

CONSTITUTIONAL REFORM ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 12: The Judicial Appointments Commission

Part 1 The Commissioners

222. This part of Schedule 12 sets out the size and balance of membership of the Judicial Appointments Commission.

Paragraphs 1-6 The Commissioners

223. [Paragraph 1](#) requires there to be a chairman and 14 other Commissioners, to be appointed by The Queen on the recommendation of the Lord Chancellor.
224. [Paragraph 2](#) provides for the chairman to be a lay member. Of the other Commissioners, 5 must be judicial members, 2 must be professional members, 5 must be lay members, 1 other must be the holder of an office listed in Part 3 of Schedule 12 (which lists members of tribunals and other similar office holders who will be appointed by the Lord Chancellor), and 1 other must be a lay justice member. The judicial members must be made up of one Lord Justice of Appeal, one puisne judge of the High Court, one judge who is either a Lord Justice of Appeal or a puisne judge of the High Court, one Circuit Judge and one District Judge or a person appointed to an office under section 89 of the Supreme Court Act 1981 (i.e. the offices of Senior Master of the Queen's Bench Division, Chief Chancery Master, Chief Taxing Master, Chief Bankruptcy Registrar and Senior District Judge of the Family Division). The two professional members must be a practising barrister and a practising solicitor. A Commissioner only counts towards the total in the category to which he was appointed, so that a lay member, for example, does not become a professional member if he qualifies as a practitioner.
225. [Paragraph 3](#) specifies that a person cannot be appointed as a Commissioner if he is a civil servant. This is to ensure that the Commission is not subject to any covert or improper Governmental influence.
226. [Paragraph 4](#) details what is meant by judicial, professional, lay and lay justice member. A judicial member holds one of the offices specified in paragraph 2(3) (set out above) and is not a practising lawyer (defined in paragraph 6 as a practising solicitor or barrister in England and Wales, a solicitor or advocate in Scotland and a Solicitor or member of the Bar in Northern Ireland which includes those employed to give legal advice or providing legal advice under a contract for services). A professional member is a barrister or solicitor practising in England and Wales (again further defined in paragraph 6 to include employed lawyers and those who give legal advice under a contract for services). A lay member is an England and Wales resident who has never been a holder of a listed judicial office (by paragraph 6, an office listed in Schedule 14) or a practising lawyer.
227. [Paragraph 5](#) allows the Lord Chancellor to increase the size of the Commission, by increasing the size of any or all of the different categories of Commissioner. He can

do this by order, but only with the agreement of the Lord Chief Justice, and subject to affirmative resolution in both Houses of Parliament (by virtue of section 144(5) (e) of this Act). This is to prevent a Lord Chancellor seeking improperly to influence selections by altering the balance of the Commission in one direction or another at his own unchecked discretion.

228. **Paragraph 6** provides definitions of terms used in the Schedule.

Paragraph 7 Selection of Commissioners

229. **Paragraph 7** provides that in appointing the three senior judicial members of the Commission (the judges drawn from the Court of Appeal and the High Court) the Lord Chancellor may recommend to Her Majesty only people selected by the Judges' Council, which must give reasons for its selection. The Judges' Council is defined as the body designated for that purpose by the Lord Chief Justice. Other Commissioners will be appointed after being selected by a panel convened by the Lord Chancellor. Paragraph 7(2) provides the Lord Chancellor may only recommend people as the other 12 Commissioners if he has appointed a panel for the purposes of selection of Commissioners and they have been selected by that panel. Provision about the composition of the panel is made in paragraph 8.

Paragraph 8 Panels

230. **Paragraph 8** provides for a panel to select the Commissioners, with the exception of the three senior Judges. The panel will comprise four members, unless the appointment being made is that of the chairman of the Judicial Appointments Commission, when there will be no fourth member. The first member (who will be the chairman of the panel) is chosen by the Lord Chancellor with the agreement of the Lord Chief Justice (or if the post of Lord Chief Justice is vacant then with the agreement of the senior Head of Division). The second member will be the Lord Chief Justice or his nominee, unless the office of the Lord Chief Justice is vacant, when it will be the senior Head of Division or his nominee. The third member will be chosen by the chairman. The fourth member will be the chairman of the Judicial Appointments Commission, when there is one and that is not the post being appointed to. Members of the panel must not be civil servants. In addition the chairman of the panel must not be a Commissioner, a member of the Commission's staff, a practising lawyer, a judicial office holder listed in Schedule 14, or a member of the House of Commons. The third member must not be a member of the House of Commons. In selecting the first member, consideration must be given as to whether the person being appointed has previously exercised any judicial functions or has any past service as a civil servant, a Commissioner, a member of the Commission's staff, a practising lawyer, a judicial office holder listed in Schedule 14, or any past or present political activity or affiliations which would make them inappropriate for appointment. The first member must apply the same considerations in nominating the third member. These provisions are intended to ensure the neutrality of the panel, including its political neutrality.
231. **Paragraph 9** provides for the Lord Chancellor to pay the panel fees and expenses.

Paragraph 10 Selection by a panel

232. The panel must take account of any views expressed by the Bar Council and Law Society in appointing the barrister and solicitor members respectively. Before selecting the chairman and the other lay members, the panel must consider the same questions that apply in selecting the first and third members of the panel, in relation to whether they have exercised any functions or have any political affiliations which make them inappropriate for the appointment. Those functions are expressed in broadly the same terms as for the first member as set out above, but also include past employment in the civil service. In selecting lay members, the panel must seek to ensure, as far as practicable, that one of the selected lay members has special knowledge of Wales.

Paragraph 11 Vice-chairman

233. This paragraph provides that the senior judicial member of the Commission will be the vice-chairman. The vice-chairman will be able to exercise the functions of the chairman, other than those of sitting on the panel for selecting members of the Commission and sitting on the selection panels for Heads of Division and for Lords Justices of Appeal, for which, in the absence of the chairman, a lay Commissioner is required.

Paragraphs 12- 15 Term of office etc. of Commissioners

234. Paragraphs 12 to 15 provide for the term of office of the Commissioners. They will serve for two fixed terms of up to five years, meaning that their maximum period of service is 10 years. Commissioners cease to be Commissioners if they cease to qualify for the category of membership under which they were appointed. However, the Lord Chancellor may allow Commissioners to continue in office for a specified period even if they have ceased to fall within the category to which they were appointed. For example, if a member had particular skills or a background which was required for a particular competition that was being run by the Commission, then the Lord Chancellor might allow him to continue in office until the competition was over. Commissioners also lose office if they are appointed to the civil service, but they may not be continued in office where this is the case. If a Commissioner resigns he must do so in writing to The Queen. Commissioners can be removed from office by The Queen on the recommendation of the Lord Chancellor. Paragraph 15 (2) specifies the conditions in which the Lord Chancellor may recommend that a Commissioner be removed from office. They are that the person has failed to exercise their functions for a continuous period of six months; or they have been convicted of an offence; or they have been made bankrupt; or are otherwise unfit to hold office or unable to exercise its functions.

Paragraph 16 Salary, allowances and expenses

235. This paragraph makes provision for the Commission to pay fees, expenses, pensions and any other allowances in respect of Commissioners and former Commissioners. These payments will be determined by the Lord Chancellor.

Paragraph 17 Code of conduct

236. This paragraph provides for the Lord Chancellor to issue and revise a code of conduct to be observed by the Commissioners.

Part 2 The Commission

237. Part 2 sets out the status and functions of the Commission.

Paragraph 18 Status of the Commission and its property

238. This paragraph specifies that the Commission is not to be regarded as part of the Crown or, therefore, of the Government; it will be a non-departmental public body.

Paragraph 19 Powers

239. This paragraph allows the Commission to do anything to enable it to perform its functions, but does not allow the Commission to borrow money unless the Lord Chancellor has given permission for it to do so.

Paragraph 20 Committees

240. This paragraph allows the Commission to establish committees, and its committees to establish sub-committees, in order for it to undertake its business, and allows activities to be delegated by the Commission to a committee and by a committee to a sub-committee. Only Commissioners may be members of the committees and sub-

committees. Committees or sub-committees charged with making selections for judicial appointments must include at least one judicial and one lay member. The Commission will of course be advised by its staff, and by anyone else invited to give advice, and it may rely on interviewing panels made up of non-Commissioners, but final decisions are the responsibility of the Commissioners. The requirements of this paragraph in relation to committees and sub-committees do not apply to the selection panels for senior appointments, which are provided for separately in sections 71 and 80 of the Act.

Paragraph 21 Procedure and proceedings

241. This paragraph specifies that the Commission may control how it conducts its business and those of its committees and sub-committees including the numbers of members that must be present to make the proceedings valid, which in the case of a committee or sub-committee exercising functions of selection set out in Part 4 of the Act must be 3. The proceedings of the Commission or a committee or a sub-committee are still valid even if one of the posts on the Commission is unoccupied or if the appointment of a member is defective.

Paragraph 22 Staff

242. This paragraph makes provision requiring the Commission to appoint a Chief Executive and allowing it to appoint staff (which may include staff who transfer from other Government departments) to enable it to undertake its objectives. The Lord Chancellor has to agree the appointment of the Chief Executive. The terms and conditions of service with the Commission will be set by the Commission and agreed by the Lord Chancellor. The Commission will pay staff, as set out in their terms and conditions and in doing so will take account of the pay and terms and conditions operating in the Civil Service. The Commission is added to Schedule 1 to the Superannuation Act 1972. The Commission must pay for any increase attributable to its inclusion in the Schedule to the Superannuation Act 1972 that the Minister of the Civil Service requires. Staff of the Commission are not servants or agents of the Crown, neither do they have the Crown's status, immunity or privileges.

Paragraph 23 Arrangements for assistance

243. This paragraph allows for the Commission, with the agreement of the Lord Chancellor, to make arrangements for people to provide assistance to it. This would enable it to contract out services as it sees fit and in doing so to pay for such services.

Paragraphs 24 and 25 Appointments and arrangements by the Lord Chancellor

244. This paragraph allows the Lord Chancellor to appoint a Chief Executive for an interim period prior to a Chief Executive being appointed in accordance with paragraph 23(1) (a). The Chief Executive appointed by the Lord Chancellor may undertake matters on behalf of the Commission including incurring expenditure, appointing staff and making arrangements for people to provide assistance to the Commission subject to any directions given by the Lord Chancellor.
245. **Paragraph 25** allows the Lord Chancellor to appoint staff to the Commission and to make contracting out arrangements as appropriate. The Lord Chancellor cannot exercise these powers after the end of 3 years from the date on which the Commission is first constituted under paragraph 1, or at such earlier time as the Commission itself may decide. If a Chief Executive has been appointed to the Commission, the Lord Chancellor cannot exercise these powers without the Chief Executive's agreement.

Paragraph 26 Power to transfer staff to employment of the Commission

246. This paragraph makes provision for the Lord Chancellor to make regulations for relevant staff to be transferred to the Commission. Such staff must be current civil servants who are providing assistance in the Commission. Before making these

regulations the Lord Chancellor must consult organisations that appear to him to represent the interests of those likely to be affected by the regulations, such as trade unions. The Lord Chancellor can only exercise this power before the Commission is first constituted in accordance with paragraph 1 and, with the agreement of the Commission, during the period of 3 years from that time.

Paragraph 27 Delegation

247. This paragraph provides for the Commission, a committee or sub-committee or the Chief Executive to delegate any activities to staff, secondees, and to people providing assistance e.g. those with whom contracting out arrangements are made or who are providing services in connection with such arrangements. The Commission, a committee or a sub-committee cannot delegate its function of making selections in relation to judicial appointments.

Paragraph 28 Delegation and contracting out of superannuation functions

248. This paragraph allows powers in relation to the Superannuation Act 1972 to be delegated to the Chief Executive and then allows such powers to be delegated by the Chief Executive to anyone he authorises. The Chief Executive or his delegate may authorise the contracting out of any superannuation functions but the Commission or the Chief Executive may revoke such an authorisation at any time.

Paragraph 29 Inspection of documents

249. This paragraph requires the Commission to allow anyone authorised by the Lord Chancellor, for example auditors, to look at or to copy accounts and any other papers which the Lord Chancellor considers relate to the Commission's expenditure. In doing this, the Commission must give such explanations of the material as the Lord Chancellor may require.

Paragraph 30 Financial provisions and directions

250. This paragraph provides for the Lord Chancellor to pay the amount of money to the Commission that he determines to be appropriate for it to exercise its functions. It also allows the Lord Chancellor to require the Commission not to incur specific or total expenditure above a specified threshold without the consent of the Lord Chancellor and to follow specified procedures in relation to its costs and expenditure, to ensure he has the appropriate financial control over the Commission, for which he will be ultimately accountable to Parliament.

Paragraph 31 Accounts and audit

251. This paragraph obliges the Commission to maintain proper financial systems and to prepare accounts each financial year, which are an accurate reflection of its income and expenditure. In preparing its accounts, which must be sent to the Lord Chancellor when he directs, the Commission must comply with any instructions from the Lord Chancellor and the Treasury. The accounts must be sent to the Comptroller and Auditor General on or before 31 August for the financial year last ended, who will scrutinise them and prepare a report which, together with the accounts, will be laid before each House of Parliament.

Paragraph 32 Reports

252. This paragraph specifies that the Commission will produce annually for the Lord Chancellor a report detailing its activities. The Lord Chancellor, after consulting the Lord Chief Justice, may oblige the Commission to deal with any particular subject in all or any of its annual reports. In addition, the Lord Chancellor may require the Commission to report at any time on any matter he directs. The annual report must be

*These notes refer to the Constitutional Reform Act 2005
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laid before Parliament and published. Other reports which, for example, might contain confidential information, would not be laid before Parliament.

Paragraphs 33 - 35 Documentary evidence

253. These paragraphs allow for a Commissioner or an authorised member of the Commission's staff to sign under the Seal of the Commission to authorise documentary evidence. Contracts and instruments need not be under the Seal if entered into by properly authorised individuals designated for a general or specific purpose. A document that is under the Seal of the Commission or signed on behalf of the Commission is to be received in evidence and is to be taken to be duly authorised unless the contrary is proved.

Paragraph 36 General

254. This paragraph specifies that the Commission's first financial year begins when the Commission is established and ends the following 31 March. Subsequent financial years run from 1 April to 31 March. Commissioners are disqualified from election to the House of Commons by inserting a reference to the Judicial Appointments Commission into Part 2 of Schedule 1 to the House of Commons Disqualification Act 1975. The Commission is included in the list of public authorities for the purposes of the Freedom of Information Act 2000 by inserting a reference to the Commission into Part 6 of Schedule 1 to that Act.

Section 62: The Judicial Appointments and Conduct Ombudsman

255. **Section 62** establishes a Judicial Appointments and Conduct Ombudsman. Provisions about this office appear in sections 99 to 105, sections 110 to 114 and in Schedule 13.