

# CONSTITUTIONAL REFORM ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Chapter 1 Appointments Commission*

#### **Disclosure of information to the Commission**

#### *Section 123: Disclosure of information to the Northern Ireland Judicial Appointments Commission*

343. The Justice (Northern Ireland) Act 2002 provides for the creation of the Northern Ireland Judicial Appointments Commission. There is currently no provision in the 2002 Act for disclosure of information, held by permitted persons, to the Commission for the purposes of selection for appointment to judicial office. This section makes provision equivalent to that made in section 107 of the Constitutional Reform Act for disclosure to the Judicial Appointments Commission in England and Wales. Permitted persons are defined as:

- a chief officer of police of a police force in England and Wales;
- a chief constable of a police force in Scotland;
- the Chief Constable of the Police Service of Northern Ireland;
- the Director General of the National Criminal Intelligence Service;
- the Director General of the National Crime Squad;
- the Commissioners of Inland Revenue; and
- the Commissioners of Customs and Excise.

344. This section also provides that the Lord Chancellor may, by order, designate other persons who exercise functions, which he considers are of a public nature, as ‘permitted persons’.

#### **Ombudsman**

#### *Section 124: Northern Ireland Judicial Appointments Ombudsman*

345. [Sections 124 to 131](#) amend the Justice (Northern Ireland) Act 2002 to establish the office of Judicial Appointments Ombudsman for Northern Ireland. Section 124 inserts section 9A into the 2002 Act to establish the Ombudsman’s office and provide that he shall be appointed by Her Majesty the Queen on the recommendation of the Lord Chancellor.

#### *Schedule 15: Northern Ireland Judicial Appointments Ombudsman*

346. [Schedule 15](#) inserts Schedule 3A into the 2002 Act. Schedule 3A makes further provision in relation to the qualification, tenure of office and powers of the

Ombudsman. The eligibility provisions reflect those that currently apply to the Judicial Appointments Commissioner for Northern Ireland, namely that he must not engage in political activity during the term of his appointment. Previous political activity will not constitute a bar to appointment.

## **Complaints and references**

### ***Section 125: Complaints: interpretation***

347. **Section 125** inserts section 9B into the 2002 Act to provide an interpretation of the different types of complaint which may be made to the Ombudsman, namely a Commission complaint (where the complaint is about the Commission's handling of a candidate for judicial appointment's application) and a departmental complaint (where the complaint is about alleged maladministration by the Lord Chancellor or the Northern Ireland Court Service's handling of an application). Those entitled to complain are those who have applied for selection or have been selected for appointment to a listed judicial office, (that is, offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002, which includes the judicial office of High Court Judge and below) and claim to have been adversely affected by the maladministration about which they are complaining.

### ***Section 126: Complaints to the Commission or the Lord Chancellor***

348. **Section 126** inserts section 9C into the 2002 Act to require the Commission and the Lord Chancellor each to make arrangements for handling complaints made to them in relation to judicial appointments but provides that the arrangements need not apply to complaints made more than 28 days after the matter complained of.

### ***Section 127: Complaints to the Ombudsman***

349. **Section 127** inserts section 9D into the 2002 Act to provide that the Ombudsman must investigate any complaints relating to judicial appointments that are made within 28 days of the person concerned being notified of the Minister's or Commission's decision on their complaint unless he considers that investigation is not necessary. The Ombudsman also has discretion whether or not to investigate complaints received at any other time. Any complaint made to the Ombudsman must be in a form approved by him. This section also makes transitional provision to allow for any ongoing complaints to be transferred from the Northern Ireland Commissioners for Judicial Appointments to the Northern Ireland Ombudsman upon the commencement of this section.

### ***Section 128: Report and recommendations***

350. **Section 128** inserts section 9E into the 2002 Act to provide that the Ombudsman must prepare a report in relation to any complaint investigated by him. In his report he may make recommendations for action to be taken by the Commission or by the Lord Chancellor, including payment of compensation (albeit that any compensation is limited to loss suffered as a result of maladministration, and not in respect of any earnings the complainant would have received had his application for appointment been successful.)

### ***Section 129: Report procedure***

351. **Section 129** inserts section 9F into the 2002 Act to provide that the Ombudsman shall send his report in draft to the Lord Chancellor, and, if the complaint related to the Judicial Appointments Commission, to the Commission also. Before finalising the report, the Ombudsman must have regard to any proposals they make for amendment, and if their proposals are not reflected in his final report he must include a statement of those proposals. In addition to sending the finalised report to the Lord Chancellor, and where appropriate the Commission, the Ombudsman shall send a copy (which must not include confidential information) to the complainant.

***Section 130: References by the Lord Chancellor***

352. **Section 130** inserts section 9G into the 2002 Act to provide that the Lord Chancellor may refer to the Ombudsman any matters relating to the Commission's procedures, and for the Ombudsman to report on his investigations.

***Section 131: Information***

353. **Section 131** inserts section 9H into the 2002 Act to require the Commission and the Lord Chancellor to provide the Judicial Appointments Ombudsman with such information, or produce any such documentation that he may need to perform his functions in relation to complaints about judicial appointments.

***Section 132: Confidentiality in relation to judicial appointments and discipline***

354. **Section 132** inserts section 9I into the 2002 Act to provide that any person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of any relevant provision relating to judicial appointments and discipline, must not disclose that confidential information without lawful authority.

***Chapter 2: Removals***

***Section 133: Removal from most senior judicial offices***

355. **Section 133** inserts a new section 12B in the Judicature (Northern Ireland) Act 1978 to make provision for the removal of senior judicial office holders in Northern Ireland. Her Majesty may remove the Lord Chief Justice, a Lord Justice of Appeal or a High Court judge on an address presented by both Houses of Parliament. A motion for the presentation of an address may be made to the House of Commons by the Prime Minister and to the House of Lords by the Lord Chancellor or, if the Lord Chancellor is not a member of that House, by another Minister of the Crown at his request. However, a motion for the presentation of an address can be made only if a removals tribunal convened under section 135 of the Act (see below) has reported to the Lord Chancellor recommending removal on the ground of misbehaviour. The report must be laid before each House of Parliament. Subsection (6) of the new section 12B provides for the suspension of a senior judicial office holder while the making of motions for the presentation of an address is under consideration. The Prime Minister may suspend the Lord Chief Justice. A Lord Justice of Appeal or a High Court judge may be suspended by the Prime Minister with the agreement of the Lord Chief Justice.

***Section 134: Removal from listed judicial offices***

356. **Section 134** gives the Lord Chancellor the power to remove a judicial office holder below the level of High Court judge but only if a tribunal convened under section 135 of the Act (see below) has recommended removal on the ground of misbehaviour or inability to perform the functions of the office and after consultation with the Lord Chief Justice. The section also gives the Lord Chancellor the power to suspend a judicial office holder below the level of High Court judge pending a decision on their removal but only if a tribunal considering whether to recommend removal has recommended suspension and after consultation with the Lord Chief Justice.

***Section 135: Tribunals for considering removal***

357. **Section 135** provides for the convening of tribunals to consider the removal of holders of protected judicial office (as defined in section 136 of the Act). A tribunal to consider the removal of the Lord Chief Justice may be convened by the Lord Chancellor provided the Prime Minister has been consulted. A tribunal to consider the removal of a Lord Justice of Appeal may be convened by the Lord Chancellor after consulting the Lord Chief Justice and the Prime Minister, or by the Lord Chief Justice after consulting the Lord Chancellor and the Prime Minister. A tribunal to consider the removal of all

other holders of protected judicial office may be convened by the Lord Chancellor after consulting the Lord Chief Justice, or by the Lord Chief Justice after consulting the Lord Chancellor.

358. A tribunal will consist of three members: a judicial chairman, a judicial member and a layperson. The judicial members of a tribunal to consider the removal of the Lord Chief Justice of Northern Ireland, a Lord Justice of Appeal or a High Court judge are to be selected by the Lord Chancellor after consultation with the Lord Chief Justice of Northern Ireland (unless the tribunal is to consider his removal), the President of the Supreme Court of the United Kingdom, the Lord Chief Justice of England and Wales and the Lord President of the Court of Session. Such a tribunal will be chaired by a person who holds high judicial office (within the meaning of Part 3 of the Act) and has never been a senior judicial office holder in Northern Ireland. The other judicial member will be a current or retired judge of the Court of Appeal of England and Wales or the Inner House of the Court of Session.
359. The judicial members of a tribunal to consider the removal of any other holder of protected judicial office are to be selected by the Lord Chief Justice and such a tribunal will be chaired by a person who holds, or has held, the office of Lord Chief Justice or Lord Justice of Appeal. The other judicial member will be a High Court judge. The lay member of a tribunal will be appointed by the Lord Chancellor.
360. This section further provides that the procedure of a tribunal is to be determined by the Lord Chief Justice unless this office is vacant, he is unavailable or the tribunal is to consider his removal from office, in which case the procedure is to be determined by the chairman.

### ***Section 136: Interpretation of Part 5***

361. **Section 136** defines, for the purpose of Part 5 of the Act, the meaning of “listed judicial office”, “Lord Chief Justice”, “Lord Justice of Appeal” and “protected judicial office”.

## **Part 6: Other Provisions Relating to the Judiciary**

### **Commentary on Sections**

#### ***Section 137: Parliamentary Disqualification***

362. In summary, section 137 has the effect of barring members of the Supreme Court of the United Kingdom from membership of the House of Commons and the Northern Ireland Assembly; and of barring them, and certain other holders of judicial office which exclude the holder from membership of the House of Commons, from sitting and voting in the House of Lords while they hold that office.
363. Subsection (1) inserts the office of ‘Judge of the Supreme Court’ into Part 1 of Schedule 1 to the House of Commons Disqualification Act 1975. Subsection (2) makes corresponding provision for the Northern Ireland Assembly Disqualification Act 1975 (specific provision in relation to the Scottish Parliament and National Assembly for Wales being unnecessary because disqualification for membership of those bodies is tied to the House of Commons Disqualification Act). This of itself ensures that the holders of that office are, for as long as they hold it, disqualified for membership of the House of Commons. Taken with subsection (3), this has the effect of making it impossible to hold full-time high judicial office and at the same time be an active member of the House of Lords.
364. Subsection (3) bars holders of any “disqualifying judicial office” (defined in subsection (4) as the offices in Schedule 1 to the House of Commons Disqualification Act 1975 and the corresponding list in the Northern Ireland Assembly Disqualification Act 1975) from sitting or voting in the House of Lords or in any Lords Committee or

Joint Committee. Such a person does not cease to be a member of the House while this disqualification continues, however.

365. Subsection (3) means that a person who is disqualified from sitting and voting in the House of Lords by virtue of subsection (2) is not disqualified from receiving a writ of summons to the House of Lords.

### ***Section 138 and Schedule 16: Judicial Committee of the Privy Council***

366. **Section 138** introduces Schedule 16 which amends various statutory provisions to remove the right of the Lord President of the Council to be a member of the Judicial Committee of the Privy Council, and to sit judicially. Paragraph 2 of that Schedule recasts section 1 of the Judicial Committee Act of 1833 to redefine the membership of the Judicial Committee. This has the effect of removing not only the Lord President, but also the Lord Chancellor, Lord Keeper and Commissioners of the Great Seal. It also removes the (now in practice obsolete) power to appoint to the Judicial Committee other members of the Privy Council who do not fulfil the statutory requirements. Members of the Judicial Committee of the Privy Council from the United Kingdom will in future be only those Privy Councillors who have held high judicial office as defined by Part 3 of the present Act (The Supreme Court). This will include judges of the new United Kingdom Supreme Court. Other enactments also provide for certain Commonwealth judges to be members of the Judicial Committee of the Privy Council. These judges' membership of the Judicial Committee is maintained Paragraph 3 of the Schedule requires the appointment of the registrar of the Judicial Committee to be made only after consultation with the President of the Supreme Court.

## **Part 7: General**

### **Commentary on Sections**

#### ***Section 139: Confidentiality***

367. **Section 139** is a general confidentiality provision which applies to the selection and appointment of Justices of the Supreme Court under sections 26 to 31 in Part 3 of the Act and to the selection, appointment and discipline of judicial office holders under Part 4 and under any regulations and rules made under Part 4. All information which relates to an identified or identifiable individual is confidential and can be disclosed only with lawful authority. Disclosure without lawful authority is made subject to a civil action for breach of statutory duty.
368. Information may be lawfully disclosed with the consent of the person concerned; or where disclosure is necessary in order for a person to perform their functions in relation to the selection, appointment or disciplining of judicial office holders; or where disclosure is necessary in connection with the exercise of Parliamentary powers to remove a senior judge or a decision whether to exercise such powers; or where the disclosure is necessary in connection with the exercise of powers to remove, discipline or suspend a judicial office holder; or where the disclosure is required for the purposes of legal proceedings in order to comply with court rules or a court order.
369. Where confidential information has been provided by one identifiable person about another identifiable person, it relates to both, and may only be disclosed to the subject of the information with the consent of its provider.
370. Despite the confidentiality provisions, the Lord Chancellor and Lord Chief Justice may decide to disclose information about disciplinary action taken against an identifiable judicial office holder. Disclosure which would otherwise be prohibited by this section is also permitted if the information concerned is already available to the public from other sources, or has been so in the past.



### ***Section 140 “Enactment”***

371. **Section 140** defines “enactment” for the purposes of the Act. Different Parts of the Act extend to different parts of the United Kingdom. In those Parts of the Act that apply throughout the United Kingdom, “enactment” is defined to include Acts of the Scottish Parliament and Northern Ireland legislation. In those Parts that extend only to England and Wales and Northern Ireland, “enactment” refers only to Acts of the Westminster Parliament and Northern Ireland legislation (and, where necessary, Measures of the Church of England). The aim is to remove any uncertainty about the meaning of the term “enactment” in different Parts of the Act.

### ***Section 141 “Subordinate Legislation”***

372. **Section 141** defines “subordinate legislation” for the purposes of the Act, giving it the same meaning as in the Interpretation Act 1978, but also providing that in the context of making supplementary provisions about functions of the Lord Chancellor, and other transitional or consequential provisions, it also includes an enactment contained in an instrument made under Northern Ireland legislation.

### ***Section 142: General Interpretation***

373. The section defines “functions” to include powers and duties, and extends the definition of “Minister of the Crown” in the Ministers of the Crown Act 1975 so that it applies in this Act.

### ***Section 143: Supplementary provision etc***

374. **Section 143** provides for the Lord Chancellor to make, by order (made by statutory instrument), any supplementary, incidental, consequential, transitory, transitional or saving provision, as he considers necessary or expedient for the purposes of the Act, in consequence of it, or to give it full effect. Subsection (2) makes it clear that such an order can, if necessary, amend or repeal other enactments, subordinate legislation, and other instruments or documents.

### ***Section 144: Orders and Regulations***

375. **Section 144** regulates the way in which the Lord Chancellor may exercise the order making powers conferred on him elsewhere in the Act. These will generally be subject to the negative resolution procedure in Parliament, except for the following, which will be subject to the affirmative resolution procedure:
- an order under section 85(2)(a) or (b) (selection of puisne judges and other office holders) that amends Part 1 of Schedule 14 (The Judicial Appointments Commission: relevant offices and enactments);
  - an order under section 19(1) (transfer, modification or abolition of functions by order) which amends a public general Act, except where the only amendment is to include a function of the Lord Chancellor in Schedule 7 (protected functions of the Minister);
  - an order under section 19(1) (transfer, modification or abolition of functions by order) which amends subordinate legislation of which a draft was required to be laid before and approved by each House of Parliament, except where the only amendment consists of a provision that falls within subsection 2(b) of section 19
  - an order under section 143 (supplementary provision etc) which amends a public general Act;
  - an order under paragraph 5 of Schedule 12 (the Judicial Appointments Commission).

*These notes refer to the Constitutional Reform Act 2005 (c.4)  
which received Royal Assent on 24 March 2005*

376. In addition, commencement orders made under sections 66(5) and 148 are, as usual with such instruments, not subject to Parliamentary scrutiny.

***Section 145 and Schedule 17: Minor and Consequential amendments***

377. Section 145 introduces Schedule 17 which contains some minor and consequential amendments to other legislation that follow from the substantive sections of the Act.

***Section 146 and Schedule 18: Repeals and revocations***

378. Section 146 introduces Schedule 18 which lists legislation repealed or revoked by, or in consequence of, other provisions in the Act.

***Section 147: Extent***

379. This section sets out the territorial extent of the Act. Different parts of the Act extend to different parts of the United Kingdom. Certain provisions relating to the President of the Courts of England and Wales and the Heads and Deputy Heads of Criminal and Family Justice extend to England and Wales only. Section 6 (Representations to the Northern Ireland Assembly) and Part 5 extend to Northern Ireland alone. Amendments made by the Act will have the same extent as the provisions being amended. The Act otherwise extends to the whole of the United Kingdom.

***Section 148: Commencement***

380. Provisions relating to the Speakership of the House of Lords, functions of the Lord Chancellor subject to transfer, modification or abolition, protected functions of the Lord Chancellor, interpretation, supplementary provision, ancillary provision for orders and regulations, extent, commencement and short title will come into force on Royal Assent. Section 4 (Guarantee of continued judicial independence: Northern Ireland) will be brought into force in accordance with an order made by the Secretary of State. All other provisions in the Act will be brought into force by order by the Lord Chancellor, who may make different arrangements for different purposes. Subsections (4) and (5) set out requirements relating to approval of accommodation for the Supreme Court, which must be fulfilled before the provision establishing the Supreme Court, section 23(1), may be brought into force.