

CONSTITUTIONAL REFORM ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 14: the Judicial Appointments Commission: relevant functions and offices

294. **Schedule 14** lists in Part 1 judicial and tribunal appointments below the High Court which are formally made by the Queen, with the relevant appointing powers; Part 2 lists judicial and other appointments made by the Lord Chancellor to posts whose holders will not be eligible to be appointed as a member of the Judicial Appointments Commission under Schedule 12 paragraph 2(2)(d); Part 3 lists appointments made by the Lord Chancellor to those tribunal and similar posts whose holders will be eligible to be appointed as a member of the Judicial Appointments Commission under Schedule 12 paragraph 2(2)(d). None of these appointments may be made unless the Commission has selected the person concerned.

Section 86: Duty to fill vacancies

295. **Section 86** imposes a duty on the Lord Chancellor to fill vacancies in the office of puisne judge of the High Court and the other offices listed in Parts 1, 2 and 3 of Schedule 14. But, whilst the Lord Chief Justice agrees, the Lord Chancellor can leave any such vacancy unfilled.

Section 87: Request for selection

296. **Section 87** enables the Lord Chancellor to request the Commission to select someone for appointment as a puisne judge of the High Court or to any of the offices listed in Schedule 14. Before asking the Commission to select someone the Lord Chancellor must consult the Lord Chief Justice. Any request may relate to more than one recommendation or appointment. The Lord Chancellor is able to withdraw or modify requests in accordance with the provisions of section 95.

Section 88: Selection Process

297. **Section 88** requires the Commission to decide on and run a selection process and make a selection of one person for each post. In the course of doing so it must consult the Lord Chief Justice and another person who has held the office concerned or has relevant experience. If the selection process has not identified candidates of sufficient merit to be appointed, the Commission will not be able to make a selection, and section 88(2) and section 93 will apply.

Section 89: Report

298. **Section 89** provides that after it has run the selection process, the Commission must submit a report to the Lord Chancellor, in a form approved by him, which describes the process; names the person selected for each post, or states if it has not been able to make a selection; states any recommendations which the Lord Chief Justice and the other person with relevant experience made when they were consulted under section 88 and

gives reasons if the Commission has not followed their recommendations; and contains any other information required by the Lord Chancellor. After submitting the report the Commission must provide any further information required by the Lord Chancellor.

Section 90: The Lord Chancellor's options

299. In the same way as in relation to more senior appointments, when the Lord Chancellor receives the report informing him of the person selected by the Commission, he has three options. He can accept the selected person; reject that person and require a different name to be put forward; or require the Commission to reconsider its selection. This is stage 1 of the process. If the Lord Chancellor rejects the selection or requires reconsideration, the process moves into stage 2. At this stage the Commission puts a name to the Lord Chancellor, and the Lord Chancellor has these options: he may accept the selected person; he may reject the selection (but only if he has not already used that power at stage 1); or he may require reconsideration (but only if he has not already used that power at stage 1). If the Lord Chancellor rejects the selection or requires reconsideration, the process moves into stage 3. At this stage the Commission again puts a name to the Lord Chancellor. This time he must accept the selection of the latest selected candidate, or of a candidate selected in stage 1 or stage 2 whose name was not resubmitted by the Commission after reconsideration, but who has not been rejected.

Section 91: Exercise of powers to reject or require reconsideration

300. The Lord Chancellor can only use his power in section 90 to reject a selection outright if, in his opinion, the person selected is not suitable for the office concerned, or for particular functions of that office. He can only require reconsideration if, in his opinion, there is not enough evidence that the selected person is suitable for the office concerned or for particular functions of that office, or there is evidence that the person is not the best candidate on merit. If the Lord Chancellor either rejects a selection or requires it to be reconsidered, he must give his reasons in writing.

Section 92: Selection following rejection or requirement to reconsider

301. If the Lord Chancellor rejects a selection, the Commission must submit a new name it has not previously selected for the post. If the Lord Chancellor requires the Commission to reconsider, it may submit the same name, but not the name of someone who has already been selected and rejected. This does not prevent someone being selected in a subsequent appointments process. Having made its selection, the Commission must inform the Lord Chancellor.

Section 93: Reconsideration of decision not to select

302. [Section 88](#), which provides for the Commission to apply a selection process in response to a request from the Lord Chancellor, allows for the fact that the Commission may find that the selection process has not identified candidates of sufficient merit for them to make a selection. [Section 93](#) provides that if the Commission informs the Lord Chancellor that it is unable to make a selection because there are no candidates of sufficient merit, he may require it to reconsider, and they must inform him of any person then selected. If the Commission makes a selection on reconsideration, the Lord Chancellor will have the same options in relation to appointment as in ordinary cases.

Section 94: Duty to identify persons for future requests

303. [Section 94](#) enables the Commission to recruit in advance a pool of potential candidates for appointment to a particular class of posts. As requests to fill specific appointments of that class arise, they can then select people from that pool. . These people will not be guaranteed selection for actual appointments. The Lord Chancellor will initially give the Commission an indication of the numbers of people that are expected to be needed at a particular level and over a specific time. The Commission will identify suitable people

taking into account the number of appointments that have been requested and report to the Lord Chancellor saying how far it has identified suitable people and provide any other information to assist the Lord Chancellor. As part of the process the Commission will be required to consult the Lord Chief Justice and someone with experience of the office concerned. If the Commission decides not to follow a recommendation made during the consultation process it must give reasons for not doing so in its report on the competition.

Section 95: Withdrawal and modification of requests

304. **Section 95** enables the Lord Chancellor to withdraw or modify a request under section 69, 78 or 87 of the Act in three particular circumstances. First, if the request was to fill a vacancy, he may only withdraw or modify the request with the agreement of the Lord Chief Justice (who has to agree to any decision not to fill an existing post). This situation could arise where there is a change in circumstances or simply because the predictions as to the number of vacancies likely to arise was wrong. Secondly, if the request was other than to fill a vacancy and would have resulted in the creation of additional posts, he may withdraw or modify such a request after consulting the Lord Chief Justice. Thirdly, if he considers that the process of identifying candidates by the Commission or the selection panel was not satisfactory or not applied satisfactorily, he may withdraw a request as a whole, after consulting the Lord Chief Justice, provided that he has not made any recommendations or appointments resulting from that request. The withdrawal or modification of a request (for whatever reason) must be by notice in writing from the Lord Chancellor to the Commission. The notice must state the circumstances and, if it relates to an unsatisfactory process, the reasons why the Lord Chancellor considers it to be so.

Section 96: Effect of acceptance of selection

305. **Section 96** allows the Commission to perform health checks on successful candidates for appointment, if the Lord Chancellor requires, and to report the results to the Lord Chancellor. If the checks are satisfactory the Lord Chancellor will appoint or recommend for appointment the person selected. If for any reason the Lord Chancellor rejects the candidate on health grounds he must consult the Lord Chief Justice. Selections can also be disregarded where the candidate does not accept an appointment when it is offered or is not available within a reasonable time to take up post.

Section 97: Scotland and Northern Ireland

306. The Lord Chancellor has responsibility for appointing members of certain tribunals with a UK-wide jurisdiction, some of whose members sit wholly or mainly in Scotland or in Northern Ireland. Section 97 provides that, where consultation with the Lord Chief Justice is required under section 87(2), 88(3), 94(3), 95(2)(a), (b) or (c) or 96(4)(a), and where the consultation appears to relate to an appointment of a person that exercises functions wholly or mainly in Scotland or Northern Ireland, the Lord President of the Court of Session, or the Lord Chief Justice of Northern Ireland respectively will be consulted, rather than the Lord Chief Justice of England and Wales.

Assistance in connection with other appointments

Section 98: Assistance in connection with other appointments

307. In addition to his responsibilities for senior judicial appointments in England and Wales and the other judicial appointments listed in Schedule 14, the Lord Chancellor has a role in identifying, nominating or recommending candidates for other judicial posts, including, for example, members of various international courts and tribunals. Many of these are ad hoc appointments, not judicial appointments in England and Wales. In some cases the appointments are not formally within the remit of the United Kingdom Government. It is therefore not possible for them to be listed in Schedule 14 and

placed formally within the remit of the Judicial Appointments Commission. Section 98 therefore gives the Lord Chancellor the power to ask the Commission for assistance in such cases. This assistance may range from merely giving advice on how to proceed to running a selection process and selecting a candidate. Before requiring the Commission to give ad hoc assistance of this kind, the Lord Chancellor must consult the Lord Chief Justice and the Commission itself.

Complaints and references

Section 99 : Complaints: interpretation

308. **Section 99** describes two types of complaint about the appointment process: 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 the Lord Chancellor or his Department's handling of the application. Those entitled to complain are those who have applied for selection or have been selected, and claim to have been adversely affected by the maladministration about which they are complaining. It will not be possible under the Act for other members of the public to complain about the fact that someone else has, or has not, been selected for judicial appointment.

Section 100: Complaints to the Commission or the Lord Chancellor

309. **Section 100** requires the Commission and the Lord Chancellor to make arrangements for handling the complaints made to them. It will not, however, be mandatory for either of them to investigate a complaint that is made more than 28 days after the matter complained of. Complainants will need to make a complaint under this section before they can complain to the Ombudsman about maladministration in making an appointment.

Section 101: Complaints to the Ombudsman

310. **Section 101** provides that the Ombudsman must consider complaints which have been made under section 100 if the complainant refers the complaint to the Ombudsman within 28 days of the complainant being notified of the Commission or Lord Chancellor's decision in relation to their original complaint. If the Ombudsman does not think the complaint requires investigation he must inform the complainant; otherwise he must conduct an investigation. The Ombudsman has discretion to consider complaints received out of time. Any complaints made to the Ombudsman must be in a form approved by him. Section 101 goes on to provide that unresolved complaints made to the existing Commissioners for Judicial Appointments at the time these provisions are brought into force will be transferred to the Ombudsman, who will have a discretion to investigate them. No further complaints to the Commissioners for Judicial Appointments about such matters will be possible.

Section 102: Report and recommendations

311. The Ombudsman must prepare a report on his findings on a complaint, with any recommendations, including any recommendation for the payment of compensation. Compensation would only be payable for 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 103: Report procedure

312. The Ombudsman must submit his report in draft to the Lord Chancellor, and to the Commission, if it was a Commission complaint. The Ombudsman must have regard to their proposals for amendment, and if their proposals are not reflected in his final report he must include a statement of those proposals. The Ombudsman must send

the final report to the Lord Chancellor and, if it was a Commission complaint, to the Commission. He will also send a copy of the report to the complainant, but this version is not to contain confidential information relating to someone other than the complainant and the disclosure of which would otherwise be prohibited by section 139.

Section 104: References by the Lord Chancellor

313. **Section 104** allows the Lord Chancellor to refer to the Ombudsman any matters relating to the Commission's procedures, and for the Ombudsman to report on his investigations. The report, which must be signed by the Ombudsman personally, will include his findings and any action he recommends.

Section 105: Information

314. The Commission and the Lord Chancellor must provide the Ombudsman with any information he reasonably requires relating to his investigations.

Miscellaneous

Section 106 : Consultation on appointment of lay justices

315. **Section 106** inserts a new subsection (2A) into Section 10 of the Courts Act 2003, which sets out the appointments process for lay justices. This provision provides that, in following the two stage process of appointment and assignment provided for in the Courts Act, the Lord Chancellor will be obliged to consult people who have special knowledge of matters relevant to the appointment of a lay justice for a particular area. In practice, the Lord Chancellor is likely to meet this requirement by consulting the local Advisory Committee.

Section 107: Disclosure of information to Commission

316. **Section 107** allows the Commission to carry out confidential checks on applicants for judicial appointment. If an applicant is selected for appointment checks may be carried out with the police, the National Criminal Intelligence Service, the National Crime Squad and HM Revenue and Customs. The Lord Chancellor will also be able to designate by order under the negative resolution procedure other bodies with which confidential checks may be made. These are likely to include the Law Society in relation to solicitors, the Bar Council in relation to barristers, and the General Medical Council in relation to the appointment of medical practitioners to certain tribunals. The material that is required is for the purposes of deciding whether the applicant is suitable to hold judicial office.