

# CONSTITUTIONAL REFORM ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3 Duty to Convene Commission: Special Rules**

##### **Composition for Proceedings**

168. The Supreme Court will, like the House of Lords, be able to sit in panels. Section 42, together with section 43, makes provision for the composition of panels. The underlying rule is that no panel should ever consist wholly or predominantly of non-permanent judges, but that otherwise, the Court should have considerable flexibility (essentially mirroring that of the Appellate Committee), including the flexibility, subject to the agreement of the parties, to commence or continue hearing proceedings notwithstanding that a judge is unable to continue.

##### ***Section 42: Composition***

169. Subsections (1), (2) and (3) provide for the basic rule that an uneven number of judges equal to or greater than three must be designated to hear any proceedings - there is no flexibility to designate an even number of judges. Given that an uneven number must be designated, permanent judges have to be in the majority in order to ensure that the composition is never wholly or predominantly of non-permanent judges (subsection (1) (c)).
170. This does not mean that the actual hearing cannot commence before an even number of judges, as the judges will by definition have been designated to hear proceedings in advance of the beginning of the hearing proper, and section 42 is, as subsection (4) makes clear, subject to section 43, which allows for additional flexibility. Subsection (5) makes it clear that the power to require more than three judges to be designated for particular proceedings or a particular class or classes of proceedings is exercisable by the President of the Court; and subsection (6) makes provision which ensures that the sections work on the basis that the Court is constituted for proceedings when the judges are designated to hear those proceedings (rather than when the hearing commences).

##### ***Section 43: Changes in Composition***

171. This section provides for flexibility in the event of the Court being reduced in number (for example due to death or illness) before the end of proceedings.
172. Subsection (1) provides for this section to apply if the Court ceases to be duly constituted "because one or more members of the Court are unable to continue". In such a case, subject to any directions which the President may give (subsection (4)), the presiding judge (defined in subsection (6) as the judge who is to preside over the proceedings, or is presiding if they have already commenced) may direct that the Court is still duly constituted (subsection (2)), but only if the parties agree, the Court still consists of at least three judges, and at least half of those judges are permanent judges. So the Court may continue with an even number of judges; and if it does, and the judges

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

divide evenly in their decisions, the case must (subsection (5)) be re-argued before a Court constituted in accordance with section 42 .

173. Because the section applies (by virtue of section 42(6)) to any proceedings from the time that judges are designated to hear proceedings (rather than when the proceedings commence), the Court is (for example) enabled to start the hearing with four judges where five were designated but one is unable to continue, as long as at least two of the four are permanent judges. The provision in subsection (1), that the section applies to a court constituted in accordance with a direction 'under this section', is to allow for the possibility of two judges falling out of a panel which started off with at least five. This might occur if, for example, a panel of five is designated, and before the hearing commences, one judge is unable to continue, and the presiding judge directs (the parties being in agreement and there still being four judges of whom at least two are permanent) that the Court is still duly constituted; and then another judge is unable to continue, leaving three, of whom two are permanent, and the parties are still in agreement that the proceedings should continue. Then there would be a Court which ceases to be duly constituted "in accordance with this section", but the presiding judge may direct that it is still duly constituted.