



# Constitutional Reform Act 2005

## 2005 CHAPTER 4

### PART 4

#### JUDICIAL APPOINTMENTS AND DISCIPLINE

### CHAPTER 2

#### APPOINTMENTS

#### *Puisne judges and other office holders*

#### **85 Selection of puisne judges and other office holders**

(1) Sections 86 to 93 apply to—

- (a) a recommendation for an appointment to the office of puisne judge of the High Court;
- (b) a recommendation for an appointment to an office listed in Part 1 of Schedule 14 in exercise of Her Majesty's function under the enactment listed opposite that office;
- (c) an appointment to an office listed in Part 2 or 3 of that Schedule in exercise of the Lord Chancellor's function under the enactment listed opposite that office.

(2) Any such recommendation or appointment must be made in accordance with those sections and section 96.

[<sup>F1</sup>(2A) This section is subject to—

- (a) section 30(4) of the Courts-Martial (Appeals) Act 1951,
- (b) sections 91(1ZB) and 102(1C) of the Supreme Court Act 1981,
- (c) section 8(1ZC) of the County Courts Act 1984, and
- (d) sections 94A and 94B below.]

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- (3) The Lord Chancellor may by order make any of the following amendments to Schedule 14—
- (a) an amendment which adds a reference to an enactment under which appointments are made to an office;
  - (b) an amendment which adds a reference to an office to which appointments are made under an enactment;
  - (c) an amendment consequential on the abolition or change of name of an office;
  - (d) an amendment consequential on the substitution of one or more enactments for an enactment under which appointments are made to an office.

[<sup>F2</sup>(4) The Lord Chancellor may by order amend section 94A or 94B if he thinks that the amendment is consequential on an amendment made to Schedule 14 by an order under subsection (3).]

#### Textual Amendments

- F1** S. 85(2A) inserted (19.7.2007) by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\), s. 53\(3\)](#)  
**F2** S. 85(4) inserted (19.7.2007) by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\), s. 53\(4\)](#)

#### Modifications etc. (not altering text)

- C1** S. 85 excluded (19.7.2009) by [Supreme Court Act 1981 \(c. 54\), s. 91\(1ZB\)](#) (as inserted by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\), ss. 57\(3\)](#))  
**C2** S. 85 excluded (19.9.2009) by [Courts-Martial \(Appeals\) Act 1951 \(c. 46\), s. 30\(4\)](#) (as inserted by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\), ss. 58\(3\); S.I. 2007/2709, art. 2\(a\)](#))

#### Commencement Information

- I1** S. 85 wholly in force at 2.4.2007; s. 85 not in force at Royal Assent see s. 148; s. 85(3) in force 1.10.2005 by [S.I. 2005/2505](#); s. 85(1)(b)(c)(2) in force at 3.4.2006 by [S.I. 2006/1014, art. 2\(a\), Sch. 1 para. 19](#); s. 85(1)(a) in force at 2.4.2007 by [S.I. 2006/1014, art. 2\(b\), Sch. 2 para. 2](#)

## 86 Duty to fill vacancies

- (1) The Lord Chancellor must make a recommendation to fill any vacancy in the office of puisne judge of the High Court or in an office listed in Part 1 of Schedule 14.
- (2) The Lord Chancellor must make an appointment to fill any vacancy in an office listed in Part 2 or 3 of that Schedule.
- (3) Subsections (1) and (2) do not apply to a vacancy while the Lord Chief Justice agrees that it may remain unfilled.

## 87 Request for selection

- (1) The Lord Chancellor may request the Commission to select a person for a recommendation or appointment to which this section applies.
- (2) Before making a request the Lord Chancellor must consult the Lord Chief Justice.
- (3) A request may relate to more than one recommendation or appointment.
- (4) Sections 88 to 93 apply where the Lord Chancellor makes a request under this section.
- (5) Those sections are subject to section 95 (withdrawal and modification of requests).

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## **88 Selection process**

- (1) On receiving a request the Commission must—
  - (a) determine the selection process to be applied,
  - (b) apply the selection process, and
  - (c) make a selection accordingly.
- (2) But if or so far as the Commission decides that the selection process has not identified candidates of sufficient merit for it to comply with subsection (1)(c), section 93 applies and subsection (1)(c) does not apply.
- (3) As part of the selection process the Commission must consult—
  - (a) the Lord Chief Justice; and
  - (b) a person (other than the Lord Chief Justice) who has held the office for which a selection is to be made or has other relevant experience.
- (4) One person only may be selected for each recommendation or appointment to which a request relates.
- (5) Subsection (4) applies to selection under this section and to selection under section 92 or 93.

## **89 Report**

- (1) After complying with section 88 the Commission must submit a report to the Lord Chancellor.
- (2) The report must—
  - (a) describe the selection process;
  - (b) state any selection made;
  - (c) state any decision under section 88(2);
  - (d) state any recommendation made in consultation under section 88(3) by a person consulted;
  - (e) give reasons in any case where the Commission has not followed such a recommendation;
  - (f) contain any other information required by the Lord Chancellor.
- (3) The report must be in a form approved by the Lord Chancellor.
- (4) After submitting the report the Commission must provide any further information the Lord Chancellor may require.

## **90 The Lord Chancellor's options**

- (1) This section refers to the following stages—

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<i>Stage 1:</i>	where a person has been selected under section 88
<i>Stage 2:</i>	where a person has been selected following a rejection or reconsideration at stage 1

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*Stage 3:* where a person has been selected following a rejection or reconsideration at stage 2.

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- (2) At stage 1 the Lord Chancellor must do one of the following—
- (a) accept the selection;
  - (b) reject the selection;
  - (c) require the Commission to reconsider the selection.
- (3) At stage 2 the Lord Chancellor must do one of the following—
- (a) accept the selection;
  - (b) reject the selection, but only if it was made following a reconsideration at stage 1;
  - (c) require the Commission to reconsider the selection, but only if it was made following a rejection at stage 1.
- (4) At stage 3 the Lord Chancellor must accept the selection, unless subsection (5) applies and he accepts a selection under it.
- (5) If a person whose selection the Lord Chancellor required to be reconsidered at stage 1 or 2 was not selected again at the next stage, the Lord Chancellor may, at stage 3, accept the selection made at that earlier stage.
- (6) Before exercising his powers under this section at any stage in relation to a selection for an appointment or recommendation, the Lord Chancellor must—
- (a) consult any person whom he is required by any enactment to consult before making the appointment or recommendation, and
  - (b) consult the Scottish Ministers if it appears to him to be an appointment, or a recommendation for the appointment, of a person to exercise functions wholly or mainly in Scotland.

## **91 Exercise of powers to reject or require reconsideration**

- (1) The power of the Lord Chancellor under section 90 to reject a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion, the person selected is not suitable for the office concerned or particular functions of that office.
- (2) The power of the Lord Chancellor under section 90 to require the Commission to reconsider a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion—
  - (a) there is not enough evidence that the person is suitable for the office concerned or particular functions of that office, or
  - (b) there is evidence that the person is not the best candidate on merit.
- (3) The Lord Chancellor must give the Commission reasons in writing for rejecting or requiring reconsideration of a selection.

## **92 Selection following rejection or requirement to reconsider**

- (1) If under section 90 the Lord Chancellor rejects or requires reconsideration of a selection at stage 1 or 2, the Commission must select a person in accordance with this section.

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- (2) If the Lord Chancellor rejects a selection, the Commission—
  - (a) may not select the person rejected, and
  - (b) where the rejection is following a requirement to reconsider, may not select the person (if different) whose selection it reconsidered.
- (3) If the Lord Chancellor requires a selection to be reconsidered, the Commission—
  - (a) may select the same person or a different person, but
  - (b) where the requirement is following a rejection, may not select the person rejected.
- (4) But if the Commission decides that the selection process has not identified a candidate of sufficient merit for it to make a selection under this section—
  - (a) section 93 applies;
  - (b) subsection (1) does not apply, but subsections (2) and (3) apply to any selection under section 93.
- (5) The Commission must inform the Lord Chancellor of any person selected following a rejection or a requirement to reconsider.
- (6) Subsections (2) and (3) do not prevent a person being selected on a subsequent request under section 87.

### **93 Reconsideration of decision not to select**

- (1) The Lord Chancellor may require the Commission to reconsider a decision that the selection process has not identified candidates of sufficient merit for it to make a selection.
- (2) The Commission must inform the Lord Chancellor of any person selected on reconsideration under this section.
- (3) Sections 90 to 92 apply to such a person as if the Commission had selected him instead of making the decision reconsidered.

### **94 Duty to identify persons for future requests**

- (1) If the Lord Chancellor gives the Commission notice of a request he expects to make under section 87 the Commission must—
  - (a) seek to identify persons it considers would be suitable for selection on the request, and
  - (b) submit a report to the Lord Chancellor containing any information it considers appropriate about—
    - (i) the extent to which it has identified suitable persons, and
    - (ii) other matters likely to assist the Lord Chancellor in exercising his functions relating to appointments and recommendations.
- (2) For the purposes of subsection (1)(a) and (b)(ii), the Commission must in particular have regard to—
  - (a) the number of recommendations and appointments the Lord Chancellor expects to request selections for;
  - (b) the powers of the Lord Chancellor to reject or require reconsideration of a selection.

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- (3) As part of the process of identifying persons under subsection (1)(a), the Commission must consult—
- (a) the Lord Chief Justice, and
  - (b) a person or persons, other than the Lord Chief Justice, with experience in the office or offices to which requests specified in the notice relate, or with other relevant experience.
- (4) A report under subsection (1)(b) must—
- (a) state any recommendation made in consultation under subsection (3) by a person consulted;
  - (b) give reasons in any case where the Commission has not followed such a recommendation.
- (5) Where the Lord Chancellor makes a request for the purposes of which the Commission has identified persons under subsection (1)(a), the Commission must, in determining the selection process to be applied, consider whether selection should be from among those persons.

**[<sup>F3</sup>94A Appointments not subject to section 85: courts**

- (1) Where this section applies to an appointment—
- (a) section 85 does not apply, but
  - (b) the Lord Chancellor may not make the appointment without the concurrence of the Lord Chief Justice.
- (2) This section applies to the appointment of a person, on a fee-paid basis, to an office in the table below (the “proposed appointment”) if the person—
- (a) holds the corresponding qualifying office (or one of them) on a salaried basis, or
  - (b) ceased to hold the corresponding qualifying office (or one of them) within two years ending with the date when the proposed appointment takes effect and, immediately before ceasing to hold that office, held it on a salaried basis.

<i>Proposed appointment (fee-paid)</i>	<i>Qualifying office (salaried)</i>
An office listed in Part 2 of Schedule 14.	The same office.
Deputy District Judge (Magistrates' Courts).	District Judge (Magistrates' Courts), Senior District Judge (Chief Magistrate), or Deputy Senior District Judge (Chief Magistrate).
Assistant Judge Advocate General, or a person appointed temporarily to assist the Judge Advocate General.	Judge Advocate of Her Majesty's Fleet, Judge Advocate General, Vice Judge Advocate General, or Assistant Judge Advocate General.

- (3) The Lord Chief Justice may nominate a judicial office holder (as defined in section 109(4)) to exercise his function under subsection (1)(b).
- (4) In this section “salaried” and “fee-paid” have the meaning given by paragraph 1(2) of Schedule 7 to the Judicial Pensions and Retirement Act 1993 (c. 8).

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### Textual Amendments

**F3** Ss. 94A, 94B inserted (19.7.2007) by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\)](#), s. 53(2)

## 94B Appointments not subject to section 85: tribunals

- (1) Where this section applies to a recommendation or appointment—
  - (a) section 85 does not apply, but
  - (b) the Lord Chancellor may not make the recommendation or appointment without the concurrence of the Senior President of Tribunals.
- (2) In the case of the appointment of a person as a deputy judge of the Upper Tribunal, if the person holds or has held an office listed in section 6(1) of the Tribunals, Courts and Enforcement Act 2007, the Lord Chancellor must also consult the Lord Chief Justice before making the appointment.
- (3) This section applies to, or to a recommendation to Her Majesty for, the appointment of a person, on a fee-paid basis, to an office in the table below (the “proposed appointment”) if the person—
  - (a) holds the corresponding qualifying office (or one of them) on a salaried basis, or
  - (b) subject to subsection (4), ceased to hold the corresponding qualifying office (or one of them) within two years ending with the date when the proposed appointment takes effect and, immediately before ceasing to hold that office, held it on a salaried basis.

<i>Proposed appointment (fee-paid)</i>	<i>Qualifying office (salaried)</i>
An office listed in Part 3 of Schedule 14 (other than the office of Chamber President or Deputy Chamber President of a chamber of the Upper Tribunal or the First-tier Tribunal).	The same office, or a more senior office, listed in Part 3 of Schedule 14, in the same tribunal or body (but excluding the Upper Tribunal and the First-tier Tribunal).
F4	F4
F4	F4
Deputy judge of the Upper Tribunal.	Ordinary judge of the Court of Appeal in England and Wales, Lord Justice of Appeal in Northern Ireland, Judge of the Court of Session, Puisne judge of the High Court in England and Wales or Northern Ireland, Circuit judge, Sheriff in Scotland, County court judge in Northern Ireland, District judge in England and Wales or Northern Ireland, District Judge (Magistrates' Courts), or Judge of the Upper Tribunal by virtue of any of paragraphs (a) to (f) or (i) of

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	section 5(1) of the Tribunals, Courts and Enforcement Act 2007.
Judge of the First-tier Tribunal by appointment under paragraph 1(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007.	Transferred-in judge of the First-tier Tribunal (see section 31(2) of that Act).
Other member of the First-tier Tribunal by appointment under paragraph 2(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007.	Transferred-in other member of the First-tier Tribunal (see section 31(2) of that Act).
Judge of the Upper Tribunal by appointment under paragraph 1(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007.	Transferred-in judge of the Upper Tribunal (see section 31(2) of that Act).
Other member of the Upper Tribunal by appointment under paragraph 2(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007.	Transferred-in other member of the Upper Tribunal (see section 31(2) of that Act).
Deputy judge of the Upper Tribunal by appointment under paragraph 7(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007.	Deputy judge of the Upper Tribunal under section 31(2) of that Act.

- (4) In subsection (3)(b) the words “within two years ending with the date when the proposed appointment takes effect” do not apply if—
- (a) the proposed appointment is to the office of deputy judge of the Upper Tribunal, and
  - (b) the corresponding qualifying office is—
    - (i) ordinary judge of the Court of Appeal in England and Wales,
    - (ii) Lord Justice of Appeal in Northern Ireland,
    - (iii) judge of the Court of Session, or
    - (iv) puisne judge of the High Court in England and Wales or Northern Ireland.
- (5) In this section “salaried” and “fee-paid” have the meaning given by paragraph 1(2) of Schedule 7 to the Judicial Pensions and Retirement Act 1993.]

#### Textual Amendments

- F3** Ss. 94A, 94B inserted (19.7.2007) by [Tribunals, Courts and Enforcement Act 2007 \(c. 15\), s. 53\(2\)](#)
- F4** [S. 94B\(3\)](#): table entries omitted (3.11.2008) by virtue of [The Transfer of Tribunal Functions Order 2008 \(S.I. 2008/2833\)](#), art. 9, [Sch. 3 para. 218](#)



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