HOUSE OF LORDS LIBRARY

LIBRARY NOTE

The Appellate Jurisdiction of the House of Lords

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Contents

INTRODUCTION

This Library Note focuses on the appellate jurisdiction of the House of Lords. Part I looks at the historical development of that jurisdiction, whilst Part II discusses the contemporary judicial work of the House, giving an overview of the current jurisdiction and composition of the Appellate and Appeal Committees, and including a look at the Law Lords' role in the Judicial Committee of the Privy Council. Part III gives a chronology of the passage through both Houses of the Constitutional Reform Act 2005, which envisages a new Supreme Court of the United Kingdom to which the Lords' appellate jurisdiction and the devolution jurisdiction of the Judicial Committee of the Privy Council will be transferred. Finally, Part IV goes on to describe the new Supreme Court.

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I. HISTORY OF THE APPELLATE JURISDICTION TO 1948

1. Origins – 1800

The origins of the appellate jurisdiction of the House of Lords lie in the distant precursor of Parliament, the *Curia Regis*, the advisory body to the King in the early Middle Ages, which combined what in modern parlance would be termed legislative, executive and judicial functions. The King dispensed justice through the *Curia Regis* and, although separate common law courts later split off, the "High Court of Parliament" retained its role as the highest court of royal justice. With the emergence in the fourteenth century of the two Houses, the House of Lords gradually inherited that role.

By the sixteenth century, however, the judicial work of the House was in marked decline. Between 1514 and 1589 only five cases are recorded in the *Journal*. The House did not accept any cases between 1589 and 1621, which may be attributed to improved procedures in the Court of King's Bench and in the Court of Chancery. The jurisdiction of the House was still recognised both in legal treatises and in statute: thus it was acknowledged by the Error from the Queen's Bench Act 1584 and by the Error Act 1588.

In the 1620s, Henry Elsyng, Clerk of the Parliaments, commented on the judicial role of Parliament that "The execution of all our laws has been long since distributed by Parliament unto the inferior courts, in such sort as the subject is directed where to complain, and the Justices how to redress wrongs and punish offences. And this may be the reason of the Judges' opinion in Thorp's case. That actions at common law are not determined in this High Court of Parliament. Yet complaints have ever been received in Parliament, as well of private wrongs as of public offences. And according to the quality of the person, and nature of the offence, they have been retained or referred to the common law." (E. Read Foster (ed.), *Judicature in Parliament, by Henry Elsyng* (1991), page 7).

Besides the right of a Peer to be tried by his Peers, Elsying identified six cases in which judicature still belonged to Parliament:

1) In judgments against delinquents, as well for capital crimes, as misdemeanours, on accusations by the Commons, either by their complaints, or impeachments; by information from the King; by complaint of private persons.

2) In reversing erroneous judgments in Parliament.

3) In reversing erroneous judgments given in the Court of King's Bench.

4) In deciding of suits long depending either for difficulty or delay.

5) In hearing complaints of particular persons on petition.

6) In setting at liberty any of their own Members or servants imprisoned; and in staying the proceedings at the common law during the privilege of Parliament[1].

[1] The right of a Peer to be tried by his Peers was abolished by the Criminal Justice Act 1948, as a result of an amendment in the House of Lords. Impeachment is technically still possible, but it was last used in 1804 with the impeachment of Lord Melville.

On 3rd March 1621, James I sent the petition of Edward Ewer, a notoriously persistent litigant, to the House of Lords. Ewer had asked that the record of his case in the Court of King's Bench be reviewed by the House of Lords. The King's decision was noted by other litigants and thirteen other petitions were accepted by the House in the 1621 Parliament. The number of petitions accepted increased markedly in the Parliament of 1624, 1626 and 1628[2]. The petitions included both cases requesting a review of proceedings in a lower court and cases of first instance, where the petitioner took his grievance directly to the House.

With the gradual increase in the number of petitions, the House appointed a standing Committee for Petitions which grew in size from 8 Members in 1621 to 39 Members in 1629. Justices in the lower courts and other high legal officials were summoned by writs of assistance to provide expert legal advice[3]. At first, petitions were brought to the Clerk of the Parliaments who arranged for them to be read to the House which then decided whether the petition should be accepted and referred to the Committee. The great increase in the number of petitions led the House to give the Committee the power to accept or reject petitions itself.

After 1629, there was a period of eleven years when Charles I ruled without Parliament. The failure of the King's personal rule led to the calling of the Short Parliament in the spring of 1640. The House of Lords soon appointed a Committee for Petitions containing 41 Members. The importance of the committee is shown by the fact that the lay Peers included few men who had been sympathetic to the personal rule of Charles I. When the King had to return later in the year to Parliament and summoned the Long Parliament in November 1640, the House of Lords had to deal with a large number of petitions pleading for redress from arbitrary actions by the King's government in the 1630s. The gradual collapse of the King's government allowed the House of Lords to assume a greater role as a judicial body. However, the House's ability to act as a court of law was diminished by the outbreak of the Civil War in 1642 when the Lord Keeper, the Master of the Rolls and several of the judges decamped to Oxford where the King's government was then established. Only a few of the legal assistants who normally served the House on a regular basis remained in London. From 1643, when the House acquiesced in the ordinance passed by the House of Commons for the seizure of private property, the Lords found it difficult to remain aloof from the highly partisan politics of the time. The end came when the Commons voted on 6th February 1649 "That the House of Peers is useless and dangerous and ought to be abolished." The House was condemned as much for its judicial work as its legislative role.

The Convention Parliament which met between 25th April and 29th December 1660 saw the House of Lords restored to its former position. A Committee for Petitions was appointed on 2nd May. Petitioners turned to the House both for redress of grievances arising from the Civil War and Interregnum and for redress of private grievances as in the decade of the 1620s. Again, the House dealt with cases of first instance and cases appealing from decisions of the lower courts.

However, a crisis with the House of Commons arose over the case of Thomas Skinner v. East India Company. Skinner had entered the East India trade at a time when the Protectorate sponsored open trade. While he was establishing his trading base in the East, the Protectorate granted a monopoly of the trade to the East India Company which seized all of Skinner's property in the East Indies. Despite attempts at arbitration, sponsored by Charles II, the Company was obdurate and, at Skinner's request, the King referred the matter to the House of Lords in 1667. The East India Company was ordered to answer Skinner's petition to the

[2] The total number of petitions accepted 1621-29 was 207; the number of petitions sent to the House was probably over 300

[3] The legal assistants advised on both legislative and judicial matters.

House and, in a strong reply, the Company objected to the jurisdiction of the House mainly because this was a case of first instance and not a petition to review a decision by a lower court. This argument was not accepted by the House which proceeded to consider the case. At the request of the Company, four postponements were granted. Heneage Finch, the Solicitor General, appeared for the Company in the hearing which began in December 1667. Finch argued that the House had no right to hear cases of first instance, except where the lower courts could not provide a remedy. The case was further clouded by the question of parliamentary privilege because the leading figures in the Company were Members of the Commons. Matters dragged on until Spring 1668 when the House decided in favour of Skinner. The Company promptly petitioned the House of Commons for relief from the 'unusual' and 'extraordinary' proceedings of the Lords. The Commons considered the petition and came to the conclusion that the Lords had acted arbitrarily and Skinner himself had breached the Commons' privilege. The dispute between the two Houses over Skinner's case continued throughout 1668 and 1669. At the beginning of the new session of Parliament in February 1670, King Charles II asked both Houses to abandon their differences over the case. The Commons ignored this request. The King ordered all references to the dispute to be erased from the Journals of both Lords and Commons and that neither House continue with the dispute. The King's wishes were obeyed by both Houses. The House of Lords still retained the jurisdiction it held before the case. In practice, the House now limited its jurisdiction to appellate cases.

Another crisis with the House of Commons arose over the case of Shirley v. Fagg in 1675. The defendant, Sir John Fagg, was a member of the Commons and the Lords were promptly warned by the other House to "have regard for their Privileges." Again, a furious and lengthy row ensued between the two Houses. It was exacerbated when the Commons discovered that there were two other cases before the Lords in which Members were defendants: Thomas Dalmahoy and Arthur Onslow. Two of the cases were appeals from the Court of Chancery and one from the equity side of the Court of Exchequer. The House of Commons continued to defend its privileges but now added a challenge to the jurisdiction of the House of Lords to hear appeals from court of equity. This claim by the Commons led to a complete breach with the House of Lords and a prorogation of Parliament by the King on 9th June 1675. The dispute continued unabated when Parliament met again on 13th October and tempers were so inflamed that the King prorogued the House in late November 1675. Tempers cooled during the prorogation which lasted until February 1677 and neither House returned to the matter nor were the two outstanding cases revived. The question of the right of the House to an appellate jurisdiction in equity became a subject of dispute for learned lawyers and it was referred to by the House of Commons during another great clash with the Lords over Ashby v. White in 1704, but the House's right to exercise this jurisdiction remained unchanged.

Following the Act of Union with Scotland in 1707, the jurisdiction of the House of Lords was extended to appeals from the Scottish courts. Article XIX of the Articles of Union stated that "no causes in Scotland be cognoscible by the courts of Chancery, Queen's Bench, Common Pleas or any other court in Westminster Hall; and that the said courts or any other of the like nature after the union shall have no power to cognosce, review or alter the acts or sentences of judicatures in Scotland, or stop the execution of the same." The Articles do not refer to the relationship of the Scottish courts after 1707 with the House of Lords. The question of the jurisdiction of the House did arise in the deliberations of both English and Scottish commissioners and there were discussions on erecting in Scotland a Court of Appeals, delegated from the House of Lords and containing Scottish nobility and gentry. This proposal was not pursued probably because, as Daniel Defoe noted in his *History of the Union*, the English commissioners were happy for appeals to come to London while the Scottish commissioners assumed that taking an appeal to London would be so inconvenient that litigants would accept the decisions of the Scottish courts. Another argument suggests

that the English Commissioners may have believed that a direct reference to the appellate jurisdiction of the House of Lords in the Articles of Union would have risked another bitter conflict between the Commons and the Lords.

The first Parliament of Great Britain met on 23rd October 1707; the first petition from a decision of the Court of Session was delivered to the House of Lords on 16th February 1708. The petitioner in the case of Rosebery v. Inglis was the Earl of Rosebery, one of the Scottish Commissioners in the negotiations over the Union, while the committee of the House of Lords which considered the petition included five other Scottish commissioners and five English commissioners. Parliament was dissolved before the defendant could present his case and there were no further proceedings on the appeal. However, the principle had been established and Scottish appeals, despite the long and difficult journey from Scotland, became so frequent that they soon far exceeded the number of other appeals. An order of the House on 19th April 1709 specified that after an appeal from any sentence or decree given or pronounced in any court in Scotland had been accepted by the House, then the sentence or decree appealed against must not be carried into execution and this encouraged Scottish appeals.

In 1713, the House accepted an appeal from the High Court of Justiciary, the highest criminal court in Scotland. In the case of Magistrates of Elgin v. Ministers of Elgin, the House reversed the decision of the Justiciary Court. However, in the case of Bywater v. Lord Advocate, a capital case in 1781, Lord Mansfield pointed out that there had been no appeal from the Justiciary Court before the Act of Union and, on this ground, it was decided that there could be no appeal from a decision of the Court to the House of Lords[4].

2. 1801 – 1948

The number of Scottish appeals resulted in a considerable number of cases waiting for a hearing by the early nineteenth century. Initially, a number of minor reforms were introduced to reduce appeals from Scotland. Under the Court of Session Act 1808, appeals could not be made on interlocutory matters, unless the Court of Session gave leave or if the members of that Court disagreed. Under the Administration of Justice (Scotland) Act 1808, the Court of Session was given the power to decide if an appeal justified a stay of execution, thus amending the House's order of 1709. These reforms did not have a great impact on the volume of appeals. Irish appeals, which came again to the House of Lords after the Act of Union of 1801, were much fewer in number but they added to the burden.

The Lord Chancellor presided over the House of Lords as a judicial body and also sat as the sole judge in the Court of Chancery. Lord Eldon, the Lord Chancellor for most of the period between 1801 and 1827, was noted for his prolonged and slow methods of dealing with the cases before him in Chancery and in the Lords. Pressure from reformers led to some changes. In 1812, an Appeal Committee of the House of Lords was established in order to hear preliminary points of procedure and petitions for leave to appeal *in forma pauperis* [on paper][5]. Moreover, the standing orders of the House were altered to allow judicial business to be taken on three days a week, starting at 10 a.m. These reforms led to a satisfactory increase in the number of appeals heard: from 21 in 1812 to 81 in 1813-14. The problems in the Court of Chancery were to be solved by the appointment of a Vice-Chancellor, but this turned out to be a failure, at the beginning, because the decisions of the Vice-Chancellor

[4] This did not prevent a number of attempts after 1781 to appeal in Scottish criminal cases to the House but this ended with the House's decision in Mackintosh v. Lord Advocate (1876).
[5] This committee is still in existence.

could be appealed to the Lord Chancellor and almost all of the first Vice-Chancellor's decisions were so appealed.

By 1820, there were further demands for reform because the backlog of cases had increased again. In 1822, the Prime Minister, Lord Liverpool, set up a select committee of the House of Lords to examine the appellate jurisdiction. The select committee considered and rejected the formation of a regular Appellate Committee to hear appeals. However, it recommended that a Speaker, who did not have to be a peer, should preside over appeals and that a rota of four lay Members should be chosen by ballot and compelled by threat of a fine to attend at appeals, which should be heard during the session on five days a week from 10 a.m. to 4 p.m. This reform was approved by the House at the beginning of 1824. Reforms relating to Scottish appeals, recommended by the select committee, were considered by a commission appointed by Lord Eldon. Eventually, Parliament gave statutory force to some of the reforms endorsed by the commissioners. The most significant reform laid down that appeals in cases which began in the sheriffs courts in Scotland could go from the Court of Session to the House of Lords on questions of law only.

Following these reforms, there was a considerable improvement in the judicial business of the House and the backlog of cases had eased considerably by 1827. The invention of the rota system did highlight the increasing irrelevance of the lay Members in hearing appeals. If a case went over one day, then a different panel or panels of lay Members would attend for the other day(s).

The reforming ministry of Lord Grey began the extension of the franchise with the Great Reform Bill of 1832. A leading member of this ministry was Lord Brougham, the Lord Chancellor, who had long had an interest in law reform as well as political reform. With great energy, Brougham reduced within four years the new backlog of cases in both the House of Lords and the Court of Chancery by increasing the number of hours in which the House sat judicially and by holding evening sessions in Chancery. Unusually, Brougham had qualified as an advocate in Scotland before he joined the English Bar. Brougham carried through a major reform programme both in the law and in the courts. Many of the reforms in the courts had an effect on the appellate jurisdiction of the House, e.g. the Master of the Rolls was empowered to sit in open court and thus relieve the Lord Chancellor of some of the work in equity cases. Brougham's lasting reform was the establishment of the Judicial Committee of the Privy Council which took over responsibility for the long established overseas appellate jurisdiction of the main Council. Brougham failed to carry through significant reform in the appellate jurisdiction of the House of Lords. In 1834, he had introduced a bill which would have separated the legal and political roles of the Lord Chancellor so that the head of the judiciary would not also be Speaker of the House of Lords. Ironically, he was persuaded to abandon this measure on the grounds that there was no backlog of cases for hearing – a fact which arose from Brougham's own efforts. In the same year, Brougham introduced a bill which merged the Judicial Committee of the Privy Council and the House of Lords as an appellate court. This bill made no progress because the Whig ministry, now led by Lord Melbourne, fell from power, for a brief period, in November 1834. Melbourne's strong dislike of Brougham meant that the latter was not re-appointed Lord Chancellor when the Whigs came back to power.

The role of the lay Members of the House in deciding cases had diminished with the introduction of the rota system. The number of Members who had been Lord Chancellor or judges in the lower courts increased to seven after 1835 and this allowed the formation of a professional panel to hear appeals. The last time the House decided an appeal in the traditional manner, i.e. with the Lord Chancellor on the Woolsack, the judges from the lower courts present as assistants, and the lay Members voting, was in June 1834. Ten years later,

the convention that lay Members did not vote on appeals was established. Daniel O'Connell, the controversial Irish politician, was convicted of conspiracy by the Court of Queen's Bench in Ireland. When he appealed to the House of Lords, an impressive panel of law lords (the Lord Chancellor, three former Lord Chancellors, a former Lord Chancellor of Ireland, a former Lord Chief Justice) met to hear the appeal. They were advised by twelve judges from the lower courts. The law lords divided on the appeal: two for upholding O'Connell's conviction and three for allowing his appeal. The lay Members present began to give their opinions. Sir Robert Peel, then Prime Minister, had anticipated that the lay members would attempt to intervene. Lord Wharncliffe, the Lord President of the Privy Council, was despatched to the House where he strongly advised the lay Members not to divide the House on the question when the Law Lords had already given their opinion. The Government believed that a vote now would damage the reputation of the House as a judicial court and this would be a far worse outcome than to allow O'Connell's appeal. Wharncliffe's arguments were accepted by the House and the role of the lay Members in the appellate work of the House ceased. The gradual retreat of the lay Members in the period from 1830 to 1845 had improved the standing of the House as a court of law. By 1834, the number of English appeals exceeded Scottish appeals. The growing professionalisation of the appellate work of the House meant that the House began to assume an important role in shaping English law[6].

The fact that the appellate work of the House relied on the presence of law lords in the House proved, by the late 1850s, to be a weakness. Failure to provide a reliable body of law lords drew increasing criticism from the legal profession, which, following Brougham's reforms, now expected professional work by the House as a court. Palmerston's government decided to promote lawyers into the House of Lords by granting them life peerages. James Parke, a judge in the Exchequer Court, was created, in January 1856, Lord Wensleydale for life. Furious opposition from the Conservative members of the House forced the question of life peerages to the Committee for Privileges which ruled that the prerogative power could not create life peers. James Parke became a hereditary peer. The Conservative leadership in the House agreed to the establishment of a select committee to consider the appellate jurisdiction. The committee failed to obtain much agreement on the reform required. Lord Derby, the Conservative leader in the House, suggested that a separate judicial committee should be appointed to consider appeals, but the select committee rejected his proposal and opted instead for the appointment of two paid judges, who were to be life peers, as Deputy Speakers. These proposals were drafted into a bill which was passed by the Lords, but encountered great opposition in the Commons both from the Conservatives led by Disraeli and from radical members who considered the proposed reforms to be inadequate. The bill disappeared into a select committee of the House of Commons which never met.

In 1867 a major achievement in political reform, the Second Reform Act which doubled the size of the electorate by granting the vote to working class men, was matched by a major initiative in legal reform when Roundell Palmer, a former Liberal Attorney General, persuaded the government to set up a Royal Commission on the Judicature. The first report of the Royal Commission, in 1869, recommended that a single supreme court be formed and that it would consist of a High Court in five divisions and a Court of Appeal. As for the House of Lords, the Royal Commission noted briefly that thought should be given as to whether the decisions of the Court of Appeal should be final unless either the Court of Appeal or the House of Lords granted leave to appeal. Little objection was raised to the concept of the Supreme Court but the questions raised over the role of the House of Lords as an appellate court hindered progress on the implementation of these recommendations. The

[6] In the case of Bradlaugh v Clarke, "Lord Denman, who had heard the arguments expressed his concurrence in the judgment of Lord Blackburn" *The Times*, 10th April 1883. Denman's vote was ignored. This was the last time a lay Member attempted to vote on an appeal.

first attempt to legislate, the Appellate Jurisdiction Bill 1870, included a proposal that the House of Lords should appoint a Judicial Committee of members and others to hear appeals. The House of Lords objected to the concept of a Judicial Committee while the judges refused to support the bill until the considerable backlog of cases in the Judicial Committee of the Privy Council had been cleared. Only then would it be possible to prepare suitable recommendations regarding the appellate jurisdiction. The bill failed. The Judicial Committee of the Privy Council Act of 1871 provided for the appointment of four paid judges as an answer to the complaints made by the judges on the backlog of cases. However, the Act provided that the new judges only held their office until parliament had agreed new arrangements for a supreme court of appellate jurisdiction. The government introduced the Supreme Court of Appeals Bill of 1872 to establish a new appeals court into which the appellate jurisdiction of the House of Lords and of the Privy Council would be transferred. This bill failed but it led to another select committee of the House of Lords on the appellate jurisdiction. By a slim majority, the select committee proposed that a joint Judicial Committee of the House and the Privy Council should consist of the Lord Chancellor and four paid judges who would be both life peers and privy councillors. Other senior judges would be ex-officio members of the new Judicial Committee.

The proposals of the select committee were promptly dismissed by Roundell Palmer, now Lord Chancellor as Lord Selborne. He introduced the Judicature Bill of 1873 which accepted the reforms proposed by the Royal Commission on the Judicature and solved the question of the House of Lords by abolishing appeals to the House. The question of Scottish and Irish appeals led to heated debate during the passage of the bill and the government conceded that these appeals could still go to the House of Lords even when English appeals could no longer be heard by the House. Except for the issue of Scottish and Irish appeals, the bill passed through both Houses without much opposition and the Act was to come into force in November 1874.

Gladstone's government was not in a strong position and it fell in February 1874. The new Conservative government, under Disraeli, continued the work of reforming the appellate jurisdiction. Lord Cairns, again Lord Chancellor, introduced a bill which abolished Irish and Scottish appeals to the House of Lords and transferred them to the Court of Appeal, renamed the Imperial Court of Appeal. The bill encountered strong opposition in the House of Lords but it was passed with a satisfactory majority; in the House of Commons, the government took the bill through Second Reading and the Committee Stage with ease. However, the opponents of this measure had been lobbying strongly behind the scenes and the government suddenly announced that this bill would be abandoned and that the Judicature Act 1873 would not come into force until November 1875. Despite attempts by the Lord Chancellor to preserve his reforms of the appellate jurisdiction, Disraeli was lobbied strongly on the need to retain the appellate jurisdiction of the Lords throughout 1874 and 1875.

The Lord Chancellor introduced the Appellate Jurisdiction of the House of Lords Bill in 1876. The bill passed through both Houses without much opposition and received Royal Assent in August 1876. Under the Appellate Jurisdiction Act 1876, the appellate jurisdiction of the House of Lords was maintained, but:

1) petitions for leave to appeal were to be addressed to "Her Majesty the Queen in her Court of Parliament";

2) Appeals could not be heard or determined unless at least three of the following were present (a) Lord Chancellor; (b) Lords of Appeal in Ordinary to be appointed under the Act; (c) Peers of Parliaments who hold or have held

offices in this Act described as high judicial office.

3) In order to assist the House in the hearing of appeals, the Queen could appoint by letters patent two qualified persons to be Lords of Appeal in Ordinary. A Lord of Appeal in Ordinary had to have held for at least two years a high judicial office as well as being for at least fifteen years a practising barrister in England or Ireland, or a practising advocate in Scotland. A salary of £6,000 was to be paid to each Lord of Appeal in Ordinary and he would be a member of the House of Lords while he held the office of Lord of Appeal in Ordinary[7].

4) The House of Lords could sit for the hearing of appeals during any prorogation of Parliament, and on the authority of Her Majesty, during a dissolution of Parliament.

5) When any two of the paid judges in the Judicial Committee of the Privy Council died or resigned, a third Lord of Appeal in Ordinary would be appointed, and on the death or resignation of the remaining two judges in the Judicial Committee, a fourth Lord of Appeal in Ordinary would be appointed.

The Act came into force in 1877; Lord Blackburn, an English judge, and Lord Gordon, a Scottish judge, were appointed the first two Lords of Appeal in Ordinary. From this time onwards, the House of Lords became primarily an English court; the number of English appeals regularly exceeded a far smaller number of Scottish appeals. The House had the power to hear criminal appeals on writs of error but it was a jurisdiction that had virtually lapsed. In 1907, the Criminal Appeal Act abolished the writ of error in criminal appeal and allowed, on the fiat of the Attorney-General, a right of appeal to the House of Lords[8].

While the four Lords of Appeal in Ordinary proved sufficient for the appellate work of the House, the emergence of self-governing dominions within the Empire had increased the burden of work in the Judicial Committee of the Privy Council. The Appellate Jurisdiction Act 1913 permitted the appointment of two extra Lords of Appeal in Ordinary. Gradually, appeals took longer to hear in both the House of Lords and in the Judicial Committee of the Privy Council. The professionalisation of the two courts had led to a more reflective approach. One measure to meet this problem was the appointment of an extra Lord of Appeal in Ordinary and this was granted under the Appellate Jurisdiction Act 1929. The other measure was to limit the right of appeal to the House; the Administration of Justice (Appeals) Act 1934 laid down that leave to appeal had to be granted by the Court of Appeal or the House of Lords.

Throughout this period, the convention remained that appeals were considered by the whole House of Lords. The Lords of Appeal in Ordinary heard appeals in the Chamber of the House. Noise caused by workmen repairing war damage to the Palace of Westminster forced the Lords of Appeal in Ordinary to move to a committee room in 1948 and this resulted in the establishment of the Appellate Committee. Judgments were and are still given in the Chamber of the House. With appeals being heard away from the Chamber, it proved more difficult for Lord Chancellors to participate in the judicial work of the House.

[7] Under the Appellate Jurisdiction Act 1887, retired Lords of Appeal in Ordinary were allowed to sit for life.
[8] The need for the Attorney-General's fiat was abolished by the Administration of Justice Act 1960. Scottish criminal appeals to the House were not, and are still not allowed.

II. THE CONTEMPORARY JUDICIAL WORK OF THE HOUSE

1. Jurisdiction

The House of Lords is now the ultimate court of appeal in Great Britain and Northern Ireland, except for Scottish criminal cases. An appeal lies to the House:

1) in civil and criminal cases, from the Court of Appeal in England and Wales, by leave of that court or of the House of Lords;

2) in civil cases, from the Court of Session in Scotland, leave to appeal not normally being required;

3) in civil and criminal cases, from the Court of Appeal in Northern Ireland, by leave of that Court or of the House of Lords;

4) in civil and criminal cases, subject to statutory restrictions, direct from a decision of the High Court in England and Wales or the High Court in Northern Ireland, by leave of the House of Lords (known as the "leapfrog" procedure, because it bypasses the respective Courts of Appeal, instituted by the Administration of Justice Act 1969, but rarely used);

5) from the Court Martial Appeal Court, by leave of that court or of the House of Lords.

The House also exercises an original jurisdiction in regard to matters of peerage. *Halsbury's Laws of England* states:

> From the time of Charles II all doubtful or contested claims to peerage have been referred to the House by the Crown not least because (until the passing of the House of Lords Act 1999) the determination of such a claim affected the membership of the House. The Crown acts on the recommendations of the House made by humble Address following a resolution of the House made on report from the Committee for Privileges. The jurisdiction of the House extends to claims to Irish peerages, although peers of Ireland do not sit in the House.
>
> (*Halsbury's Laws of England*, 4th ed., Vol. 10, para. 357)

Under the Standing Orders of the House, sittings of the Committee for Privileges on peerage claims require the presence of at least three Lords of Appeal (S.O.78).

2. Constitution of the House for hearing and determining appeals

Under the Appellate Jurisdiction Act 1876, s. 5 an appeal may not be heard or determined by the House unless not fewer than three of the following persons, designated "Lords of Appeal", are present: the Lord Chancellor, the Lords of Appeal in Ordinary (known colloquially as "Law Lords"), any peer of Parliament who holds, or who has held, any high judicial office. In practice, the latter category comprises the Lord Chief Justice, the Master of the Rolls, members or former members of the Court of Session who have peerages (Lords Cameron of Lochbroom, Cullen of Whitekirk, Hardie, and Mackay of Drumadoon), members

or former members of the Northern Ireland superior courts who have peerages, members or former members of Commonwealth superior courts who have peerages, and former Lord Chancellors.

Except for the serving Lord Chancellor, a Lord is not eligible to sit as Lord of Appeal after the age of 75, except for the purpose of completing proceedings already begun. This is the result of a provision added to s. 5 of the 1876 Act by the Judicial Pensions and Retirement Act 1993, s. 26(1), which also provided that Lords of Appeal in Ordinary must vacate office on attaining 70 years of age. Thus a Lord of Appeal in Ordinary, on resigning from office at 70, may still participate in judicial business until he is 75.

At present, the maximum number of Lords of Appeal in Ordinary is 12 (Administration of Justice Act 1968, s. 1(1) (a) as amended in 1994 by Order in Council), two of whom are normally appointed from Scotland (currently Lords Hope of Craighead and Rodger of Earlsferry) and one from Northern Ireland (currently Lord Carswell). They are appointed by the Crown by letters patent on the advice of the Prime Minister, qualification for appointment being to have held high judicial office for not less than two years or to have had right of audience in the superior courts for not less than 15 years (1876 Act, s. 6 as amended).

Until 1984 it was a convention that the office of Senior Law Lord was automatically assumed by the longest serving Law Lord. However, on 27th June 1984 (HL *Hansard*, cols. 914-918) Lord Hailsham, the Lord Chancellor, announced that henceforth the Senior Law Lord and his deputy would be appointed independently, following the appointment process for other Law Lords, bringing the process "into line with what is now the normal practice in other parts of the judicial system" (col. 916). Accordingly, the Lord Chancellor puts a list of names to the Prime Minister who then makes a recommendation to the Queen.

The maximum number of Lords of Appeal in Ordinary was originally 4 under the 1876 Act, but has gradually been increased. The maximum was set at 7 in 1945, 9 in 1947, 11 in 1968 and 12 in 1994 (HL *Hansard*, 11th December 2001, col. WA195).

In practice, it is the Lords of Appeal in Ordinary who carry out the bulk of the judicial work, sitting in panels of 5, but sometimes 7 or 9 for cases of great importance. Thus there was a panel of 7 members in *Pepper v. Hart* [1993] A.C.593 (the use of *Hansard* in cases of statutory interpretation), in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147 (the re-hearing of extradition proceedings against General Pinochet of Chile, after the previous decision of the House was set aside on the ground that the Appellate Committee was improperly constituted), and in *A(FC) and others(FC) v. Home Secretary* [2005] UKHL71 (evidence obtained by torture); and a panel of 9 members in *A(FC) and others(FC) v. Home Secretary* [2005] 2 A.C. 68 (the legality of indefinite detention) and in *Jackson v. Attorney General* [2005] UKHL56 (the validity of the Parliament Act 1949 and the Hunting Act 2004 which was passed using the 1949 Act procedure).

Halsbury's Laws of England (4th ed., Vol. 10, para. 369, note 8) comments that the current number of 12 enables the Lords of Appeal in Ordinary "each day to form a panel of five in the House of Lords and a panel of five in the Judicial Committee of the Privy Council…. with two Lords able to work on other tasks both connected with these jurisdictions (such as petitions for leave and the drafting of opinions) and extra-judicial (such as other business in the House, participation as non-permanent judges of the court of final appeal in Hong Kong, the conduct of public inquiries and academic commitments). As most Lords of Appeal in Ordinary have extra-judicial commitments, the Lords of Appeal (largely being retired Lords of Appeal in Ordinary under the age of 75) are regularly called upon to sit."

As regards participation in debates and votes in the House, the Lords of Appeal in Ordinary made a statement in the House read by Lord Bingham of Cornhill, the Senior Law Lord, on 22nd June 2000, in response to a recommendation by the Royal Commission on the Reform of the House of Lords, setting out the general principles for such participation and also eligibility to sit on related cases, as follows:

> I should tell the House that my noble and learned friends have considered this recommendation and have agreed on the terms of a Statement to give effect to it. I will now read the Statement which has been 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)]".[9]
>
> (HL *Hansard*, 22nd June 2000, cols. 419–420)

A table showing interventions in the House of Lords since that statement by the Lords of Appeal in Ordinary then in office is given in Appendix 8 to the Report of the Lords Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill [HL]* (HL Paper 125-I, 2003–04).

3. Appeal Committees and Appellate Committees

Appeals from England and Wales and Northern Ireland require leave to appeal either from the court below or from the House. Petitions for leave to appeal are heard by an Appeal Committee of three Lords of Appeal. If leave is granted, or if leave is granted by the court below, the appeal proceeds to an Appellate Committee of five (sometimes seven, see above) Lords of Appeal for a full hearing.

[9] In this case principles and guidelines were laid down regarding the disqualification of judges on grounds of bias.

Leave to appeal is not normally required for Scottish appeals which proceed directly to an Appellate Committee provided that two counsel have certified the reasonableness of the appeal. This was also the practice for English and Northern Irish appeals before legislation in 1934 and 1962.

Two Appellate Committees of which all Lords of Appeal are members, are established at the start of each session of Parliament by Standing Order of the House. The chairman of any such Committee is the Lord Chancellor, if present; in his absence the senior Lord of Appeal in Ordinary takes the chair.

The responsibility for determining the composition of Appellate and Appeal Committees was set out in a Lords written answer of 30th July 1998 as follows:

> Responsibility for determining the composition of the House of Lords in its judicial capacity, and of Appellate and Appeal Committees, lies with the Lord Chancellor. However, for many years it has been the policy of successive Lord Chancellors in practice to delegate this responsibility to the senior Lord of Appeal in Ordinary.
>
> (HL *Hansard*, 30th July 1998, col. WA220)

The extent of judicial sittings by Lord Chancellors in recent years has varied. Figures were given in the course of a debate, on the House of Lords and the separation of powers, on 17th February 1999 (HL *Hansard*, cols. 710-739). The then Lord Chancellor, Lord Irvine of Lairg, stated that Lord Gardiner, who was Lord Chancellor from 1964 to 1970, sat only 4 days; Lord Hailsham, during his first period of office from 1970 to 1974, sat 28 days, and in his second period of office from 1979 to 1987, for 53 days; Lord Elwyn-Jones, 1974 to 1979, for 8 days; Lord Havers, who was Lord Chancellor for a short period in 1987, did not sit at all; Lord Mackay of Clashfern, 1987 to 1997, for 60 days (col. 736). Lord Irvine himself sat for 17½ days, the last being on 25th October 2001, in the case of *AIB Group (UK) P.L.C. v. Martin*.

During the same speech, Lord Irvine also stated the circumstances in which it is generally regarded as inappropriate for the Lord Chancellor to sit judicially, as follows: "I am unwilling to lay down any detailed rules because it is ever a question of judgment combined with a need to ensure that no party to an appeal could reasonably believe or suspect that the Lord Chancellor might, because of his other roles, have an interest in a specific outcome. Examples might be where the lawfulness of a decision or action by any Minister or department might be at issue"; and as regards criminal appeals he said, "The furthest I would go is to say 'any appeal where the Government might reasonably appear to have a stake in a particular outcome'" (col. 736).

On 23rd February 2000 Lord Irvine further stated: "The Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged" (HL *Hansard*, 23rd February 2000, col. WA33); and on 7th July 2000 (HL *Hansard*, cols. WA163-164) he associated himself, as regards eligibility to sit on appeals, with the statement made by Lord Bingham on behalf of all the Lords of Appeal in Ordinary on 22nd June 2000, already mentioned (see above).

In the press release of 12 June 2003 from the Prime Minister's Office which announced the major constitutional changes which eventually resulted in the Constitutional Reform Act 2005, including the creation of a new Supreme Court, it was stated that the new Lord

Chancellor, Lord Falconer of Thoroton, would not sit as a judge in the House of Lords before the new Court was established.

Over the past five years the judicial workload of the House has remained steady, with appeals from Scotland and Northern Ireland increasing, as follows:

Petitions for leave to appeal disposed of

	2000	2001	2002	2003	2004
England and Wales	218	260	261	191	258
Scotland	-	-	-	-	-
Northern Ireland	11	9	13	8	13
Total	229	269	274	199	271
Allowed	58	73	94	63	95

Appeals disposed of

	2000	2001	2002	2003	2004
England and Wales	76	80	66	59	64
Scotland	6	4	4	3	10
Northern Ireland	1	1	2	3	3
Total	83	85	72	65	77

(Annual *Judicial Statistics*, DCA)

4. Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council was set up under the Judicial Committee Act 1833, under which appeals formerly heard before a committee of the whole Privy Council were to be heard by this special committee.

The core members of the Committee are the 12 Lords of Appeal in Ordinary. In addition, other judges who have been appointed as Privy Counsellors may sit. These include: the Lord Chancellor; former Lord Chancellors and retired Law Lords up to the statutory judicial retiring age of 75; the judges of the Court of Appeal in England and Wales and retired judges of that court up to the statutory age limit; the senior judges in Northern Ireland; senior judges in Scotland and those who have retired from office (up to 75); and senior judges from various Commonwealth countries. However, the Lord Chancellor will no longer be a member of the Judicial Committee when the new Supreme Court is created under the Constitutional Reform Act 2005 (being excluded by virtue of s. 138 and Schedule 16 of that Act).

The jurisdiction of the Committee comprises:

1) appeals from a number of independent Commonwealth states (former UK colonies, mostly in the Caribbean), British Overseas Territories, Guernsey, Jersey and the Isle of Man;

2) appeals from the regulatory body for veterinary surgeons (appeals from regulatory bodies for doctors, dentists and other health care professionals having been removed from the jurisdiction of the Judicial Committee to that of the High Court by the National Health Service Reform and Health Care Professionals Act 2002);

3) "devolution issues" under the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998 (these will be transferred to the new Supreme Court when the relevant provisions of the Constitutional Reform Act 2005 come into force);

4) appeals under the Church of England Pastoral Measure 1983;

5) appeals from the Court of Admiralty of the Cinque Ports and appeals in prize cases from all Admiralty courts, including the High Court.

Although formally the House of Lords in its judicial capacity and the Judicial Committee are separate institutions, in practice their work overlaps as the core members of both bodies are the 12 Lords of Appeal in Ordinary. The Constitution Unit, in its study *The Future of the United Kingdom's Highest Courts* (2001), commented:

> It is normal for five Law Lords to be sitting on an Appellate Committee while, concurrently, others are sitting on a board of the Judicial Committee. …The Law Lords have their personal offices in the Palace of Westminster and use the House of Lords' library facilities when preparing judgments for the Judicial Committee as well as the Appellate Committee. The relationship between the two Committees has had to be expressed in formal legal rules of precedent in the UK's legal system. Judicial Committee judgments given in its overseas jurisdictions are only of persuasive, not binding, authority in the courts of England and Wales, Northern Ireland and Scotland.

However,

> The devolution Acts contain a significant new rule of precedent. The Scotland Act 1998, section 103(1) provides, like the others, that 'Any decision of the Judicial Committee in proceedings under this Act ….. shall be binding in all legal proceedings (other than proceedings before the [Judicial] Committee).' This applies to
>
> proceedings in the Appellate Committee like all other courts. In relation to devolution issues, which include questions of Convention rights, the Judicial Committee is therefore now the UK's highest court.
>
> (The Constitution Unit, *The Future of the United Kingdom's Highest Courts* (2001) section 2.4)

When the new Supreme Court is created under the Constitutional Reform Act 2005 these provisions on precedent will be deleted by that Act as they will then be otiose, the devolution jurisdiction of the Judicial Committee being transferred to the new Court.

The bulk of the Committee's work consists of appeals from independent Commonwealth states, British Overseas Territories, Guernsey, Jersey and the Isle of Man. Thus in 2000 the Committee disposed of 52 appeals from these sources; 52 in 2001; 59 in 2002; 59 in 2003 and 60 in 2004 (Annual *Judicial Statistics*, DCA).

All of these figures include New Zealand, which in each of the years given was one of the largest sources of appeals (the other being Trinidad and Tobago). However, in 2003 New Zealand legislated to abolish appeals to the Judicial Committee after the end of that year; at the end of 2004 there were only 8 appeals from New Zealand still outstanding and these were likely to be disposed of before the end of 2005 (*Judicial Statistics 2004*, DCA, page 8).

In the Caribbean, the Caribbean Court of Justice, which would replace the Judicial Committee as a final court of appeal for most of the Commonwealth countries in that region, was established in April 2005. So far, however, only Barbados and Guyana have signed up to the final appellate role for the Court. The Court results from an agreement made in February 2001 by the signatories of the Treaty of Chaguaramas (1973), which established the Caribbean Community Single Market and Economy (CARICOM).

In its devolution jurisdiction the number of appeals disposed of by the Judicial Committee remains low. Thus in 2000 (when the jurisdiction began) there were 3 such appeals; 10 in 2001; 4 in 2002; 1 in 2003; and 4 in 2004. All were from Scotland (Annual *Judicial Statistics*, DCA).

Commenting on the combined effect of the loss of appeals from New Zealand, the establishment of the Caribbean Court of Justice and the forthcoming transfer of the devolution jurisdiction to the new Supreme Court, the DCA's *Judicial Statistics 2004* concludes that "Looking ahead, there is likely to be a decline in the Judicial Committee's volume of work" (page 8).

III. THE CONSTITUTIONAL REFORM ACT 2005 – A CHRONOLOGY

This section of the Note gives a chronology of the Constitutional Reform Act 2005, tracing its antecedents and the passage of the Bill through both Houses, focusing on key changes made to the Bill relating to the Lord Chancellor and the Supreme Court, as well as noting relevant reports published during that time; and finally going on to note developments since the Act received Royal Assent on 24 March 2005. It does not cover the issue of the Speakership of the House of Lords.

More detailed consideration of the background to the reforms may be found in the Lords Library Note, *Responses to Proposals for Constitutional Reform: A Supreme Court for the United Kingdom* (LLN 2004/001, 27 January 2004) and in two Commons Library Research Papers, *The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments* (RP 05/06, 13 January 2005) and *The Constitutional Reform Bill [HL] – the office of Lord Chancellor* (RP 05/05, 12 January 2005).

12 June 2003

The Prime Minister's Office issued a press release, headed *Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs*. This announced changes to Government departments, including the creation of a Department for Constitutional Affairs incorporating most of the responsibilities of the former Lord Chancellor's Department, an end to the judicial role of the Lord Chancellor and his role as Speaker of the House of Lords, the establishment of a statutory Judicial Appointments Commission and the creation of "a new Supreme Court to replace the existing Law Lords operating as a Committee of the House of Lords". The reforms were stated to be "part of the continuing drive to modernise the constitution and public services".

18 June 2003

The Prime Minister made a statement to the House of Commons on the reform package (HC *Hansard*, 18 June 2003, cols. 357–372), which was repeated in the House of Lords (HL *Hansard*, 18 June 2003, cols. 809–822).

Mr Blair explained the rationale of the reforms as follows:

> At present, judges are, effectively, selected by the Lord Chancellor. It is increasingly anomalous for a Minister – and an unelected one at that – to choose judges in that way. Following the Human Rights Act 1998, such a system is particularly outdated. The selection of judges should be by a transparent process, independently conducted. We propose to establish an independent judicial appointments commission to recommend candidates for appointment as judges on an open basis – something long advocated by many inside and outside the legal profession. There is already such an independent commission in place for selecting judges in Scotland and one forms part of the agreed settlement in Northern Ireland. The Lord Chancellor will also cease to sit as a judge, and the Appellate Committee of the House of Lords will become a fully independent supreme court. … There is one further change. Again, virtually uniquely of any major democracy, the Speaker of the Upper Chamber is a member of the Cabinet appointed by the Prime Minister, but we are now inviting the House of Lords to choose its own Speaker by a process that the House itself should determine. That

> will enable the speakership to be independent of the Executive, as is the Speaker in the House of Commons. … The reforms that I have outlined are essential acts of constitutional modernisation. They follow on the success of devolution to Scotland and Wales, the Human Rights Act 1998, freedom of information, and the removal of 90 per cent of the hereditary peers from the House of Lords.
>
> (HC *Hansard*, 18 June 2003, cols. 357–358)

14 July 2003

The Department for Constitutional Affairs issued consultation papers on the proposed Judicial Appointments Commission and the new Supreme Court: *Constitutional reform: a new way of appointing judges* (DCA, CP 10/03); *Constitutional reform: a Supreme Court for the United Kingdom* (DCA, CP 11/03). (A third consultation paper was also issued at the same time: *Constitutional reform: the future of Queen's Counsel* (DCA, CP 08/03)).

18 September 2003

Further consultation papers were issued by the Department for Constitutional Affairs, one on the office of the Lord Chancellor and another on House of Lords reform: *Constitutional reform: reforming the office of the Lord Chancellor* (DCA, CP 13/03); *Constitutional reform: next steps for the House of Lords* (DCA, CP 14/03).

26 November 2003

The Government announced in the Queen's Speech that it intended to implement the proposals for a Supreme Court, reforming the judicial appointments system and abolishing the current office of Lord Chancellor (HL *Hansard*, 26 November 2003, col. 3).

26 January 2004

The Lord Chancellor, Lord Falconer of Thoroton, made a statement in the House of Lords announcing the details of a "Concordat" that had been agreed between himself and the Lord Chief Justice, Lord Woolf (acting on behalf of the judiciary), regarding the judiciary-related functions of the Lord Chancellor, on the basis of that office being abolished under the forthcoming Bill (HL *Hansard*, 26 January 2004, cols. 12–30). The proposals in the "Concordat" included clarification of the respective constitutional roles of the Secretary of State for Constitutional Affairs and the Lord Chief Justice (the latter to assume the role of head of the judiciary in England and Wales), the new system for judicial appointments (to be handled by the proposed Judicial Appointments Commission), judicial training, complaints and discipline.

Parts of the Concordat were eventually reflected in the Constitutional Reform Act 2005. As the Lord Chancellor later explained in giving evidence to the Lords Select Committee on the Constitution:

> The concordat was given effect to, or parts of it were given effect to, in the Constitutional Reform Act 2005; not all of it required legislation. It is a statement of the Lord Chancellor and the then Lord Chief Justice's position as to how the

> relationship between the judges and the Executive will thenceforth be conducted. It remains a statement of that. I believe it has constitutional effect because of that. It was a significant constitutional document.
>
> (House of Lords Select Committee on the Constitution, *Meeting with the Lord Chancellor*, HL Paper 84, 2005–06, 13 December 2005, Q. 4)

The full text of the Concordat was published as a separate document by the DCA: *Constitutional Reform: The Lord Chancellor's judiciary – related functions: Proposals* (DCA, 26 January 2004).

On the same day the DCA also published summaries of the responses to the consultation papers that were issued in July and September (see above): *Constitutional reform: a new way of appointing judges – Summary of responses to consultation* (DCA, CP (R) 10/03, 26 January 2004); *Constitutional reform: a Supreme Court for the United Kingdom – Summary of responses to consultation* (DCA, CP (R) 11/03, 26 January 2004); Constitutional *reform: the future of Queen's Counsel – Summary of responses to consultation* (DCA, CP (R) 08/03, 26 January 2004).

9 February 2004

The Lord Chancellor made a further statement to the House of Lords, setting out the Government's proposals for a "new United Kingdom Supreme Court" (HL *Hansard*, 9 February 2004, cols. 926–941). They were eventually reflected, with amendments, in Part 3 of the Constitutional Reform Act 2005.

The Lord Chancellor stated that "Just as our proposals on the judicial functions of the Lord Chancellor rest on the separation of powers between the judiciary and the executive, so too with our court system we believe that the time has come to make a clear and transparent separation between the judiciary and the legislature. By creating a Supreme Court we will separate fully the final court of appeal from Parliament" (HL *Hansard*, 9 February 2004, col. 926).

10 February 2004

The House of Commons Constitutional Affairs Select Committee published a report on the Government's proposals. The Committee's general conclusion was as follows:

> The proposed changes consequent on the redistribution of responsibilities and proposed abolition of the office of Lord Chancellor are being bundled together and dealt with over a very short timescale as a single reform. This is unwieldy and, in the case of some of the proposals, precipitate. The proposed changes could be brought in incrementally.
>
> The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political.

> The Committee recommends that the Government proceed with the Bill as draft legislation to enable proper scrutiny of these fundamental changes.
>
> (House of Commons Select Committee on Constitutional Affairs, *Judicial appointments and a Supreme Court (court of final appeal)* (HC 48, 2003–04, page 4)

The Government published its response to this report on April 2004: *Judicial appointments and a Supreme Court (court of final appeal): the Government's response to the report of the Constitutional Affairs Committee* (Cm 6150, April 2004). It took the view that from the time it announced its intention to legislate in these areas in June 2003 to the end of the legislative process, it would have provided for "close to two years of debate – both within Parliament and beyond – on the proposals" (*ibid.*, para. 49). On the Committee's recommendation that the abolition of the office of Lord Chancellor should be delayed until the reforms were established, the Government replied that it was "taking forward the abolition of the office of Lord Chancellor as part of a wider programme of constitutional reform. It is important that these changes fit together in a comprehensive fashion. The current office of Lord Chancellor does not fit with these improvements and must go". The office would not be abolished until all the relevant provisions of the Constitutional Reform Bill had been brought into effect and until alternative arrangements for carrying out his functions were in place (*ibid.*, paras. 51 and 52).

8 March 2004

Second Reading of the Constitutional Reform Bill [HL] in the House of Lords.

At the end of the debate Lord Lloyd of Berwick (a former Lord of Appeal in Ordinary) moved an amendment to the motion committing the Bill to a Committee of the Whole House, calling for the Bill to be committed instead to a Select Committee and this was agreed by 216 votes to 183 (HL *Hansard*, 8 March 2004. cols. 979–1006 and 1023–1112).

22 March 2004

The Lords Select Committee on the Constitutional Reform Bill [HL] was appointed, consisting of 16 members (5 Labour, including the Lord Chancellor, Lord Falconer of Thoroton, and Lord Richard, Chairman, 5 Conservatives, 3 Liberal Democrats and 3 crossbenchers). The Committee was instructed to report to the House by 24 June 2004 (HL *Hansard*, 22 March 2004, cols. 468–472).

On the same day the House agreed that the Bill could be carried over to the following Session (HL *Hansard*, 22 March 2004, col. 472).

2 July 2004

The Lords Select Committee on the Constitutional Reform Bill [HL] published its report.

The Committee agreed over 400 amendments to the Bill, made "on the basis that they improve and clarify the bill while leaving the main structure of the bill in its present form". However, on at least two central features of the Bill, the abolition of the office of Lord Chancellor and the establishment of a Supreme Court, the Committee's views were "more or

less evenly divided" (House of Lords Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill [HL]*, HL Paper 125, 2003–04, para. 7).

Key areas where there was no agreement included the following:

a) Whether the office of Lord Chancellor should be abolished. Some members wished to retain a minister called the Lord Chancellor who would be a senior lawyer and sit in the House of Lords. Others preferred that the minister be a Secretary of State, who might not be a lawyer and might not sit in the Lords. There was some support for the view that he should be called a Minister for Justice, rather than for Constitutional Affairs (*ibid.*, paras. 421–428).

b) Whether the provision in clause 1 of the Bill (which became s. 3 of the Act) for judicial independence should be strengthened (*ibid.*, para. 432).

c) Whether the Appellate Committee of the House of Lords should be replaced by a separate Supreme Court (*ibid.*, paras. 438–440).

d) Whether commencement of Part 2 of the Bill, providing for the new Supreme Court (which became Part 3 of the Act), should be delayed pending a move to permanent premises (*ibid.*, para. 441).

e) Whether senior judges who hold peerages should be disqualified from sitting and voting in the House of Lords (*ibid.*, para. 484).

The Committee agreed that it was "desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary, particularly in the event of the senior judges being excluded from the House. Such a committee should not seek to hold individual judges to account" (*ibid*,. para. 485).

13 and 14 July, 16 September, 11 and 18 October, 11 November 2004

Following publication of the Lords Select Committee's report, the Constitutional Reform Bill [HL] as amended by the Committee was recommitted to a Committee of the Whole House. The Committee stage began on 13 July 2004 and ended on 11 November 2004.

The most controversial aspect of the Committee stage was in respect of Part 1 of the Bill (now Part 2 of the Act) when the Lords voted by 240 votes to 208 to retain the office and title of Lord Chancellor (HL *Hansard*, 13 July 2004, cols. 1142–1194).

Nevertheless, towards the end of the Committee stage the Lord Chancellor, Lord Falconer of Thoroton, made it clear that this decision would not preclude the Government from seeking to reverse this and restore the position of the Secretary of State for Constitutional Affairs in the House of Commons (HL *Hansard*, 11 October 2004, col. 13).

20 July 2004

On 20 July 2004 the Lords Select Committee on the Constitution, whose remit is to examine the constitutional implications of all public Bills, published a short report on the Constitutional Reform Bill (HL Paper 142, 2003–04). The Committee concluded that in view of the comprehensive analysis of the issues already undertaken by the Select Committee on

the Bill, it would be otiose to duplicate its work; but, as the Bill was of undoubted constitutional significance, the Committee would monitor its progress and, if necessary, issue a further report at a later date (*ibid.*, para. 4) (and, in fact, the Committee published a report on the Act on 13 December 2005, which is considered below).

7, 14 and 20 December 2004

Having been carried over from the 2003–04 to the 2004–05 Session, the Constitutional Reform Bill [HL] completed its remaining stages in the Lords, with the Report stage being taken on 7 and 14 December 2004 and the Third Reading on 20 December 2004.

On the first day of the Report stage, the Lords voted effectively to codify the constitutional conventions that the holder of the office of the (newly retained) Lord Chancellor should be a member of the Lords (by 229 votes to 206: HL *Hansard*, 7 December 2004, cols. 749–778) and also be a senior lawyer (by 215 votes to 175: HL *Hansard*, 7 December 2004, cols. 779–787).

On the second day of the Report stage the Lord Chancellor laid a written statement in the House of Lords on the location of the Supreme Court building and its cost. The Lord Chancellor stated that:

> Middlesex Guildhall is my preferred option for housing the Supreme Court.
>
> There are 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.
>
> … As the detailed designs are developed, I will need to remain satisfied that they fully meet the operational requirements of a modern Supreme Court. This will, of course, require the normal planning approvals … The Law Lords have continuing reservations as to the suitability of this building to house the Supreme Court of the United Kingdom. I will continue to consult them closely on the issues. The building for the new Supreme Court needs to meet the statement of requirements that was agreed with Lord Bingham of Cornhill in August 2003 and subsequently developed in discussion with the Law Lords' Supreme Court Sub-committee, chaired by Lord Nicholls of Birkenhead. The headline requirement was for a building measuring at least 3,500 square metres, including sufficient space to enable co-location with the Judicial Committee of the Privy Council (currently based in Downing Street) … The cost of establishing the Supreme Court at Middlesex Guildhall will be approximately £30 million in current terms.
>
> (HL *Hansard*, 14 December 2004, cols. WS71–74)

On the same day a "sunrise clause" in relation to the Supreme Court was added by an amendment introduced by the Government (HL *Hansard*, 14 December 2004, cols. 1320–1321). The effect of the clause (which became s. 148 (3) (4) (5) of the Act) is that the Supreme Court would not be set up until the Lord Chancellor is satisfied that the Court will be provided with appropriate accommodation in accordance with written plans approved by him, after consultation with the Lords of Appeal in Ordinary in office at the time.

The Lord Chancellor explained that only with "a clear and separate building does the functional and operational separation, so vital to the proposal, occur" and so he agreed with those who wished to insert a sunrise clause in the Bill, which had been "much discussed around the House" and had been "agreed with a senior Law Lord" (HL *Hansard*, 14 December 2004, col. 1215).

At Third Reading the Lord Chancellor moved the final text of an amendment, which became s. 1 of the Act, declaring that the Act does not adversely affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. This text had been agreed in tripartite discussions with Conservative and Liberal Democrat spokesmen (Lords Kingsland and Goodhart, respectively) and was in response to concerns which they had expressed at Report stage. The Lord Chancellor explained that they were all agreed that they did not want to change the Lord Chancellor's existing role in relation to the rule of law. "That role goes further than simply respecting the rule of law in discharging his ministerial functions. It includes being obliged to speak up in Cabinet or as a Cabinet Minister against proposals that he believes affect the rule of law. That role does not require him proactively to police every act of government. The role is not one that is enforceable in the courts". At Report stage, Lords Kingsland and Goodhart had sought reassurance that the Government's amendment covered the Lord Chancellor's "constitutional duty to speak up in Cabinet". The agreed text provided that clarity (HL *Hansard*, 20 December 2004, cols. 1538–1540).

17 January 2005

Second Reading of the Constitutional Reform Bill [HL] in the House of Commons.

During the debate the Parliamentary Under-Secretary of State for Constitutional Affairs, Christopher Leslie, indicated that the Government had accepted the Lords' decision to retain the office and title of Lord Chancellor as "many attach a symbolic value to the title" (and as a result, at Committee stage in the Commons, the remaining references to "Minister" in the Bill were replaced with references to the newly retained Lord Chancellor: HC *Hansard*, 31 January 2005, cols. 620–637). In contrast, however, Mr Leslie stated that the Government would seek to reverse the Lords' amendments to the Bill that required the Lord Chancellor to be both a member of the Lords and a senior lawyer, as there were "no especially strong arguments given the new nature of the ministerial post" to retain those requirements and "the Prime Minister's choice of office holder" should not be so restricted (HC *Hansard*, 17 January 2005, cols. 558–559).

28 January 2005

The Commons Constitutional Affairs Select Committee published an update to its first report on the Bill, published in February 2004 (see above), taking account of the debates and amendments to the Bill that had occurred since then (*Constitutional Reform Bill [Lords]: the Government's proposals*, HC 275, 2004–05).

The Committee preferred on balance to keep the office of Lord Chancellor and its distinctive status, "different from that of all other members of the Cabinet, because as we said in our earlier report when contrasting the role of the Lord Chancellor with other ministers, the Lord Chancellor 'has a special constitutional importance enjoyed by no other member of the Cabinet and … is usually at the end of his career (and thus without the temptation of possible advancement).' Although it may be more likely that someone in the House of Lords as at present constituted has the seniority and lack of aspiration towards further office which we considered desirable, it is by no means certain, and there will be suitable candidates for the post in both Houses. There does not, therefore, seem to be a compelling argument for insisting that the Lord Chancellor must be a member of the Upper House" (*ibid.*, page 29, para. 5).

The Committee also concluded that it would be an advantage for the Lord Chancellor to be a senior lawyer, as he would have key roles in relation to the judiciary, judicial independence, the rule of law, judicial appointments and discipline (*ibid.*, page 29, para. 6).

On the Supreme Court, the Committee concluded, inter alia, that the Middlesex Guildhall "if chosen, will have the potential to be an excellent base for the new court of final appeal for the United Kingdom providing that it is adapted to allow the new court to function as a modern appellate court, as the judges have urged" (*ibid.*, page 31, para. 18). The Committee noted with approval the acceptance of their recommendation that implementation of Part 3 of the Bill (dealing with the Supreme Court) should not take place until the new Court could sit in its own building, "thereby making clear the separation between the highest court of appeal in the United Kingdom and the legislature" (*ibid.*, page 31, para. 19).

Finally, the Committee agreed with the House of Lords Select Committee "on the importance of a continuing Committee with responsibility for judicial matters. We think that this Committee serves this function. It would be appropriate for both Houses to have their own Committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit. We do not see the necessity for inserting a provision to this effect in the Bill" (*ibid.*, page 32, para. 29).

The Committee's report has a useful Table appended setting out the principal amendments made to the Bill during its passage through the House of Lords (*ibid.*, Table B, pages 40–43).

31 January, 1 February and 1 March 2005

Committee and Third Reading of the Bill in the House of Commons.

On 31 January 2005 the Parliamentary Under-Secretary of State for Constitutional Affairs, Christopher Leslie, in response to comments made during the Second Reading debate, announced that the programme of the Bill had been changed to allow the entire Committee stage to take place on the floor of the House (HC *Hansard*, 31 January 2005, cols. 589–891).

During the Committee stage the Commons voted to remove the Lords amendments that required the Lord Chancellor to be a member of the Lords and a senior lawyer (HC *Hansard*, 31 January 2005, cols. 642–666, 666–684).

15 March 2005

The House of Lords considered the Commons amendments. The Lords voted (by 215 to 199) to disagree with the Commons amendments leaving out the requirements that the Lord Chancellor should be both a member of the Lords and a senior lawyer (HL *Hansard*, 15 March 2005, cols. 1211–1241).

16, 21 and 24 March 2005

In response to the above "message" from the Lords and in an attempt to break the impasse between the two Houses, the Parliamentary Under-Secretary of State for Constitutional Affairs, Christopher Leslie, successfully moved in the Commons an amendment in lieu, to the effect that the Lord Chancellor should be qualified by experience as a Minister, as a member of either House, as a qualifying practitioner, as a university law teacher or by other experience that the Prime Minister considers relevant (HC *Hansard*, 16 March 2005, cols. 358–374).

On 21 March 2005 the House of Lords agreed to these changes (HL *Hansard*, 21 March 2005, cols. 13–46) and on 24 March 2005 the Constitutional Reform Bill [HL] received the Royal Assent.

After the Act

On 13 December 2005 the House of Lords Select Committee on the Constitution published a Report on the Act, *Constitutional Reform Act 2005* (HL Paper 83, 2005–06). The Report gives an outline of the Act and then goes on to make observations on the general nature of the constitutional changes and on each Part of the Act.

On the general nature of the changes the Report observes:

> 41. When the Act is fully in force, an important area of the unwritten constitution will have been largely replaced by a new legislative scheme. Such matters as the appointment of judges, the place of the Law Lords in Parliament, the role of the Lord Chancellor as a judge and his powers in relation to the judiciary, the authority of the Lord Chief Justice as head of the judiciary, the disciplining of judges, and complaints against the judiciary, have hitherto all been subject to conventions and practices that have evolved over time. They will in future be governed by rules approved by Parliament. The passing of the Act reflects the view that these areas of the unwritten constitution would not have withstood the challenges to them likely to arise in the 21st century, and that the judiciary, and executive-judiciary relations, need in a modern democracy to be subject to greater openness and transparency. This does not guarantee that the new statutory scheme will work well. But it is certain that the new statute-based scheme will be supplemented by evolving conventions and practices: for example, what use will be made by the Lord Chief Justice of his power to lay written representations before Parliament? And, how will the two Houses respond to such representations when they are received? Similarly, although the office of Lord Chancellor is much changed by the Act, it will continue in being, charged with many functions affecting the judiciary and the courts. Future Prime Ministers could decide, despite the legislation, to appoint persons who would have fitted the model of Lord Chancellors in the late 20th century. But future Lord Chancellors

may come from the House of Commons and need not be lawyers. If a new-style Lord Chancellor from the Commons is appointed, the provisions in the Act that require the Lord Chancellor to uphold the rule of law and foster judicial independence will be tested for their effect and durability.

44. Now that this Act is on the statute book, it may cause attention to be given to other areas of the unwritten constitution where it may be said (as with the judiciary) that the complex structure of common law rules and principles, conventions and political practice need a more open and transparent legal base if their legitimacy is to be maintained during the present century. These unwritten areas include prerogative powers (such as foreign relations, war and peace, treaty-making and passports), the civil service, the obligations of Ministers and parliamentary privilege. If all such areas were to become the subject of legislation, the "unwritten" nature of the constitution would be much diminished.

(House of Lords Select Committee on the Constitution, *Constitutional Reform Act 2005*, HL Paper 83, 2005–06, 13 December 2005, paras. 41 and 44)

On the creation of the Supreme Court, the Report observes:

48. The proposal for a new Supreme Court ran into difficulties during the legislative process that were largely caused by the Government's handling of the proposed reform, rather than by the case for reform itself. From a separation of powers viewpoint, there is a very strong case for making a clear distinction between the judicial work of the House of Lords and its legislative work. Certainly, there has long been an important distinction in practice between the two functions of the House, but openness and transparency have often been lacking. The greater the emphasis placed on judicial independence and the rule of law, the more difficult it is to justify the presence of senior judges in the legislature. A future reform of the composition of the House of Lords might well have made it necessary in any event to cut the link between membership of the Supreme Court and membership of the House.

49. Apart from accommodation for the Court, the questions that may be asked about Part 3 of the Act relate to the powers of the President, the position of chief executive, and the duties of the Lord Chancellor in relation to resources. In several respects, the Act has improved upon proposals in the Constitutional Reform Bill. But it remains to be seen whether the Act goes far enough in providing the Supreme Court with the institutional independence that it needs, in light of the direct impact that the Court's decisions may have on policies to which the Government attaches much political importance. It is probably a pointer to future decisions in cases of exceptional significance that in December 2004, no less than nine Law Lords sat to decide the legality of indefinite detention without trial in the Belmarsh Prison case. Some reformers would still like to see the Supreme Court acquire duties of constitutional adjudication that are fully comparable with those placed on the US and Canadian Supreme Courts, and the High Court of Australia. However, there is no inexorable process that dictates that a Supreme Court must also be a constitutional court. There is certainly no basis for supposing that the present judiciary will seek a constitutional role greater than that which is assigned to them by the Human Rights Act.

(*ibid.*, paras. 48 and 49)

On the retention of the office of Lord Chancellor, the Report observes:

> 50. The most significant change made to the Constitutional Reform Bill during its process through Parliament was the decision, against the wishes of the Government, to retain the office of Lord Chancellor. Part 2 of the Act is entitled, "Arrangements to modify the office of Lord Chancellor". Although the modifications are considerable, and no return is possible to the former, rather uncertain position of the office, the Act leaves it open to future Prime Ministers to take the process of reform further by appointing a Lord Chancellor from the House of Commons or taking a step back towards the former position by appointing someone in the Gardiner/ Hailsham / Mackay / Irvine line of succession. Since there is nothing in the Act to link the position of Lord Chancellor with the office of Secretary of State for Constitutional Affairs, a future Prime Minister could make changes in the DCA and in the duties of the Secretary of State, while leaving the position of Lord Chancellor in being, with statutory duties relating to the judiciary.
>
> (*ibid.*, para. 50)

On 23 January 2006 the Lord Chancellor announced in a written statement to the House of Lords, that he planned shortly to introduce the statutory instruments required to bring into force, from 3 April 2006, those parts of the Constitutional Reform Act 2005 establishing a Judicial Appointments Commission and those parts giving statutory effect to the Concordat agreed between himself and the Lord Chief Justice (i.e. effectively ending the judicial role of the Lord Chancellor) (HL *Hansard*, 23 January 2006, col. WS45–46).

Accommodation for the Court

The accommodation for the Court was among the subjects covered by the Lords Select Committee on the Constitution in its yearly meeting with the Lord Chancellor for 2005. Asked to run through the sequence of setting up the Court, the Lord Chancellor stated that the Middlesex Guildhall would be refurbished as a Supreme Court, to be ready by 1 October 2008. On or by that date the Law Lords would move into Middlesex Guildhall to become the first members of the Supreme Court and the provisions of the 2005 Act creating a Supreme Court would be brought into effect, concluding that "the whole force of my case on the Supreme Court depends upon it being separate and identifiably separate from the House of Lords" (House of Lords Select Committee on the Constitution, *Meeting with the Lord Chancellor*, HL Paper 84, 2005–06, 13 December 2005, Q. 18).

After further questions, the Lord Chancellor stated that there was a continuing process of discussion between the Law Lords and those responsible for the refurbishment of Middlesex Guildhall. There were also planning permission and heritage issues, but although the process was not yet complete it was on target to start in accordance with the programme previously described (*ibid.*, Q. 39). The estimated cost of refurbishing Middlesex Guildhall remained at £30 million (in third-quarter 2004 prices, as announced to Parliament on 14 December 2004) (*ibid.*, Q. 42).

On 1 March 2006 the Lord Chancellor announced in a Lords written statement that the opening date for the Supreme Court was now October 2009. The refurbishment plans for the Middlesex Guildhall had been completed and would be formally presented to the Lord Chancellor on 7 March 2006 for statutory approval. The designs had been developed "in close consultation with the Law Lords, in accordance with section 148 of the Constitutional Reform Act, and meet the statement of requirement that was agreed with Lord Bingham of

Cornhill in August 2003. The general opinion of the Law Lords is that the existing plans, very imaginatively, provide reasonable accommodation for the Supreme Court within the confines of the Middlesex Guildhall, although there were some members who remain unconvinced that the building can, even re-designed as proposed, provide a suitable modern setting for the Supreme Court of the UK. We are working within the financial parameters set out in my statement of 14 December 2004. Middlesex Guildhall is a grade II* listed building that requires consent from Westminster City Council before the designs can be finalised. Our aim is to submit an application for planning approval at the end of April (HL *Hansard*, 1 March 2006, cols. WS28–30).

Academic comment

There has been some academic comment on the reforms in legal journals.

A special issue of *Legal Studies* in 2004 comprised a collection of essays on different aspects of the reforms, including comparative studies from Scotland, Australia, New Zealand, Canada, South Africa, the United States and the European Union: 'Constitutional innovation: The creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections'.

In 'Constitutional reform and the UK Supreme Court – a view from Scotland' (*Judicial Review*, 2004, pages 216–236) Aidan O'Neill, Q. C. looks at recent case law from the House of Lords and from the Judicial Committee of the Privy Council acting under its devolution jurisdiction. He points to certain tensions in which the two courts have been operating as courts for the whole of the United Kingdom and suggests that the proposed amalgamation within the new UK Supreme Court of the devolution jurisdiction of the Privy Council with the appellate jurisdiction of the House of Lords is a necessary step, but not sufficient to ensure constitutional coherence and stability for the Union.

Mark Ryan, in 'The House of Lords and the shaping of the Supreme Court' (*Northern Ireland Legal Quarterly*, 2005, pages 135–170), gives an overview of the reforms and the passage of the Bill through Parliament, arguing that in terms of the judiciary the 2005 Act is "the most important legislation since the Act of Settlement was passed three hundred years earlier".

Lord Windlesham gives an extensive two-part survey of the events surrounding the Bill in 'The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change' (*Public Law*, 2005, pages 806–823) and 'The Constitutional Reform Act 2005: the Politics of Constitutional Reform' (*Public Law*, 2006, pages 35–57).

IV THE FUTURE SUPREME COURT OF THE UNITED KINGDOM

The appellate jurisdiction of the House of Lords, together with the devolution jurisdiction of the Judicial Committee of the Privy Council, will be transferred to a separate Supreme Court of the United Kingdom, which will be established when the relevant provisions of the Constitutional Reform Act 2005 are brought into force. The Act also modifies the office of the Lord Chancellor and provides for the establishment of a Judicial Appointments Commission responsible for recommending judicial appointments in England and Wales.

The Act effectively, therefore, in relation to the judiciary, creates a separation of powers between the executive, the legislature and the judiciary for the first time in British constitutional history. The main provisions of the Act are contained in Parts 1 to 4.

Part 1, which has only one section, which was inserted at Third Reading in the House of Lords after cross-party discussion, concerns the rule of law, declaring that the Act does not adversely affect the existing constitutional principle of the rule of law, or the Lord Chancellor's existing constitutional role in relation to that principle. Parts 2 and 4 reflect the Concordat agreed between the Lord Chancellor and the Lord Chief Justice, dealing with the arrangements to modify the office of Lord Chancellor (consequent upon his relinquishing his judicial role and his role as Speaker of the House of Lords) (Part 2) and judicial appointments and discipline (Part 4).

Composition

The Supreme Court of the United Kingdom is dealt with by Part 3. Section 23 provides that the Court will comprise 12 judges (to be known as "Justices of the Supreme Court"), including a President and Deputy President, appointed by the Queen by letters patent (the number can be increased by Order in Council). The first members of the Court will be the 12 Lords of Appeal in Ordinary in office when s. 23 comes into affect (s. 24), and they will then be disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court (s. 137, see below). Section 23 cannot be brought into force until the Lord Chancellor is satisfied, after consultation with the Lords of Appeal in Ordinary, that appropriate accommodation for the Supreme Court will be provided in accordance with written plans approved by him (s. 148(4)(5) – "sunrise" provisions which were inserted by a Government amendment at Report stage in the Lords).

The current qualifications for appointment (holding high judicial office for at least 2 years or at least 15 years as a qualifying practitioner) are replicated in s. 25, but a new method of selection is created by ss. 26–31 and Schedule 8. The recommendation for appointment will continue to be made to the Queen by the Prime Minister but this will be preceded by a process conducted by an ad hoc selection commission consisting of five members, comprising the President and Deputy President of the Supreme Court and one member each from the Judicial Appointments Commissions for England and Wales, Scotland and Northern Ireland (s. 26 and Schedule 8). The selection commission must consult senior judges, the Lord Chancellor and the devolved executives (s. 27(2)). Selection "must be on merit" (s. 27(5)), the commission must ensure that the judges of the Court between them have knowledge and experience of practice in the law of each part of the United Kingdom (s. 27(8)), and the commission must have regard to guidance given by the Lord Chancellor as to matters to be taken into account (s. 27(9)). The commission then reports to the Lord Chancellor proposing a name to be notified to the Prime Minister, whereupon the Lord Chancellor must undertake further consultations (with the same persons he consulted under s. 27(2)) (s. 28(5)). Under s. 29 the Lord Chancellor may accept, reject or request the

reconsideration of the selection, and s. 30 details the grounds on which the power to reject or require reconsideration of a selection may be exercised. Section 31 makes provision for the process that the selection commission must follow if the Lord Chancellor requests reconsideration of a selection.

The tenure of a judge of the Supreme Court will be, as at present, that he will hold office during good behaviour, but removable on the address of both Houses of Parliament (s. 33). A judge will be able to retire or resign and there is procedure for declaring his office vacant if he is permanently disabled from performing his duties and is for the time being incapacitated from resigning (s. 36).

Under s. 38 judges of the Court of Appeal (and equivalent courts in Scotland and Northern Ireland) may be requested by the President of the Supreme Court to sit as acting judges; and under s. 39 there is to be a supplementary panel comprising persons who have recently held high judicial office and are under the age of 75.

Jurisdiction

The jurisdiction of the Supreme Court will, in effect, be the existing appellate jurisdiction of the House of Lords together with the devolution jurisdiction of the Judicial Committee of the Privy Council (s. 40 and Schedule 9). It is declared that the creation of the Supreme Court is not "to affect the distinctions between the separate legal systems of the parts of the United Kingdom" (s. 41(1)) and that a decision of the Supreme Court "on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom" (s. 41(2)).

For hearing appeals, the Supreme Court must consist of an uneven number of judges (at least three), of whom more than half are permanent judges and therefore less than half are acting judges (s. 42(1)); and the Court will have power to seek the assistance in any proceedings of specially qualified advisers (s. 44).

The legislative prohibition on taking photographs in court is removed in relation to the Supreme Court by s. 47.

Administration

The Supreme Court will have a Chief Executive, appointed by the Lord Chancellor after consulting the President of the Court (s. 48(1)), and s. 49 deals with the appointment of officers and staff of the Court. The Lord Chancellor is responsible for ensuring that the Court is provided with appropriate accommodation and other resources (s. 50).

Because of the creation of the new Supreme Court, the existing "Supreme Court of England and Wales" (comprising the Court of Appeal, the High Court and the Crown Court) will be renamed the "Senior Courts of England and Wales" (and similarly in Northern Ireland the existing "Supreme Court of Judicature of Northern Ireland" will be renamed the "Court of Judicature of Northern Ireland") (s. 59).

Parliamentary disqualification

Section 137 deals with the parliamentary disqualification of the judiciary. Judges are disqualified from membership of the Commons by the House of Commons Disqualification Act 1975, but the disqualification under that Act did not apply to the Law Lords as they were disqualified from the Commons by virtue of their life peerages. By s. 137 of the 2005 Act

judges of the new Supreme Court will be disqualified from the Commons, and members of the Lords will be disqualified from sitting and voting in that House if they hold a judicial post that disqualifies them from the Commons. If therefore the existing Lords of Appeal in Ordinary become judges of the new Supreme Court they will, until they retire from that Court, be unable to sit and vote in the Lords. This will also apply to the Lord Chief Justice and other senior judges who hold life peerages.

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