the purpose of increasing judicial diversity where there is a clear under-representation on the basis of race or gender (determined by reference to national census data and judicial diversity data from the Judicial Office).

All JAC recommendations for appointment continue to be made on merit.

The equal merit provision applies to open section 9(1) exercises. It does not apply to individual authorisations (such as for a Designated Family Judge or a Designated Civil Judge under Annex A) where a deployment decision has been made following an Expression of Interest. This is because the JAC recommends the individual for authorisation, as opposed to recommending the individual for an appointment.

### **Responsibility for section 9(1) requests**

Requests under section 9(1) are the responsibility of the Lord Chief Justice<sup>8</sup>. Before requesting a Circuit Judge, Recorder or Tribunal Judge listed in section 9(1ZB) is recommended for authorisation to the pool of judges authorised to act as a judge of the High Court under s9(1), the Lord Chief Justice must consult the Lord Chancellor.

### **How the Commission will apply this policy**

1. The Commission will apply the revised policy from February 2021.
2. The process to select members for the pool will follow a shortened version of the published JAC selection process.
3. The resulting recommendations will be sent to the Lord Chief Justice who has the power to accept or reject the names, or to ask the Commission to reconsider, providing reasons for a rejection or reconsideration. The criteria for rejection or reconsideration are set out in Part 8 of the Judicial Appointments Regulations 2013.
4. Following acceptance of any recommendations to the pool, it is for the Lord Chief Justice to consult with the Lord Chancellor before requesting candidates to act as judges of the High Court.
5. Before an exercise is launched it will be promulgated widely via a number of sources to reach all those likely to be eligible for authorisation. The Commission will use the free channels already in use for other roles that require legal or judicial experience. These will differ depending on Division but could include:
  - a) The Senior President of Tribunals
  - b) Chamber Presidents
  - c) Presiding Judges
  - d) Deputy Director Tribunals

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<sup>7</sup> Inserted by Schedule 13, Part 2, paragraph 9 CCA

<sup>8</sup> Or the Master of Rolls where the Lord Chief Justice (or his/her nominee) is unable to make the request or there is a vacancy in the office of Lord Chief Justice.

- e) Circuit secretariats
  - f) Liaison or Supervisory Judges
  - g) JAC website
  - h) Judicial intranet
  - i) Benchmark
  - j) Specialist Associations of lawyers
6. Selection exercises to recommend a person for membership of a pool from which requests will be made will include the following elements:
- a) Clear criteria
    - i. High Court Skills and Abilities
    - ii. Exercise documentation that clearly states the requirements, experience and skills that candidates need to undertake the role
  - b) Application material
    - i. Candidate statement of suitability
    - ii. Submission of three pieces of significant written work
    - iii. Completion of diversity monitoring forms
  - c) Supporting material
    - i. A statement on suitability from the relevant leadership judge<sup>9</sup> (having had sight of the application material) drawing on appraisal evidence where available
  - d) Selection process
    - i. Assessment of the application and supporting material by a panel that will include a judicial member and a lay JAC Commissioner
    - ii. Character checks with Judicial Conduct and Investigations Office (JCIO) for all candidates, and additionally with professional bodies for those who hold fee-paid roles

Details will be included in the individual selection exercise materials.

7. The Commission, sitting as the Selection and Character Committee (SCC), will recommend candidates for membership of a pool based on all the evidence gathered by the selection process.
8. Applicants for an exercise will need to demonstrate the ability to deal with cases that would otherwise be dealt with by High Court judges, or the potential to acquire these, by reference to the current published set of skills and abilities required by the High Court. The advertisement will set these out.
9. The Commission will ensure it collects sufficient data through its diversity monitoring process, an action specifically mentioned in the House of Lords Constitution Committee report. The data will enable the Commission to consider what future actions may be considered for the purposes of increasing judicial diversity. The data will be published as part of our publication of Official Statistics.
10. The policy will be subject to regular review, in consultation with the judiciary and other stakeholders.

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<sup>9</sup> Supporting material includes a statement from the Senior President of Tribunals or Chamber President, the Chancery Supervising Judge, Presiding Judge, judge-in-charge of a specialist jurisdiction or Family Division Liaison Judge as appropriate.

11. The selection recommendations will always be made by the Commission sitting as the SCC, and the statutory duties under s63 CRA (as amended) will also apply<sup>10</sup>. The Commission has considered circumstances where, due to their exceptional nature, the process detailed in paragraph 6 may not be applied. The Commission has agreed that the following examples meet the exceptional criteria:
- a) Those appointed to the post of Chamber President of the Upper Tribunal, who do not already hold an appointment as a High Court Judge in England and Wales (the post-holder is required to hear High Court cases to fulfil the business needs of that role) and who has held an office equivalent to the High Court and above in another UK jurisdiction
  - b) Any request made by the Lord Chancellor for the selection of a person for membership of a pool of requests under section 9(1) as part of a formal vacancy request for Circuit judge and Senior Circuit judge posts.
  - c) Leadership judges such as Designated Civil judges and Designated Family judges
12. In relation to the first category of exception at (a), should the office holder already be a judge equivalent to a judge of the High Court or above in another UK jurisdiction, the Lord Chancellor may send a vacancy request under section 87(1A) CRA requesting that the office holder be considered for membership of a pool for requests under section 9(1). A letter of support for the candidate from the Lord Chief Justice will be sought by the Commission to confirm an exceptional circumstance, and to verify the necessary level of competence. The SCC will consider the recommendation of that person for membership of a pool.
13. The exception at (b) refers to candidates who proceed through a JAC selection exercise which includes a request for the selection of a person for membership of a pool for requests under section 9(1). Those candidates will be assessed against the High Court skills and abilities as part of the exercise and if successful will be recommended for membership of a pool. Those section 9(1) requests forming part of a vacancy request for Circuit Judge should be accompanied by a business case to explain why the request must be dealt with as part of a Circuit Judge exercise. Additionally, the exercise must be open for existing Circuit Judges to apply.
14. The exception at (c) refers to the judiciary's process to identify leadership judges at Circuit judge level<sup>11</sup> who also need a section 9(1) authorisation. The JAC will agree an appropriate mechanism with the senior judiciary for this category of exception. The revised process to be applied in respect of selection as Designated Civil and Family judges is set out in **Annex A**.

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<sup>10</sup> Selection must be made solely on merit, and the Commission must be satisfied that the candidate is of good character

<sup>11</sup> Some Designated Civil judge and Designated Family judge posts are filled by Senior Circuit judges, the selection for which already comes under the remit of the JAC.

## Annex A

The revised process to be applied in respect of selection as a Designated Civil Judge or Designated Family Judge is set out below.

- i. The JAC should be formally notified that an Expression of Interest (EOI) is due to be launched, that a section 9(1) authorisation may or may not be required, and that a full vacancy request (VR) will be issued if it becomes apparent that the successful candidate will require authorisation. The JAC should also be notified at this stage if there is any planned deviation from the agreed process.
- ii. A VR under section 87(1A) of the Constitutional Reform Act 2005 for a section 9(1) authorisation will be issued if required.
- iii. An EOI exercise will be initiated and run by the judiciary to identify candidates suitable for these important leadership roles. The EOI will initially be open to all circuit judges on the circuit in which the vacancy occurs, but if there are no suitable candidates the vacancy may be advertised nationally;
- iv. A JAC Lay Commissioner will be assigned to each exercise. A key responsibility of the assigned Commissioner will be to ensure there is appropriate discussion about the selection with the lead judge (President of the Family Division or the President of the Queen's Bench Division) both before launch and throughout the exercise. A phone call will be scheduled to take place between the assigned Commissioner and lead judge once applications have been received. If all applicants are section 9(1) authorised, the JAC will be informed, the phone call cancelled and the involvement of the JAC will cease.
- v. The Commission's Selection and Character Committee (SCC) will be responsible for making the final selection decisions to recommend a successful candidate for membership to the pool from which section 9(1) authorisations will be made taking into account its statutory and other duties. In the interests of fairness and transparency, a statement of suitability under paragraph 6(c) above is to be provided to the SCC for each candidate, wherever possible.
- vi. Following consideration by SCC, a recommendation for membership to the of the pool will be made to the Lord Chief Justice who will consult with the Lord Chancellor.

Candidates will be invited to complete a diversity monitoring form and will be required to complete a character declaration to enable the JAC to fulfil its statutory duties.