

# CONSTITUTIONAL REFORM ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Chapter 3: Discipline*

#### **Procedures**

#### *Section 108 : Disciplinary Powers*

317. **Section 108** will form the basis of a disciplinary system in relation to senior judicial office holders in England and Wales and the holders of offices listed in Schedule 14. In accordance with the section the Lord Chancellor may only exercise his statutory powers to remove judicial office holders in accordance with prescribed procedures (which are defined by section 122 as procedures prescribed by the Lord Chief Justice with the agreement of the Lord Chancellor in regulations made under section 115 or rules made under section 117). Following the formal disciplinary process the Lord Chief Justice may formally advise or formally warn or reprimand, a judicial office holder, but only in accordance with prescribed procedures and with the agreement of the Lord Chancellor. As provided in subsection (3) this does not affect the ability of the Lord Chief Justice to speak informally to any judge about any matter of concern, or to issue general advice or warnings to the judiciary.
318. The Lord Chief Justice may also, with the agreement of the Lord Chancellor, suspend a judicial office holder from exercising the functions of his office if the office holder is subject to criminal proceedings; is serving a sentence for a criminal offence; is subject to disciplinary proceedings following a conviction; or if, following a criminal conviction, it has been decided not to remove the judicial office holder from office, but the Lord Chief Justice and Lord Chancellor agree that a period of suspension is required in order to maintain confidence in the judiciary. Senior judges may be suspended during proceedings for an Address in Parliament to remove them from office. Office holders who are listed in Schedule 14 may be suspended during criminal or disciplinary investigations, prior to any conviction.

#### *Section 109: Disciplinary powers: interpretation*

319. **Section 109** defines for the purposes of section 108 when a judge is subject to criminal proceedings, or to proceedings for an Address in Parliament, and what the meanings of 'judicial office', 'senior judge' and 'sentence' are. It provides that 'subject to prescribed procedures' and 'under investigation for an offence' may be defined in regulations.

#### *Section 110: Applications to the Ombudsman*

320. **Section 110** gives the Judicial Appointments and Conduct Ombudsman the powers to carry out a review of how a disciplinary case about a judge has been handled, at the application of an interested party, and sets out the conditions for a review. An interested party is either the judge concerned or the person, if any, who complained about his conduct. Applications for a review must be based on the grounds that those who

have investigated the complaint have failed to comply with the prescribed procedures, contained in regulations made by the Lord Chief Justice under section 115 and rules made by him under section 117, or that there has been some other maladministration. The Ombudsman is not involved in reviewing the judge's conduct itself, and cannot make determinations about the merits of the decision made in a disciplinary case. For the Ombudsman to review a case, he must be satisfied that the issue is of sufficient substance for a review to be necessary. The application must have been made within the 28 days which the section prescribes, or within a time the Ombudsman considers reasonable in the circumstances, both generally and when a review is sought on the grounds that a case has taken too long to reach a conclusion. The application must be made in a form approved by the Ombudsman.

321. The section then lists the scope of the disciplinary functions which the Ombudsman will be able to investigate, which are: the exercise of the Lord Chancellor's power to remove judicial office holders as dealt with in section 108(1) of the Act; the Lord Chief Justice's new disciplinary powers dealt with in section 108(3)-(7); and any exercise of the disciplinary regulations and rules to be made by the Lord Chief Justice under section 115 and section 117.

### ***Section 111: Review by the Ombudsman***

322. **Section 111** sets out the duties of the Ombudsman when carrying out a review of how a disciplinary case about a judge has been handled (in terms of alleged failure to comply with prescribed procedures or other alleged maladministration). It requires the Ombudsman to decide to what extent any application to him is justified and to make recommendations, which may include a recommendation for the payment of compensation resulting from any failure or maladministration to which the application relates. If the Ombudsman finds that the result of a disciplinary process was unreliable because of a failure to apply prescribed procedures or other procedural flaws, he will be able to set aside the decision, and require that the matter be subject to further investigation and reconsideration, in accordance with prescribed procedures. In exercising these powers, the Ombudsman will be able to direct the extent to which any previous investigation or review may be taken into account. This will mean that the whole of a previous investigation need not be disregarded if, for example, only the decision-making process at the end was procedurally flawed.

### ***Section 112: Reports on reviews***

323. **Section 112** provides that, after the Ombudsman has conducted a review on an application, he must submit a report in draft to the Lord Chief Justice and the Lord Chancellor. He must have regard to any proposals they make for amendment, and if their proposals are not reflected in his final report he must include a statement of those proposals.
324. The final report must be sent separately to both the Lord Chief Justice and the Lord Chancellor. He will also send a copy of the report to the applicant, but this version is not to contain confidential information relating to someone other than the applicant.

### ***Section 113: References to the Ombudsman relating to conduct***

325. **Section 113** provides for the Lord Chief Justice or the Lord Chancellor to be able to refer to the Ombudsman any matters relating to the exercise of their disciplinary functions, either generally or in relation to particular cases. It will enable the Lord Chancellor and the Lord Chief Justice, together or separately, to ask the Ombudsman to examine aspects of the complaints handling process – if for example they had become concerned by repeated issues in a number of cases - and report to them generally.

***Section 114: Reports on references***

326. **Section 114** provides for the Ombudsman to report on his investigations under section 113. The report, which must be signed by the Ombudsman, will include his findings and any action he recommends. After the Ombudsman has conducted an investigation he must submit a report in draft to the Lord Chief Justice and the Lord Chancellor. He must then have regard to any proposals they make for amendment, and if their proposals are not reflected in his final report he must include a statement of those proposals. He must send the final report in duplicate to the Lord Chief Justice and the Lord Chancellor.

***Section 115: Regulations about procedures***

327. **Section 115** provides that the Lord Chief Justice may, with the agreement of the Lord Chancellor make regulations governing the handling of judicial disciplinary cases. These regulations will be made by statutory instrument as though they had been made by a Minister, and will (by virtue of section 144) be subject to the negative resolution procedure in Parliament. It is intended that the regulations will provide the structure of the complaints and discipline system, and will include, for example, provisions relating to the judicial investigation of serious complaints and the possibility of referring serious complaints to a review body to consider the relevant facts and allegations and advise the Lord Chief Justice and Lord Chancellor.

***Section 116: Contents of regulations***

328. **Section 116** provides some more detail about what regulations made by the Lord Chief Justice under section 115 may contain. These matters include the procedures to be followed; any time limits for an investigation; the persons by whom an investigation is to be conducted; the matters to be decided by the Lord Chief Justice, the Minister or anyone else; any requirements as to record-keeping and confidentiality; or any requirements as to publicity. Regulations may require the Lord Chief Justice and Minister to make their eventual decision in accordance with findings of fact made by some other person or body (such as a review body of the kind referred to in paragraphs 96 to 99 of the Concordat (as to which see paragraph 7 above)); they may require that prescribed procedural steps be taken by the Lord Chief Justice or the Minister before they can exercise their functions, or in exercising those functions. Regulations may provide for the Lord Chief Justice and Minister to disapply requirements if they both agree. Where the regulations impose a requirement on an office holder or complainant, they may provide a procedural penalty (such as suspension or dismissal of a complaint) for failure to comply.

***Section 117: Procedural Rules***

329. **Section 117** allows the regulations made under section 115 to provide for a more limited category of detailed procedural rules in relation to complaints and discipline to be made by the Lord Chief Justice with the agreement of the Minister. It is envisaged that these would address the detailed matters covered by the existing protocol governing complaints against judges, which was agreed by the Lord Chancellor and the judiciary and published in 2003. These rules will not be subject to Parliamentary approval and might change from time to time, but they must be published. The rules may not include provision of the kind referred to in section 109(7) or (8) (which allow certain definitions to be prescribed) or section 116(2) or (3) (which allow the regulations to make certain provision about procedural steps in decision-making and procedural penalties).

***Section 118: Extension of discipline provisions to other offices***

330. **Section 118** allows the Lord Chancellor to extend the new judicial disciplinary regime by order to office holders who are not senior judges and not listed in Schedule 14. It is envisaged that this will include certain office holders, such as coroners and some

tribunal members, whom the Lord Chancellor has the power to remove but who are not currently appointed by him and who are therefore not currently included in Schedule 14. Such an order can only be made with the agreement of the Lord Chief Justice and is subject to the negative approval procedure in Parliament.

### ***Section 119: Delegation of functions***

331. **Section 119** provides that the Lord Chief Justice may share the complaints caseload with other senior judges, by giving him a power to delegate the greater part of his functions in this Chapter of this Part of the Act (specifically, his functions under section 108(3) to (7), 111(2), 112 and 116(3)(b)). There are two areas which he will not be able to delegate his functions: only he will be able to give the agreement which will be needed before the Lord Chancellor removes any judicial office-holder. And he will not delegate the power to refer issues to the Ombudsman, since that is likely to involve issues of policy, involving a number of complaints.

### ***Section 120: Scotland***

332. **Section 120** provides that where a member of a tribunal with UK-wide or Great Britain-wide jurisdiction who is appointed after selection by the Judicial Appointments Commission sits wholly or mainly in Scotland it is not the Lord Chief Justice of England and Wales who will have disciplinary responsibilities in relation to him, but the Lord President of the Court of Session. In performing those functions, he will work within the procedures prescribed by the Lord Chief Justice of England and Wales, so that the same procedures apply to all members of the same tribunal; but the Lord Chief Justice will have to consult the Lord President before making the regulations containing the procedures, to make sure that any relevant provisions of Scottish law are reflected in them. The greater part of these disciplinary responsibilities (in parallel with the situation in England and Wales) may also be delegated to other senior judges in Scotland.

### ***Section 121: Northern Ireland***

333. **Section 121** provides that where a member of a tribunal with UK-wide jurisdiction who is appointed after selection by the Judicial Appointments Commission sits wholly or mainly in Northern Ireland it is not the Lord Chief Justice of England and Wales who will have disciplinary responsibilities in relation to him, but the Lord Chief Justice of Northern Ireland. These responsibilities may also be delegated to other senior judges in Northern Ireland. In performing those functions, he will work within the procedures prescribed by the Lord Chief Justice of England and Wales, so that the same procedures apply to all members of the same tribunal; but the Lord Chief Justice will have to consult the Lord Chief Justice of Northern Ireland before making the regulations containing the procedures, to make sure that any relevant provisions of Northern Ireland law are reflected in them. The greater part of these disciplinary responsibilities (in parallel with the situation in England and Wales) may also be delegated to other senior judges in Northern Ireland.