

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

CONSTITUTIONAL REFORM ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 2: Appointments

General Provisions

Section 63: Merit and good character

271. [Section 63](#) requires that selections by the Commission (or a selection panel, in relation to senior appointments) must be solely on merit, and that the selecting body must be satisfied that the person selected is of good character.

Section 64: Encouragement of diversity

272. [Section 64](#) requires the Commission to have regard to the need to encourage diversity in the range of people available for selection, subject to the duty to select solely on merit and the duty to select a person of good character.

Section 65: Guidance about procedures

273. [Section 65](#) provides a power for the Lord Chancellor to issue guidance to the Commission or a selection panel about the exercise, firstly, of its function of identifying persons willing to be considered for selection and, secondly, of its function of assessing them. The purposes for which guidance may be given include the encouragement of diversity in the range of persons available for selection. The Commission and any selection panel under it must have regard to such guidance. Guidance cannot overrule the statutory requirements that selections be made solely on merit, and that those selected be of good character. The procedure for issuing the guidance is set out in section 66.

Section 66: Guidance: supplementary

274. [Section 66](#) provides that before issuing any guidance under section 65 the Lord Chancellor must consult the Lord Chief Justice and lay a draft of the proposed guidance before Parliament. The draft guidance will be subject to the affirmative resolution procedure. Guidance may be revised and reissued from time to time, in which case the same procedures must be complied with. Guidance may also be revoked by order; such an order is subject to the negative resolution procedure by virtue of section 144(6). The Lord Chancellor must consult the Lord Chief Justice before revoking any guidance.

Lord Chief Justice and Heads of Division

Section 67: Selection of Lord Chief Justice and Heads of Division

275. [Section 67](#) provides that recommendations to The Queen to appoint candidates to the senior judicial posts of the Lord Chief Justice and the Heads of Division (the Master of the Rolls, President of the Queen's Bench Division, President of the Family Division

and Chancellor of the High Court) can only be made in accordance with the procedures set out in the Act.

Section 68: Duty to fill vacancies

276. **Section 68** imposes a duty on the Lord Chancellor to fill any vacancies in the offices of Lord Chief Justice or the Heads of Division. But, for as long as the Lord Chief Justice agrees, he may leave a vacancy in any of the offices of the Heads of Division unfilled.

Section 69: Request for selection

277. **Section 69** provides for the Lord Chancellor to request the Commission to select someone for appointment as Lord Chief Justice or as one of the Heads of Division. Before making a request the Lord Chancellor must consult the Lord Chief Justice unless that post is vacant, or the holder of that post is incapacitated.

Section 70: Selection Process

278. **Section 70** provides that on receiving a request to select a person for appointment as Lord Chief Justice or one of the Heads of Division, the Commission must appoint a selection panel, which will decide the process to be followed and make the selection of one person for each vacant post. The panel must consult the current holder of the relevant office, if that is practicable, and will be given administrative support by the Commission, of which it will be a committee. Selection panels for senior appointments are a special form of committee of the Commission.

Section 71: Selection Panel

279. The selection panel will have four members. The first member will be the most senior judge of the Supreme Court established by the Act who was a judge of England and Wales before being appointed to the Supreme Court and who is not disqualified, or another senior judge nominated by him. He will chair and will have a casting vote. The second member will be the Lord Chief Justice or his nominee, except where the Lord Chief Justice is disqualified or there is no Lord Chief Justice, in which case it will be another senior judge chosen by the most senior Supreme Court Judge. The third member will be the chairman of the Commission or his nominee, or if that post is vacant or the chairman is unavailable and has been unable to make a nomination, one of the lay members of the Commission chosen by themselves. The fourth member will be a lay member of the Commission chosen by the third member. A person is disqualified from being a member of the panel if that person is the current holder of the office being selected for, or if that person is willing to be considered for selection for that office.

Section 72: Report

280. After making its selection the panel must report to the Lord Chancellor, in a form approved by him, telling him who has been selected and providing him with any other information he requires. After submitting its report the panel must provide any further information the Lord Chancellor requires.

Section 73: The Lord Chancellor's options

281. When the Lord Chancellor receives the report informing him of the person selected by the panel, he has the options of accepting the selection; rejecting that person and requiring a different name to be put forward; or requiring the selection panel 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 panel puts a name to the Lord Chancellor, and the Lord Chancellor has these options: he may accept the selection; 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 panel 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 panel after reconsideration, but who has not been rejected.

Section 74: Exercise of powers to reject or require reconsideration

282. The Lord Chancellor can only reject a selection outright if, in his opinion, the person selected is not suitable for the office concerned. 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 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 75: Selection following rejection or requirement to reconsider

283. If the Lord Chancellor rejects a candidate at stage 1 or stage 2, the panel must make a new selection, and may not reselect the rejected candidate, or reselect a candidate whose selection it previously withdrew after reconsideration. If the Lord Chancellor requires reconsideration at stage 1 or stage 2, the panel may confirm its selection, or may select a different person, but may not select a candidate who has already been rejected. The panel must inform the Lord Chancellor of its selection. These provisions do not prevent a rejected candidate, or one whose selection was withdrawn after reconsideration, from being selected for appointment on a subsequent occasion when the Lord Chancellor makes a request for a selection.

Lords Justices of Appeal

Section 76: Selection of Lords Justices of Appeal

284. A similar process applies to the appointment of Lords Justices of Appeal. Section 76 provides that a person may only be recommended for appointment to one of these posts in accordance with the procedures in the Act.

Section 77: Duty to fill vacancies

285. **Section 77** imposes a duty on the Lord Chancellor to fill any vacancy in the office of Lord Justice of Appeal. The Lord Chancellor can only decide not to fill a vacancy whilst the Lord Chief Justice agrees that it may remain unfilled.

Section 78: Request for selection

286. **Section 78** provides for the Lord Chancellor to request the Commission to select someone for appointment as a Lord Justice of Appeal. Before asking the Commission to select someone the Lord Chancellor must consult the Lord Chief Justice. Any request may relate to more than one post and recommendation.

Section 79: Selection Process

287. When the Lord Chancellor makes a request the Commission must appoint a selection panel, which will determine the procedure to be applied, apply the process and make a selection of one person for each vacancy. The panel is a committee of the Commission, which will provide it with administrative support.

Section 80: Selection Panel

288. For the appointment of Lords Justices of Appeal, the selection panel will consist of four members. The first member is the Lord Chief Justice or another senior judge nominated by him, who will chair and have a casting vote; the second member is one of the Heads of Division or a Lord Justice chosen by the Lord Chief Justice; the third member is the

Chairman of the Commission or his nominee, or if that post is vacant or the chairman is unavailable and has been unable to make a nomination, one of the lay members of the Commission chosen by themselves; and the fourth member is another lay member of the Commission chosen by the third member. No one who is willing to be considered for selection may be a member of the panel. No nominee may represent more than one person or be a member of the panel in another capacity.

Section 81: Report

289. When the panel has selected someone, it must report to the Lord Chancellor, in a form approved by him, with the name of the person selected and any other information he requires. After submitting the report it must provide any further information the Lord Chancellor requires.

Section 82: The Lord Chancellor's options

290. As in relation to the appointment of the Heads of Division, when the Lord Chancellor receives the report informing him of the person selected by the panel, he has the options of accepting the person selected; rejecting that person and requiring a different name to be put forward; or requiring the selection panel 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 panel puts a name to the Lord Chancellor, and the Lord Chancellor has these options: he may accept the person selected; 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 panel 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 panel after reconsideration, but who has not been rejected.

Section 83: Exercise of powers to reject or require reconsideration

291. The Lord Chancellor can only reject a selection outright if, in his opinion, the person selected is not suitable for the office concerned. 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 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 84: Selection following rejection or requirement to reconsider

292. If the Lord Chancellor rejects a selection, the panel cannot put forward the same candidate, or one whose selection has already been withdrawn after being reconsidered. If he requires reconsideration, the panel may reselect the same candidate, but not one who has already been rejected. In either case, the panel must inform the Lord Chancellor of its new or reconsidered selection. A person who has been reconsidered or rejected is not prevented from being selected by the panel in response to a subsequent new request from the Lord Chancellor to select someone for appointment as a Lord Justice.

Puisne judges and other office holders

Section 85: Selection of puisne judges and other office holders

293. **Section 85** provides that sections 86 to 93 of the Act apply to a recommendation for the appointment by The Queen of a puisne judge of the High Court; a recommendation for the appointment by The Queen to any of the offices listed in Part 1 of Schedule 14; and an appointment by the Lord Chancellor to any of the offices listed in parts 2 and 3 of Schedule 14. The Lord Chancellor has a power to amend the Schedule by order

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

in order to add or delete offices and references to statutes. Section 144 provides that any such order is subject to the negative resolution procedure in parliament, unless the order amends Part 1 of the Schedule 14 (which lists offices below the High Court to which The Queen makes appointments), in which case by section 144(5)(a) it is subject to affirmative resolution in both Houses.