EXPLANATORY MEMORANDUM TO

THE JUDICIAL DISCIPLINE (PRESCRIBED PROCEDURES) REGULATIONS 2006
2006 No. 676

THE DISCIPLINE OF CORONERS (DESIGNATION) ORDER 2006
2006 No. 677

THE JUDICIAL APPOINTMENTS AND DISCIPLINE (MODIFICATION OF OFFICES) ORDER 2006
2006 No. 678

THE PERMITTED PERSONS (DESIGNATED PERSONS) ORDER 2006
2006 No. 679

THE LORD CHANCELLOR (TRANSFER OF FUNCTIONS AND SUPPLEMENTARY PROVISIONS) ORDER 2006
2006 No. 680

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs 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 These Regulations and orders are all made under the Constitutional Reform Act 2005 (c.4) ('the Act').

2.2 **The Judicial Discipline (Prescribed Procedures) Regulations 2006 No. 676** prescribe the procedures to be followed in the investigation and determination of allegations of misconduct by judicial office-holders, and timetables for reviews and investigations by the Judicial Conduct and Appointments Ombudsman (JACO).

2.3 **The Discipline of Coroners (Designation) Order 2006 No. 677** designates the officers of coroner and of Coroner of the Queen's Household so that they can be disciplined under Part 4 of the Act.

2.4 **The Judicial Appointments and Discipline (Modification of Offices) Order 2006 No. 678** adds a number of additional judicial offices to Schedule 14 of the Act, which brings them within the appointment and discipline provisions of Part 4 of the Act and removes some references to offices contained in legislation that has been repealed.

2.5 **The Permitted Persons (Designated Persons) Order 2006 No. 679** designates a number of bodies which discharge professional regulatory functions as bodies permitted to disclose to the Judicial Appointments Commission established by the Act information held by them or on their behalf, for the purposes of better assessing the suitability of applicants for judicial office.

2.6 **The Lord Chancellor (Transfer of Functions and Supplementary Provisions) Order 2006 No. 680** amends secondary legislation which can be amended by a negative instrument, in order to transfer or modify functions of the Lord Chancellor in accordance with the changes made to that office by the Constitutional Reform Act 2005 and with the Concordat agreed between the Lord Chancellor and the Lord Chief Justice.

2.7 All these regulations and orders are subject to negative resolution procedure.

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

3.1 The Judicial Discipline (Prescribed Procedures) Regulations are made by the Lord Chief Justice of England and Wales ("the Lord Chief Justice"). By virtue of section 144(3) of the Act, they are in the form of a statutory instrument to which the Statutory Instruments Act 1946 applies as if they were made by a Minister of the Crown.

4. Legislative Background

4.1 These regulations and orders, with one other subject to affirmative resolution procedure,[1] form a group of instruments required to implement provisions of the Act. In each case the instrument is the first exercise of any of these powers.

4.2 **The Judicial Discipline (Prescribed Procedures) Regulations 2006 No. 676** are made under section 115 of the Act with the agreement of the Lord Chancellor, under section 120 with the agreement of the Lord Chancellor and the Lord President of the Court of Session, and under section 121 with the agreement of the Lord Chancellor and the Lord Chief Justice of Northern Ireland.

4.3 **The Discipline of Coroners (Designation) Order 2006 No. 677** is made under section 118 of the Act, with the agreement of the Lord Chief Justice.

4.4 **The Judicial Appointments and Discipline (Modification of Offices) Order 2006 No. 678** is made under section 107(6) of the Act.

4.5 **The Permitted Persons (Designated Persons) Order 2006 No. 679** is made under sub-section 107(6) of the Act.

4.6 **The Lord Chancellor (Transfer of Functions and Supplementary Provisions Order 2006 No. 680** is made under section 19 of the Constitutional Reform Act 2005. The related Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order is subject to the affirmative resolution procedure as it amends primary legislation or secondary legislation which can only be amended by an affirmative instrument.

5. Extent

5.1 The Discipline of Coroners (Designation) Order 2006 relates only to England and Wales. The other orders and the regulations extend to the United Kingdom.

[1] The Lord Chancellor (Transfer and Modification of Functions) Order (No.2) Order 2006

6. European Convention on Human Rights

6.1 As these instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

The Act

7.1 Part 2 of the Act modifies the office of the Lord Chancellor so that the office-holder is no longer a judge nor exercises any judicial functions. It deals with functions relating to the judiciary and courts so that they are appropriately shared between the reformed ministerial office of Lord Chancellor and the Lord Chief Justice, who becomes Head of the Judiciary in England and Wales (his functions as such can be shared with other senior members of the judiciary as appropriate). Schedule 4 to the Act accordingly amends some hundreds of functions contained in primary legislation, but it did not amend legislation enacted by Parliament in the same session as the Constitutional Reform Act or, with a few exceptions, provisions in secondary legislation.

7.2 Part 4 of the Act makes provision for a Judicial Appointments Commission (JAC) to be responsible for recruiting and selecting judges for the courts of England and Wales and members of certain tribunals. It changes the arrangements for investigating complaints against judges, to reflect the new division of responsibilities between the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor's powers to remove judicial office holders from office are amended by Schedule 4 of the Act so that they are exercisable only with the agreement of the Lord Chief Justice or a judicial office holder to whom he has delegated that responsibility. (The Lord Chancellor has also indicated that he will only initiate the processes for removing from office a senior judge with the Lord Chief Justice's agreement). The Lord Chief Justice is given new powers formally to advise, warn or reprimand a judicial office holder for disciplinary purposes; and to suspend the person from judicial office in specified circumstances.

7.3 These provisions apply mainly to members of the judiciary in England and Wales, but may also extend to judicial office holders in the small number of tribunals, such as those dealing with social security or tax appeals, which cover the whole of the United Kingdom, or England and Wales and either Scotland or Northern Ireland. The Lord Chief Justice's new disciplinary powers are conferred upon the Lord President of the Court of Session in relation to members of those tribunals who sit wholly or mainly in Scotland, and on the Lord Chief Justice of Northern Ireland in the case of those sitting wholly or mainly there.

7.4 The exercise of disciplinary functions is to be subject to the regulations, or, by virtue of section 117, to rules made under them which are not subject to Parliamentary scrutiny. The Lord Chief Justice will make such rules, with the Lord Chancellor's agreement, for the handling of complaints against magistrates, and with the agreement, of the Lord Chancellor, Lord President and the Lord Chief Justice of Northern Ireland, for the handling of complaints against tribunal members.

7.5 The Act also establishes the new office of Judicial Conduct and Appointments Ombudsman (JACO), to review allegations of maladministration in the appointment process, or the handling of a complaint against a judicial office holder.

7.6 Parts 2 and 4 are intended to give substantial effect to the agreement between the Lord Chief Justice of England and Wales and the Lord Chancellor on the proposals relating to the transfer of the Lord Chancellor's judiciary-related functions. This was set out in a document called "Constitutional Reform: the Lord Chancellor's judiciary-related functions: Proposals" (usually referred to as the 'Concordat'). This was placed in the libraries of both Houses of Parliament at the time of the Oral Statement made to the House of Lords by the Lord Chancellor, and repeated in the House of Commons, on 26th January 2004. The text was also printed as Appendix 6 to the House of Lord Select Committee's Report on the Bill.

The Judicial Discipline (Prescribed Procedures) Regulations 2006 No. 676

7.7 The policies introduced by the Regulations are new to legislation, although many of them were contained in the Judicial Complaints Protocol published in 2002. The new arrangements were outlined in the Concordat. The most important areas with little or no precedent in the current arrangements are:

(i) prescribed procedures to be applied to the senior judicial officers specified in Part 4 of the Act and those listed in Schedule 14 ;

(ii) a dedicated body of officials is designated to support the Lord Chancellor and the Chief Justices in their new joint responsibilities;

(iii) a legislative framework is set out for the initial investigation of complaints against magistrates by advisory committees and against tribunal members by tribunal Presidents (in tribunals which have such an office), and their transmission to the Lord Chancellor and the Lord Chief Justice (or relevant Chief Justice) for decisions relating to the exercise of formal disciplinary powers;

(iv) legislative criteria are for the first time set out for the dismissal of a complaint by officials, an advisory committee, or a tribunal President (where there is doubt about whether a case should be dismissed, decisions are to be taken by the Lord Chancellor and the Lord Chief Justice);

(v) arrangements for judicial office holders to be nominated by the Lord Chief Justice with the Lord Chancellor's agreement to advise on officials' initial assessments of complaints;

(vi) procedures for decisions on whether any of those cases is sufficiently serious to be referred for judicial investigation to be taken by either the Lord Chancellor or the Lord Chief Justice;

(vii) procedures for decisions on whether disciplinary action is necessary, and if so what it should be, to be taken jointly by them;

(viii) provision for the conduct of judicial investigations;

(ix) provision for a new stage in examining judicial complaints, a body to review at the request of the judicial office holder the findings of a judicial investigation

or to examine cases referred to them by the Lord Chancellor and the Lord Chief Justice or the JACO;

(x) procedures for reaching decisions on disciplinary action, including the initiation of proceedings for the removal of senior judges;

(xi) procedures for the disclosure of material relating to the investigation of complaints to complainants and other parties, with the agreement of the Lord Chancellor and Lord Chief Justice; and

(xii) the establishment of a framework of time limits for the investigation of complaints, and for the conduct of reviews by the JACO (the JACO will himself determine the procedures to be adopted for his reviews and investigations, but setting timetables with a procedural penalty should they not be complied with requires prescribed procedures).

7.8 The Regulations are an important part of the constitutional reforms introduced by the Act. Their terms have been discussed in detail with a working group containing representatives from all levels of the judiciary. The instrument is constitutionally and legally important.

The Discipline of Coroners (Designation) Order 2006 No. 677

7.9 The Act specifies in sections 67, 76 and 85(1)(a) the senior judicial appointments, and in Schedule 14 the other appointments, to which the provisions relating to judicial appointments and discipline in Part 4 are to apply. They are all appointments made by the Lord Chancellor, or by Her Majesty on his recommendation. Appointments to the office of coroner are made by local authorities, and to the post of Coroner of Her Majesty's Household by Lord Steward, but the Lord Chancellor has the power of removal (which is amended by Schedule 4 to the Act to be exercisable only with the agreement of the Lord Chief Justice). The Order will bring the exercise of those powers within the new disciplinary system for handling complaints against other judicial office holders, which is new to legislation, and an important part of the Act's constitutional reforms.

The Judicial Appointments and Discipline (Modification of Offices) Order 2006 No. 678

7.10 This order brings within the judicial appointments and discipline provisions of the Act a number of additional judicial offices. There are two main groups: offices created since the introduction of the Bill for the Act, and offices where the appointment powers are contained in delegated legislation. The order removes some offices that have been repealed

The Permitted Persons (Designated Persons) Order 2006 No. 679

7.11 Sub-section 107(5) of the Act provides for the disclosure to the JAC of information held by, or on behalf of, Chief Officers of Police, the Directors General of the National Crime Intelligence Service and National Crime Squad, and the Commissioners of Revenue and Customs in order to help with assessing the suitability for appointment of applicants for judicial office. The range of potential applicants is such that the list of regulatory bodies who it might be necessary to ask for information about the suitability for judicial office is long and variable. Requests for information

as to the suitability of applicants for appointment to judicial office are now made by the Department. The Order makes it possible for the necessary information to be disclosed to the new Judicial Appointments Commission. But all of the bodies listed are already, or may be, asked for information by the Department for Constitutional Affairs.

The Lord Chancellor (Transfer of Functions and Supplementary Provisions) Order 2006 No. 680

7.12 The Order contains one Schedule which amends secondary legislation in accordance with the Concordat agreed by the Lord Chancellor and Lord Chief Justice, usually by transferring functions to the Lord Chief Justice or by requiring the Lord Chancellor to consult or obtain the concurrence of the Lord Chief Justice before exercising his function. Certain functions which extend across the United Kingdom are amended to require the concurrence of all three of the Chief Justices (the Lord Chief Justice of England and Wales, Lord President of the Court of Session, and Lord Chief Justice of Northern Ireland). Certain functions relating to Northern Ireland are amended to require the concurrence of, or consultation with, the Lord Chief Justice of Northern Ireland.

7.13 The transfer and modification of the Lord Chancellor's functions have been discussed in detail with a working group containing representatives from all levels of the judiciary.

8. Impact

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

8.2 The impact on the public sector is likely to be minimal. The annual cost of the review bodies created by the Prescribed Procedures Regulations is estimated to be between £0.1m and £0.5m depending on the number of references. The Office for Judicial Complaints will be staffed by 18 existing civil servants from the Department of Constitutional Affairs.

9. Contact

9.1 Alistair Shaw at the Department for Constitutional Affairs, Tel: 020 7210 2101 or e-mail: alistair.shaw@dca.gsi.gov.uk can answer any queries regarding the instrument.