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The *Constitutional Reform Bill [HL]*: a Supreme Court for the United Kingdom and judicial appointments

Bill No 18 of 2004-05

This Paper is one of two which examines the main proposals of the *Constitutional Reform Bill* which is due for second reading on Monday 17 January 2005. It deals with proposals for a new Supreme Court for the United Kingdom and for new selection and disciplinary arrangements for judges in England and Wales. Research Paper 05/05 *The Constitutional Reform Bill [HL] – the office of Lord Chancellor* deals with the proposals in respect of the office of Lord Chancellor. The Bill is subject to a Sewel motion in respect of its provisions relating to Scotland.

Catherine Fairbairn and Sally Broadbridge

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Summary of main points

The Government announced the abolition of the office of Lord Chancellor in June 2003, as part of a reshuffle, which led to the replacement of Lord Irvine as Lord Chancellor, by Lord Falconer, to be known as the Secretary of State for Constitutional Affairs. The Government issued a series of consultation papers in 2003, designed to set out their proposals to abolish the office of Lord Chancellor, and to create a Supreme Court and a statutory Judicial Appointments Commission. The perceived need to provide greater separation of powers between legislature and judiciary was a major factor in the proposals.

The *Constitutional Reform Bill* was introduced into the Lords where it was committed to a select committee, a rare proceeding. As a result of negotiations, the Bill was subject to a carry over motion in the Lords to enable its consideration in the 2004-5 session. The committee heard evidence from a wide range of experts and rehearsed the major arguments about the Bill. It did not reach agreement on a number of issues including the abolition of the Lord Chancellor and the creation of a Supreme Court.

This Research Paper deals only with the provisions of the Bill relating to the establishment of a new, independent Supreme Court and a statutory Judicial Appointments Commission and other arrangements concerning judicial appointments and discipline. Library Research Paper RP05/05, *Constitutional Reform Bill [HL] – the office of Lord Chancellor*, deals with the provisions in the Bill relating to the office of Lord Chancellor and the overall impact of the Bill on the constitution.

This Bill has undergone considerable modification during its Lords passage and the version now presented in the Commons:

- Modifies the office of Lord Chancellor so that the holder is no longer the formal head of the judiciary in England, Wales and Northern Ireland
- Requires the Lord Chancellor to be a senior lawyer and member of the House of Lords
- Ensures that the Lord Chancellor no longer sits as a judge
- Removes the requirement of the Lord Chancellor to be Speaker of the House of Lords
- Removes the Law Lords from membership of the House of Lords and creates a new Supreme Court
- Enshrines a concordat between the Government and the judiciary about judiciary-related functions of the office
- Creates an independent statutory Judicial Appointments Commission to recommend appointments
- Enshrines a statutory guarantee to uphold judicial independence and the rule of law

The Bill is subject to a Sewel motion in respect of its provisions relating to Scotland.

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A. Introduction and background

1. Introduction

On 12 June 2003 the Prime Minister announced the creation of a new Department for Constitutional Affairs which would incorporate most of the responsibilities of the former Lord Chancellor's Department but with new arrangements for judicial appointments, and the abolition of the office of Lord Chancellor.[1] Further reforms proposed included:

- The establishment of an independent Judicial Appointments Commission.
- Reform of the speakership of the House of Lords[2]
- The creation of a new Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords

On 14 July 2003, the Department for Constitutional Affairs issued a consultation paper entitled *Constitutional reform: a Supreme Court for the United Kingdom.*[3] On the same day, Christopher Leslie, Parliamentary Under-Secretary of State for Constitutional Affairs, summarised the Government's proposals:

> We propose that the Appellate Committee of the House of Lords will cease to exist as the United Kingdom's highest court of appeal, and that the present Lords of Appeal in Ordinary instead form a new separate supreme court. While they are members of that court, they will not sit and vote in the House of Lords. The Government propose to transfer the whole of the present jurisdiction of the Appellate Committee to the new supreme court. The time has come to take the final court of appeal out of the legislature.
>
> The Government also propose, subject to consultation, to transfer from the Judicial Committee of the Privy Council to the new court its present jurisdiction over devolution issues. That will enable us to restore a single apex to the United Kingdom's judicial systems. The Judicial Committee of the Privy Council will, however, remain in being to continue its work as the final court of appeal for a number of Commonwealth and Crown dependency jurisdictions.
>
> The supreme court will be a new United Kingdom court. It will stand in exactly the same relationship to the courts in Scotland, Northern Ireland and England and Wales as the Appellate Committee of the House of Lords does now. The independence of those three judicial jurisdictions will be totally respected.

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1 10 Downing Street Press Release, *Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs,* 12 June 2003

2 See Library Research Paper 05/05, *Constitutional Reform Bill[HL] – the office of Lord Chancellor*

3 CP11/03 http://www.lcd.gov.uk/consult/supremecourt/index.htm

> Arrangements will be made, as now, to secure appropriate representation for Scottish and Northern Irish judges.[4]

More information about the Consultation Paper is included in part I A 3 of this Research Paper (p13).

The *Constitutional Reform Bill [HL]* was introduced in the House of Lords as Bill 30 of 2003-04 on 24 February 2004. During the second reading debate on 8 March 2004 the House voted on a motion in the name of the retired Law Lord, Lord Lloyd of Berwick, to commit the Bill to a Select Committee. The major parties in the House of Lords agreed that the Bill should be subject to a carry-over motion allowing the Bill to be considered in the 2004-05 session.

The Select Committee's Final Report was published on 2 July 2004.[5] The Select Committee referred the Bill back to the House of Lords for further passage through Parliament. The Bill was re-presented in the Lords on 24 November 2004 as Bill 1 of 2004-05. The Bill had its third reading in the House of Lords on 20 December 2004 and was introduced in the House of Commons as Bill 18 of 2004-05 on 21 December 2004. It is due to have its second reading in the House of Commons on 17 January 2005. [6]

2. Background

a. The present position

The functions of the highest courts in the land are divided between the Appellate Committee of the House of Lords which receives appeals from the courts in England and Wales and Northern Ireland in both civil and criminal matters, and in civil cases from Scotland, and the Judicial Committee of the Privy Council, which hears ecclesiastical, devolution and certain Commonwealth cases. The term "Supreme Court of England and Wales" currently refers to the Court of Appeal, the High Court and the Crown Court.[7]

The judicial business of the House of Lords is carried out by the Lords of Appeal in Ordinary, commonly known as the Law Lords. They usually hear appeals as a Committee of the House called the Appellate Committee. The Appellate Committee usually sits in panels of five, but there may be more members in important cases. The number of Law Lords is set at 12 by the *Administration of Justice Act 1968.* Any holder of high judicial office who is a member of the House of Lords under the age of 75 is also eligible to sit.

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4 HC Deb 14 Jul 2003 c21-2

5 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I & II, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

6 For more information about the nature of the Parliamentary proceedings see Library Research Paper 05/05, *Constitutional Reform Bill [HL] – the office of Lord Chancellor*

7 *Supreme Court Act 1981* Section 1

The Law Lords are full members of the House of Lords and can therefore take part in debates and vote. However, the Law Lords have agreed to limit their participation in Parliamentary proceedings. In June 2000, Lord Bingham of Cornhill, the Senior Law Lord, made the following statement, agreed by all the Lords of Appeal in Ordinary:

> General principles:
>
> As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.
>
> The Lords of Appeal in Ordinary will continue to be guided by these broad principles. They stress that it is impossible to frame rules which cover every eventuality. In the end it must be for the judgment of each individual Lord of Appeal to decide how to conduct himself in any particular situation.
>
> Eligibility
>
> In deciding who is eligible to sit on an appeal, the Lords of Appeal agree to be guided by the same principles as apply to all judges. These principles were restated by the Court of Appeal in the case of Locabail (UK) Ltd v. Bayfield Properties Ltd and others and four other actions [2000] 1 All E.R. 65 (CA).[8]

Most appeals require the permission of the court below, which is rarely given, or of the Appellate Committee. However, in Scotland, in most cases there is no requirement to seek leave to appeal from either the Court of Session or the Appellate Committee but rather there is a requirement for two Counsel to certify the reasonableness of the appeal.

Judgments are delivered in the Chamber of the House of Lords and are formally a report from the Committee to the House, to which the House has to agree. Only members of the Committee who are giving judgment speak and vote at sittings of the House for this purpose.

Membership of the Judicial Committee of the Privy Council comprises all members of the Appellate Committee, including retired Law Lords under the age of 75, and also other Privy Councillors who are, or have been, senior judges of courts within the United

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[8] HL Deb 22 Jun 2000 c419. The case referred to sets out guidelines for disqualification of a judge to hear a particular case.

Kingdom and Privy Councillors who are judges of certain superior courts in other Commonwealth countries.

b. The Government's previous view on retaining the Law Lords in the House of Lords

A House for the Future, the report of the Royal Commission on the Reform of the House of Lords chaired by Lord Wakeham, concluded that "There is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords".[9]

The Report also recommended that the Lords of Appeal in Ordinary should continue to be ex officio members of the reformed second chamber and carry out its judicial functions.

> We would be reluctant, however, to see the Law Lords' contribution to the second chamber removed, unless that was judged to be essential. There is also a powerful argument that in the exercise of their judicial functions the Law Lords – and the judicial system generally – benefit from their membership of the second chamber. Their involvement in the second chamber raises their own awareness of the broader political context in which legislation and policies are formulated. Now that the European Convention on Human Rights has been enshrined in British law, it is even more vital that the members of the senior judiciary are alert to the wider political context of their work. We therefore conclude, subject to clarification of the conventions about their role, that it would, on balance, be beneficial to Parliament for the Lords of Appeal in Ordinary to continue to be ex officio members of the reformed second chamber and to carry out its judicial functions. Given the effective separation between the appellate work and the other functions of the second chamber we do not consider that the continuation of the present arrangements would undermine the independence of the judiciary or public confidence in the judiciary.[10]

In its White Paper, *The House of Lords – Completing the Reform*, the Government stated that it supported the presence of the Law Lords in the reformed House of Lords:

> The Government is committed to maintaining judicial membership within the House of Lords. In practice, it has been recognised that the formal judicial function constrains the capacity of active Law Lords to comment on legislation and issues of the day. However, Law Lords represent a significant body of expertise and experience, which can benefit the House beyond the period when they can sit judicially.[11]

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9 Royal Commission on the Reform of the House of Lords, *A House for the Future*, January 2000, Cm 4534, para 9.4, http://www.archive.official-documents.co.uk/document/cm45/4534/4534.htm

10 *Ibid* Chapter 9

11 November 2001, Cm 5291, Paragraph 82, http://www.dca.gov.uk/constitution/holref/holreform.htm

In June 2002, the then Lord Chancellor, Lord Irvine of Lairg ruled out the creation of a Supreme Court at that time:

> Lord Lester of Herne Hill asked Her Majesty's Government:
>
> Whether they favour the creation of a supreme court of the United Kingdom, independent from the House of Lords; and, if not, why not.
>
> The Lord Chancellor: The Government are of the view that a sufficient case has not been made for the abolition of the Appellate Committee of the House of Lords and its replacement by a separate new supreme court.[12]

c. Calls for change

Even before the Government's proposals were announced, some calls had already been made for a change to the present system, including:

- A report entitled, *The Future of the United Kingdom's Highest Courts* by Professor Andrew Le Sueur and Richard Cornes.[13] In a press article, Richard Cornes argued a managerial case for reform because the courts are working at the limits of their capacity. He also argued that there is a constitutional case for reform because the *Human Rights Act 1998*, Article 6, guarantees an independent and impartial hearing in the determination of criminal charges and civil rights and obligations.[14]

- In March 2002, the Law Lord, Lord Steyn, in his Neill Lecture at All Souls College, Oxford, called for:

> a supreme court independent of other branches of government, in the framework of our existing system in which the supremacy of Parliament is the paramount principle of our constitution. Such a court would in the eyes of the public carry a badge of independence and neutrality: it would be a potent symbol of the allegiance of our country to the rule of law.[15]

- Lord Bingham of Cornhill's lecture to the Constitution Unit in May 2002 entitled, *A New Supreme Court for the United Kingdom*.[16] He argued:

> [M]y own personal preference would be for.... a supreme court severed from the legislature, established as a court in its own right, re-named and appropriately re-

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12 HL Deb 10 June 2002 c3WA

13 Professor Andrew Le Sueur (University of Birmingham) and Richard Cornes (University of Essex), *The Future of the United Kingdom's Highest Courts*, The Constitution Unit, July 2001 http://www.ucl.ac.uk/constitution-unit/files/top.pdf

14 Richard Cornes, *The Guardian*, 23 July 2001

15 Quoted by Lord Falconer of Thoroton, HL Deb 2 December 2003 c292

16 *A New Supreme Court for the United Kingdom*, The Constitution Unit Spring Lecture 2002, Lord Bingham of Cornhill, 1 May 2002, http://www.ucl.ac.uk/constitution-unit/files/90.pdf

> housed, properly equipped and resourced and affording facilities for litigants, judges and staff such as, in most countries of the world, are taken for granted.

- A policy paper by Justice, dated November 2002, entitled, *A Supreme Court for the United Kingdom.*[17] The key features of the argument were stated to be:

> (i) Senior full-time judges should not be members of the Upper House, because it is inappropriate that they should be able both to act as legislators and to perform judicial functions. Members of the Supreme Court should be full-time judges.
> (ii) Former judges should be eligible to be appointed to the Upper House on ceasing to hold judicial office, (provided that the composition of the Upper House will remain, in part, appointed).
> (iii) The Supreme Court should be housed in its own building with sufficient resources to enable it to maintain the highest standards in carrying out the judicial process.
> (iv) The functions of the Judicial Committee of the Privy Council in determining devolution issues should be transferred to the new Supreme Court, whose composition should ensure that it reflects the legal systems of the United Kingdom as a whole.
> (v) The new Supreme Court building could also house the Judicial Committee of the Privy Council in dealing with Commonwealth appeals etc, in the interests of the efficient use of resources.

- Matthias Kelly QC, then Chairman of the Bar Council, whilst emphasising that he was neither criticising the quality of the judges appointed nor their decisions:

> Judges should have no part of the legislature -as is understood by almost every other democracy. It is very difficult to understand why our Supreme Court (the law lords) should be a committee of the second house of Parliament.[18]

- In April 2003 the Council of Europe Parliamentary Assembly Legal Affairs and Human Rights Committee adopted the report, *Office of the Lord Chancellor in the constitutional system of the United Kingdom.* This includes a recommendation to the United Kingdom authorities to consider the creation of a Supreme Court whose members could not at the same time be members of the upper house of the legislature.[19]

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17 http://www.justice.org.uk/images/pdfs/supreme.pdf
18 "Lord Chancellor's role 'should end'", *The Times*, 2 April 2003
19 28 April 2003, Doc 9798, http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9798.htm

3. The Consultation Paper, Constitutional Reform: a Supreme Court for the United Kingdom

In the Consultation Paper, *Constitutional Reform: a Supreme Court for the United Kingdom*[20] the Government set out its proposal to legislate to transfer the functions of the Appellate Committee of the House of Lords to a new Supreme Court which would be separate from Parliament. The consultation paper was stated to be part of the Government's drive to modernise the constitution and the legal system. The court would be a Supreme Court for the United Kingdom, quite separate from the courts of England and Wales or Scotland or Northern Ireland. However, the Government stated that it would not be a Supreme Court on the US model with the power to overturn legislation.

Explaining the proposal to establish a new Supreme Court, the Government stated that it is essential to minimise the risk of any public perception that judges' decisions could be politically motivated. It stated that it is not always clearly understood that decisions of the House of Lords are made by the Appellate Committee and not by non-judicial members of the House, or that Law Lords refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate:

> The intention is that the new Court will put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system.[21]

The Paper cited the *Human Rights Act 1988*, particularly in relation to Article 6 of the *European Convention on Human Rights*, (right to a fair trial), as being an added justification for taking a stricter view on anything which might, or might even appear to, undermine the independence and impartiality of a judicial tribunal. However, it stressed that the proposals for change do not imply any criticism of the present Law Lords and that there have been no accusations of actual bias.

The Government also justified the proposals on the basis of the limited space and resources available to the Law Lords.

The Consultation Paper did not seek views on the principle of whether there should be a Supreme Court at all. However, it did seek views on a range of practical issues relating to the creation of the court. More information about the Consultation Paper is included in a Library standard note entitled, *Proposals for a Supreme Court for the United Kingdom.*[22]

Responses were sought by 7 November 2003.

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20 CP11/03, July 2003, http://www.dca.gov.uk/consult/supremecourt/index.htm
21 Paragraph 1
22 SN/HA/2701

In January 2004, the Government published a summary of responses to the Consultation Paper.[23] A full text version of individual responses was published in February 2004.[24] Views both for and against the Government's proposals were received.

4. Consideration by the Constitutional Affairs Committee and the Government's response

The Constitutional Affairs Committee published its report, *Judicial appointments and a Supreme Court (court of final appeal)* on 10 February 2004.[25] The purpose of the Committee's inquiry was to examine the Government's proposals for a new Supreme Court and a new Judicial Appointments Commission and the responses to the two consultation papers, in time for second reading of the *Constitutional Reform Bill* in the House of Lords.

The Government published its response to the report of the Constitutional Affairs Committee on 19 April 2004.[26]

On 21 May 2004, the Constitutional Affairs Committee announced that it would be conducting a further inquiry and that this would look at practiccal issues relating to the creation of a new Supreme Court, including how the Court would be administered, and how judges would manage the Court's relationship with Parliament and the Government. Evidence sessions for this inquiry have been held.

Issues considered by the Committee in relation to its published report, and the Government's response include:

a. The need for change

The Committee noted that the present system for appeals works and that the arguments for change are about principle and perception with the main argument for the change being that is that it is felt to be wrong in principle to have judges sitting as members of the legislature.

The government confirmed that there had been no questioning of the high standards and reputation of the Law Lords, but stated that there is an overriding need for transparency and clarity in institutional arrangements. The House of Lords Appellate Committee should be openly acknowledged to be the separate court that it is. The Government also considers that having an independent Supreme Court would increase public confidence in

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23 http://www.dca.gov.uk/consult/supremecourt/scresp.htm
24 http://www.dca.gov.uk/consult/supremecourt/scresplist.htm
25 Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal,* 10 February 2004, HC 48 I & II
26 Cm 6150 http://www.dca.gov.uk/pubs/reports/jascresp.htm

and understanding of the judicial system, as it would be demonstrably separate from the legislature.

b. Jurisdiction

The Committee recommended that the legislation establishing the new court should make clear the jurisdiction of the court and that it should establish the extent to which it is a United Kingdom court as opposed to a final court of appeal serving each of the United Kingdom's three jurisdictions.

In its response, the Government agreed with the Committee on this point and confirmed that the *Constitutional Reform Bill* would make clear that the Supreme Court is a United Kingdom court and would have the same jurisdiction as the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council.

The Committee also commented on the Government's proposal to transfer the jurisdiction on devolution cases from the Judicial Committee to the new Supreme Court with arrangements which would enable additional Scottish and Northern Ireland judges to sit in cases raising devolution issues, where appropriate. It noted that this approach was not universally accepted and referred to the issue as a "sensitive matter".[27]

c. Judges

The Committee considered that, in relation to membership of the new court, two aspects should be taken into account, namely the need for special expertise in the laws and understanding of the society in all parts of the United Kingdom, and the need for there to be an equal sense of ownership of the new court in all parts of the United Kingdom.

The Government agreed with the Committee but stated that it did not believe that there should be a formalised quota system to ensure Scottish and Northern Irish presence in the Court. Appointment to the court should be by merit, but with regard being given to the need to ensure the court has available to it experience and expertise from each jurisdiction. The Government said it intended that, as with the Lords' Appellate Committee, the Supreme Court would contain two Scottish Judges and normally one Northern Irish Judge.

d. Relationship between Supreme Court and Parliament

The Committee identified this as a complex question which in many ways goes to the heart of the division of opinion between those who regard the system as needing to be changed and those who think that it should be allowed to remain essentially unchanged.

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[27] Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal,* 10 February 2004, HC 48 I & II, para 32

The Committee stated that, on balance, it would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords.[28]

The Government agreed that all Justices of the Supreme Court should be appointed to the House of Lords upon retirement.

The Committee agreed with the Government's view that confirmation hearings for judges would not be desirable.

e. Operational matters

The Committee considered it to be vital that the administrative arrangements for the new court should reflect the two priorities of judicial independence and the fact that the Supreme Court would be a United Kingdom court. At the same time, the new court should be accountable for the public money at its disposal.

The Committee considered that the Department for Constitutional Affairs would not be the appropriate organization to run the new court because it is too associated with the court system of England and Wales and because giving the Government control over the administration of the new court could offend against the principle of judicial independence.

The Government disagreed that the DCA is inextricably linked with the England and Wales Court Service and pointed out the Department's wider responsibilities. The Government confirmed that the Supreme Court would be administered as a distinct constitutional entity.

The Committee recommended that the timing of the establishment of the court should be adjusted to ensure that suitable accommodation was secured. If the court had to sit temporarily in the House of Lords, looking much like its predecessor, the objective of the Government and the supporters of reform to make the Court appear clearly separate from the legislature, would not be met. In its response to the Committee, the Government agreed but pointed out the inevitability of the time necessary to identify and equip a suitable building:

> However, it is for the Government to decide how best to manage any transitional period and it would be inappropriate for the legislation to impose limitations or restriction in this respect. There is no possibility that legislation on a Supreme Court will be enacted and not followed by the provision of suitable accommodation; however, the Government agree that it is crucial to maintain the momentum of change.[29]

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[28] *Ibid* paragraph 80

[29] Cm 6150, para30, http://www.dca.gov.uk/pubs/reports/jascresp.htm

f. The timing of the proposed changes

The Committee called for a delay, saying that the consultation process had been too short, and the legislative timetable too restrictive, and that the plan should be first published in draft form.

In response, the Government pointed out the debate and consultation which had already taken place and was still planned, and said that the need to allow time for debate had to be weighed against the need to avoid unnecessarily prolonging the process, and creating a blight over existing systems and structures.

5. The Government's proposals

On 9 February 2004, following the publication of responses to the consultation, the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, made a statement to the House of Lords in which he set out the Government's plans for the proposed new Supreme Court.[30] He confirmed that the Government intended to proceed with the creation of the Supreme Court for the United Kingdom to replace the existing system whereby the Law Lords operate as a committee of the House of Lords; and that the Supreme Court would also take over the jurisdiction of the Judicial Committee of the Privy Council in respect of devolution issues under the *Scotland Act 1998*, the *Government of Wales Act 1998* and the *Northern Ireland Act 1998*. Lord Falconer also confirmed that there was no intention to create a new body of United Kingdom law and that, as at present, decisions made in an appeal from a court in one of the three jurisdictions within the United Kingdom would be of binding effect only within that jurisdiction, and of persuasive effect in the others.

The key objective would be to achieve a full and transparent separation between the judiciary and the legislature. Other proposals announced include:

- The avenues of appeals from Scottish Courts would remain the same so that only Scottish civil appeals would be heard by the Supreme Court.

- Justices of the Supreme Court, other holders of full-time judicial office, or retired justices of the Supreme Court who continue to sit, would no longer be entitled to sit or to vote in the House of Lords or to participate in the work of Parliament for as long as they held their judicial appointment.

- Judges of the new Supreme Court would be known as "Justices of the Supreme Court" and in the first instance these would be the existing law lords. Qualifications for appointments would be unchanged.

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[30] HL Deb 9 February 2004 c926-9

- Appointments would be made on the recommendation of a new Supreme Court Appointments Commission to be convened when there is an actual or impending vacancy.

- The commission would recommend to the Secretary of State a minimum of two and a maximum of five candidates for each vacancy. On receipt of the nominations, the Secretary of State would be under a statutory duty to ensure that the court had among its members sufficient knowledge and experience of the law in each United Kingdom jurisdiction. In doing so he would be required to consult the senior judiciary in the three jurisdictions. The Secretary of State would then submit a name from the shortlist to the Prime Minister, who would make a recommendation to the Queen.

- The Supreme Court would be administered as a distinct constitutional entity. Special arrangements would apply to its budgetary and financial arrangements.

- The Supreme Court would be based in London but would be able to sit elsewhere when appropriate.

- The new Supreme Court should be housed in an appropriate building.

Some of these proposals have been modified during the Bill's passage through the House of Lords. Significant amendments are discussed, in context, in the following sections of this Research Paper.

6. Proceedings in the House of Lords

The House of Lords debated the proposal to create a United Kingdom Supreme Court on a motion to take note on 12 February 2004. This provided an opportunity for many of the arguments, both for and against the proposals, to be aired.

On 8 March 2004, at second reading, peers voted by 216 to 183 in favour of an amendment put down by Lord Lloyd of Berwick, a retired law lord, to have the Bill referred to a select committee.

The House of Lords Select Committee proposed more than 400 amendments to the Bill. Its report then went before a committee of the whole House.

In Committee (on Recommitment), Lord Richard, Chairman of the Select Committee, confirmed that the Committee was more or less equally divided on the issue of whether a Supreme Court should be established. Therefore the Committee made no recommendation about whether there should be a Supreme Court, or whether, if a Supreme Court was established, it should not assume its responsibilities until it was able to move to permanent premises. However, the Committee did agree on a framework for

the Court in the event that it did go ahead. The issues on which the Committee agreed on this basis include:

- the name of the court – the Supreme Court of the United Kingdom, and the title of the judges – Justice of the Supreme Court
- the number of justices (12) and that at least two should be Scottish (by convention)
- the qualifications for appointment to the Supreme Court
- the composition of the Selection Commission, including that there should be one lay member
- the Selection Commission should provide the name of only one candidate for appointment
- the extent of consultation with senior judges and the devolved administrations
- the role of the Prime Minister should solely be to act as a conduit between Ministers and the Queen
- the provisions for acting justices and the supplementary panel
- the designation of the Supreme Court as a superior court of record should remain
- there was no need to change provisions of the Bill in respect of the Scottish civil and criminal appeals or the leave arrangements for Scottish civil appeals
- devolution jurisdiction should be transferred from the Privy Council to the Supreme Court
- the court should make its own rules
- the court should be established according to the model of a non-ministerial department, so that it would have greater control over its own financial and administrative agreements
- the court should set its own fees
- there should be an amendment to the Bill which safeguards the separate jurisdiction to be examined by the Supreme Court in respect of Scottish, Northern Irish, English and Welsh laws.[31]

Further information about the nature of proceedings in the House of Lords is included in Library Research Paper, *Constitutional Reform Bill [HL] – the office of Lord Chancellor*.[32]

B. The Bill

The provisions relating to the Supreme Court are contained in Part 3 of the Bill, Clauses 20 to 54 and Schedules 7 to 9. Some of these provisions have been substantially amended since the Government's proposals were first announced. Full information about the

[31] HL Deb 13 July 2004 c1140-1
[32] RP 05/05

clauses and the Schedules is contained in the Government's Explanatory Notes published on 10 January 2005.[33]

Briefly, the provisions of the Bill include:

1. The Supreme Court and its judges

Clause 20 would establish the Supreme Court of the United Kingdom. There would be 12 Judges (the same number as the present Lords of Appeal in Ordinary). This number could be increased by Order in Council after a draft of the Order has been approved by both Houses of Parliament. The judges would be called "Justices of the Supreme Court".

The current Law Lords would be the first justices of the Supreme Court (Clause 21) and similar qualification criteria would apply for future appointment as a judge (Clause 22).

2. Appointment of judges

Clauses 23 to 28 deal with the selection of future members of the Court. The proposed process was amended by the Government during the passage of the Bill through the House of Lords.

A selection commission would be convened to deal with any vacancy (actual or anticipated) in the office of judge of the Supreme Court, President or Deputy President of the Court. Details about the selection commission are set out in Schedule 7 (there must be at least one lay member, a requirement which was introduced by an amendment made by the House of Lords Select Committee). Clause 24(5) specifies that selection must be on merit and the commission is also required to ensure that, between them, the judges will have knowledge and experience of practice in the law of each part of the United Kingdom (Clause 24(8)). The commission would have to have regard to any guidance given by the Minister as to matters to be taken into account in making a selection (Clause 24(9)).

Originally, it was intended that the selection commission should put forward a list of two to five names from which the Minister would select. However, this process was opposed on the basis that it might introduce an element of political influence which the reforms were designed to remove. Accordingly, the Bill was amended by the Select Committee on the basis of a new Clause proposed by the Lord Chancellor. It now provides that the selection commission, after consulting the senior judges and the devolved administrations, would put forward only one name.

The Minister would then consult with the same bodies and would then have three options. These are summarised in the Government's Explanatory Notes as follows:

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[33] Bill 18 – EN, http://www.publications.parliament.uk/pa/cm200405/cmbills/018/en/05018x--.htm

98. The Minister's options as set out in this clause can be summarised as follows. He can:

(a) accept the recommendation;

(b) ask the commission to reconsider; or

(c) reject the recommendation.

99. If the Minister selects option (b) first, he would ask the selection commission to reconsider. After reconsideration the commission, under clause 28, can still put forward the same name with further reasons or recommend an alternative. The Minister can then put forward either of the recommended candidates (unless he chooses to reject the second candidate put forward).

100. Under (c) the Minister can reject the name provided by the selection commission.

101. If rejection follows reconsideration, under clause 28 the selection commission must submit an alternative candidate. At this point the Minister can either:

(a) accept this candidate; or

(b) accept the candidate originally put forward before reconsideration.

102. If the Minister rejects the original name provided by the selection commission, under clause 28 it must submit an alternative candidate giving reasons for their choice. At this point the Minister can either:

(a) accept the second candidate; or

(b) ask the selection commission to reconsider - The selection commission, under clause 28 can then either resubmit the second candidate or an alternative candidate. If an alternative candidate is put forward the Minister can then choose between the first name following rejection or the new name following reconsideration.[34]

The Minister would have to provide in writing his reasons for requiring reconsideration or rejecting a candidate. The grounds on which the Minister could exercise these options are set out in Clause 27. Under Clause 28, the commission would not be able to recommend a person whose selection has been rejected at any stage in the process.[35]

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[34] Bill18-EN, paras 98-102, http://www.publications.parliament.uk/pa/cm200405/cmbills/018/en/05018x-b.htm

[35] The procedures for appointing judges at other levels are described below, see part II B 2 (p61)

3. Terms of appointment

Clauses 29 to 34 deal with the terms of appointment, including taking the oath of allegiance and the judicial oath, tenure (during good behaviour), salaries and allowances, resignation and retirement, medical retirement, and pensions.

4. Acting judges

At present, any holder of high judicial office under the age of 75 who is a member of the House of Lords, may be called upon to sit on the Appellate Committee. Clause 35 would provide for a pool of acting judges to be available to supplement the permanent members of the Supreme Court when necessary. The pool would be made up of those holding office as a senior territorial judge (that is, judges of the highest appeal courts below the Supreme Court in each of the three parts of the United Kingdom), and members of the supplementary panel which would be established by Clause 36. The first members of the supplementary panel would be those, aged under 75, who have held high judicial office within 5 years of the commencement of the Supreme Court or who are (or were within the five years before commencement) members of the Judicial Committee of the Privy Council. In future, subject to the requirements set out in Clause 36, a person would become a member of the supplementary panel on ceasing to hold office as a judge of the Supreme Court or as a senior territorial judge (as defined in Clause 35(8)), for a period of 5 years or, if earlier, until reaching the age of 75.

5. Jurisdiction

Clause 37 sets out that the Court would have the same jurisdiction as the House of Lords Appellate Committee and the devolution jurisdiction of the Judicial Committee of the Privy Council.

Clause 38 clarifies that the Bill would not affect the distinctions between the separate legal systems of the parts of the United Kingdom. This clause was introduced by a Government amendment at third reading and clarifies the position in order to address concerns raised during House of Lords proceedings.[36] For example, in written evidence to the House of Lords Select Committee, the Law Lord, Lord Hope of Craighead, said:

> 15. The Bill as it stands says nothing about the need to preserve the distinct nature of Scots law and the separate existence of the Scottish legal system, which is guaranteed by article XVIII of the Treaty of Union 1707. Something needs to be done about this, in order to ensure that the established conventions will not be lost when the judicial business of the House is transferred to the new court.[37]

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[36] HL Deb 20 December 2004 cc1597-8

[37] Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-II, p191, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

A decision of the Supreme Court on appeal from any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom.

Schedule 8 includes amendments to existing legislation relating to the jurisdiction of the Supreme Court. Section 53 and Schedule 9 contain transitional provisions relating to proceedings under jurisdiction which is transferred to the Supreme Court.

6. Composition, practice and procedure

Clauses 39 and 40 would deal with the composition and changes in composition of the court. As with the Appellate Committee, the Court would sit in panels.

Clauses 41 to 44 would deal with practice and procedure including the making of rules. This provision has been changed during the passage of the bill through the Lords. Originally, the Minister would have had power to allow or disallow rules made by the President of the Court. The House of Lords Select Committee considered that it was inappropriate for the Minister to have this power and said that the rules should be made by the Supreme Court in consultation with the Minister who would have no power to amend them.[38] An amendment to that effect was made in Committee (on Recommitment).[39]

7. Staff and resources

Clauses 45 to 48 would deal with staff and resources. The Supreme Court would be established according to the model of a non-ministerial department. This would give the Court greater financial and administrative autonomy than originally envisaged and reflects amendments introduced by the Government on Report following a recommendation made by the House of Lords Select Committee. Lord Falconer of Thoroton explained the intended effect of the provisions:

> The model now proposed by the Government is to establish the Supreme Court as an independent statutory body with its own estimate within the overall Department for Constitutional Affairs departmental expenditure limit and, as a result of a separate estimate, independent financing from the Consolidated Fund through the normal supply process. The chief executive of the Supreme Court will be a separate accounting officer in right of the court itself and not a sub-accounting officer under the DCA Permanent Secretary.
>
> Treasury accounting regulations make it unnecessary to spell out in full detail in the Bill how the revised model will work. However, I am sure that the House will appreciate my placing on the record how the model is to operate. The Supreme

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38 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, para 252, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

39 HL Deb 11 October 2004 c110

> Court will be an independent statutory body responsible for appointing the staff for its own administrative service. That service will be headed by a chief executive—a civil servant appointed by a process involving an ad hoc commission and designed to exclude political interference.
>
> The staff of the court will also be civil servants, accountable to the chief executive and not to the Minister. The chief executive himself will be principally answerable to, and operate under the day-to-day guidance of, the President of the Supreme Court and will be accountable directly as accounting officer for the court rather than under the DCA Permanent Secretary.
>
> The President of the Supreme Court and the chief executive will determine the bid for resources for the court in line with governmental spending review timescales, and they will pass it to the Minister, who will include it as a separate line in the overall DCA bid submitted to the Treasury. The Treasury will scrutinise the overall DCA bid and approve the overall financial expenditure before putting the bid before the House of Commons as part of the overall Estimates. The House of Commons will approve the overall Estimates and transfer resources accordingly. Because the Supreme Court will have its own estimate, the funds approved will be transferred to the court direct from the Consolidated Fund and not via the DCA. That assures the Supreme Court a high level of independence in securing and expending resources and in the day-to-day administration of the court.
>
> In this revised model, the Minister will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it on to the Treasury. Once the Treasury has scrutinised the bid and it has been voted on by Parliament, the funds will go directly to the Supreme Court from the Consolidated Fund rather than via the DCA. That ring-fences the Supreme Court budget and ensures that it cannot be touched by Ministers. The chief executive will be able to allocate resources as he considers appropriate to ensure an effective and efficient system to support the court in carrying out its business. In other words, the chief executive will be solely responsible for the administration of the court, in accordance with directions from the president, and will be free from ministerial control.
>
> Your Lordships will note, however, that this model retains some ministerial involvement. That remains absolutely necessary as it is a key constitutional principle that a Minister must remain ultimately responsible for securing funding from the Treasury and be answerable to Parliament for its overall operation.[40]

Lord Kingsland, Shadow Lord Chancellor, considered that the Supreme Court would enjoy less financial independence than the Lords of Appeal in Ordinary do in the Appellate Committee.[41]

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[40] HL Deb 14 December 2004 c1236-7
[41] HL Deb 14 December 2004 c1244

The Minister would be under a duty to ensure that the court has appropriate accommodation. This provision was introduced by a Government amendment made on Report[42] after concerns had been expressed in Committee (on Recommitment) that it appeared the Minister had discretion to provide accommodation.[43] The chief executive would have to ensure that the Court's resources are used to provide an efficient and effective system to support the Court in carrying on its business.

8. Fees

Clauses 49 and 50 deal with fees. Fees would be set by order after the Minister has consulted with the listed individuals and professional bodies. There has been considerable debate on the issue of fees.

Lord Falconer of Thoroton set out the Government's policy that there should be full cost recovery for civil cases generally in written evidence to the House of Lords Select Committee:

> So far as England, Wales and Northern Ireland are concerned, Government policy was announced to the House of Lords by Lord Irvine of Lairg on 19 November 1998. This was that all the costs of administering the civil courts (including capital and judicial costs) should be recovered, through fees, from users of the civil courts. The justification for this policy is that services provided by the Government should be paid for by those who use them, rather than spread among the generality of taxpayers. Concerns about levying fees preventing access to justice are met by the system of exemptions, remissions and subsidies ... The policy is therefore settled in respect of all civil business arising in England, Wales and Northern Ireland, and will naturally apply to the civil work of the Supreme Court.[44]

The Government intends that the costs of civil work should be shared between all civil litigants before the courts below the Supreme Court. Effectively this would mean placing a premium on all civil fees. Baroness Ashton of Upholland, Parliamentary Under-Secretary of State Department for Constitutional Affairs, indicated, in Committee (on Recommitment) that the premium would be around 20 pence to 50 pence per fee. She also pointed out that the Supreme Court would provide judgments "of huge benefit across a wider use by those who use the civil justice system".[45]

In Committee (on Recommitment) Lord Evans of Temple Guiting, the Government's spokesperson for Constitutional Affairs, confirmed that the Scottish Executive has agreed

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42 HL Deb 14 December 2004 c1250
43 HL Deb 18 October 2004 cc571-4
44 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, para 270, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf
45 HL Deb 18 October 2004 c585

that Scotland's share of the cost of civil work would be met through the transfer of an agreed amount from an appropriate budget.[46]

In evidence to the Constitutional Affairs Select Committee, Lord Bingham of Cornhill commented on the Government's philosophy that civil justice should pay for itself through the imposition of fees. In the uncorrected transcript of oral evidence, he said:

> The judges have actually always resisted this philosophy because they feel that providing a system of justice is something that a civilised state has to do, like providing other forms of social service, military protection and so on. That does not mean to say that litigants should not pay anything, but it does mean that if the public purse has to meet some of the expense of providing an alternative to violence or self-help, it should.[47]

In Committee (on Recommitment), the Labour peer Lord Brennan disagreed with the proposal to make litigants the revenue source of paying for the Supreme Court:

> The court exists only to try points of general public importance which need resolution for the public good. There will be some costs—yes—but having it run by the litigants of the nation is not really appropriate. Some other way should be devised.[48]

On Report, Lord Ackner spoke of the implications for litigants of spreading the cost of the Supreme Court among civil cases generally:

> I understand that instead of loading the 10-times figure on the litigants in the House of Lords or in the Supreme Court, the costs will be spread about the whole of the civil administration of justice. Therefore, litigants will be expected to contribute to the costs of litigation in the House of Lords, despite the fact that the House of Lords in its judicial capacity is essentially making decisions on questions of policy. That is what differs it so much from the High Court and the Court of Appeal. Leave to appeal is granted largely on the basis that an important policy issue is involved.
>
> So we shall have the absurdity of a litigant in the High Court in a personal injury matter—so no policy is involved and the question is purely one of quantum—having to contribute to the costs of deciding some abstruse point which may be largely conditioned by the European approach in matters of natural justice and the like.
>
> However, the matter does not end there, because the litigant will have to contribute not only to that, but also to the costs—which are considerable—of

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46 HL Deb 18 October 2004 c590
47 Q116 http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-ii/uc62802.htm
48 HL Deb 11 October 2004 c69

> moving out those who currently occupy the premises which the new Supreme Court is to occupy. Those are part of the costs of the new Supreme Court. So in addition to the costs which have been referred to are the very significant costs which the Government should themselves be defraying.[49]

On Report, Lord Kingsland, the Shadow Lord Chancellor, moved an amendment which would have ensured that the average costs of bringing appeals to the Supreme Court would not exceed "in real terms" the cost of bringing such appeals to the House of Lords in February 2004.[50]

Although he did not support the wording of the amendment, which was subsequently withdrawn, Lord Goodhart, the Liberal Democrat spokesperson for the Department for Constitutional Affairs, did agree that there are serious issues about fees:

> There is undoubtedly a threat that increasing fees can lead to the denial of access to justice to a number of people who cannot afford to litigate if they are compelled to pay excessive fees.[51]

9. Annual report

The chief executive would be required to prepare an annual report which would be laid before both Houses of Parliament (Clause 51).

10. Renaming the existing Supreme Court of England and Wales

The Government has acknowledged that it will be necessary to rename the existing Supreme Court of England and Wales. At second reading Lord Falconer indicated that an amendment to this effect would be brought forward at a later stage.[52] No such amendment was made in the House of Lords, and an amendment may now be moved in the House of Commons.

C. The views of the Law Lords and the Lord Chief Justice

1. Law Lords' response to the Consultation Paper

The Law Lords' response, dated 27 October 2003, to the Consultation Paper, *Constitutional Reform: a Supreme Court for the United Kingdom,* set out their majority view. The Law Lords stated that their opinions differed on important questions of principle and detail and that the response to the more specific questions should be read subject to six important provisos:

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49 HL Deb 14 December 2004 c1200
50 HL Deb 14 December 2004 c1251
51 HL Deb 14 December 2004 c1251
52 HL Deb 8 March 2004 c983

- A number of Law Lords believe that, on pragmatic grounds, the proposed change is unnecessary and will be harmful, for various reasons including that the present arrangements work well, that the Law Lords' presence in the House is of benefit to the Law Lords, to the House and to others including the litigants, and that appeals are heard in a unique, suitably prestigious setting.[53] These Law Lords consider that the cost of the change would be wholly out of proportion to any benefit. Other Law Lords regard the functional separation of the judiciary at all levels from the legislature and the executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law.[54]

- Any new Supreme Court should be properly accommodated and resourced.

- Any new Supreme Court should have corporate independence.

- In the light of the proposal to abolish the office of Lord Chancellor, there should be continued protection for important constitutional values such as judicial independence.

- Provided its institutional independence was preserved, there would be obvious gains in operational efficiency if the Judicial Committee of the Privy Council were to sit under the same roof as the Supreme Court.

- There should be no change in the jurisdiction of the Appellate Committee on its becoming the Supreme Court.

Since the publication of this response, three new Lords of Appeal in the Ordinary have been introduced. Baroness Hale of Richmond supports the Supreme Court, while her predecessor, Lord Millett, opposed it. Lord Carswell, like his predecessor, Lord Hutton, opposes it. Lord Brown of Eaton-under-Heywood did not make his views known when he was appointed. His predecessor, Lord Hobhouse was one of the abstainers.

At second reading in the House of Lords, Lord Brennan summarized the balance of views of the current Law Lords:

> Of the 12 current members of the judicial panel of the Judicial Committee, five have said they are in favour of a Supreme Court, five are against, one has abstained, and one is as yet undecided.[55]

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53 Lords Nicholls of Birkenhead, Hoffman, Hope of Craighead, Hutton, Millett and Rodger of Earlsferry.
54 Lords Bingham of Cornhill, Steyn, Saville of Newdigate and Walker of Gestingthorpe
55 HL Deb 8 March 2004 c1026

2. Law Lords' view of choice of building

After starting with a long list of 48 properties for the Supreme Court, the Government narrowed consideration to two - Middlesex Guildhall and the New Wing of Somerset House.[56]

On 30 April 2004, Lord Bingham of Cornhill wrote a memorandum to the Select Committee setting out the views of the Law Lords. He expressed concerns about the use of the Middlesex Guildhall because of its layout and appearance:

> We have grave doubts whether, even if radically transformed, these spaces can ever provide a suitable setting. The impression will always remain that the Supreme Court has been crudely thrust into a building designed and built for quite another purpose.[57]

3. Views expressed in House of Lords' proceedings

In the House of Lords, the retired Law Lord, Lord Lloyd of Berwick was one of the main opponents of the proposals. The second senior Law Lord, Lord Nicholls of Birkenhead and Law Lords Lord Hope of Craighead and Lord Hoffmann also spoke against the proposals. More information about the points made by them is included in the next section of this Research Paper. However, other Law Lords, some of whom supported the proposals in comments made outside the Chamber, felt that it was inappropriate to take part in the debates. At second reading, Lord Brennan pointed to the misleading impression that might be gained by this difference of approach:

> In the debates of February and now, it may well be that the impression is given to the House that the judiciary at that level is against this reform. That would be totally misleading. The judges of the Judicial Committee, such as the noble and learned Lords, Lord Bingham, Lord Steyn and others who are in favour of it, choose by virtue of their belief in democratic principle not to attend and debate the question in this Chamber, not because they are diffident about their convictions that a Supreme Court is the right course for our constitution. [58]

4. Lord Woolf's views

The position of the Lord Chief Justice, Lord Woolf, appears to have moved since the proposals were first announced. On 11 February 2004 Lord Woolf was quoted as saying that he would be against a Supreme Court unless and until there was new money to pay

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56 HL Deb 14 December 2004 c74WS

57 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-II, p115, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

58 HL Deb 8 March 2004 c1026

for it. He also expressed the view that he did not believe that a worthwhile Supreme Court could be established for under £50 million.[59]

In March 2004, Lord Woolf was reported as saying, as he delivered the Squire Centenary Lecture at Cambridge University, that the planned Supreme Court would not have powers to strike out legislation, as with the US Supreme Court, and that because of its more limited role, it would be the "poor relation" of others around the world. "We will be exchanging a first-class final Court of Appeal for a second-class supreme court".[60]

At second reading Lord Woolf announced that the judiciary had no agreed position on the proposals to establish a Supreme Court and that he himself was ambivalent on the subject. He did stress, however, that any new Supreme Court should be appropriately accommodated and resourced.[61]

By Report, Lord Woolf was in favour of the proposal to create a Supreme Court. He stated that his previous coolness was primarily financial and that the proposal that the Supreme Court would not be established until suitable accommodation was available (the so-called "sunrise clause", which is discussed in section I E of this paper (p44) below) would go a considerable way to meeting his reservations. He also stated that the Supreme Court would have very real advantages over the Appellate Committee: the final court of appeal would be more accessible to the public, it would be more in accord with the separation of powers, and its role would be more understandable to the public.[62] At third reading, he pointed out that the number of Law Lords in favour of creating a Supreme Court might increase in the future.[63]

D. Is a Supreme Court necessary?

This part of this Research Paper considers this fundamental issue which recurred during debates within the House of Lords and in views which were made known outside Parliament. Reference is not necessarily made to every stage at which any particular issue was raised.

A considerable time was spent debating whether there really is a need for change, or whether the whole exercise of establishing a Supreme Court would be pointless, or, worse, harmful. An amendment moved by Lord Lloyd of Berwick at third reading which would have defeated the proposal to establish a Supreme Court was defeated by 199 votes to 133. Another amendment moved at third reading by Lord Kingsland which would have established the Supreme Court within the Palace of Westminster, but not within the chamber of the House, was also defeated, by 190 votes to 126. Recurring themes

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59 "Lord Chief Justice warns of opposition to Supreme Court plans", *Press Association*, 12 February 2004
60 "Ministers are breaking the law, say judges", *Times Online*, 4 March 2004
61 HL Deb 8 March 2004 c1005
62 HL Deb 7 December 2004 c758

emerged including arguments based on the separation of powers and judicial independence, public perception, the cost of the exercise, the benefits and strengths of the existing system, the need for improved facilities and public access, and human rights considerations A summary of some of the arguments advanced, which to some extent overlap with one another, is included in this section.

1. The constitutional argument and separation of powers

In the debate on the motion to take note, Lord Falconer of Thoroton set out the purpose of the reform:

> The purpose of this first area of reform is clear. It is to modernise and redefine the relationship between the executive, the legislature and the judiciary. We want to protect and indeed enhance judicial independence, to clarify the roles of the Government and the judiciary, and to set out the relationships between us on an explicit and transparent basis.[64]

In Committee (on Recommitment) he stated that the current arrangements "simply do not meet the expectations of a modern, 21st-century democracy".[65]

Those arguing in favour of the creation of a Supreme Court argued that the judiciary should be seen to be independent of the legislature. Lord Falconer of Thoroton quoted the senior Law Lord, Lord Bingham of Cornhill's evidence to the Constitutional Affairs Select Committee:

> "It is high time we did have a Supreme Court divorced from the legislature and therefore representing in institutional terms what the constitutional reality is. Judges are not legislators, they are judges."[66]

In a Westminster Hall debate on 27 May 2004, on the Constitutional Affairs Committee's report, Alan Beith, the Liberal Democrat Chairman of that committee, drew attention to the fact that an argument of principle exists notwithstanding the care taken by the Law Lords in handling their situation:

> The argument about [the Law Lords] presence in the House of Lords does not derive from the way in which serving Law Lords carry out their responsibilities in that Chamber, because they are extremely careful. If a Law Lord comments on legislation during its passage and it then becomes an issue in court, he does not sit in the case. However, that judges have found ways of handling the situation properly and without compromising their integrity does not detract from the argument of principle. The judiciary and the legislature are not the same thing, and we would not recommend to any other country that some of their legislators should also be judges. In this country, the anomaly also persists at another level,

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63 HL Deb 20 December 2004 c1557
64 HL Deb 12 February 2004 c1213
65 HL Deb 11 October 2004 c73
66 HL Deb 12 February 2004 c1217

> because some Members of Parliament, including members of the Committee, sit as recorders—but that is another story.[67]

Lord Richard, the Labour peer who chaired the Select Committee, argued in favour of a Supreme Court. On Report he said:

> I find it somewhat offensive that judges should be legislators and sit in a House of the legislature.[68]

On Report, Lord Goodhart said that powers must not only be separate but also should be seen to be separate.[69]

At third reading, Lord Falconer emphasised his view that it was necessary to create a Supreme Court:

> the time has come for the separation to occur, not because of any slavish adherence to the doctrine of the separation of powers but because the idea of having a court separate from the legislature is the way in which every other modern democracy has gone. It is the way that leads to people seeing with great clarity what the true position is.[70]

However, others spoke against the constitutional argument. Critics of the proposal said that there is no theoretical constitutional principle in the United Kingdom requiring separation of judicial and legislative functions.[71]

In the debate on the motion to take note, Lord Nicholls of Birkenhead, the second senior Law Lord, said:

> Under the present arrangements the Law Lords do not lack independence from Government—no one suggests that they do. They also do not lack independence from the legislature. Only Law Lords participate in this House's judicial business, as all your Lordships know. No one could suggest the Law Lords' membership in itself of your Lordships' House compromises our judicial independence in some way.[72]

He also argued that judges have to be careful of all extra-judicial activities, including, for example, making comments in lectures, which might prejudice their ability to sit on a panel to hear an appeal, so that potential problems were not confined to taking part in

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67 HC Deb 27 May 2004 c506WH
68 HL Deb 14 December 2004 c1201
69 HL Deb 14 December 2004 c1210
70 HL Deb 20 December 2004 c1566
71 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, para 111, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf
72 HL Deb 12 February 2004 c1228

debates in the House of Lords. Likewise, in Committee (on Recommitment), Lord Lloyd of Berwick referred to Lord Steyn having to refrain from sitting on the panel in the appeal against the Home Secretary concerning the detention of men without trial in Belmarsh prison,[73] because he had already expressed views in a lecture.[74]

Another Law Lord, Lord Hoffmann, questioned the benefit of changing the current arrangement:

> [I]f we were drawing up a constitution for the first time we would very likely be ordering things differently. But this is the United Kingdom and we are not drawing up a constitution for the first time. And just as there may be no overwhelming arguments for having us here, so, equally, there are no very strong arguments for getting rid of us.
>
> No one suggests that our membership of your Lordships' House compromises our independence. The House of Lords as a judicial body has a high reputation throughout the world.[75]

In the debate on the motion to take note, Lord Kingsland said that "the argument that the separation of powers requires these reforms proposed by the Government is wholly unsustainable".[76]

The Labour peer, Lord Borrie, doubted that it was necessary to go to the expense of creating a Supreme Court and considered that it should be sufficient to rely on Lord Bingham's statement in June 2000 outlining the limitations under which the Law Lords would exercise their right to speak and vote in the Chamber. He said that he could not see how the independence of the judiciary would be any stronger among members of a new Supreme Court than it now is among members of the judicial committee of the House of Lords.[77]

In Committee (on Recommitment), Lord Lloyd of Berwick asked how the Supreme Court would protect and enhance the independence of the Law Lords:

> The answer is that everyone accepts that the Law Lords are completely independent. How do we add to their independence by requiring the same people doing the same job to move to another location?[78]

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73 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56

74 HL Deb 11 October 2004 c57

75 HL Deb 12 February 2004 c1260

76 HL Deb 12 February 2004 c1222

77 HL Deb 12 February 2004 c1263

78 HL Deb 11 October 2004 c56

He also argued that the theory of separation of powers is not a part of the constitution and countered the argument that the Law Lords are appointed as judges and not as legislators by drawing a parallel with other professions:

> The answer is that the same is true of many of the Cross-Benchers. It is true of the doctors, diplomats, Cabinet secretaries, service chiefs, men of science and the Bishops. They are all appointed because they have reached the top of their professions. They are not appointed as legislators; nevertheless they make very useful contributions to this House. Why therefore should the Law Lords be the only profession excluded?[79]

On Report, the Conservative peer, Lord Carlisle of Bucklow, questioned what would actually be achieved by the change:

> The argument for having a Supreme Court is obviously in effect, ... one of principle. The principle is based on the separation of powers and yet it has been conclusively shown by many speakers in this debate and the evidence given to the Select Committee that the separation of powers does not really apply as a principle in this country. So we are not considering a major change of principle but a change in perception between the House of Lords, the Judicial Committee and the Supreme Court.
>
> What is there to put against that perception? There is the fact that the practicalities of change will be very few. We will have the same number of the same judges, who will be required to have the same qualifications—all those matters were agreed in Committee—doing the same work as they do at the moment. More importantly ... it is accepted that they have a high reputation at home and abroad for the excellence of their judgments. The Government accepted that their probity and ability was beyond question. So we are being asked to spend a substantial amount of money to find a new building outside this one for what I suggest are no practical advantages at all.[80]

More information about the separation of powers as a constitutional principle is included in Library Research Paper 05/05, *Constitutional Reform Bill [HL] – the office of Lord Chancellor.*

2. Public perception

The Government and those in favour of the proposal to create an independent Supreme Court argued that the present arrangements are likely to give rise to confusion in public perception.

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79 HL Deb 11 October 2004 c57
80 HL Deb 14 December 2004 c1203

For example, in the debate on the motion to take note, the Labour peer, Lord Brennan said:

> The world outside simply does not understand the arguments about the judicial committee and the value in the way that Law Lords can participate. It is a matter of incomprehension.[81]

In evidence to the Constitutional Affairs Select Committee, Lord Falconer of Thoroton justified the creation of a Supreme Court by reference to the recent appeal by the men detained without trial in Belmarsh prison. In the transcript of uncorrected evidence he said:

> I think it is extremely important that there [is] clarity about the arrangement for the final Court of Appeal. For example, in the last few months a very important appeal, namely the appeal of those being held in Belmarsh under the anti-terrorist legislation, has been going on in the House of Lords. We all understand that it is the court of final appeal that is hearing it, we all understand that it is not the politicians or the legislators who are deciding it, but I am not sure throughout the whole of the nation and throughout the whole of the world that that is clear, and I think it is incredibly important, particularly when rights are so important, that there be total clarity about where a court is deciding something and where the legislature is deciding something.[82]

At second reading, the Labour peer, Baroness Goudie supported the Government's proposals:

> "Supreme Court" is a totally appropriate description for what will be created by the Bill. The public, here and overseas, will clearly understand its role. The descriptions "Appellate Committee", "Judicial Committee of the House of Lords", or whatever, make only for confusion. The title "Lord Appeal of Ordinary" is archaic. The legislative and judicial functions are separate. Most judges are not legislators; most legislators are not judges—certainly not at the same time. It makes sense to keep the two functions apart. [83]

At third reading, Lord Goodhart gave an actual example of public confusion:

> I took part last Thursday evening in a discussion programme on television. We were discussing the Belmarsh case, and one of the viewers rang in, saying "Is the Government going to abolish the House of Lords because of this decision?". That is an indication of the confusion that is rampant, not among the journalists who regularly cover these issues, but among the general public.[84]

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81 HL Deb 12 February 2004 c1303

82 HC 628-iv Q275, http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-iv/uc62802.htm

83 HL Deb 8 March 2004 c1070

84 HL Deb 20 December 2004 c1563

In evidence to the Constitutional Affairs Select Committee Lord Falconer of Thoroton was pressed on his view of public perception:

> Q276 Mr Clappison: (...) I have not had any constituents, and I am not sure any other member of Parliament has had a constituent or is aware of anybody else at all having complained about this in the past and that they would be conscious of the cost as far as this is concerned. I would rather you than me to explain it to them?
>
> Lord Falconer of Thoroton: I am sure you are right. Certainly I have never been approached by people on the street saying, "Please let us have a Supreme Court", and I am quite sure it is not an issue that is on the doorstep, but I think it is the right thing to do. I fully appreciate what you are saying about the difficulty of explaining it to the audience generally, but I think it is a very important thing to do and I think it is the right thing to do.[85]

The House of Lords Select Committee report quoted evidence from Professor Robert Stevens, UCL Constitution Unit:

> I am not certain that there is really any public opinion.[86]

The Government's view of public perception was also challenged in debate.

In the debate on the motion to take note on 12 February 2004, the Conservative, Lord Norton of Louth questioned the Government's view of public perception:

> The fact that people may not grasp the distinction between the House of Lords in its legislative and judicial capacities does not necessarily raise a doubt as to the capacity, or the perceived capacity, of the Law Lords to remain unbiased.
>
> Also, the Government's claims as to public perceptions rest on presumptions: we are offered the Government's perception of perception. No hard data are presented for their claims as to the public confusion and certainly none to sustain the claim of any perception of bias. Given the weight resting on the Government's claims, it is difficult to see how the Government can proceed with these proposals without putting some evidence for their assertion into the public domain.[87]

Lord Lloyd of Berwick made a similar point at second reading:

> The only benefit so far identified by the Government is the removal of a so-called perception in the mind of the public: a perception that the Law Lords are not

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85 HC 628-iv Q276, http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-iv/uc62802.htm

86 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, para 117, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

87 HL Deb 12 February 2004 c1269

> independent; a perception that their decisions are politically motivated; and a perception that they are operating under the shadow of Parliament.
>
> (...)
>
> I have never met anyone with those perceptions and I wonder whether the noble and learned Lord the Lord Chancellor has done so. ... The Government have put no evidence forward that any such perception exists. There has been no response from the public on that point because the Government did not ask the relevant question.[88]

At second reading, the retired Law Lord, Lord Brightman, spoke of a misunderstanding of how the system works:

> The move to send the Law Lords away from your Lordships' House is, I believe, built on a total misunderstanding of how the system works. People do not realise how easily judging can be wholly separated from law-making without incurring the expense of setting up a Supreme Court somewhere else.[89]

At third reading, Lord Lloyd of Berwick referred to press coverage of the recent decision of the Law Lords against the Home Secretary in the case concerning the detention of men without trial in Belmarsh prison, which he considered supported his view that there was no confusion in the public mind:

> Surely any reader of the Sun or the Mirror would realise that the Law Lords, the highest court in the land, had done something that the Government did not like. How, then, can it be said that there is confusion in the minds of the public? How can it be said that their decisions are thought by the public to be politically motivated? The Government produced not a shred of evidence to the Select Committee to support any suggestion of confusion. ...
>
> I accept of course that the public do not know what is meant by a Lord of Appeal in Ordinary. I accept of course that the public do not know that the Law Lords are an Appellate Committee of this House. But what, I ask, does that matter? They understand very well what matters: that the Law Lords, the name by which they are universally known, form the highest court in the land; and they understand that the Law Lords are completely and fearlessly independent of government—of any government of whatever colour. I therefore cannot accept that public understanding would be improved by moving the Law Lords from here to the Guildhall and calling them a Supreme Court.[90]

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88 HL Deb 8 March 2004 c996
89 HL Deb 8 March 2004 c1095
90 HL Deb 20 December 2004 c1549

3. The cost of establishing and running a Supreme Court

Several peers expressed concern at the cost of establishing a Supreme Court and whether this could be justified. For example, at second reading, Lord Kingsland said:

> Our view is that establishing a Supreme Court is pointless and extravagant.[91]

In the debate on the motion to take note on 12 February 2004, Lord Woolf, the Lord Chief Justice, questioned the costs of setting up a Supreme Court:

> I make it clear that it worries the judiciary immensely that, so far as we know, not one penny of new money is available for these reforms. The budget of the department is already stretched and, without new money, the reforms will detract from the administration of justice generally. If the Government are proposing these significant changes, I suggest that it is their responsibility to make clear, first, that new money will be available and, secondly, that there is no question of litigants generally having to bear the costs of the new Supreme Court. They may have to do so unless that is made clear because, very unwisely, the Treasury is committed to full cost recovery from court fees. That being so, the money for running the new Supreme Court could be intended to come out of such fees at the expense of litigants generally.[92]

The Law Lord, Lord Hope of Craighead also expressed concern about the annual cost of the new court and the risk of undue pressure from the executive in the future to reduce costs.[93]

Another Law Lord, Lord Hoffmann pointed out that other courts were already in need of renovation, if money was available.[94]

A number of peers considered that it would be necessary to have an estimate of costs before a decision could be taken on the establishment of a Supreme Court. For example, at second reading, the retired Law Lord, Lord Ackner raised questions about the costs:

> With regard to the Supreme Court, the Select Committee should consider a number of points. First, who is to pay for its building and general maintenance? Surely not the litigant, since the function of the court is to develop the law and not to be concerned with the inter-parties dispute. Secondly, why has no provision been made in the Bill suspending the operation of the Supreme Court until appropriate accommodation has been found? Thirdly, why has no cost-benefit analysis been made?[95]

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91 HL Deb 8 March 2004 c986
92 HL Deb 12 February 2004 c1293
93 HL Deb 12 February 2004 c1301
94 HL Deb 12 February 2004 c1261
95 HL Deb 8 March 2004 c1082

On 14 December 2004, on the morning of the second of two days of Report, Lord Falconer of Thoroton made a written statement in which he set out the running costs and capital costs of establishing the Supreme Court at his preferred option, Middlesex Guildhall.[96] In the debate that day, considerable discussion took place about these costs and the reliability of the estimates given in Lord Falconer's statement. The Conservative peer, Lord Crickhowell asked some very detailed questions on the costs and on what had been taken into account in the estimates given. He reminded peers of the escalating costs of the Scottish Parliament building.[97] Lord Falconer said that the project had been estimated by a team which he said had a good track record and confirmed that the form of contract would be decided on the basis of professional advice.[98]

Lord Falconer said that he considered that the expenditure was justified on the basis that it would achieve a Supreme Court which is separate from Parliament and which he believed would be the envy of the world:

> We get a functional and operational separation that every single modern democracy in the world has. I believe that it is money well spent. [99]

Several peers complained that the information had been provided too late to be considered in the context of the debate on Report – and on this basis Lord Lloyd of Berwick withdrew an amendment to defeat the proposal to create a Supreme Court so that he could re-introduce it at third reading when he had had more time to consider the figures.

4. The benefits and strengths of the existing system

The Government has stated that the proposals for change do not imply any criticism of the present Law Lords.[100]

In the debate on the motion to take note, Lord Nicholls of Birkenhead, expressed the view that the proposal is misguided because it is unnecessary, as it would achieve nothing of real value, and would do more harm than good. He also considered that, whereas the House of Lords has a long and distinguished history, a new court would have to start from scratch to build up its own reputation. He valued the wider perspective afforded by working in an environment that is not judge centred and the opportunity to have an awareness of the broader context in which legislation and policies are formulated.[101]

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96 HL Deb 14 December 2004 cc 71-4WS. For more information about this see section I F (p44) of this Research Paper

97 HL Deb 14 December 2004 cc1189-90

98 HL Deb 14 December 2004 c1216

99 HL Deb 14 December 2004 c1217

100 See, for example, Lord Falconer in the motion to take note: HL Deb 12 February 2004 c1213

101 HL Deb 12 February 2004 cc1227-8

Similarly, Lord Hope of Craighead spoke of the value of being able to put particular issues into context.[102]

On Report, the Conservative, Lord Waddington spoke of what would be lost if the Government's proposals were implemented:

> It is painfully easy to spell out what will be lost if the change is made. For a start, this House will lose the experience and wisdom of the Law Lords, who add lustre to this place and give wise counsel on criminal justice and legal matters. It should not be forgotten that they make a distinguished contribution to our work in committee. Judges will lose a forum in which they can defend judicial independence and fight measures inimical to the proper administration of justice; and taxpayers will lose the very substantial sums of money that the new Supreme Court will cost.[103]

On Report Lord Richard questioned the value of having the Law Lords in the House of Lords if they do not speak in debates or vote:

> It is interesting how the argument has developed over the months. Every time that those of us on this side of the argument have made that point, the answer has come back, "Well, of course they need not sit". Very well, then why are they here? Or it is argued that they need not speak. Again, why are they here? Or it is argued that they should not be allowed to vote. Again, why are they here? I know not.[104]

At third reading Lord Richard pointed out that it was the retired Law Lords, rather than the Law Lords themselves who contribute to the House:

> It is not the Law Lords who make the contribution but the retired Law Lords. If one looks at the Cross Benches of an afternoon, where legislative things are being considered in a legislative way, one sees a fair sprinkling of people who have been Lords of Appeal in Ordinary and are now appearing in the House. If one looks at the way in which committees are constituted, particularly those taking place in the Moses Room, they have a fair, and extremely valuable, sprinkling of retired Law Lords. There seems to be a self-denying ordinance on the part of sitting Law Lords to appear in this House and to speak in this House and now never to vote in this House. If that is the situation, I cannot for the life of me see the argument that says that somehow or other the force of the Supreme Court will be diminished if it is moved outside this building.[105]

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[102] HL Deb 12 February 2004 c1300
[103] HL Deb 14 December 2004 c1199
[104] HL Deb 14 December 2004 c1201
[105] HL Deb 20 December 2004 c1562

As a result of a Government amendment passed on Report, there would be no bar on being members of the House for retired Supreme Court judges who are members of the supplementary panel, and could therefore be called upon to hear appeals.[106]

5. The need for improved facilities and public access

Several peers spoke of the need to improve the accommodation and facilities available to the Law Lords and of the need to improve public access. For example, at second reading, Lord Lester of Herne Hill, after earlier expressing his party's support of the proposal to replace the Law Lords with a Supreme Court[107] said:

> Moving the Supreme Court from the Lords to a suitable home will overcome the acute shortage of space that now prevents the Law Lords from having sufficient support staff and the public having proper facilities. The needs of the senior judiciary should no longer be cramped by the shortage of proper accommodation in this building. The justices of the Supreme Court should have as suitable a home and resources as those provided for the final courts of Australia, Canada, South Africa and New Zealand...[108]

The retired law lord, Lord Millett spoke in favour of the creation of a Supreme Court on the basis that the House of Lords could no longer provide appropriate accommodation, resources and facilities. He saw this as the only justification for creating a Supreme Court:

> The fact is that this House can no longer provide the accommodation, resources and facilities which a properly serviced Supreme Court requires—or, if it can, it is not minded to do so.[109]

On Report, Lord Goodhart spoke of the poor accommodation for the Law Lords and difficulties of public access because of increased security requirements:

> It is wrong that the judges of the highest court in the land should have to hear cases perching in two of the Committee Rooms of your Lordships' House and not in their own court building. It is wrong that they should have pokey rooms in the Law Lords Corridor rather than proper offices of their own. It is wrong that public access to the sittings of the Appellate Committee is so difficult—particularly now with the heightened security—and that accommodation for the public in those rooms is so bad.[110]

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[106] HL Deb 14 December 2004 cc1313-4. More information about this amendment is included in Library Research Paper 05/05, *The Constitutional Reform Bill [HL] – the office of Lord Chancellor*, section V

[107] HL Deb 12 February 3004 c1223

[108] HL Deb 12 February 2004 c1227

[109] HL Deb 12 February 2004 c1293-4

[110] HL Deb 14 December 2004 c1209

However, some Law Lords and retired Law Lords did not agree with this assessment of their accommodation and facilities.

The retired Law Lord, Lord Ackner said that any discomfort did not justify the expense of the proposed new Court.[111]

Lord Hope of Craighead also disagreed and said:

> I, at least, have never felt that my work here was in the least inhibited by lack of space or lack of assistance. On the contrary, I have been greatly assisted by the facilities that I am given as a Member of the House.[112]

Lord Nicholls of Birkenhead also disagreed that the accommodation of the Law Lords needed to be improved. At third reading he questioned how much extra space was actually needed for members of the public and stated that on the rare occasions where there was a high level of public interest (such as the Pinochet appeal) it has usually been possible for the Appellate Committee to sit in a larger committee room.[113]

At third reading, Lord Falconer quoted the views of other Law Lords who had not spoken in the debate:

> The noble and learned Lord Hobhouse, said:
>
> "Major needs: 1) move to new premises nearer to the RCJ and the Inns and their facilities, 2) have a building sufficient to house us properly and our staff and the facilities which we need".
>
> (...)
>
> The noble and learned Lord, Lord Bingham, said:
>
> "I doubt if any supreme court anywhere in the developed world is as cramped as our own. This is not the product of spite or malevolence or public parsimony. It is the result of an acute shortage of space available to the House of Lords in the Palace of Westminster and a wholly understandable precedence given by the House authorities to those who manage and work in the legislative chamber".

6. Human Rights issues

The Government and others have argued that a Supreme Court separate from Parliament is required in order to comply with the requirements of Article 6 of the European

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[111] HL Deb 12 February 2004 c1280
[112] HL Deb 12 February 2004 c1300
[113] HL Deb 20 December 2004 c1552

Convention on Human Rights which requires that judges must be independent, impartial and free of any prejudice or bias—both real and perceived.

On Report, Lord Lloyd of Berwick disagreed with this argument:

> As the noble and learned Lord, Lord Hope, made clear in a recent judgment given in this House, there is no requirement that a judge or a part-time judge should not sit in the House of Commons or in the House of Lords. It all depends on the facts of a particular case whether the judge is disqualified by something that he has said in the House of Lords.
>
> (...)
>
> In the report of the Joint Committee on Human Rights, exactly the same point is made:
>
> "It is clear that Article 6 does not require the UK to abolish the Appellate Committee of the House of Lords and establish a new Supreme Court which is entirely separate from Parliament".
>
> ... It is true that it goes on to say in paragraph 170 that to have a separate Supreme Court would reduce the risk of violations of Article 6—but what is that risk? We have had the European Convention on Human Rights since 1950, and there has never yet been a single case where that risk has materialised. Far greater is the risk that a Law Lord would say something in a lecture that was inconsistent with a case that he might subsequently be called on to decide.[114]

Lord Lester of Herne Hill questioned some of Lord Lloyd's comments on the European Convention on Human Rights.[115]

7. Other arguments

The House of Lords Select Committee Report included a fear expressed by Lord Rees-Mogg that should a Supreme Court be established, it might encourage senior judges to usurp the principle of parliamentary supremacy.[116] The Committee also stated that some witnesses complained that the bill does not go far enough in the reforms proposed and had missed the opportunity, for example, to create a Supreme Court with a United Kingdom-wide jurisdiction, including over Scottish criminal appeals, or to create a court which sits en banc (that is, where all judges hear each case).[117]

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[114] HL Deb 14 December 2004 c1186

[115] *Ibid*

[116] Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, para 122, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

[117] *Ibid* para 124

E. The sunrise clause

In the course of debates, several peers questioned whether it was right to create the Supreme Court before it could be accommodated away from the House of Lords. The so-called "sunrise clause" (Clause 120(4)) was added by an amendment introduced by the Government on Report.[118] The effect of the clause is that the Supreme Court would not come into being until the Minister is satisfied that appropriate accommodation will be ready for the Supreme Court on the day the commencement order would take effect. "Appropriate accommodation" means accommodation in accordance with written plans that the Minister has approved after consultation with the Lords of Appeal in Ordinary in office at that time. Lord Falconer of Thoroton explained why he now agreed that such a provision should be included in the Bill:

> Only with a clear and separate building does the functional and operational separation, so vital to the proposal, occur.[119]

He confirmed that the clause had been agreed with a senior Law Lord.

F. The location of the new Supreme Court

Concerns were voiced on many occasions that the Supreme Court should have suitable accommodation from the very start. For example, at second reading, Lord Lester of Herne Hill said:

> Like many across the House, we on these Benches would oppose the creation of a Supreme Court separate from and independent of this House, unless and until it were given a proper home and sufficient resources.[120]

Two buildings emerged as favourites: Somerset House and Middlesex Guildhall. On 25 May 2004, Lord Bingham of Cornhill gave evidence to the Constitutional Affairs Select Committee and the question of accommodation was discussed. In the uncorrected transcript of oral evidence he expressed his views on the Middlesex Guildhall:

> We do not think, unless it is virtually demolished internally, that it can provide the ambience which the Supreme Court needs. It was built, as we all know, in 1912 to house downstairs some criminal courts and they are very typical and useful criminal courts of the period no doubt intended to strike horror into the breast of the malefactor who was standing trial, but it is entirely the wrong ambience as it now is for a Supreme Court.[121]

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[118] HL Deb 14 December 2004 c1320-1
[119] HL Deb 14 December 2004 c1215
[120] HL Deb 8 March 2004 c991
[121] Q105 http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc628-ii/uc62802.htm

Although Lord Falconer at first refused to rule out seeking transitional arrangements for the Supreme Court to sit in the House of Lords, he later announced that the Supreme Court would not be set up until a suitable building is ready. On 14 December 2004, Lord Falconer made a written ministerial statement about the Supreme Court building which he said would provide a physical demonstration of the separation between the judiciary and the legislature. He confirmed his view that establishing the Supreme Court in the Palace of Westminster would be entirely inappropriate.

He announced that his preferred option was Middlesex Guildhall and gave three key reasons for this decision:

> its location on Parliament Square will mean that the judiciary, the legislature, the executive and the Church are each represented on the four sides of the square enhancing its position at the heart of our capital;
>
> it is able to provide all the key design requirements of a modern Supreme Court and therefore represents a significant improvement on the Law Lords' current accommodation; and
>
> it will deliver this much improved accommodation at a reasonable cost, demonstrating good value for money.[122]

However, Lord Falconer did stress that Middlesex Guildhall was only his preferred option and that normal planning approvals would be required. He confirmed that the Law Lords had continuing reservations as to the suitability of this building to house the Supreme Court and that he would continue to consult with them closely on the issues. The statement includes details of the design proposals and confirmation that the plans would be developed in close consultation with the Law Lords, English Heritage and Westminster City Council.

Lord Falconer also set out the cost of establishing the Supreme Court at Middlesex Guildhall which he stated would be approximately £30 million in current terms (the statement also includes more information about how this figure was arrived at) and a further £15 million for the provision of additional courtrooms to deal with the criminal cases currently heard at Middlesex Guildhall. Lord Falconer said that the approximate annual cash running costs following establishment of the Supreme Court would be £8.8 million (£8.4 million relating to the Supreme Court; the remainder being the ongoing costs from courtroom reprovision), and again set out the composition of this figure. He included a table to show a comparison of the running costs of the new court with the approximate costs of the present arrangements, which shows an annual increase of over £5 million:

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[122] HL Deb 14 December 2004 c71-4WS

Annual running costs (£m)

	Appellate Committee Costs 2002-03	Supreme Court Estimated Costs
Judicial Salaries	2.1	2.1
Staff Salaries	0.6	1.1
Admin	0.4	1.0
Utilities and Rates	0.1	0.4
Building costs	n/a	3.8
TOTAL	**3.2**	**8.4**

Source. HL Deb 14 December 2004 cWS73

Lord Falconer hoped that the court's first sitting would be in 2008 and confirmed that the Supreme Court would not be established until the building was ready for operation.

However, Lord Nicholls of Birkenhead continued to express reservations about the choice of the Middlesex Guildhall:

> The site of the Middlesex Guildhall is superb. Unhappily, the same cannot be said of the building itself. No doubt, if the exterior were cleaned, it would look much better. But the main entrance to that Edwardian mock-Gothic building is hardly what one would choose as the perennial television backdrop for news items and interviews concerning activities of a newly created Supreme Court.
>
> I wonder how many of your Lordships have ever been inside the building. The entrance hall, even when cleared of the present clutter, will always be ordinary and banal and at odds with the distinguished new purpose that the building is being called on to serve. The proposed three court rooms will retain some of their existing original furnishings, including opaque glass windows that are set with coats of arms of successive Lords Lieutenant of the county of Middlesex.
>
> Those rooms will never rid themselves of the atmosphere of their original purpose—one room as the council chamber and the other two as intimidating criminal courts. Overall, in spite of the great cost envisaged, the interior of the building will always retain much of its heavy, original character. The net result could be only an expensive hybrid, with the building having, in part, the feel of its unexceptional origin and, in part and discordantly, the feel of a latter-day-come new Supreme Court, and with the whole lacking distinction. A new Supreme Court for this country surely deserves better.[123]

Lord Falconer confirmed that he had discussed the position with Lord Bingham who has reservations about the Middlesex Guildhall, but who is prepared to talk them through and see whether changes can be made.[124]

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[123] HL Deb 20 December 2004 c1553-4
[124] HL Deb 20 December 2004 c 1567

II Judicial appointments and discipline

A. Judicial appointments

1. Background

Judicial appointments have been recognised as the special responsibility of the Lord Chancellor by a convention going back to the Middle Ages.[125] Currently Lords of Appeal in Ordinary, Lord Justices of Appeal and Heads of Division (the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor) are appointed by the Queen on the recommendation of the Prime Minister who acts on the advice of the Lord Chancellor. High Court judges, circuit judges, recorders and District Judges (Magistrates' Courts) (formerly known as stipendiary magistrates) are appointed by the Queen on the advice of the Lord Chancellor. Other district judges, masters and registrars of the Supreme Court are appointed by the Lord Chancellor. The minimum eligibility qualifications for each judicial office are set out in primary legislation, and will not be affected by the Bill.

The Lord Chancellor is assisted in this work by staff in the Department for Constitutional Affairs. The present judicial appointments process is described in Chapter 1 and Annex A of the DCA consultation paper *Constitutional reform – a new way of appointing judges*.[126] The paper explains that:

> … the guiding principle which underpins the Lord Chancellor's policies in selecting candidates for judicial appointment is that appointment is strictly on merit. The Lord Chancellor appoints those who appear to him to be the best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability.

The appointments system has been criticised in the past, both in principle as a breach in the separation of powers and for lack of accountability and transparency in practice. Back in 1991 the Law Society had described the then system of judicial appointments as "a very peculiar creature indeed", identifying a number of defects and suggesting that they led to bias in appointments in favour of those in the same mould as the existing judiciary. Their view was that the Lord Chancellor should act on the recommendation of an independent judicial appointments commission, which was not a new concept even then, and would have the advantages that it would:

> (i) distance the responsibility for individual appointments from direct political control
> (ii) ensure the presence of a broader range of views on candidates at the highest level in the decision making process;

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[125] N. Underhill, *The Lord Chancellor*,1978, p143

> (iii) assist in formalising the procedure and criteria by which candidates are appointed; and
> (iv) assist in achieving public confidence in the objectivity and even-handedness of the appointment process.[127]

Since then there have been a number of changes to the system although the powers have continued to be vested in the Lord Chancellor, who has been head of the judiciary as well as a government minister. In July 1993 the then Lord Chancellor, Lord Mackay of Clashfern, announced that he intended to introduce specific competitions for judicial vacancies, including open advertising; more specific job descriptions and criteria for appointment; improved application forms; a more structured basis for consultations on candidates; and the involvement of lay people in the process. This followed recommendations made in two reports. One was a report on sex equality in the judiciary, which he and the Bar Council had commissioned. The other was a report of a review of the procedures, produced by M J Moriarty, a retired civil servant.

In May 1994 Lord Mackay issued a consultation paper proposing the introduction of advertised, time-limited competitions for the appointment of each tier of the judiciary below the level of the High Court Bench.[128] While those reforms were being put into effect, the Home Affairs Committee chose to inquire into the methods for appointing members of the judiciary and magistracy in England and Wales. They were told by Sir Thomas Legg QC, then Permanent Secretary at the LCD, that the Lord Chancellor was informed on the quality and performance of candidates by the views of members of the judiciary and of the legal professions, in a -

> … "structured, organised rolling programme of quite extensive consultations" carried out "according to the rules and principles which the Lord Chancellor has laid down". He objected to the use of the term "soundings" to describe the exercise which suggested to him a "casual old-boy network" which he believed to be an inaccurate representation.[129]

In their conclusion, the Committee commended the Lord Chancellor for his programme of reform, which represented a distinct advance on the previous system, which had been described as-

> a closed system of selection by peers and supervisors which is free from scrutiny and largely free from challenge or redress.[130]

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126 July 2003 http://www.dca.gov.uk/consult/jacommission/index.htm
127 *Judicial Appointments: A Discussion Paper by the Remuneration and Practice Development and Courts and Legal Services Committees of the Law Society*, March 1991
128 *Developments in judicial appointments procedures,* May 1994,LCD
129 Home Affairs Committee, *Judicial appointments procedures* Third Report 1995-96, , June 1996
130 para 45

In the evidence they had received, the main focus for criticism had been the system of consultations. For instance, Frances Gibb, legal correspondent of *The Times* had submitted:

> "One of the biggest defects of the present system – certainly one which attracts much criticism – is the keeping of confidential files with comments on candidates going back several years. In no other walk of life is a person judged to such an extent on what they did or said years earlier. The system is anachronistic and stems from the time when judges were all drawn from a small Bar. It also fosters suspicion and secrecy. Mistakes can enter files, to the detriment of candidates. The taking of references should surely be done as required, so that there is no chance – however unlikely – of a damaging remark blocking a person's judicial career prospects.

The Committee did consider proposals for the establishment of a judicial appointments commission, but rejected the option. They were not persuaded that the quality of appointees would necessarily improve and believed that the values of a consultations network might be diminished if a commission were to play a part in selecting judges.

Shortly after taking office as Lord Chancellor, Lord Irvine of Lairg, announced that the Government proposed to consult on the merits of establishing a Judicial Appointments Commission, but he later said that he would concentrate first on making the changes he considered most urgent in the existing system. In July 1999, he launched an independent scrutiny of how judges and Queen's Counsel in England and Wales are appointed. He asked Sir Leonard Peach, former Commissioner for Public Appointments, to examine the selection procedures and whether safeguards against racial or sex discrimination were effective.[131] Sir Leonard's report was published in December 1999. An LCD press notice said that Sir Leonard had been impressed by the quality of the work, the professionalism and the depth of experience of the civil servants involved. He had found that their approach compared well with those of other organisations in the public and private sectors. The press notice went on to summarise his recommendations, which included:

> A Commission for Judicial Appointments. A Commissioner, and a number of Deputy Commissioners, would provide ongoing, independent monitoring of procedures and act as an Ombudsman for disappointed candidates and organisations. The Commissioner would make recommendations to the Lord Chancellor about improvements to the process. The Commission which Sir Leonard recommends would not advise on the appointments to be made but would pursue an independent oversight of the system through participating in the meetings and deliberations that are critical in the whole appointments process. The Commission would publish an annual report which would be part of the Lord Chancellor's report to Parliament on judicial appointments.
> …

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[131] *Legal/Independent Audit of how Judges Queen's Counsel Appointed* , 27 July 1999, LCD press notice 316/99

> Sir Leonard's 26 recommendations also include improvements to succession planning for High Court and Appeal judges; improved reserve listing to meet requirements more quickly, particularly for tribunals; and more interchange between various judicial groups. He also makes a number of recommendations in the equal opportunities field.[132]

The press notice also announced that the Lord Chancellor had decided to appoint a Commissioner for Judicial Appointments to provide independent monitoring of the procedures for appointing judges and Queen's Counsel. Sir Colin Campbell was appointed First Commissioner of the Commission for Judicial Appointments, which was established in March 2001 by Order in Council, to review the appointments processes for judges and Queen's Counsel, and also to investigate individual complaints about the operation of the procedures. Since then the Commission has published three Annual Reports, and a number of specific reports on competitions for appointment to particular judicial offices. These have included competitions for the appointments of Deputy District Judge (Magistrates) and Deputy District Judge (Civil), Part-time Chairman of VAT and Duties Tribunal and Deputy Special Commissioner of Income Tax. Last year, the Commission reported on its audits of the 2003 competitions for Silk and for appointments to the High Court Bench.[133]

During the period since the Commission was established, developments in the judicial appointments system have included:[134]

> - a pilot Assessment Centre for some judicial appointments which was successful and Lord Falconer decided that they would be used for future deputy district judge competitions.
>
> - abolishing the system of appointments to the High Court bench by invitation only and allowing all suitable candidates to apply
>
> - removing lower age limits for most appointments and removing upper age limits for those applying for professional judicial offices.
>
> - involving judicial and lay members in the selection of candidates for interview as well as the interviews themselves
>
> - amending appointment criteria in the light of the 1999 report of the Joint Working Party on Equal Opportunities

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[132] *Review of Queen's Counsel and Judicial Appointments systems*, 3 December 1999, LCD press notice 379/99

[133] Its reports are available on-line from its website at http://www.cja.gov.uk/

[134] *Lord Chancellor welcomes the first report by Judicial Appointments Commissioner* , 7 October 2002, LCD press notice 345/02

- stipulating that any allegation of misconduct or any serious criticism about a candidate must be specific and will be disclosed to the candidate for response

- providing formal feedback for unsuccessful candidates

- confirming that advocacy experience is not a prerequisite for judicial appointment

- improving application and consultation forms and guidance; publicising criteria and appointments procedures on the LCD website and on video

- researching factors that affect (especially) women and ethnic minority lawyers in deciding whether to apply to be judges

- consulting the professions and other interested parties on possible improvements to the appointments processes for High Court, Circuit Bench and Recordership

- the proportion of people from minority ethnic groups appointed as judges, magistrates and tribunal members in England and Wales during 2002/03 was greater than in any previous year but the overall proportion of women appointed during the year fell.

Also, in October 1997, Lord Irvine of Lairg had announced that in future he intended to present an Annual Report to Parliament on the operation of the judicial appointments system in England and Wales. Since 1999, the Department has published six annual reports covering the existing and developing procedures for judicial appointments and Queen's Counsel. Each summarises recent changes which have been introduced in the appointments process.[135]

The Commissioners for Judicial Appointments' most recent Annual Report was published in October 2004 and, as well as reporting on the year's work, set out their views on the Bill. They welcomed the Government's confirmation of its intention to create a Judicial Appointments Commission but suggested that structures proposed in the Bill could be strengthened by provision for continuing independent audits, a lay majority on that Commission, and by having a Commission which made appointments to lower judicial offices as well as recommendations for the more senior appointments. This would prevent the new Commission's recommendations being called into question on the basis of less or inferior evidence to that which was available to it and to avoid wasteful bureaucratic double-checking.

The report also set out the Commissioners' key messages for the future of the judicial appointments system which had emerged from their work. These related to the need to improve the fairness and transparency of the judicial appointment processes and to integrate the concepts of merit and diversity. They made it clear that all the relevant

[135] For the more recent reports see http://www.dca.gov.uk/dept/depstrat.htm

criteria and competencies must be publicly known at the outset of a competition, and suggested a number of improvements to the processes for obtaining evidence of suitability for appointment. These included the abolition of 'automatic consultation' in its traditional form and its replacement with a more structured and accountable method of collecting views from the judiciary on candidates' suitability for office. They saw no place for the present practice of seeking the senior judiciary's views on assessments which have already been made on the basis of all available evidence, before the Lord Chancellor takes decisions, and called for much fuller audit trails of how selection decisions have been reached.[136]

2. The Consultation Paper, Constitutional Reform: a new way of appointing judges

On 14 July 2003, the Department for Constitutional Affairs issued a consultation paper entitled *Constitutional reform: a new way of appointing judges.*[137] On the same day, Christopher Leslie, Parliamentary Under-Secretary of State for Constitutional Affairs, summarised the Government's proposals on judicial appointments:

> The Government also propose to establish an independent judicial appointments commission for England and Wales to recommend candidates for appointment as judges. At present, judges are effectively selected by the Lord Chancellor. It is unsustainable for a Minister to continue to select judges in this way. The process of selection of judges for appointment in England and Wales must be demonstrably impartial and independent, as it now is in Scotland and will be in Northern Ireland.
>
> Appointments will continue to be made solely on merit but, in addition, a judicial appointments commission will insulate more the appointment of judges from politicians and assist in opening up appointments to some groups of lawyers that are under-represented in the judiciary at the moment, including women, ethnic minorities and, at the higher levels, non-barristers.
>
> The Government propose, subject to consultation, that the new independent judicial appointments commission would make recommendations to the Secretary of State. That model would significantly curtail ministerial involvement by placing the process of selecting candidates in the hands of the commission. The Secretary of State, however, would remain ultimately accountable to Parliament for the actual appointment. The model would therefore preserve the constitutional convention that the Queen acts on the advice of her Ministers.
>
> The Government propose a balance of judicial representatives, legally qualified members and lay members for the commission. We seek views on who should chair it. It is proposed that the members be appointed by a separate appointing

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136 Commission for Judicial Appointments, *Annual Report 2004*, http://www.cja.gov.uk/files/2003_report_pdf_(final).pdf

137 CP11/03, DCA, http://www.lcd.gov.uk/consult/supremecourt/index.htm

> body. It would not include Ministers, but would be chaired by a senior civil servant, supported by a senior judge and a senior public figure entirely independent of the judiciary and the Executive. Appointments to the commission would be made under Nolan principles, which would further ensure its independence from Ministers. After the abolition of the post of Lord Chancellor, the Secretary of State for Constitutional Affairs will remain responsible for ensuring the independence of the judiciary in England and Wales within the Cabinet, and consideration should be given to whether that responsibility should be embedded in legislation.[138]

The paper set out options for change, indicating what the Government's preferred model for a Judicial Appointments Commission would be.

> In brief, the Government proposes that:
>
> - The Commission should be a recommending Commission, putting up a short-list of candidates for appointment to the Secretary of State
> - A separate judicial Ombudsman should be established by legislation (broadly fulfilling the role of the existing Commission for Judicial Appointments)
> - The Commission should be a fully independent Non-Departmental Public Body, established by legislation
> - The Commission should take day-to-day responsibility for issues related directly to appointments, and for the development of the appointments process
> - The Department for Constitutional Affairs should retain policy responsibilities for appointments
> - The Department for Constitutional Affairs should task the Commission with establishing how best to attract a more diverse range of qualified candidates to apply for judicial posts
> - Most Commission members should be appointed following open competition by an appointing panel (made up of the Permanent Secretary, a senior judge, a senior figure, not connected to the legal system and an independent assessor)
> - The Commission should have 15 members (five of whom should be judges, five should be lawyers, and five should be non-lawyers).[139]

Responses were sought by 7 November 2003.

Early in 2004 the DCA published a summary of responses and texts of most of the individual responses.[140] There had been a total of 270 responses to the consultation paper, three quarters of which came from the judiciary and legal professions. Over half had favoured an appointing commission, stressing that this was needed to achieve a separation

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[138] HC Deb 14 July 2003 c 23

[139] http://www.dca.gov.uk/consult/jacommission/index.htm#part4 : Executive Summary

[140] http://www.dca.gov.uk/consult/jacommission/jacresp.htm

of powers between the judiciary and executive and to remove any political influence over the selection of judges. It was pointed out, for example, that the Lord Chancellor, although a member of the government had not been a "normal" minister. Those who did favour a recommending commission were concerned about an appointing commission's lack of accountability to Parliament. The majority of those who commented on how much discretion a minister should have, if there were to be a recommending commission, supported a narrow discretion. Many respondents agreed that there should be special arrangements for appointing to senior posts, with wide acceptance of the important input that the existing senior judiciary should have. But there were different views about whether the line should be drawn above or below the level of High Court judge.

3. Existing Judicial Appointments Commissions and Boards

Annex B to the Consultation Paper provides information about judicial appointments systems in other jurisdictions, including civil law jurisdictions (whose judicial career structures make direct comparison impossible). The Annex refers to State level appointments in the USA, where the use of merit commissions to select candidates for appointment by the Executive has arisen as a result of growing criticism of direct popular election of judges, and the adoption of advisory commissions in Canada, in an attempt to provide greater openness and wider participation after criticisms of what were viewed as a series of overtly party political appointments in the 1980s. In Australia, judicial appointments are made by the Executive, at federal and state level, on the recommendation of the Attorneys General. The Paper also refers to appointments in New Zealand, where the power does still rest with the Executive: since 1998 there has been a Judicial Appointments Board which submits ranked lists of candidates to the Attorney General, who makes the final recommendation to the Governor General. In April 2004 the New Zealand Government issued a consultation paper seeking views on the possibility of a Judicial Appointments Commission for New Zealand.[141] The paper contains useful sections on features of judicial appointment Commissions internationally, identifying key features of judicial appointment commissions in selected overseas countries. It begins with developments in the United Kingdom and constituent nations, and then looks at certain continental European countries, North America, Australia, Israel and South Africa.

[141] New Zealand Ministry of Justice,*Appointing Judges: A Judicial Appointments Commission for New Zealand?* April 2004, http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/index.html

4. Existing bodies in the UK

a. Scotland: Judicial Appointments Board

Following a public consultation which demonstrated substantial support for the creation of an independent Judicial Appointments Board, the Judicial Appointments Board for Scotland was set up by the Scottish Executive in 2002.[142] Its remit is:

- to provide the First Minister with a list of candidates recommended for appointment to the offices of Judge of the Court of Session, Sheriff Principal, Sheriff and Part-time Sheriff

- to make such recommendations on merit, but in addition to consider ways of recruiting a Judiciary which is as representative as possible of the communities which they serve

- to undertake the recruitment and assessment process in an efficient and effective way. At present the Board operates on an administrative basis but Ministers have given a firm commitment that it will be put on a statutory footing once it has been in operation for a little time.

A short history and a description of its work is provided on its website.[143]

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b. Northern Ireland: Judicial Appointments Commission

Following the Good Friday (Belfast) Agreement 1998, and a wide ranging criminal justice review, the *Justice (Northern Ireland) Act 2002* included provisions to establish a Judicial Appointments Commission. The provisions were modified by the *Justice (Northern Ireland) Act 2004*, partly so that a Commission could be set up in advance of the (anticipated but delayed) transfer of justice matters to the Northern Ireland Assembly.[144] During the passage of the second Bill, there was some criticism of the timing, relative to the *Constitutional Reform Bill* which was expected to establish a Judicial Appointments Commission to assume responsibility for the appointment of judges in England and Wales. The *Constitutional Reform Bill* was published two weeks after the second *Justice (Northern Ireland) Bill* had completed its passage though the Lords. One suggestion had been that no changes should be made to judicial appointments for Northern Ireland before seeing the Bill which would change the judicial appointments system in England and Wales. A recurring concern was in areas where the Northern Ireland provisions might be diverging from those of England and Wales, without good

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[142] see Scottish Executive consultation paper, *Judicial Appointments: An Inclusive Approach*, and The Judicial Appointments Board for Scotland, *Annual Report 2002-2003,*August 2003

[143] http://www.judicialappointmentsscotland.gov.uk

[144] For further background see Library Research Papers 04/22 and 02/07 on the two *Justice (Northern Ireland) Bills*

ground, particularly in the context of judicial appointments and removals from office. The Act received Royal Assent in May 2004, but none of the judicial appointments provisions is yet in force.

The sections relating to the judiciary (sections 1-5) provide for the Judicial Appointments Commission ("the Commission") for Northern Ireland to be established prior to devolution of responsibility for criminal justice matters. The sections make provision to apply the time limits on membership which were already to apply to lay members of the Commission to its judicial members. Provision is also made for the Commission to engage in a programme of action aimed at securing a judiciary in Northern Ireland that is reflective of the community. Judicial appointments will continue to be made on the basis of merit.

During the debates, Lord Smith of Clifton explained some significance in the use of the word “reflective” rather than “representative”:

> … it gives a greater precision in the sense that the word "representative" does not easily translate across the Irish Sea. In Northern Ireland, it tends in our view to mean something more like a delegate. We believe that "reflective" is a better way in which to describe the sort of balance that one would want to achieve between both communities, and gender and, if necessary, disability.[48]

These sections also provide that the composition of the Commission itself taken as a whole will, as far as possible, be reflective of the community in Northern Ireland. In addition, the sections provide that in respect of appointments of the Lord Chief Justice and Lords Justices of Appeal, the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister prior to his making recommendations to Her Majesty The Queen. Finally, the requirement for the Lord Chief Justice's agreement to removal or suspension as a result of a Tribunal recommendation is removed, and provision is made for him to be consulted instead.

c. England & Wales: Commission for Judicial Appointments

This Commission is an independent body which was set up in March 2001 to:

- review the judicial and Queen's Counsel appointment procedures; and
- investigate complaints about the operation of those procedures.

Its statutory remit, as set out in Order in Council, is supervisory. It is not involved in making appointments or recommending candidates for appointment. Once a recommending Judicial Appointments Commission is set up by the provisions of the Constitutional Reform Bill, the existing Commission would cease to exist. Its complaints investigating role would go to the new Judicial Appointments and Conduct Ombudsman. But its role of auditing judicial appointment competitions would not be continued at all.

5. The concordat

The Judges' Council is a body which represents all levels of the judiciary, acts as the collective voice of the judiciary and is chaired by the Lord Chief Justice. Its views have been influential in the development of the Bill's reforms relating to judicial appointments. In the introduction to its detailed response to the consultation papers on constitutional reform, the Council said:

> 41. In the past, as a result of the dual roles of the Lord Chancellor, the separation of powers has been blurred and it has not been necessary to define the respective functions of the judiciary and the executive in relation to the administration of justice. The new constitutional arrangements will make such definition necessary. Otherwise, the division of power, and the checks and balances imposed on the different branches, will create tensions between them. Clarifying responsibilities is in itself constitutionally desirable, It is also a means of ensuring that the executive and the judiciary co-operate while knowing who has the ultimate responsibility for any particular aspect of the justice system. Clearly setting out the respective responsibilities of the executive and the judicial branches of Government is a requirement of the modern democracy that the Government is committed to bringing about.
>
> 42. The need for the respective responsibilities of the new Secretary of State and the judiciary to be defined thus stems from the very nature of the constitutional change. There are, however, two further reasons why it is important. The first is transparency. Lord Falconer states, in the Foreword to Reforming the Office of the Lord Chancellor, that separating out the different roles now fulfilled by the Lord Chancellor will bring greater transparency and increased public confidence. He is correct to favour clearer constitutional mechanisms. For there to be transparency however, it is necessary that there be clarity as to respective responsibilities. The second reason is that if the issues arising out of the present reforms are to be discussed frankly, it has to be recognised that the manner in which the reforms were announced, without any consultation, has damaged the confidence of judiciary in the executive's commitment to preserving the independence of the judiciary. It was inconsistent with the principle of co-operation which had existed hitherto .
>
> 43. The concern of the judiciary is heightened by the failure of the Government sufficiently to appreciate the full significance of the changes that the reforms involve. This is illustrated by the fact that, as indicated already, no consultation paper is being issued on the effects of the reforms on the judiciary other than in relation to appointments and discipline.[145]

In January 2004, the Lord Chancellor was reported as saying that the *Constitutional Reform Bill* would not be ready before March at the earliest, and that he would make a

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[145] Available on-line at http://www.dca.gov.uk/consult/jacommission/responses/ja126.pdf

statement to Parliament, expected in the next month, which would answer the main questions raised by consultation papers published the previous July.[146]

On 26 January he made a statement on the judiciary related functions of the Lord Chancellor.[147] He said:

> I have had detailed discussions with the Lord Chief Justice, who has been speaking on behalf of the judges on these issues. I am pleased to be able to tell the House that the terms of today's Statement have been agreed with the noble and learned Lord the Lord Chief Justice. The Lord Chief Justice's agreement is, of course, conditional on Parliament's approval of our proposals. I think it is right that Parliament should be told first of the results of those discussions.
> …
> we intend to define in the forthcoming Bill the respective responsibilities of the Secretary of State for Constitutional Affairs and those of the Lord Chief Justice, as the most senior judge in England and Wales.
>
> The Bill will make it clear that the Secretary of State is responsible for the administration of the courts; that he is accountable to Parliament for the efficiency and effectiveness of the court system; and that he is responsible for supporting the judiciary in enabling it to fulfil its functions.
>
> The Lord Chief Justice will lead the judges, with the authority that comes from being appointed as chief judge. He will be responsible for ensuring that the views of the judiciary are effectively represented; he will be responsible for the education and training of judges; and he will be responsible for the decisions on deployment of individual members of the judiciary.
> ..
> I announced in July the Government's proposals for a judicial appointments commission and consulted over the summer on the detail. Central to the appointments process will be a new, clearly independent, judicial appointments commission. The commission will have full responsibility for the process of advertising vacancies and evaluating candidates for judicial appointment. No candidate will be appointed to the judicial posts for which the commission will be responsible unless recommended by the commission. The sole criterion for the commission in making its recommendations will remain that the appointments must be made on merit.
>
> To ensure proper accountability to Parliament, the final decision on whom to appoint—or whom to recommend to the Queen for appointment—should remain with the Secretary of State. However, the Secretary of State's discretion must be severely circumscribed. He should be able to appoint only candidates recommended by the commission and should have strictly limited powers to challenge those recommendations. It is not right that a political appointee (albeit

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[146] "Falconer delays law reform bill", 6 January 2004, *Daily Telegraph*
[147] HL Deb 26 January 2004 c13- 31

> one always acting in good faith) should be able to cut across the system to appoint who he or she thinks is right.
>
> ..
>
> It is vital that the commission itself should incorporate the expertise of the judiciary and the legal professions, but also the demonstrable impartiality and wider experience of those who are not from the legal world. We propose, therefore, that the chair of the commission should be neither a lawyer nor a judge, and that the largest single group on the commission should be members who are neither lawyers nor full-time judges. The commission will include members of each level of the judicial hierarchy, up to the Court of Appeal, and will be required to consult the Lord Chief Justice during the recruitment process. The Lord Chief Justice will be able to engage judicial colleagues. That will ensure the commission is able to benefit from the views of the judges about potential candidates, and about any particular requirements for a vacancy.
>
> ..
>
> In order to ensure that the system is as open and accountable as it can be, and that it is independent of government, we propose that the commission should be fully responsible for the appointments process itself. It should recruit its own staff and submit an annual report detailing its activities over the year. To provide a further guarantee of the impartiality of the system, the commission should establish a system for handling complaints from candidates who are unhappy with the way that their application has been handled. We will provide for an ombudsman to deal with those instances where a candidate remains dissatisfied.
>
> ..
>
> The Secretary of State and the Lord Chief Justice will both continue to have a role to play in relation to judicial discipline and conduct. That partnership reflects the importance of respecting the independence of the judiciary, of providing assurance to the public that complaints about judges are subject to proper scrutiny, and of providing accountability to Parliament for the complaints system.
>
> In the most serious cases, in which it falls to be considered whether a judge should be removed from office for incapacity or misbehaviour, removal will be by the Secretary of State with the agreement of the Lord Chief Justice. It will not be possible unless they both agree. For the higher judiciary, removal will continue to be by Her Majesty the Queen on an address from both Houses of Parliament. Such cases will be first investigated by a judge of appropriate seniority and will be able to be referred to a review body.
>
> In less serious cases, the Lord Chief Justice and the Secretary of State will need to agree on any penalties short of dismissal to be applied to a judge.
>
> ..
>
> The Lord Chief Justice and I will listen carefully to views expressed today in your Lordships' House and elsewhere. Your Lordships will have a further opportunity to consider those issues in more detail when legislation is introduced. To assist in such consideration, we have today placed in the Libraries of both Houses an explanatory document setting out the proposals in more detail.

That document has come to be known as “the concordat”. Lord Woolf, the Lord Chief Justice, also made a statement, saying that the arrangements just announced were the

result of detailed discussions between the Lord Chancellor and himself. If they were accepted by Parliament, their implementation would have his firm support. He went on:

> If you compare what is announced with the response of the Judges' Council to the Government's consultation papers on constitutional reforms, you will find significant differences. However, the judiciary recognises that there is more than one way in which its objectives can be achieved. During the course of our discussions, the Lord Chancellor and I have been willing to accommodate the views of the other as long as they do not involve impinging upon the important principles that we each believe have to be secured by an agreement that safeguards the interests of the public.

After emphasizing that the agreed package covered only the issues arising as a consequence of the Lord Chancellor ceasing to be the head of the judiciary, not questions about abolition of his office, about a Supreme Court, or about senior judges sitting in the Lords, the Lord Chief Justice explained seven reasons why the judiciary considered it acceptable. These were:

> …first, the appointments commission will be wholly independent of the executive and appointed by a body that is equally independent….
> Secondly, the Secretary of State is to be involved in the appointments process to an extent necessary to meet his responsibilities to Parliament and the public, but his involvement is suitably restricted…
> Thirdly, the security of tenure of the judiciary is preserved…
> Fourthly, the Secretary of State, unlike the Lord Chancellor, will not be head of the judiciary….
> Fifthly, the Judicial Studies Board is to continue to be independent of the executive. ..
> Sixthly, as to resources, the judiciary is to have, for the first time, non-executive membership of the boards of both the department and the Unified Courts Administration…
> Seventhly, in addition to the proposed specific duty on the Secretary of State for Constitutional Affairs to defend and uphold the continuing independence of the judiciary, there will be a general statutory duty on the Government, all those involved in the administration of justice and all those involved in the appointment of judges to respect and maintain judicial independence.[148]

In a subsequent address, he informally described what had happened:

> I don't mind confessing that, initially, I was deeply alarmed by the Prime Minister's announcement last June. The announcement has proved a catalyst for very constructive discussions between the judiciary and the DCA. The discussions focused on the need to safeguard the rule of law and the independence of the judiciary should the office of Lord Chancellor be abolished

[148] HL Deb 26 January 2004 c25

> and they resulted in an agreement being reached between the Lord Chancellor and myself…. I am now satisfied that the independence of the judiciary will be safer than it has ever been if – as I still expect will be the case – the Concordat is reflected in legislation.[149]

The Concordat runs to 144 paragraphs and is available on-line from the DCA website.[150]

B. The new arrangements: Part 4 of the Constitutional Reform Bill

1. Judicial Appointments Commission

Clause 55 establishes a new Judicial Appointments Commission ("the Commission"), whose membership, status and powers are detailed in Schedule 10.

The Commission is to have a lay chairman and fourteen other members. Five of those must also be lay members. Five must be "judicial members", holding judicial office as prescribed, drawn from the levels ranging from Lord Justice of Appeal to district judge. One will be a justice of the peace and one will hold one of the offices listed in Part 3 of Schedule 12 (offices such as tribunal members which the Minister is responsible for appointing). The other two will be a practising barrister and a practising solicitor. A member who could qualify under more than one category is taken into account only as filling the complement to which he was appointed. Civil servants cannot be members, and the definition of lay member excludes anyone who has ever held a listed judicial office or been a practising lawyer. The Minister may by order increase any of the numbers, with the consent of the Lord Chief Justice.

Members are to be appointed for fixed terms, not to exceed five years at a time, and no-one may be a member for more than ten years altogether. (This applies to all members, including judicial members.)

2. Judicial appointments

Part 4 of the Bill provides that the Commission is to recommend names to the Minister for appointments to all levels of the judiciary in England and Wales other than the Supreme Court.[151] Part 1 of Schedule 3 to the Bill provides that appointments of district judges, and of High Court Masters and Registrars, will in future be made by the Queen rather than the Lord Chancellor, as currently.

The general provisions of Part 4, applicable to all judicial appointments, require that selection must be solely on merit and that a person must not be selected unless the selecting body is satisfied that he is of good character.

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[149] Lord Woolf, *Address to the Inner London Magistrates Association*, 18 May 2004

[150] http://www.dca.gov.uk/consult/lcoffice/judiciary.htm#part2

[151] The procedures for appointing Supreme Court Judges are described above, see part I B 2 (p20)

Three groups of clauses in chapter 2 deal with the selection process for:

- The Lord Chief Justice and Heads of Division (clauses 60-66)
- Lords Justices of Appeal (clauses 67-73)
- Puisne (High Court) judges and other office holders listed in a schedule (clauses 74-82)

The principal difference is that the provisions on selecting for the higher judicial offices (in the first two groups) expressly require the Commission to set up a four member selection panel usually consisting of two judicial members (of specified seniority), the Chairman of the Commission and one other lay member. The chairman of the panel will be the more senior judicial member and will have a casting vote. The provisions for selecting puisne judges and below do not require any selection panel to be set up, but do require that at least once during the selection process, the Commission must consult the Lord Chief Justice and another person who has held the office for which a selection is to be made or has other relevant experience.

Each group of clauses sets out requirements for selecting one person,[152] and submitting a report to the Minister, with the selected name and any other information required by the Minister. Each group also sets out in intricate detail the options available, for the selectors and the Minister, in the event of his not making a recommendation of the candidate selected at the first stage. The Minister's options, broadly the same for each group, are summarised in the Explanatory Notes as follows:

> 252. When the Minister receives the report informing him of the person selected by the panel, he has the options of recommending that person for appointment; 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 Minister rejects the selection or requires reconsideration, the process moves into stage 2: the panel puts a name to the Minister, and the Minister may recommend the appointment of the candidate; 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 Minister rejects the selection or requires reconsideration, the process moves into stage 3: the panel again puts a name to the Minister. This time he must recommend the appointment 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.

A rejected candidate may not be reselected, but a candidate may be reselected after the Minister has required a reconsideration.

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[152] Clauses 60, 68

In each case, the Minister's powers to reject or require reconsideration of a selection is limited. He may reject a selection only on the ground that in his opinion the person selected is not suitable for the office concerned or the particular functions of that office. He may require reconsideration only on the grounds that in his opinion either that there is not enough evidence of suitability or there is evidence that the person is not the best candidate on merit. These limitations were added by amendments tabled by the Lord Chancellor when the Select Committee considered that the discretion had been too widely drawn.[153]

3. Some issues which have arisen

During the Lords' debates and consideration by committees, a number of issues relating to judicial appointments have been raised and some have led to significant amendments. The issues and outcomes are outlined below under the following headings:

- The concordat
- A commission which makes recommendations only
- The minister's role
- Audit
- Lay involvement
- Selection panels
- The merit test
- A judiciary to reflect the community
- Independence of justices' clerks
- Confidentiality
- Politics of members

a. The concordat

At Second Reading the Lord Chancellor said that the concordat was reflected in the Bill, but he also referred to amendments which he intended to bring forward to ensure that the Bill delivers the detail of the concordat.[154] While amendments have been brought forward to carry out the stated intention of reflecting the concordat, some Peers have seen commitment to the detail of the concordat as being unduly restrictive of their endeavours to improve the Bill. For example, when urging reconsideration of the procedures for selecting High Court judges, Lord Lloyd of Berwick did not see the terms of the concordat as a necessary obstacle:

> I hope that the noble and learned Lord the Lord Chancellor will consider the matter again and not just say, "It is all in the concordat and that is that". We know

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153 Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf

154 HL Deb 8 March 2004 c 982

> that the concordat can be changed by agreement between him and the Lord Chief Justice. I hope that he will try to secure that agreement.[155]

b. A commission which makes recommendations only

In the consultation paper, the government put forward the three options of:

- an Appointing Commission which would itself make those appointments which the Lord Chancellor currently makes personally and directly advise The Queen on appointments above that level without any ministerial involvement; or,

- a Recommending Commission which would make recommendations to a minister as to whom he or she should appoint (or recommend that The Queen appoints); or,

- a Hybrid Commission in which the Commission would act as an appointing commission in relation to the more junior appointments (for example, part-time judicial and tribunal appointments) and as a recommending commission in relation to more senior appointments.[156]

The Government recognised that it would be possible to approach the recommending model in different ways, according to the amount of discretion the Minister had in relation to individual appointments, and its view was that the best combination of independence, accountability and propriety in safeguarding the constitutional position of The Queen and her relationship with her ministers would be achieved by a Recommending Commission, combined with severely circumscribed ministerial discretion, in which the Commission would generally put forward only one name to the Secretary of State, who could however reject that name and require another to be put forward.

The Select Committee found that an appointing commission was not a popular option, and although there was some support for a hybrid which could make appointments at more junior levels, that would be a departure from the concordat. Accordingly the Select Committee did not recommend any change.

c. The Minister's role

Under the Bill, the Minister will have power to issue guidance (to which the Commission and any selection panel must have regard) about procedures for the performance by the Commission or a selection panel of its functions of—

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[155] HL Deb 14 December 2004 c 1293

[156] http://www.dca.gov.uk/consult/jacommission/index.htm#part4

(a) identifying persons willing to be considered for selection under this Part, and
(b) assessing such persons for the purposes of selection

and will also have power to reject a selection.

Guidance

The power to issue guidance is considerably more circumscribed than the wide power which appeared in the Bill as introduced. Amendments intimated by the Lord Chancellor at Second Reading now stipulate that the Lord Chief Justice must be consulted about any proposed guidance, which will also be subject to parliamentary oversight through the affirmative resolution procedure.

Nevertheless the Joint Committee on Human Rights has concluded that the power is incompatible with the principle of judicial independence. Although it is expressed to be a power to give guidance about procedures, its scope is very broadly defined and includes the power to give guidance as to how the Commission should assess eligible candidates for selection.[157]

Power of rejection

The Select Committee agreed with witnesses (including the Judges' Council) who said that the Minister's discretion to reject selections was too widely drawn in the Bill as introduced. Lady Justice Arden had suggested that there could be a convention, established by a ministerial statement during the passage of the Bill, to the effect that the Minister's discretion would be exercised only in exceptional circumstances. Following amendments tabled by the Lord Chancellor, the Bill now provides that the Minister may reject only if he considers a candidate unsuitable, and require a reconsideration only if he considers that the candidate is not the best suited to the post

The Human Rights Committee appeared to have less concern about the Minister's power of rejection. They said that the mere fact of the Commission being a recommending rather than appointing commission was not in itself incompatible with any human rights obligations or non-binding principles or guidelines, but the question was whether the safeguards were adequate to ensure transparency and independence from the executive in practice. They welcomed the inclusion of a requirement that selection should be on merit, and suggested only that the safeguards would be strengthened by an elaboration of what was meant by "merit".

The Judges' Council Working Party on the Bill told the Select Committee of its concern lest the minister's power to withdraw a request for the Commission to make a selection should be capable of being used as a backdoor route to rejecting a selection which the

[157] Joint Committee on Human Rights, *Scrutiny of Bills Final Progress Report*, 23rd Report 2003-04, November 2004, HL 210/HC 1282, para 1.55

Commission had already made. (It was not in the concordat.) Their proposal was that the minister should be required to consult the Lord Chief Justice: this is now reflected in clause 82.

d. Audit

The existing Commission for Judicial Appointments was set up in 2001 to oversee existing judicial appointments procedures, but the Bill contains no comparable arrangements for oversight of the new procedures. (Such arrangements are often described as "auditing".) The Select Committee agreed with the Lord Chancellor that no further provision need be made, although Sir Colin Campbell had made a plea for somebody to continue to audit, since even the new Commission might develop bad tendencies which somebody might be able to flush out. The Lord Chancellor said that the situation reflected what had been agreed in the Concordat and reasoned that the new system would be more transparent and open, there would be safeguards in a more rigorous complaint handling system, and that the National Audit Office would be able to examine the Commission.

However, the Joint Committee on Human Rights was concerned that the lack of any provision for audit of appointments was inconsistent with the UK's obligations in relation to equal opportunities.

e. Lay involvement

The Select Committee did not agree with witnesses who suggested that there should be a lay majority in the Commission. They amended the original Bill so that the Minister's power to change the number of Commissioners could be exercised only to increase the number. While they recognised that the making of an order under that power could have the effect of altering the balance between judicial and lay members, the requirement of concurrence between the Lord Chief Justice and the Minister was sufficient safeguard against disproportionately disturbing the Commission's composition.

f. Selection panels

The Bill is very specific about the composition of the selection panels which must be set up for appointments to the most senior judicial offices, but not at all specific about appointment to the High Court Bench and below. The Commission will not have to set up panels for these but if it does, there must be at least one judicial member and one lay member, and the quorum must be not less than three. It is envisaged that in some cases an assessment centre approach may be more appropriate.

The Select Committee considered whether, on the one hand, selection for the more senior appointments should be delegated at all, rather than being decisions of the whole Commission, and on the other hand, whether high court judges should be selected in a manner similar to Lords Justices of Appeal.

The Committee could not agree on whether the arrangements for high court judges were appropriate, and therefore made no recommendation. While it could be said that the rank of high court judge had more in common with the more senior ranks than the less senior (eg judging in superior courts of record and enjoying the same stringent safeguards against improper removal from office) the Lord Chancellor had rejected the proposal that the bill be amended to equate the appointment of high court judges with Lords Justices. Appointment to the latter was almost always by promotion, while appointment of high court judges and below were typically first time appointments. And the Bill reflected the concordat.

During subsequent debate the Government insisted that the process of High Court selection should be for the Commission to decide, despite urging from, among others, Lord Lloyd of Berwick, who said:

> The High Court judge is the key appointment in the whole judicial process. In many ways, he is more important than, although of course not as senior as, members of the Court of Appeal. The High Court judge is important because, unlike circuit judges, he is irremovable, except following an address by both Houses of Parliament, and therefore it is essential that we should not make a mistake in his appointment. He is also important because he is in the front line in defending the liberty of the subject against the Government by the process of judicial review. Again, circuit judges are in an entirely different position because they have no jurisdiction in judicial review.
>
> Therefore, I was very surprised to find that, instead of being given the kind of panel that Lords Justices are given, High Court judges were tucked away in Schedule 12 to the Bill between non-judicial members of the Restrictive Practices Court and Masters of the Queen's Bench Division. In my submission, that is quite wrong. High Court judges are worth much more than that…
>
> The only argument put forward in the Select Committee for distinguishing between High Court judges and judges of the Court of Appeal was that judges of the Court of Appeal were chosen by promotion, whereas it was said that judges of the High Court were not. That is no longer true, because increasingly High Court judges are chosen by promotion from the circuit Bench. In any event, promotion is an irrelevant consideration in this discussion. We need the best way of getting the best men in those important jobs, which include not only the Lords Justices but also the judges of the Court of Appeal. If promotion is irrelevant, it follows that no good reason has been given for distinguishing between the two.
>
> This is a genuine attempt, as I have said, to improve the Bill and to eliminate what High Court judges could well consider a grievance.[158]

[158] HL Deb 14 December 2004 c 1293

Former Lord Chancellor Lord Mackay of Clashfern agreed that the critically important distinction was between the judges of the High Court and those immediately below them, and that details of the concordat need not be regarded as sacrosanct.

> The concordat is of course to be taken into account, but I do not think that any one would claim that the concordat is the laws of the Medes and Persians; it has shown that it can be altered; and, if it can be improved, I am sure that the noble and learned Lord the Lord Chief Justice would be the first to agree to that. So I hope that it will be possible, at the level of the High Court, to make a distinction between the methods of appointment and exactly what they should be.[159]

The change which has been made is that clause 74 now expressly refers to recommendations for appointment of puisne judges as one of the functions of the Commission. Previously, the Commission's role of selection for that office had been achieved by including that office with the others listed in Schedule 12.

g. The merit test

Clause 57(2) requires that selection must be solely on merit, reflecting existing practice. In the Bill as introduced there was provision which would have given the Minister power to specify considerations to be taken into account in assessing merit: the Lord Chancellor indicated at Second Reading that he intended to delete the power, which accordingly is omitted from the present Bill. The Select Committee said that selecting on merit could be understood in two ways-

> Selecting "the best candidate"; or setting a very high threshold of competences above which other factors may be taken into account.[160]

Although there seems to have been general consensus that appointment should be on the basis of merit, not all witnesses agreed that finely graded distinctions of merit were always appropriate or possible.

The word "solely" was added by Government amendment on Report, to -

> … put the matter beyond doubt and remove any possible suggestion that the merit criterion was in some way qualified by other considerations.[161]

The Select Committee had considered but been unable to agree whether the addition was necessary, and the Lord Chancellor's view was that the addition might be otiose. One relevant factor was that the *Justice (Northern Ireland) Act 2004* did require judicial

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[159] HL Deb 14 December 2004 c1295

[160] Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf para 324

[161] HL Deb 14 December 2004 c 1289

appointments in Northern Ireland to be "solely" on merit, and it might be unwise to use different forms of words to achieve the same policy in different jurisdictions.[162]

The Joint Committee on Human Rights welcomed the inclusion of the requirement that selection should be on merit, but their view was that the safeguard in the Bill would be strengthened if it included at least an indicative elaboration of what was meant by "merit" in the context of judicial appointments, and what sorts of objective criteria would be relevant to such appointments.[163]

h. A judiciary to reflect the community

There appears to be a long-standing and continuing consensus that the social make-up of the senior judiciary does not reflect that of society as a whole, or the legal professions, in terms of the proportions of women and people from ethnic minorities. But while the *Justice (Northern Ireland) Act 2004* imposes a statutory duty on its Judicial Appointments Commission to -

> .. so far as it is reasonably practicable to do so, secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office[164]

the present Bill contains no equivalent. The remit of the Judicial Appointments Board for Scotland also includes considering ways of recruiting a judiciary which is as representative as possible of the communities which they serve. In contrast, the present Bill simply includes –

> … the encouragement of diversity in the range of persons available for selection

among the purposes for which the Minister may issue guidance ((clause 58(3)).

That subsection was added by the Select Committee which received evidence from witnesses who wanted an express statutory duty to be imposed, but the Committee was unable to agree on that issue. When it was considered by the Committee of the Whole House, Lord Henley and Lord Goodhart made the point that the judiciary could not and should not reflect the membership of society as a whole, including stupid people, bigots and people without legal qualifications, or even young people.[165] No further amendment was made in the House of Lords but meanwhile, in October 2004, the DCA issued a consultation paper examining –

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[162] para 330
[163] para 1.53
[164] s5(8)
[165] HL Deb 18 October 2004 c629

> the current lack of diversity in the judiciary, focusing on the issues of gender, ethnic origin and disability

and seeking views on what should be done about it.[166]

The paper includes a substantial annex of statistical tables showing the proportions of women and of ethnic minorities, among the judiciary and applicants for office, and in membership of the legal profession.[167] Also in October 2004, Linda Dobbs QC took up her appointment as the first black High Court judge.

The Lord Chief Justice outlined his perception of the problem in the foreword to the paper:

> We are singularly fortunate in this country in having a judiciary that is generally accepted to be of the highest calibre: free of corruption, independent and certainly better trained than ever before. However the judiciary can be, and are, criticised for the undoubted fact that, as a group, they do not sufficiently reflect the society for which they are responsible for providing justice. There is the potential for this lack of diversity to undermine the public's confidence in the justice system.
>
> In this situation it is accepted generally by the judiciary that we must increase among our number the percentage of women judges and the percentage of judges who come from the ethnic minorities. It is imperative that this is achieved in ways that enhance rather than damage the existing quality of the judiciary. We could just wait until the changing patterns of recruitment into the professions bring about the necessary changes to the pool from which the judiciary is, at present, recruited. This would undoubtedly happen over a period of time. However, such a policy would devalue the importance of what is in issue. I am satisfied a more proactive approach is required and I hope this consultation process will identify the action that should be taken.

The consultation period closes on 21 January 2005.

The Joint Committee on Human Rights concluded that the provision about diversity in the guidance clause was not sufficient to meet international standards concerning equality of opportunity, and that the Commission should be under an express duty comparable to that in the Northern Ireland legislation. They referred to the UN Convention for the Elimination of Discrimination Against Women, and also to the Latimer House Guidelines (on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights, originally drawn up for the Commonwealth in 1998). Those guidelines provide that –

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[166] DCA Consultation Paper, *Increasing Diversity in the Judiciary*, 13 October 2004, DCA

[167] Up to date statistical information is available on-line at http://www.dca.gov.uk/judicial/judges/stats.htm

> Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and other historic factors of discrimination.[168]

i. Independence of justices' clerks

Concerns were expressed to the Select Committee that the independence of justices' clerks and assistant clerks would be detrimentally affected by the transfer of responsibility for appointing them from the Lord Chancellor to the Secretary of State for Constitutional Affairs. The Government pointed out that the Lord Chancellor currently appoints justices' clerks in line with his statutory functions for the magistrates' courts rather than his judicial capacity. He assumed these functions in 1992 from the Home Secretary who previously appointed justices' clerks and who is not a judicial figure.

Some members of the Select Committee agreed with the Lord Chancellor that with the creation of Her Majesty's Court Service in April 2005, justices' clerks should become civil servants, but with the Lord Chief Justice consulted on appointment, deployment and role. Others felt that the Judicial Appointments Commission should appoint justices' clerks. They therefore made no recommendation.

The justices' clerks' concerns were again urged on the Government in the Committee of the Whole House by Lord Maclennan of Rogart with the support of Lord Kingsland. Lord Maclennan explained:

> The concerns of the 70 justices' clerks are not theirs alone; they are shared very widely by the magistrates, who have written in substantial numbers not only to the Lord Chancellor, but also to my noble friend Lord Goodhart to express their concern and their support for the amendment.
>
> The matter might appear on the face of it be hypothetical or abstract, but, in practice, it is much more than that. The justices' clerks' concern is that whereas they have hitherto been ultimately appointed by the highest judge—that is, the Lord Chancellor—the change that is proposed in the Bill will result in their appointment being in the hands of a political Minister who will be the head of the department. The consequences they fear will arise from that are not be viewed as purely hypothetical or abstract…
>
> It is quite clear from the correspondence between the Justices' Clerks' Society and the Lord Chancellor that the Lord Chancellor has given considerable thought to the issue. I understand that he has it in mind to introduce two further amendments, as revealed in his letter of 2 October to the chief executive of the Justices' Clerks' Society.[169]

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[168] http://www.clea.org.uk/comdocs/lat.htm

[169] HL Deb 11 November 2004 c 1072

Lord Kingsland said that he was bewildered by the Government's stance. The principle behind the bill was the principle of the separation of powers, but if the present situation was allowed to stand, there would be no separation of powers between the executive and judiciary in relation to the legal advice that justices' clerks give to the magistrates' Bench. The Government would have driven a coach and horses through the principles that underlie their own legislation

In responding, Baroness Ashton of Upholland said that the Government believed it was appropriate for the power to appoint justices' clerks to rest with the Minister given his overall accountability to Parliament under Section 1 of the *Courts Act 2003*.

> As we have indicated, justices' clerks carry out an important role but they are not judges. As noble Lords will be more aware than I, they do not have formal judicial status. They do not conduct trials or sentence offenders and they do not take the judicial oath. The Judicial Appointments Commission will be set up to select judicial office holders and will have the skills and expertise to do so. I do not believe that it would be adequately equipped to select people for their administrative and managerial skills as well as their skills in giving legal advice. ..
>
> The Lord Chancellor has discussed the matter of appointment of justices' clerks with the Lord Chief Justice, who I recognise takes this issue very seriously, and they have agreed that the Government should bring forward an amendment to the Bill on Report… this will provide that the Minister should consult the Lord Chief Justice before designating and assigning a justices' clerk. In practice this will be achieved by including a judge or a magistrate on the local selection panel arranged by Her Majesty's Courts Service for any justices' clerks appointments. That will ensure direct judicial involvement in the selection process, which is important given the dual role of justices' clerks. We believe that this process is the most appropriate way forward and best reflects the role that justices' clerks play.

Amendments to the Courts Act 2003 were accordingly made at Report, but Lord Maclennan indicated that the justices' clerks remained dissatisfied.[170]

j. Confidentiality

In the Bill as introduced in the Lords, clause 81 imposed a duty on Commissioners and staff not to disclose confidential information without lawful authority. Witnesses including both the First Commissioner for Judicial Appointments, and the then permanent secretary to the DCA, stressed to the Select Committee the need for absolute confidentiality.

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[170] HL Deb 14 December 2004 c 1300

At Third Reading, the Government replaced the several confidentiality provisions formerly in the Bill with what is now general clause 111, by a group of amendments which Baroness Ashton of Upholland explained:

> The amendments delete the existing confidentiality provisions in Clauses 86 and 98 and replace them with a new provision to be added into the general provisions of Part 6 of the Bill. This provides for confidentiality in relation to Supreme Court appointments under Clauses 18 to 23 and to judicial appointments and judicial disciplinary matters under Part 3 and under related rules and regulations.
>
> The Lord Chancellor and the Lord Chief Justice may agree to disclose what would otherwise be confidential information about the result of disciplinary action that they have taken against judicial office holders. Information is not protected if it is already in the public domain. Subject to that, any unlawful disclosure would give rise to a civil action for breach of statutory duties.
>
> This group of amendments also brings references in Clauses 82 and 96 into line with the new provisions, requiring that reports from the judicial appointments and conduct ombudsman, which are disclosed to complainants, may not include confidential information about other people.[171]

k. Politics of members

Schedule 10 expressly disqualifies Members of the House of Commons from being Commissioners. A provision which also disqualified Members of the House of Lords was removed on Report. Baroness Ashton of Upholland explained why the Government was accepting the Liberal Democrat amendments:

> …we agree that many distinguished figures in public life, with the experience and qualities that might well suit them to the work of the commission, are Cross-Bench Peers. There is no good reason why those of your Lordships' House without clear party political affiliations should be barred from membership of the commission. As the noble Lord, Lord Lester, has indicated, the amendments would remove the restriction on Peers and put in place instead a test of whether someone, whether or not they are a Peer, has past or present party political activities or associations that make them unsuitable for appointment.
> In addition, we intend that the terms and conditions of commissioners and their code of conduct will make it clear that they are barred from party political activities. Any commissioner who wished to pursue a party political career would have to resign.[172]

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[171] HL Deb 20 December 2004 c 1602
[172] HL Deb 14 December 2004 c1281

Paragraph 11(c) now provides that the Minister must consider whether the extent of any present or past party political activity or affiliations appears to him to make the person inappropriate for the appointment.

C. Discipline

1. Background

Judges of the High Court and above can be removed only by The Queen on an Address from both Houses of Parliament. [173] Holders of lower judicial office may be removed by the Lord Chancellor for incapacity or misbehaviour. That power was used in 1983, when a Circuit Judge was removed from office when the judge concerned pleaded guilty to several charges of smuggling. More recently, another Circuit Judge was prosecuted in 1998 for fraud allegedly committed before his appointment, but had become unfit to stand trial, and the case could not proceed. In July 1999, Lord Irvine said that police investigations continued, and he was considering whether the evidence would justify him concluding that the judge had been guilty of misbehaviour sufficient to allow the Lord Chancellor to remove the judge for misbehaviour.[174] The judge resigned in December 1999.[175]

In answer to a written question by Vera Baird in January 2004, Christopher Leslie explained how many complaints against judges the Lord Chancellor had heard in each of the previous five years; and what details of these complaints and the outcome were publicly available.[176]

> Mr. Leslie: The Lord Chancellor typically receives between 1,000 and 1,200 complaints about judges each year. The majority of these turn out to be complaints against judicial decisions and the complainant is advised that the appropriate remedy is by way of appeal. Those complaints which appear to relate to judicial conduct are investigated and both the complainant and the judge concerned are informed of the outcome. However, the results of this disciplinary process are not normally publicised more widely. Since May 1997, 27 judges have been reprimanded by the Lord Chancellor. These have included one High Court judge, 11 circuit judges, eight district judges, five recorders, and two deputy district judges.

2. The Bill

Chapter 3 of part 4 of the Bill deals with disciplinary powers. Under clause 94 the Minister's power to remove a person from judicial office will be exercisable only after

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[173] *Supreme Court Act 1981* s11
[174] HL Deb 13 July 1999 c31WA
[175] "Fraud judge quits to avoid sack", 18 December 1999 *The Times*
[176] HC Deb 22 January 2004 c 1451W

compliance with prescribed procedures, and the Lord Chief Justice will have express power, with the consent of the Minister, to give a judicial officer –

(a) advice
(b) a warning
(c) a formal reprimand

for disciplinary purposes.

Those powers also may only be exercised after complying with prescribed procedures. Clause 96 gives the Lord Chief Justice power to make regulations providing for the procedures to be followed in the investigation and determination of allegations of misconduct by judicial office holders. Such regulations, which require the agreement of the minister, will be made by statutory instrument subject to the negative resolution procedure, as if they had been made by a minister. Clause 97 goes on to give an indication (without limiting the generality of the power) of what might be covered. The *Explanatory Notes* say -

> 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 Minister.[177]

The principal concerns which have been expressed about the new disciplinary provisions relate to the requirement of ministerial approval for the Lord Chief Justice's disciplinary decisions, both in principle and in the practical effect of ministerial involvement substituting cumbersome procedures which would displace more subtle, and more effective mechanisms.

a. Informal advice by the Lord Chief Justice

In his evidence the Lord Chief Justice Lord Woolf told the Select Committee that the Lord Chancellor already had a central role in discipline, with almost daily correspondence between Lord Chancellor and Lord Chief Justice; and that the only change would be that the question would be in statutory form.[178] He also said that he had never had any difficulty in approaching any judge and saying that he would "prefer you not to do that or not to do this", and that one of the differences between the Lord Chancellor and himself was that the Lord Chancellor had to do it formally.[179]

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[177] para 286
[178] Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill*, 2 July 2004, HL 125-I, http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf Q510
[179] Q505

The Select Committee was content on the evidence that it was not the intention of the Bill to prevent informal cajoling and disciplining of judges by the Lord Chief Justice.[180] The Lord Chancellor had explained:

> It is most certainly not intended that the Lord Chief Justice should not be able to have a quiet word, or even a noisy word, with a judge about particular pieces of his or her conduct in particular circumstances. I think it is clear from the context of clause [94] that advice in that context is a formal disciplinary conclusion, as it were.

The Committee suggested that it was open to further consideration whether "advice" offered under the subsection should require the minister's agreement.[181] The issue was debated at some length in Committee of the Whole House. Peers who spoke were not satisfied that the distinction between the two kinds of "advice" could be made. Among them, Viscount Bledisloe posed the hypothetical problem of "one of the more difficult of the judicial characters" refusing to listen to the advice of the Lord Chief Justice unless the Lord Chancellor had been consulted first.[182]

For the Government, Baroness Ashton of Upholland said that of course it must remain possible for the Lord Chief Justice to advise or have an informal word with any of the judges without needing to have the approval of the Lord Chancellor. It would be appropriate to consider the drafting of the provisions further to ensure that they had no unintended effect. She gave a commitment to tabling an amendment on report if necessary.[183]

The point is still under consideration but the *Explanatory Notes* to the Bill now state that:

> This will not affect the Lord Chief Justice's general ability to speak informally to any judge on any matter which concerns him, without having to inform or obtain the agreement of the Minister.[184]

The view of the Human Rights Committee was that while all international standards recognised the need for disciplinary powers over all judicial office holders, the very existence of the requirement for ministerial agreement to the exercise of these powers created a perception of political interference with judicial discipline, which was incompatible with judicial independence.

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[180] para 280
[181] para 384
[182] HL Deb 11 November 2004 c 1084
[183] HL Deb 11 November 2004 c 1085
[184] para 194

b. Suspension from office

Another concern has been that the power to suspend holders of high judicial office holders could amount to an erosion of the safeguard whereby they may be removed from office only by Parliament. Some members of the Select Committee believed that it was wrong for any minister to have power to suspend a senior judge from office. Lord Woolf had let the Select Committee know his view that the powers of suspension in relation to senior judges should be more limited.

This issue too was expanded on at subsequent stages. Viscount Bledisloe suggested that the very powerful power of suspension could be used in a way which virtually amounted to removal of a judge. He also suggested that it was disproportionate to allow suspension when a judge was under investigation for any offence, not just a serious offence, or when a judge was sentenced, for example, to penalty points on his licence. Lord Donaldson of Lymington, who was Master of the Rolls for 10 years, said that he was troubled by the whole basis of this part of the concordat. He thought that an open suspension of a High Court judge would be immensely damaging to the judge and might force his resignation. It was not a happy basis for legislation to include disciplinary provisions – which might for instance include a Lord Chief Justice censuring a Master of the Rolls – on the basis that no Lord Chief Justice would try it on.[185]

Baroness Ashton of Upholland recognised that some of the provisions relating to judicial discipline required further refinement to bring them fully into line with the concordat, and said that the government intended to move amendments on report after further discussions with the judiciary. A number of drafting and technical amendments were brought forward on report, including correction of a provision which had in effect limited "criminal proceedings" to those on indictment in England and Wales.[186] A consequence of other amendments is that High Court judges, no longer being listed in Schedule 12, are no longer to be subject to the minister's power to suspend office holders who are under investigation for an offence or subject to disciplinary procedures (clause 94(7)).

D. Judicial Appointments and Conduct Ombudsman

Clause 56 would establish a Judicial Appointments and Conduct Ombudsman, whose appointment, office, status and powers are dealt with in Schedule 11. Those who have held judicial office or been practising lawyers are disqualified from appointment. Like the Commissioners, an Ombudsman may not be appointed for more than five years at a time and may not hold the office for longer than a total of ten years.

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[185] HL Deb 11 November 2004 c1087
[186] HL Deb 14 December 2004 c1308

As the name suggests, the Ombudsman is to have two quite different functions. He will investigate complaints about the appointments process, as the present Commission for Judicial Appointments does, although he will not take over that Commission's other function, of monitoring the appointments systems. He will also investigate complaints about maladministration in the way in which complaints about a judge's conduct have been handled.

1. Whether an ombudsman is needed

Although the proposal for an ombudsman had attracted support in the DCA consultation, and had been reflected in the concordat, there was a substantial body of opinion on the Select Committee which doubted the need for one. Both the Council on Tribunals and the British and Irish Ombudsman Association had submitted in evidence that complaints about the appointments process could appropriately be handled by the Commissioner for Public Appointments. The Council on Tribunals added that complaints about appointment procedures and complaints relating to conduct did not sit happily together.

2. The Ombudsman's powers

The Ombudsman is to hear complaints about the appointments process from applicants who claim to have been adversely affected by maladministration (whether or not they have been selected) but only after they have addressed their complaints to the Minister or Judicial Appointments Commission (as the case may be). There is a 28 day time limit. Unless he considers that the claim does not require investigation (in which case he must so inform the complainant) he must investigate it. (Clause 87)

He is to hear complaints about the handling (by the Lord Chief Justice or the Minister) of complaints about judicial conduct, made by either the original complainant, or the judicial office holder involved. Again there is a time limit, and the Ombudsman must investigate the complaint unless he considers it unnecessary. (Clause 100)

In both cases he is required to prepare a report stating his findings and his recommendations, which must first be submitted in draft (to the Minister or Commission for appointments complaints and to the Lord Chief Justice and the Minister for conduct complaints). He is required to have regard to any proposals they make for change, and the final report must include a statement of any such proposal not given effect to. (Clauses 88,89,101 and 102)

As well as considering complaints directly addressed to him, the Ombudsman may have matters referred to him by the Minister (or the Lord Chief Justice on matters of conduct) in which case he must investigate and report on that matter. Appointment matters may relate to the procedures generally or particular cases, and likewise conduct matters may relate to the investigation or determination of a particular complaint or complaints of any description.(Clauses 90 and 103)

No significant amendments have been made to these provisions. The Bill does not appear to make specific provision for dealing with a complaint arising from a matter which had previously been referred to the Ombudsman under those powers of reference.