

Introduction

1. This Appendix provides examples of provisions in England and Wales, Northern Ireland and Scotland relating to judicial independence together with provisions relating to the selection, appointment and tenure of the senior judiciary and Law Officers in several other jurisdictions:
 - a. **The United Kingdom (England and Wales, Northern Ireland and Scotland)** – The UK is a constitutional monarchy with a bicameral legislature. The Queen is the Head of State and the Prime Minister the Head of Government. There are distinct court systems in England and Wales, Scotland and Northern Ireland. The UK Supreme Court is the final court of appeal for all UK civil cases, and criminal cases from England, Wales and Northern Ireland. A High Court and Court of Appeal are established in England and Wales and in Northern Ireland. In Scotland the superior courts are the High Court of the Justiciary and the Court of Session¹.
 - b. **The Cayman Islands** – The Cayman Islands is a parliamentary democracy with a unicameral legislature. It is a self-governing overseas territory of the UK. The Queen is the Head of State and the Premier is the Head of Government. The Governor is appointed by the Crown. The Cayman Islands have a Court of Appeal, a Grand Court and a Summary Court. Appeals beyond the Court of Appeal are heard by the Judicial Committee of the Privy Council in London².
 - c. **Gibraltar** – Gibraltar is a parliamentary democracy with a unicameral legislature. It is a self-governing overseas territory of the UK. The Queen is the Head of State and the Chief Minister is the Head of Government. Gibraltar has a Court of Appeal, Supreme Court of Gibraltar and a number of subordinate courts and

¹ Page 205, 2015 Compendium

² <https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html>

tribunals. Appeals beyond the Court of Appeal are heard by the Judicial Committee of the Privy Council³.

- d. **The Bahamas** - The Bahamas are a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The superior courts are the Supreme Court and the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council⁴.

2. The following are also of note:

- a. **The 2015 Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice⁵ ('the 2015 Compendium')** - In 2015 the Commonwealth Secretariat and British Institute of International and Comparative Law produced a document entitled 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice'. The Compendium examined the legal frameworks for the appointment, tenure and removal of judges in the superior courts of independent Commonwealth member states. Its aims were to: to provide an overview of the various approaches taken by member states to these matters; and to identify best practice, from a rule of law perspective, in the light of the Commonwealth Latimer House Principles, the Latimer House Guidelines and other relevant international norms. It includes a useful summary of findings and best practice from across the Commonwealth.⁶
- b. **The 2013 Judicial Appointments Commissions: A Model Clause for Constitutions' - the Commonwealth Lawyers Association, Commonwealth Magistrates' and Judges'**

³ <https://www.cia.gov/library/publications/the-world-factbook/geos/gi.html>

⁴ Page 132, 2015 Compendium

⁵ [http://www.biicl.org/documents/689_bingham_centre_compendium.pdf?showdocument=1;
http://thecommonwealth.org/media/press-release/commonwealth-announces-principles-judicial-appointments-tenure-and-removal](http://www.biicl.org/documents/689_bingham_centre_compendium.pdf?showdocument=1;http://thecommonwealth.org/media/press-release/commonwealth-announces-principles-judicial-appointments-tenure-and-removal)

⁶ Pages xv-xxiii

Association and the Commonwealth Legal Education Association⁷ - In 2013 the Commonwealth Lawyers Association, Commonwealth Magistrates and Judges Association and the Commonwealth Legal Education Association produced a document entitled 'Judicial Appointments Commissions: A Model Clause for Constitutions'. In producing the Model Clause, which was not intended to be prescriptive, one of the aims was to stimulate discussion about the process for the appointment of the judiciary, and to share what was considered to be evidence of best practice from around the Commonwealth. It was considered that the Model Clause should be seen as a starting point that could be developed and improved. It is understood that the Commonwealth Secretariat is currently building the Model Clause through its continuing work on a Model Judicial Service Commission Act⁸.

Guarantees of Judicial Independence

England and Wales

3. The Constitutional Reform Act 2005⁹ ('CRA05') provides that the Lord Chancellor¹⁰, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary¹¹.
4. The following particular duties are imposed for the purpose of upholding judicial independence:
 - a. The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

⁷ <http://www.cmja.org/downloads/latimerhouse/Judicial%20Appointments%20Commissions-%20CLA-CLEA-CMJA%20Report.pdf>

⁸ <http://thecommonwealth.org/media/press-release/new-commonwealth-model-law-set-improve-judicial-appointment-process>

⁹ <http://www.legislation.gov.uk/ukpga/2005/4/contents>

¹⁰ Section 1 CRA05 also provides that the CRA05 does not adversely affect – (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle.

¹¹ Section 3(1) CRA05; Sections 3(2)-(3) CRA05 exclude duties in respect of Scotland and Northern Ireland.

- b. The Lord Chancellor must have regard to: (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters¹².
5. The ‘judiciary’ for these purposes includes the judiciary of, for example: the Supreme Court; any other court established under the law of any part of the United Kingdom; Tribunals and any international court, including the International Court of Justice or any other court or tribunal which exercises jurisdiction, or performs functions of a judicial nature, in pursuance of an agreement to which the United Kingdom or Her Majesty’s Government in the United Kingdom is a party, or a resolution of the Security Council or General Assembly of the United Nations.¹³
6. In respect of the representation of the judiciary, the CRA05 also provides that the chief justice of any part of the United Kingdom¹⁴ may lay before the UK Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.¹⁵
7. The CRA05 also provides that the Lord Chief Justice holds office as President of the Courts of England and Wales and is Head of the Judiciary of England and Wales. It also states that as President of the Courts of England and Wales he is responsible: a) for representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally; (b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor; (c) for the maintenance of appropriate arrangements for the

¹² Section 3(4)-(6) CRA05

¹³ Section 3(7) CRA05

¹⁴ Section 5(5) CRA05 provides that in this section “chief justice” means, in relation to England and Wales or Northern Ireland, the Lord Chief Justice of that part of the United Kingdom; in relation to Scotland, the Lord President of the Court of Session

¹⁵ Section 5 CRA05

deployment of the judiciary of England and Wales and the allocation of work within courts¹⁶.

Northern Ireland

8. The Justice (Northern Ireland) Act 2002¹⁷ ('JNIA02'), as amended by the CRA05, provides that the following persons must uphold the continued independence of the judiciary: the First Minister; the deputy First Minister; Northern Ireland Ministers, and; all with responsibility for matters relating to the judiciary or otherwise to the administration of justice, where that responsibility is to be discharged only in or as regards Northern Ireland¹⁸.
9. The following particular duty is imposed for the purpose of upholding that independence; the First Minister, the deputy First Minister and Northern Ireland Ministers must not seek to influence particular judicial decisions through any special access to the judiciary¹⁹.
10. For these purposes "the judiciary" includes the judiciary of any of the following: the Supreme Court; any other court established under the law of any part of the United Kingdom; or any international court including the International Court of Justice or any other court or tribunal which exercises jurisdiction, or performs functions of a judicial nature, in pursuance of an agreement to which the United Kingdom or Her Majesty's Government in the United Kingdom is a party, or a resolution of the Security Council or General Assembly of the United Nations²⁰.
11. In respect of the representation of the judiciary, the CRA05 provides that the chief justice of any part of the United Kingdom²¹ may lay before the UK Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.²²

¹⁶ Section 7 CRA05

¹⁷ <http://www.legislation.gov.uk/ukpga/2002/26/contents>

¹⁸ Section 1(1) JNIA02

¹⁹ Section 1(2)-(3) JNIA02

²⁰ Section 1(4)-(5) JNIA02

²¹ Section 5(5) CRA05 provides that in this section "chief justice" means, in relation to England and Wales or Northern Ireland, the Lord Chief Justice of that part of the United Kingdom; in relation to Scotland, the Lord President of the Court of Session

²² Section 5 CRA05

12. The CRA05 also provides that the Lord Chief Justice of Northern Ireland may lay before the Northern Ireland Assembly written representations on certain matters relating to Northern Ireland that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in Northern Ireland²³.

13. The JNIA02 also provides that the Lord Chief Justice of Northern Ireland holds the office of President of the Courts of Northern Ireland and is Head of the Judiciary of Northern Ireland. As President of the Courts of Northern Ireland he is responsible: (a) for representing the views of the judiciary of Northern Ireland to Parliament, the Lord Chancellor and Ministers of the Crown generally; (b) for representing the views of the judiciary of Northern Ireland to the Northern Ireland Assembly, the First Minister and deputy Minister and Northern Ireland Ministers; (c) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Northern Ireland within the resources made available by the Lord Chancellor; (d) for the maintenance of appropriate arrangements for the deployment of the judiciary of Northern Ireland and the allocation of work within courts²⁴.

Scotland

14. The Judiciary and Courts (Scotland) Act 2008²⁵ ('JCSA08') provides that the following persons must uphold the continued independence of the judiciary: the First Minister; the Lord Advocate; Scottish Ministers; members of the Scottish Parliament and all other persons with responsibility for matters relating to the judiciary or the administration of justice where that responsibility is to be discharged only or as regards Scotland²⁶.

15. In particular the JCSA08 provides that the First Minister, the Lord Advocate and the Scottish Ministers: (a) must not seek to influence particular judicial decisions through any special access to the judiciary,

²³ Section 6 CRA05

²⁴ Section 12 JNIA02

²⁵ <http://www.legislation.gov.uk/asp/2008/6/contents>

²⁶ Section 1(1) JCSA08

and (b) must have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions²⁷.

16. For these purposes ‘judiciary’ is defined to include: the Supreme Court of the United Kingdom; any other court established under the law of Scotland and any other international court, which includes the International Court of Justice or any other court or tribunal which exercises jurisdiction, or performs functions of a judicial nature, in pursuance of an agreement to which the United Kingdom or Her Majesty’s Government in the United Kingdom is a party, or a resolution of the Security Council or General Assembly of the United Nations²⁸.
17. In respect of the representation of the judiciary, the CRA05 provides that the chief justice of any part of the United Kingdom²⁹ may lay before the UK Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.³⁰
18. The JCSA08 also provides that the Lord President is the Head of the Scottish Judiciary and in that role is responsible: for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts; for representing the views of the Scottish judiciary to the Scottish Parliament and Scottish Ministers; for laying before the Scottish Parliament written representations on matters that appear to the Head of the Scottish Judiciary to be matters of importance relating to the Scottish judiciary or the administration of justice; for making appropriate arrangements for the welfare, training and guidance of judicial office holders, and; for making and maintaining, in accordance with section 28 JCSA08, appropriate arrangements for the investigation and determination of any matter concerning the conduct of judicial office holders and the review of such determinations.

²⁷ Section 1(2) JCSA08

²⁸ Section 1(3)-(4) JCSA08

²⁹ Section 5(5) CRA05 provides that in this section “chief justice” means, in relation to England and Wales or Northern Ireland, the Lord Chief Justice of that part of the United Kingdom; in relation to Scotland, the Lord President of the Court of Session

³⁰ Section 5 CRA05

19. References to the Scottish judiciary are references to the judiciary of any court established under the law of Scotland (other than the Supreme Court of the United Kingdom)³¹.

Judicial Selection and Appointment

2015 Compendium

20. The 2015 Compendium provides:

“1.1 The appointment of judges and the rule of law

The Commonwealth Latimer House Principles recognise that in order to uphold the rule of law and dispense justice, the judiciary must be ‘independent, impartial, honest and competent’. The aim of judicial appointment processes should be to provide a reliable means of identifying persons who possess these qualities, and to do so in a manner that is legitimate, in order to sustain public confidence in the judiciary.

1.2 Criteria for judicial office

The requirement of the Commonwealth Latimer House Principles that judges should be appointed ‘on the basis of clearly defined criteria and by a publicly declared process’ conveys a fundamental commitment to transparency. At a minimum, the public must be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual applies, or is considered for appointment.

The Principles further make clear that the criteria for judicial office should be informed by the fundamental objectives of equality of opportunity, appointment on merit and the need to address gender inequity and other historic factors of discrimination in the context of their particular society.

While there is considerable agreement among Commonwealth member states that intellectual abilities, moral qualities and practical skills are all relevant to the determination of merit, there are significant differences in how states have sought to address gender inequity and other historic

³¹ Section 2 JCSA08

factors of discrimination. The causes of these problems are often complex and specific to particular societies. Although some states have modified the criteria for judicial office in an attempt to enhance judicial diversity, it is not clear whether this is always an effective or desirable approach. Alternative or additional measures may be needed to address wider causes of the problem, such as outreach programmes to attract a more diverse pool of candidates, improvements in the areas of legal education and judicial training, and changes to the working practices of the organised legal profession and the judiciary itself.

1.3 Appointment mechanisms

The Commonwealth Latimer House Principles do not specify the mechanism by which judges should be appointed. However, the Latimer House Guidelines indicate that an ‘independent process’ should be used, and recommend that a judicial appointments commission be established where no such mechanism exists.

1.4 The role of the executive

It is now relatively uncommon for judicial appointments to be in the hands of the executive alone, without the involvement of any other public body in selecting or shortlisting candidates. Only 19% of Commonwealth jurisdictions have executive-only appointment systems in this sense (appointments to the highest court are reserved for the executive in another 8% of jurisdictions, and the appointment of the Chief Justice in a further 23% of jurisdictions).

Executive-only appointment systems require a combination of legal safeguards and settled political conventions in order to be a reliable and legitimate means of appointing judges. The precise mix may differ between jurisdictions, but should include at least transparency regarding the criteria for appointment and the procedures followed, a requirement of consultation with senior judges and others, and ideally the existence of an independent body to provide oversight and deal with complaints.

1.5 The role of the legislature

In 21% of Commonwealth jurisdictions there is some legislative involvement in the appointment of judges, usually by way of confirmation of candidates selected by a judicial appointments commission.

While legislative confirmation proceedings offer the possibility of enhancing the legitimacy of the courts, which is particularly relevant at the highest level, good practice requires that the dangers of politicisation and deadlock be managed through a combination of carefully designed legislative procedures and a respectful and constructive attitude on the part of politicians to the constitutional role of the judiciary.

1.6 The composition and structure of judicial appointments commissions

In 81% of Commonwealth jurisdictions there is a judicial appointments commission which plays some role in the selection or shortlisting of candidates for judicial appointment.

It is important to ensure that judicial appointment commissions are genuinely independent and that their members have among them sufficient expertise and experience to assess the quality of candidates. An emerging standard of best practice is that judges and representatives of the legal profession (academic and practising) should constitute at least half the members of the commission, which is the case in 63% of Commonwealth jurisdictions.

It may also be valuable for a commission to include ‘lay’ members who offer a civil society perspective on the court system, or contribute expertise in other relevant disciplines such as human resources. The legal framework should ensure that the selection of lay members does not fall under political control. The need for gender balance and the representation of minorities on the commission should also be considered.

Other structural features that may affect the independence of a commission include who chairs the commission (in 72% of jurisdictions it is the Chief Justice), how long its members serve and with what security of tenure, and the extent to which the funding and staffing arrangements of the commission enable it to operate with autonomy.

1.7 The role of a judicial appointments commission

In order to ensure general transparency with regard to the appointment of judges, judicial appointments commissions should advertise judicial vacancies and conduct an open application process. The commission may consider various forms of evidence when evaluating a candidate, including application forms, references, background checks and, in some cases, written tests. It is generally desirable that a commission should interview a shortlist of candidates prior to making its selection. In a small number of jurisdictions, such interviews are held in public. Individual transparency of this kind exposes both the candidates and the commission to public scrutiny, which may be particularly beneficial in transitional societies. Other jurisdictions have established different means of holding commissions to account for their individual decisions, including ombudsman mechanisms and judicial review.

The executive remains responsible for the formal act of appointing a judge in almost all jurisdictions. Legal frameworks should clearly set out the relationship between the prior selection process conducted by the commission and role of the executive at this final stage. Best practice would require that the commission be empowered to present the executive with a single, binding recommendation for each vacancy. Alternatively, if the executive has a legal power to reject the commission's recommendation, then it should be required to provide reasons for doing so. Where the commission is required to present the executive with a shortlist of recommended candidates, the executive should be guided by the safeguarding principles applicable to executive-only systems when making its final selection (set out under 1.4 above)."³²

UK Supreme Court

21. Judicial appointments to the UK Supreme Court are made by the Crown on the recommendation of the Prime Minister, who in turn may only recommend candidates whose names have been notified by the Lord Chancellor. The Lord Chancellor may only notify the Prime Minister of candidates selected by a five-member selection commission composed of

³² Pages xv-xviii

two senior judges, one of whom will be the President of the Supreme Court unless the vacancy that is due to be filled is in respect of that position, and one member representing each of the judicial appointments bodies for England and Wales, Scotland and Northern Ireland³³. The Lord Chancellor may once reject a selected candidate and once ask the commission to reconsider its selection, but must thereafter notify a name selected by the commission at any stage in the process in relation to that particular vacancy, and not previously rejected, to the Prime Minister. The grounds for rejecting a candidate and for requiring the commission to reconsider its selection are narrowly defined and if the Lord Chancellor exercises either power, he or she must give written reasons to the commission³⁴. The CRA05 also sets out qualifications for appointment³⁵.

England and Wales

22. A Judicial Appointments Commission³⁶ is established in England and Wales³⁷. It was created on 3rd April 2006 as a non-departmental public body.

23. The Commission consists of 15 members: seven judicial members (a Lord Justice of Appeal; one puisne judge of the High Court; one senior tribunal office-holder; a circuit judge; a district judge; one judge of a first-tier tribunal or employment judge; and one non legally qualified judicial member); two practising or employed lawyers; and six lay members³⁸.

24. The Chairman of the Commission is a lay member. Twelve Commissioners, including the Chair, are appointed through open competition by a specially constituted panel and therefore independently from any profession they undertake. The other three are selected by the Judges' Council (2 senior members of the courts judiciary) or the Tribunal Judges' Council (1 senior member of the tribunals judiciary). The Judges'

³³ CRA05 Part 3 and Schedule 8; Supreme Court (Judicial Appointments) Regulations 2013;

³⁴ Page 206, 2015 Compendium; Supreme Court (Judicial Appointments) Regulations 2013; see also <https://www.supremecourt.uk/about/appointments-of-justices.html>

³⁵ S. 25 CRA05

³⁶ <https://jac.judiciary.gov.uk/>

³⁷ Page 206 2015 Compendium; CRA05, s 61 and Schedule 12

³⁸ Pages 206-207 2015 Compendium; CRA05 Schedule 12 and Judicial Appointments Commission Regulations 2013

Council is chaired by the Lord Chief Justice, with the Judicial Executive Board as members³⁹.

25. Appointments to the Court of Appeal and High Court are made by the Crown on recommendation by the Lord Chancellor of a candidate selected by the Judicial Appointments Commission (in the case of puisne judges of the High Court) or selection committees formed to make appointments to the Court of Appeal or to the position of Lord Chief Justice or other Heads of Division. In each case, as in relation to appointments to the UK Supreme Court, the Lord Chancellor may once reject a selected candidate and require reconsideration once before recommending one of the candidates selected and not previously rejected.

26. The CRA05 provides that selection by the JAC or selection panel must be solely on merit and that a person must not be selected unless the selecting body is satisfied that he is of good character⁴⁰. JAC has a duty to “*have regard to the need to encourage diversity in the range of persons available for selection for appointments*”⁴¹.

27. Detailed provision is made for the governance and administration of the JAC⁴².

Northern Ireland

28. The Northern Ireland Judicial Appointments Commission⁴³ is established in Northern Ireland⁴⁴.

29. The NIJAC consists of 13 members: six judicial members (the Lord Chief Justice, who chairs the Commission, and five additional judicial members nominated by the Lord Chief Justice); a barrister and a solicitor nominated by the General Council of the Bar and Law Society of Northern Ireland

³⁹ <https://jac.judiciary.gov.uk/commissioners>

⁴⁰ Section 63 CRA05

⁴¹ Sections 64 CRA05

⁴² Part 4 and Schedule 12 CRA05

⁴³ <https://www.nijac.gov.uk/>

⁴⁴ Page 206 2015 Compendium; s. 3 Justice (Northern Ireland) Act 2002

respectively; and five lay members, all appointed by the First and Deputy First Minister acting jointly⁴⁵.

30. Justices of the Court of Appeal and the Lord Chief Justice are appointed by the Crown on the recommendation of the Prime Minister after consultation with the senior judiciary and the NIJAC⁴⁶.

31. Judges of the High Court are selected by the Northern Ireland Judicial Appointments Commission (NIJAC) and appointed by the Crown on the Lord Chancellor's recommendation⁴⁷.

Scotland

32. The Judicial Appointments Board for Scotland (JABS) is established in Scotland⁴⁸ which is an advisory, non-departmental public body, from 1st June 2009.

33. The JABS consists of 12 members: four judicial members (a Court of Session judge other than the Lord President and the Lord Justice Clerk, a sheriff principal, a sheriff, and one person holding the position of Chamber President or of Vice-President within the Scottish Tribunals); one practising advocate and one solicitor; and six lay members⁴⁹.

34. The legal members and the lay members are appointed by the Scottish Ministers. The three judicial members are appointed by the Lord President of the Court of Session, who is head of the Scottish judiciary⁵⁰.

35. JABS is responsible for recommending individuals suitable for appointment to the following judicial offices: Judge of the Court of Session; Chair of the Scottish Land Court; Sheriff Principal; Sheriff; Part-time Sheriff; Summary Sheriff; Temporary Judge (except in cases where the individual to be appointed already holds or has held one of the following

⁴⁵ Page 207 2015 Compendium; s3 Justice (Northern Ireland) Act 2002

⁴⁶ Page 207, 2015 Compendium; s. 12 Judicature (Northern Ireland) Act 1978

⁴⁷ Page 207 2015 Compendium; s 5 and Schedules 1 and 3 Justice (Northern Ireland) Act 2002

⁴⁸ Page 206, 2015 Compendium; s 9 and Schedule 1 Judiciary and Courts (Scotland) Act 2008

⁴⁹ Page 207, 2015 Compendium; Schedule 1 Judiciary and Courts (Scotland) Act 2008

⁵⁰ Schedule 1, 2 Judiciary and Courts (Scotland) Act 2008

offices: Judge of the European Court; Judge of the European Court of Human Rights; Chair of the Scottish Land Court; Sheriff Principal; and Sheriff). The selection of individuals for recommendation must be made solely on merit and an individual may only be selected for recommendation if he or she is of good character. Only the judicial and legal members of the JABS may assess the applicant's knowledge of the law or their skill and competence in the interpretation and application of the law. Decisions about an applicant's suitability to be recommended for appointment are made by the whole Board⁵¹.

36. JABS selects candidates for appointment by the Crown on the First Minister's recommendation. In selecting the Lord President and Lord Justice Clerk (the two most senior Scottish judges), the First Minister is only required to have regard to the recommendation of an advisory panel composed of the chairman of the JABS, one lay member and two senior judges⁵². In respect of other appointments, the First Minister must appoint a candidate recommended by the JABS, but has the power not to accept a recommended candidate and require the JABS to make a further recommendation, which may be the same candidate or a different candidate⁵³. The First Minister is obliged to provide the Board with reasons if he or she does not accept a recommended candidate⁵⁴.

Cayman Islands

37. The Cayman Islands Constitution Order 2009 ('the 2009 Constitution') established a Judicial and Legal Services Commission ('JLSC')⁵⁵.

38. The JLSC is an independent body, which is crucial for its effectiveness and legitimacy⁵⁶. In the exercise of their functions, the Judicial and Legal Services Commission and its members shall not be subject to the direction or control of any other person or authority⁵⁷.

⁵¹ www.judicialappointments.scot/about-us/role-and-remit-board

⁵² s 19 and Schedule 2 Judiciary and Courts (Scotland) Act 2008

⁵³ ss 10 and 11 Judiciary and Courts (Scotland) Act 2008

⁵⁴ Page 207, 2015 Compendium

⁵⁵ <http://www.gov.ky/portal/page/portal/jlshome>;

⁵⁶ <http://www.gov.ky/portal/page/portal/jlshome/what-we-do>

⁵⁷ Section 106 2009 Constitution.

39. The JLSC comprises: a Chairman and one other member, neither of whom shall be a lawyer, appointed by the Governor, acting after consultation with the Premier and the Leader of the Opposition; the President of the Court of Appeal, *ex officio*; a person appointed by the Governor who holds or has held high judicial office in the Cayman Islands and has recent personal knowledge of the courts in the Cayman Islands; two persons appointed by the Governor who hold or have held high judicial office in a Commonwealth country or Ireland, but do not currently hold such office in the Cayman Islands; and two attorneys-at-law qualified to practise in the Cayman Islands, one with experience in Government service and one with experience in private practice, appointed by the Governor, acting after consultation with representatives of legal professional organisations in the Cayman Islands and, where appropriate, the Attorney General. Members of the Legislative Assembly are not permitted to be appointed to the JLSC⁵⁸.
40. The power to make appointments to judicial and certain other offices⁵⁹ and to remove and to exercise disciplinary control over persons holding or acting in such offices, vests in the Governor, acting in accordance with the advice of the Judicial and Legal Services Commission; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice Her Majesty's service.
41. Before exercising those powers the Governor may, acting in his or her discretion, once refer the advice of the Judicial and Legal Services Commission back to the Commission for reconsideration by it.
42. No member of the Judicial and Legal Services Commission is permitted to participate in any proceedings of the Commission which affect him or her personally.

⁵⁸ Section 105 2009 Constitution

⁵⁹ Chief Justice and other judge of the Grand Court; President of the Court of Appeal and other judge of the Court of Appeal; Attorney General; Director of Public Prosecutions; Magistrate; and such other offices in the public service, for appointment to which persons are required to possess legal qualifications, as are prescribed

Gibraltar

43. In Gibraltar, the Judicial Services Act 2007 ('the 2007 Act') and the Constitution⁶⁰ make provision which is similar in some respects to that made in the Cayman Islands.
44. Under section 57(1) of the Constitution, there is established the Gibraltar Judicial Services Commission (GJSC), which is chaired by the President of the Court of Appeal, who is the head of the judiciary in Gibraltar. The other members are the Chief Justice; a Stipendiary Magistrate; two members appointed by the Governor, acting in accordance with the advice of the Chief Minister; and two members appointed by the Governor at his discretion.
45. The process for making judicial appointments is that the Governor, after consultation with the Minister responsible for Justice, requests that the GJSC select a person for appointment to fill a vacancy. The GJSC must then either carry out the selection exercise itself or form a selection panel for this purpose and is responsible for determining the process to be followed. Selection should be on merit alone. At the conclusion of the process, the GJSC must prepare a report that it submits to the Governor confirming who it is recommending for appointment.
46. The Governor, acting in accordance with the advice of the Judicial Service Commission, has the power to make and confirm all judicial appointments. The Governor may, with the approval of the UK Foreign Secretary, disregard the advice of the GJSC in any case where he judges that compliance with that advice would prejudice Her Majesty's Service. If the selection is rejected, then the Commission may be required to repeat the selection exercise, but may not select the same candidate again.

The Bahamas

⁶⁰ http://www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf

47.A Judicial and Legal Service Commission (JLSC) is established⁶¹. It consists of five members: two judicial members (the Chief Justice, who chairs the Commission and one Justice of the Supreme Court nominated by the Chief Justice); the Chairman of the Public Service Commission and two persons nominated by the Prime Minister after consultation with the Leader of the Opposition⁶².

48.All judges are formally appointed by the Governor-General. In the appointment of judges of the Supreme Court the Governor-General acts on the recommendation of the JLSC. In the appointment of the Chief Justice and the members of the Court of Appeal, the Governor-General acts on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. In all cases the Governor-General may ask the person or institution offering the recommendation to reconsider once, and is obliged to do so in cases where the Leader of the Opposition has a right to be consulted and does not concur in the Prime Minister's recommendation⁶³.

Judicial Tenure, Complaints and Discipline

2015 Compendium

49.The 2015 Compendium provides the following in respect of tenure:

“2.1 Judicial tenure and the rule of law

The Commonwealth Latimer House Principles declare that ‘appropriate security of tenure and protection of levels of remuneration must be in place’ in relation to the judiciary. Such guarantees serve to shield judges from external pressures and conflicts of interest when they hold powerful individuals or government bodies legally to account, and thereby

⁶¹ Art 116 Constitution of the Commonwealth of the Bahamas 1973
(<https://www.bahamas.gov.bs/wps/wcm/connect/e7de94b9-8b6f-4ad3-b98b-d1a5906f0704/Chap+8+Public+service.pdf?MOD=AJPERES>)

⁶² Page 132, 2015 Compendium

⁶³ Page 132, 2015 Compendium; Arts 79(2), 79(5), 94(1)–(2) and 99(1) Constitution of the Commonwealth of the Bahamas 1973

contribute to sustaining an independent judiciary, which is an essential element of the rule of law.

2.2 Duration of judicial appointments

It is a long established principle that judges should not serve at the pleasure of the executive, or be subject to loss of office as a result of changes of government or legal measures that are ostensibly intended to serve other objectives. Most Commonwealth jurisdictions protect this principle implicitly by stating that their removal mechanisms are the only valid means by which a judge may be deprived of office, and some explicitly prohibit the abolition of the office of a judge while there is a substantive holder thereof.

States which are undergoing a constitutional transition may find themselves in a somewhat different situation. In exceptional cases in which there is evidence of widespread judicial malfeasance, for example systemic corruption, pervasive bias or collusion in human rights abuses, it may be appropriate to require incumbent judges to undergo some form of individual review before their tenure under the new constitution is confirmed. The process of individual review is sometimes known as ‘vetting’ and must be conducted by an independent body of manifest integrity and impartiality and in accordance with appropriate safeguards to ensure fairness.

Apart from acting or temporary appointments, Commonwealth jurisdictions currently appoint judges either permanently, to serve until a mandatory age of retirement, or for a fixed period of time. Permanent appointments are generally preferable, although some smaller jurisdictions have no alternative but to seek judges who are prepared to serve in the higher and appellate courts on a fixed-term basis. Fixed-term appointments to a constitutional court are acceptable if they are for a long period and not renewable. There is also an argument to be made for the moderate use of fixed-term appointments in the ordinary courts to provide flexibility in numbers and perhaps also to enable prospective candidates to gain judicial experience before applying for permanent judicial office.

Where appointments are permanent until a prescribed age of retirement, it is a violation of judicial independence for that age to be lowered with retroactive effect. While a retirement age of at least 60 is currently the minimum standard among Commonwealth states, best practice in modern conditions would probably require the mandatory retirement age to be set at, or closer to, 70 years. This would guard against the risk of conflicts of interest arising in relation to post-retirement employment for which a judge may be eligible. A discretion for the executive to extend the tenure of an individual judge beyond the mandatory retirement age is particularly problematic. Cases of physical or mental incapacity can be dealt with by way of specialised procedures for removing a judge from office on such grounds.

2.3 Protection of judicial remuneration

The Latimer House Guidelines recommend that ‘judicial salaries and benefits should be set by an independent body and their value should be maintained’. This is a clear indication that the level of judicial remuneration, broadly understood as including benefits such as pensions, must be protected. Judicial remuneration should reflect the professional skill and responsibilities of a judge and should guard against financial inducements or conflicts of interest that might lead a judge to compromise his or her independence. Establishing independent bodies to review judicial remuneration at regular intervals, as a number of Commonwealth jurisdictions have done, represents best practice. Ideally such bodies should be established within a constitutional and statutory framework and all three branches of government should approach matters of judicial remuneration in a co-operative rather than a confrontational manner.

The stability of judicial remuneration is traditionally ensured by a rigid prohibition on the reduction of judicial salaries. Such provisions exist in 90% of Commonwealth jurisdictions. However, it is also possible to protect judicial remuneration in ways that leave states with greater flexibility to respond to economic crises. The minimum requirement is that if the

holders of public offices are to have their salaries cut, judges should not to be singled out for disproportionate reductions.”⁶⁴

50. The 2015 Compendium provides the following in respect of judicial complaints and discipline:

“3.1 The removal of judges and the rule of law

States need a mechanism to enable judges to be removed from office. However, the challenge is for legal frameworks to ensure that the removal process cannot be used to penalise or intimidate judges. The Commonwealth Latimer House Principles declare that judges ‘should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties’. Removal from office is a very serious form of judicial accountability. In most cases, judicial accountability is satisfied by judges providing reasons for their decisions, which may be subject to review or appeal without any consequential sanctions if the judge acted in good faith.

3.2 Substantive grounds of removal

The grounds on which judges may be removed from office should be clearly discernible from the legal or constitutional framework under which they serve. The Commonwealth Latimer House Principles require these to be restricted to misconduct or incapacity.

In jurisdictions where additional grounds of removal are listed, for example incompetence, it is preferable to view such grounds as being particular instances of misconduct or incapacity. Wider interpretations risk leaving judges vulnerable to removal for errors which are not of their own making but may be caused by systemic factors such as excessive caseloads or inadequate administrative support. The same considerations apply in jurisdictions where judges are liable to be removed for breach of a judicial code of ethics. While such codes provide helpful guidance to judges on the standards of conduct that are expected of them, both within and

⁶⁴ Pages xviii-xx

outside the courtroom, not every breach of a code will be sufficiently serious to warrant removing a judge from office.

As the Privy Council stated in Re Chief Justice of Gibraltar (2009), removal ‘can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge’s ability properly to perform the judicial function’. This statement shows that the bar for removal is set fairly high. The Privy Council also indicated that whereas the international standards set out in the Bangalore Principles of Judicial Conduct are relevant to evaluating the behaviour of judges, conduct falling short of those standards does not automatically constitute grounds for removal.

3.3 Removal mechanisms

According to the Commonwealth Latimer House Principles, proceedings to determine whether a judge should be removed from office ‘should include appropriate safeguards to ensure fairness’. The Latimer House Guidelines further indicate that a judge facing removal ‘must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal’. The common law principles of administrative law require, in addition: a presumption of innocence in questions of wrongdoing; sufficient time to prepare a defence; the opportunity to present evidence and where relevant to cross-examine witnesses; a right to legal or other representation; a right to reasons, particularly in matters such as these in which there is great public interest; and the possibility of judicial review to ensure that all the legal requirements of the removal process are adhered to in practice, and, where appropriate, also an appeal which may consider both questions of law and fact.

As far as the institutions and public bodies responsible for removal decisions are concerned, several different approaches exist. In 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an ad hoc tribunal is formed to determine the issue. In another 21% of jurisdictions a permanent disciplinary council is established for that purpose. A parliamentary removal mechanism is found in 34% of jurisdictions. In the remaining 4% of jurisdictions, some

judges are removed by a parliamentary process and others by a disciplinary council.

3.4 Removal via an ad hoc tribunal

*An important part of the removal process under this mechanism is the initial investigation to determine whether an ad hoc tribunal should be formed. In a majority of Commonwealth jurisdictions, such investigations are conducted by the Chief Justice or a judicial service commission, which constitutes best practice. In a minority of jurisdictions it is left to the executive to investigate any allegations against a judge. Fairness generally requires that the judges should be given an opportunity to respond to the allegations informally before the investigation is concluded, since a decision to commence tribunal proceedings is likely to damage the reputation of a judge and affect his or her ability to command the confidence of litigants. This was established by the Privy Council in *Rees v Crane* (1994).*

If the investigation does result in a recommendation that a tribunal be formed, then the investigating body usually advises the head of state that a tribunal be formed, and also proposes its members. Tribunal members must usually be serving or retired judges, either from the jurisdiction itself or from other Commonwealth states, which helps ensure the manifest impartiality of the tribunal by making it possible to avoid local conflicts of interest. It is common for judges to be automatically suspended from office while tribunal proceedings are pending. (This highlights the need for removal proceedings to be completed without delay, as a suspension lasting for years may amount to a de facto removal from office.)

Once tribunal proceedings commence, they should follow the best practice standards of fairness set out under 3.3 above. In some jurisdictions tribunal decisions are subject to confirmation by the Privy Council, while in others provision has been made for appeals to the highest court. This provides an important additional safeguard alongside judicial review.

3.5 Removal by disciplinary councils

The category of disciplinary councils includes judicial service commissions, judicial councils and other permanent bodies which are authorised in some Commonwealth jurisdictions to determine whether a judge should be removed from office. International norms stipulate that these should be judicial bodies, although in half of the Commonwealth states which follow this model only a minority of members are required to be judges.

One advantage of entrusting removal decisions to disciplinary councils rather than ad hoc tribunals is that their members are not chosen for the purpose of an inquiry relating to a particular judge, which makes it more difficult to manipulate the composition of the body. In proceedings before disciplinary councils, the safeguards set out under 3.3 above should be observed in order to ensure fairness.

3.6 Parliamentary removal

The system of parliamentary removal has a long history. It was developed in 18th century England to ensure that the King could only dismiss a judge if both Houses of Parliament passed a resolution, or ‘address’, calling for the removal of the judge, and this has not occurred since the early 19th century. Although parliamentary removal procedures are in place in 38% of Commonwealth jurisdictions, the mechanism has been described as an ‘accident of history’, which could lead to serious constitutional conflict if put into action.

In particular, it is difficult for parliamentary bodies themselves to provide judges with a hearing before an ‘independent and impartial tribunal’, as required by the Latimer House Guidelines. For this reason, most parliamentary removal systems have been modified by the involvement of an independent, external body in initial investigations, fact-finding and assessment of the allegations against a judge. This represents good practice. Such a body would be required to observe the safeguards set out under 3.3 above in order to ensure fairness.

If legislators are able to decide questions of removal by simple majority vote, there is a danger that that the executive may be able to muster sufficient votes to dismiss a judge without requiring any support from

opposition parties. However, a majority of Commonwealth jurisdictions have adopted some form of higher legislative hurdle, whether it be the involvement of both legislative chambers in a bicameral system or setting a higher threshold for removal by requiring the support of a qualified majority, for example two-thirds of legislators. Such measures should now be considered best practice in jurisdictions which follow the parliamentary removal model.”⁶⁵

UK Supreme Court

51. Judges retire at the age of 70 years⁶⁶, and provisions are in place to secure judicial salaries against reduction other than by Act of Parliament⁶⁷.
52. Supreme Court judges hold office ‘during good behaviour’. They are removed from office by the Crown on an address presented by both Houses of Parliament⁶⁸. A member of the Supreme Court who faces an allegation of misconduct will have the opportunity to appear before a tribunal whose members include the heads of court of the various jurisdictions within the UK, and the tribunal must report before any motion is tabled in Parliament⁶⁹. A judge, the President or Deputy President of the Supreme Court may at any time resign that office by giving the Lord Chancellor notice in writing to that effect⁷⁰. Provision is also made for medical retirement of judges of the Supreme Court⁷¹.
53. Judges of the Supreme Court are entitled to a salary. The amount of the salary is to be determined by the Lord Chancellor with the agreement of the Treasury. A determination may increase but not reduce the amount. Salaries payable are charged on and paid out of the Consolidated Fund of the UK. Any allowance determined by the Lord Chancellor with the

⁶⁵ Pages xx-xxiii

⁶⁶ S. 26 Judicial Pensions and Retirement Act 1993; <http://www.legislation.gov.uk/ukpga/1993/8/contents>

⁶⁷ Page 208, 2015 Compendium; s 12 Senior Courts Act 1981

⁶⁸ S. 33 CRA05

⁶⁹ Page 208 2015 Compendium; Guidance published at <https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html>)

⁷⁰ Section 35 CRA05

⁷¹ Section 36 CRA05

agreement of the Treasury may be paid to a judge of the Court out of money provided by Parliament⁷².

England and Wales

54. Once appointed to a full time position, judges may not be removed other than in exceptional circumstances⁷³.

55. The standards of conduct expected of judges in England and Wales are set out in the Official Guide to Judicial Conduct⁷⁴ (“the Guide”), drafted by a working group of judges set up by the Judges’ Council. The Guide is intended to offer assistance to all members of the judiciary, including lay magistrates and tribunal members. The Guide forms part of the terms and conditions of appointment of most members of the judiciary, though there is a separate Code of Conduct for members of the UK Supreme Court⁷⁵.

56. Judges in England and Wales hold office ‘during good behaviour’. They are removed from office by the Crown on an address presented by both Houses of Parliament⁷⁶.

57. The Judicial Conduct Investigations Office (JCIO)⁷⁷ (formerly the Office for Judicial Complaints) supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. It seeks to ensure that all judicial disciplinary issues are dealt with consistently, fairly and efficiently. The JCIO operates in accordance with the Judicial Discipline (Prescribed Procedures) Regulations 2014 and the supporting rules. It can only deal with complaints about a judicial office-holder’s personal conduct – it cannot deal with complaints about judicial decisions or about case management⁷⁸. It can investigate complaints against: Deputy District

⁷² Section 34 CRA05

⁷³ s11 (3) Senior Courts Act 1981

⁷⁴ <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/how-the-judiciary-is-governed/guide-to-judicial-conduct>

⁷⁵ See the Supreme Court Website for a detailed description of the Guide adopted by the President, Deputy President and Justices of the United Kingdom Supreme Court, referencing the Guide and the Bangalore Principles: <https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html>

⁷⁶ Page 208 2015 Compendium; s 11(3) Senior Courts Act 1981

⁷⁷ <http://www.legislation.gov.uk/ukpga/1981/54/contents>

⁷⁷ <https://judicialconduct.judiciary.gov.uk/>

⁷⁸ <https://judicialconduct.judiciary.gov.uk/about-us/>

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Judge, District Judge, Master, Recorder, Coroner/Assistant Coroner, Circuit Judge, High Court Judge and Lord Justice⁷⁹.

58. If a complaint is received against a judge in England and Wales, the JCIO operates a system of preliminary inquiry and investigation carried out by two different judges, followed by a review panel which decides whether to advise the Lord Chancellor to table a motion in Parliament⁸⁰.

59. Judicial salaries are decided following the recommendation of the Senior Salaries Review Body (“SSRB”)⁸¹, and are a matter of public record⁸². The Judicial salaries approved by the SSRB are paid out of the consolidated fund without separate parliamentary authorisation.

Northern Ireland

60. A similar provision to Scotland applies in Northern Ireland, where the tribunal consists of two senior judges and a lay member of the Northern Ireland Judicial Appointments Commission⁸³.

Scotland

61. In Scotland, judges are removed by the Crown on recommendation by the Scottish First Minister. The recommendation cannot be made unless a resolution to that effect is passed by the Scottish Parliament on a motion initiated by the First Minister. That motion cannot however be initiated unless a tribunal, constituted of two serving or retired judges, a senior lawyer and a lay person, has laid before the Scottish Parliament a report concluding that the judge is unfit for office by reason of inability, neglect

⁷⁹ <https://judicialconduct.judiciary.gov.uk/making-a-complaint/who-can-i-complain-about/>

⁸⁰ Page 208 2015 Compendium; Judicial Discipline (Prescribed Procedures) Regulations 2014 (<http://www.legislation.gov.uk/ukksi/2014/1919/contents/made>)

⁸¹ The SSRB was established in 1971 and provides independent advice to the Prime Minister, the Lord Chancellor and the Secretary of State for Defence on the remuneration of the judiciary, as well senior governmental bodies and many other important groups that are referred to it from time to time. Appointments are made by the Prime Minister. <https://www.gov.uk/government/organisations/review-body-on-senior-salaries/about>

⁸² For further details see Judges, Tribunals and Magistrates – Terms of Service published by the Ministry of Justice: <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/terms-of-service/salary>

⁸³ Page 208 2015 Compendium; s 12C Judicature (Northern Ireland) Act 1978 (<http://www.legislation.gov.uk/ukpga/1978/23/contents>)

of duty or misbehaviour. In the case of proposed removal of the Lord President or the Lord Justice Clerk, the Scottish First Minister must also consult the UK Prime Minister⁸⁴.

62. The Lord President, as Head of the Scottish Judiciary, has responsibility for making and maintaining appropriate arrangements for the investigation and determination of any matters concerning the conduct of judicial office holders. Accordingly, the Lord President has made the Complaints about the Judiciary (Scotland) Rules 2017⁸⁵.
63. Judicial salaries in Scotland are decided, along with those in England and Wales, following the recommendation of the Senior Salaries Review Body (SSRB)⁸⁶. The Scottish Executive Justice Department has responsibility for meeting the costs of judicial salaries and the accruing superannuation liability commitment for judicial pensions in Scotland.
64. The standards of conduct expected of Scottish judges are set out in the Statement of Principles of Judicial Ethics for the Scottish Judiciary⁸⁷. This provides a set of principles by which judges are guided in their personal and professional life.

Cayman Islands

65. The 2009 Constitution provides for judges to have security of tenure during good behaviour, and that judges' salaries may not be reduced while they are in office without their consent.
66. The JLSC is responsible for drawing up a Code of Conduct for the judiciary and magistracy and a procedure for dealing with complaints against them. The Code of Conduct and Complaints Procedure of the Cayman Islands were published in early 2012⁸⁸. The JLSC's Code is founded on the

⁸⁴ Page 208 2015 Compendium; s 95 Scotland Act 1998 ss 35–38 Judiciary and Courts (Scotland) Act 2008

⁸⁵ http://www.scotland-judiciary.org.uk/Upload/Documents/ComplaintsabouttheJudiciaryScotlandRules2017_1.pdf

⁸⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518055/moj-judicial-salaries-1-april-2016.pdf

⁸⁷ <http://www.scotland-judiciary.org.uk/21/0/Principles-of-Judicial-Ethics>

⁸⁸ <http://www.judicialandlegalservicescommission.ky>

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*'Bangalore Principles of Judicial Conduct'*⁸⁹ and requires judicial office holders to recognise these principles as fundamental to properly upholding their duties.

67. The Governor may permit a judge of the Grand Court who has reached the age of 65 to continue in office until he has attained such later age, not exceeding the age of 70 years, as agreed between the judge concerned and the Governor, following the recommendation of the JLSC⁹⁰.
68. The Governor of the Cayman Islands has the power to exercise disciplinary control over judicial office holders, including magistrates. However, this power is to be exercised in accordance with the advice of the JLSC, which investigates complaints and can only be exercised against the JLSC's advice in very limited circumstance where compliance with the advice would in the Governor's opinion 'prejudice Her Majesty's service'.

Gibraltar

69. A judge may only be removed from office for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.
70. The President of the Courts of Gibraltar, acting after consultation with the GJSC, may issue advice, a warning or reprimand to the Chief Justice, a Puisne Judge, the President of the Court of Appeal or a Justice of Appeal or suspend them from office pending an investigation.
71. If the Governor considers that the question of removing the Chief Justice, a Puisne Judge, the President of the Court of Appeal or a Justice of Appeal from office for inability or for misbehaviour ought to be investigated, then the Governor must appoint a tribunal, which shall consist of a chairman and not less than two other members selected by the Governor from among persons who hold or have held high judicial office. That tribunal

⁸⁹ http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

⁹⁰ Paragraph 96 of the 2009 Constitution

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must then inquire into the matter and report to the Governor and advise whether he should request that the question of the removal of that judge should be referred to the Judicial Committee of the Privy Council⁹¹. The Governor may suspend a judge from office pending the decision of a tribunal or the Judicial Committee of the Privy Council.

72. With regard to more junior judicial office holders and magistrates, the Governor may, on the advice of the GJSC, issue advice, a warning or reprimand; or suspend or remove a junior judicial office holder from office. In procedural terms, upon receipt of any formal complaint or allegation to which it attaches credibility about the behaviour of a junior judicial office holder, the GJSC must determine the disciplinary process to be applied and then apply that process before making recommendations to the Governor. The Governor must then act on the GJSC's advice, except where he judges that compliance with that advice would prejudice Her Majesty's Service and he has the approval of the UK Foreign Secretary.

73. Section 32 of the 2007 Act requires that the President of the Courts of Gibraltar, in consultation with the Chief Justice and the Chairman of the Bar Council, draw up and propose to the GJSC a draft of a Code of judicial conduct and ethics for application to persons holding or acting in any judicial office in Gibraltar. The GJSC may then modify or amend the draft Code before adopting it. Once adopted, it is sent to the Minister responsible for justice who lays it before Parliament and then moves a motion asking Parliament to consider it. If Parliament approves the Code then it becomes effective 7 days later and the Commission is required to have regard to the Code in considering any disciplinary matters. The Code currently in place, approved by the Gibraltarian Parliament in 2010, is very similar to those in place in England and Wales and in Scotland⁹².

74. Under section 64 of the Constitution most judges retire at the age of 67, though the President of the Court of Appeal and any Justice of Appeal vacate their office on the expiry of the term specific in the instrument appointing them to their office, though not later than at the age of 72.

⁹¹ Section 64(4) of the Constitution

⁹² Code of Judicial Conduct and Ethics: <http://www.gibraltarlaws.gov.gi/articles/2010s134.pdf>

75. Under section 72 of the Constitution, senior judges are paid such salaries and allowances as may be prescribed by the Legislature. However, after their appointment, under section 72(3) any alteration to the salary or remuneration payable to judges or to any of their other terms or office that is to their disadvantage does not have effect unless it is agreed with each judge concerned.

The Bahamas

76. Judges of the Court of Appeal retire at 68 while judges of the Supreme Court, including the Chief Justice, retire at 65. The Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may extend a retiring judge's term for a maximum period of two years⁹³.

77. There is constitutional protection against reduction of the salary and allowances of judges⁹⁴ and provision is made for a review of judicial remuneration every three years⁹⁵.

78. No office of a judge of the Supreme Court or Court of Appeal shall be abolished while there is a substantive holder thereof⁹⁶.

79. A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour'⁹⁷.

80. Proceedings to remove a judge of the Supreme Court are initiated by the Prime Minister, in the case of the Chief Justice, or the Chief Justice after consultation with the Prime Minister, in the case of any other judge⁹⁸. Proceedings to remove a member of the Court of Appeal are initiated by the Prime Minister, in the case of the President of the Court of Appeal, or

⁹³ Page 133, 2015 Compendium; Arts 96(1), 102(1) and 102(11) Constitution of the Commonwealth of the Bahamas 1973

⁹⁴ Art 135 Constitution of the Commonwealth of the Bahamas 1973

⁹⁵ Page 133, 2015 Compendium; Section 4 Judges' Remuneration and Pensions Act

⁹⁶ Page 133, 2015 Compendium; Art 93(3) and 98(3) Constitution of the Commonwealth of the Bahamas 1973

⁹⁷ Page 133, 2015 Compendium; Arts 96(4) and 102(4) Constitution of the Commonwealth of the Bahamas 1973

⁹⁸ Art 96(6) Constitution of the Commonwealth of the Bahamas 1973

the President of the Court of Appeal or the Chief Justice after consultation with the Prime Minister, in the case of any other judge⁹⁹. The initiating person or body also advises the Governor-General as to whether to suspend the judge while removal proceedings are pending¹⁰⁰.

81. Once approached by the relevant initiating body, the Governor-General forms an ad hoc tribunal. The tribunal is composed of no fewer than three serving or retired judges, who are appointed by the Governor-General acting on the advice of the relevant initiating body. The tribunal must report to the Governor-General on the facts of the matter and make a recommendation, which the Governor-General must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council¹⁰¹.

82. The tribunal has the same powers of the Supreme Court in summoning and questioning witnesses and the accused has the right to counsel¹⁰².

83. Judges are ultimately removed by the Governor-General, who shall remove a judge from office when advised to do so by the Judicial Committee of the Privy Council¹⁰³.

Introduction – Law Officers

England and Wales

84. The Attorney General for England and Wales (who is also the Advocate General for Northern Ireland) and the Solicitor General are appointed by the Queen on the recommendation of the Prime Minister¹⁰⁴. The Solicitor General may exercise any function of the Attorney General either in his capacity as Attorney General or as Advocate General for Northern Ireland¹⁰⁵.

⁹⁹ Art 102(6) Constitution of the Commonwealth of the Bahamas 1973

¹⁰⁰ Page 133, 2015 Compendium; Arts 96(7)–(8) and 102(7)–(8) Constitution of the Commonwealth of the Bahamas 1973

¹⁰¹ Page 133 2015 Compendium; Arts 96(6) and 102(6) Constitution of the Commonwealth of the Bahamas 1973

¹⁰² Page 134 2015 Compendium; ss 10 and 12 Commission of Inquiry Act

¹⁰³ Page 134 2015 Compendium; Arts 96(5) and 102(5) Constitution of the Commonwealth of the Bahamas 1973

¹⁰⁴ Para. 3 <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf>

¹⁰⁵ Law Officers Act 1979

85. The Law Officers are conventionally appointed from one of the Houses of Parliament. The Attorney General is a non-cabinet Minister and head of the Attorney General's Office (a ministerial department) which provides legal advice to HM Government. The Attorney General is also ultimately responsible for the superintendence of criminal prosecutions, although in practice this is delegated to the Director of Public Prosecutions, who is the head of the Crown Prosecution Service ('CPS'). The Attorney General also oversees the Serious Fraud Office and the CPS Inspectorate. The Attorney General of England and Wales is also officially the leader of the Bar.

86. In their capacity as MPs, the Law Officers are subject to the MP Code of Conduct together with the Guide to the Rules relating to the conduct of Members¹⁰⁶. Any breach of this Code may be investigated by the Parliamentary Commissioner for Standards. If following an investigation the Commissioner finds that there has been a breach, this may be resolved informally using the "*rectification procedure*", which may involve a written apology and, in the case of financial wrongdoing such as with expense claims, a repayment. In more serious cases, a complaint may be referred by the Commissioner to the Committee on Standards which is comprised by MPs and others from outside the House. The Committee may make its own report for publication and may recommend a range of penalties to the House. As Ministers, the Law Officers are also subject to the Ministerial Code of Conduct¹⁰⁷. Any breach of this Code would be a matter for the Prime Minister. As barristers holding practising certificates, the Law Officers are also subject to the professional disciplinary codes and processes of the Bar Standards Board.

Scotland

87. The Lord Advocate and Solicitor General for Scotland are appointed by Her Majesty but on the recommendation of the First Minister and the

¹⁰⁶ <http://www.publications.parliament.uk/pa/cm201012/cmcode/1885/188501.htm>

¹⁰⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf

approval of the Scottish parliament¹⁰⁸. The Solicitor General may discharge any of the functions authorised or required to be discharged by the Lord Advocate if the office of the Lord Advocate is vacant, the Lord Advocate is unable to act through illness or absence, or the Lord Advocate authorises the Solicitor General to act in any particular case¹⁰⁹. If the Law Officers are not members of the Scottish Parliament they may nonetheless participate in the proceedings of Parliament but may not vote¹¹⁰.

88. The Law Officers may at any time resign and shall do so if the parliament resolves that the Scottish Government no longer enjoys the confidence of the Parliament¹¹¹.

89. The Lord Advocate is responsible for the Crown Office and the Procurator Fiscal Office (“COPFS”). COPFS is responsible for prosecutions and the investigations of deaths in Scotland. The Lord Advocate is the principal legal adviser to the Scottish Government but any decisions about prosecutions or investigations of death are taken independently¹¹².

90. The Scottish Law Officers, as Ministers in the Scottish Government, are subject to and referred to in the Scottish Ministerial Code and are subject to any professional codes of conduct applicable to them. They are not subject to the Civil Service Code as they are not civil servants.

Cayman Islands

91. The Attorney General of the Cayman Islands is appointed by the Governor¹¹³. The Governor is advised on the appointment of the Attorney General by the JLSC¹¹⁴. The Attorney General is the principal legal adviser to the Government and the Legislative Assembly. The Attorney General is an employee of the Cayman government and is subject, save for where the Constitution provides otherwise, to the terms and conditions of such employees.

¹⁰⁸ Section 48(1) Scotland Act 1998; <http://www.legislation.gov.uk/ukpga/1998/46/contents>

¹⁰⁹ S.2 Law Officers Act 1944; <http://www.legislation.gov.uk/ukpga/Geo6/7-8/25/contents>

¹¹⁰ S.27 Scotland Act 1988

¹¹¹ S.48(2) Scotland Act 1988

¹¹² S. 48(5) Scotland Act 1988

¹¹³ section 56 Cayman Islands Constitution Order, 2009

¹¹⁴ Section 9 of the Public Service Management Law (Revised-2013)

92. The Attorney General may only be removed from office due to an inability to discharge the functions of his or her office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour¹¹⁵.

93. Since 2011, a Director of Public Prosecutions ('DPP') has been appointed in Cayman to be the public officer responsible for instituting, continuing or discontinuing prosecutions on behalf of the Cayman government¹¹⁶. In the exercise of the powers conferred on him or her, the Director of Public Prosecutions is not subject to the direction or control of any other person or authority. The DPP is a "Chief Officer" appointed by the Governor following consultation with the Judicial and Legal Services Commission. The Head of the Civil Service may only dismiss the DPP if he or she has shown an inability to discharge the functions of his or her office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour¹¹⁷.

94. The Solicitor General is a Chief Officer who is appointed and dismissed etc. in the same manner as the DPP. The Solicitor General is responsible for the Solicitor General's Office which, on behalf of the Attorney General, deals with all government civil and advisory matters.

Gibraltar

95. The Attorney General of Gibraltar is the legal adviser to the Crown. He combines the functions of Attorney General and Director of Public Prosecution and is also an ex officio member of the House of Assembly¹¹⁸. No publicly available information has been located in respect of the appointment, terms and conditions or discipline of the Attorney General of Gibraltar.

The Bahamas

¹¹⁵ Section 106 of the 2009 Constitution

¹¹⁶ Section 57 of the 2009 Constitution

¹¹⁷ Section 106 of the 2009 Constitution

¹¹⁸ <https://www.gibraltar.gov.gi/new/law-justice>

96. The Attorney General of the Bahamas is a member of the Cabinet¹¹⁹ and is appointed from the elected MPs of the House of Assembly or the Senate. The Attorney General is head of the Office of the Attorney General and the Ministry of Legal Affairs and the Attorney General's portfolio therefore encompasses a diverse range of responsibilities including legal advice to government, international legal co-operation, mutual legal assistance, coroners and registration of births, marriages and deaths. The Office of the Attorney General is divided into the Department of Legal Affairs which deals with civil advice and litigation, legislative drafting and law reform, and the Department of Public Prosecutions. The Department of Public Prosecutions assist the Attorney General in his or her function of instituting, undertaking, continuing, taking over or discontinuing criminal prosecutions. No publically available information has been located in respect of the terms and conditions or discipline of the Attorney General of the Bahamas.

¹¹⁹ Article 72 of the Constitution of the Commonwealth of the Bahamas