EXPLANATORY MEMORANDUM TO

THE MAXIMUM NUMBER OF JUDGES ORDER 2008

2008 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This Order in Council increases the maximum number of ordinary judges of the Court of Appeal from 37 to 38.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 Subsequent to the changes made to the process for judicial appointments by the Constitutional Reform Act 2005, this Order is required to maintain the policy intention that the Chair of the Law Commission should be a person suitably qualified to sit as a judge of the Court of Appeal. The policy intention is explained in greater detail at section 7 below.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Secretary of State for Justice and Lord Chancellor has made the following statement regarding Human Rights:

In my view the provisions of the Maximum Number of Judges Order 2008 are compatible with the Convention rights.

7. Policy background

7.1 The Law Commissions Act 1965 provided (s.1(2)) for all the Law Commissioners to be persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a university. Section 1(1A) provides that the person appointed to be Chair must be a High Court or Court of Appeal judge. In fact, ever since the Law Commission's creation, the Chair of the Commission has always been appointed from the ranks of senior High Court

judges and, by unwritten convention, has been appointed to the Court of Appeal subsequent to completing his or her term at the Commission.

7.2 The convention of promotion to the Court of Appeal on leaving the Law Commission was possible because the same person, the Lord Chancellor, appointed both to the Chair of the Commission and to the Court of Appeal. The convention recognised that the standing and responsibilities of the Chair require the position to be filled by a very senior, able and respected judge, who is of Court of Appeal calibre.

7.3 Since the Constitutional Reform Act 2005 (CRA) and the establishment of the Judicial Appointments Commission (JAC), the Lord Chancellor continues to appoint to the Chair of the Commission, but a selection panel appointed by the JAC is responsible for making selections of persons whom the Lord Chancellor will recommend for appointment to the Court of Appeal. A senior High Court Judge can therefore no longer have any certainty that, if appointed to the Chair of the Commission, he or she will then proceed immediately to the Court of Appeal.

7.4 It is in the public interest that the post of chair of the Commission is filled by the most able senior Judges. This is true more so than ever in view of the significant structural reforms (both adopted reforms and proposed reforms) to improve the effectiveness of the Commission and its relations with Parliament and the Executive. These include a new procedure in place for Law Commission Bills, and a proposed new protocol with Departments with statutory backing, and the proposed new statutory obligation on the Lord Chancellor to report annually to Parliament on unimplemented Law Commission recommendations. The latter two proposals are set out in detail in the *Constitutional Renewal White Pa*per (Cm 7342)

7.5 It is therefore appropriate and desirable that, subject to selection by the selection panel under the CRA, the Chair of the Law Commission should be able to hold the office of Judge of the Court of Appeal during the term of his office as Chair. That is not feasible at present within the existing limit on the number of judges in the Court of Appeal – hence the proposal to increase the limit by 1. Work to align the appointment processes within the structure provided by the CRA will be undertaken by the Ministry of Justice and the JAC shortly.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is two-fold: there is an annual financial cost which is minimal and will be met from within the Ministry of Justice budget; and the Ministry of Justice and the JAC will put in place work to align the two appointments processes, i.e. for the post of Chair of the Commission and for appointment to the Court of Appeal.

9. Contact

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