RESEARCH PAPER 05/05
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The *Constitutional Reform Bill [HL]*– the office of Lord Chancellor

Bill No 18 of 2004-5

This Paper is one of two which examines the main proposals of the *Constitutional Reform Bill*. It deals with the proposals in respect of the office of Lord Chancellor. The original Government proposal was to abolish the office altogether, but the Bill has been amended, following Government defeats during the Lords passage of the Bill. These amendments require the Lord Chancellor to be both a peer and a senior lawyer, but the Bill ends his role as head of the judiciary and removes his responsibility for judicial appointments. Research Paper 05/06 *The Constitutional Reform Bill[HL]: A Supreme Court for the United Kingdom and Judicial Appointments* deals with the new Supreme Court and the Judicial Appointments Commission. The Bill is subject to a Sewel motion in respect of its provisions relating to Scotland.

Oonagh Gay and Richard Kelly

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Summary of main points

The *Constitutional Reform Bill* has undergone considerable modification during its Lords passage and the version now presented in the Commons:

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

The Government announced the abolition of the office of Lord Chancellor in June 2003, as part of a reshuffle, which led to the replacement of Lord Irvine, as Lord Chancellor, by Lord Falconer of Thoroton, to be known as the Secretary of State for Constitutional Affairs. Although the announcement had not been trailed, some commentators argued that the new appointment marked the changing nature of the Lord Chancellor's Department which had become a large spending department with an annual budget of £3billion. The Government issued a series of consultation papers in 2003, designed to set out their proposals to abolish the office, to create a Supreme Court and a statutory Judicial Appointments Commission.

The Bill was introduced into the Lords in 2003-04 when it was committed to a select committee, a rare proceeding. As a result of negotiations, the Bill was subject to a carry over motion in the Lords to enable its consideration in 2004-05. The committee heard evidence from a wide range of experts and rehearsed the major arguments about the Bill. It did not reach agreement on the abolition of the Lord Chancellor and the creation of a Supreme Court. Subsequent Lords amendments have led to considerable restructuring of the Bill's provisions on the Lord Chancellor, following a Government defeat on an Opposition amendment to retain the office in modified form. Government amendments are expected in the Commons to reverse the effects of a number of these Lords changes.

The removal of the Law Lords from the upper chamber did not feature in the House of Lords reform measure carried in the first Labour administration. The abandonment of Government proposals for Lords reform in 2003 has meant that the removal of the Law Lords from the upper chamber can be seen as another step in the evolution of the membership of the House of Lords, not matched by a full consideration of the role and function of an upper chamber.

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I Separation of powers as a constitutional principle

In 1690 John Locke wrote:

> It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.[1]

The doctrine of separation of powers was further developed by the French philosopher Montesquieu, and is a major influnce on many constitutions, most notably that of the United States. The concept is imperfectly fulfilled in the United Kingdom, given that the executive (Ministers) form part of the legislature and that part of the judiciary (Law Lords) sit in the legislature.[2] Indeed, as Professor George Jones has written: 'the notion of separation of powers …is alien to the English constitution. The English system is based on the mixture of powers, a commixture or intermixture in the words of JJ Park in *Dogmas of the Constitution* or a fusion of powers in the term of Walter Bagehot in *The English Constitution'*.[3]

The Lord Chancellor, as head of the judiciary, and the person responsible for the appointment of the judiciary, as Speaker of the House of Lords and Cabinet member, appears to epitomise this intermingling. Some lawyers have suggested that Article 6 of the European Convention on Human Rights (independence of judges) might be a factor in encouraging the separation of legislature and judiciary, but this line of reasoning has been attacked by some senior judges.[4] Finally the growth of judicial review has also placed strain on this traditional intermingling as the judiciary is called upon to interpret the actions of the executive and legislature.

A. The Constitutional Reform Bill and separation of powers

The Bill makes major changes in this traditional arrangement. The Bill

- Modifies the office of Lord Chancellor so that the holder is no longer the formal head of the judiciary in England, Wales and Northern Ireland
- Ensures that the Lord Chancellor no longer sits as a judge

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1 *Second Treatise of Civil Government* 1690, cited in Bradley and Ewing's *Constitutional and Administrative Law* p81

2 For further detail on overlap see Chapter 5 of Bradley and Ewing's *Constitutional and Administrative Law* 13th ed 2003

3 George Jones, cited in Appendix 7 of the Lords Select Committee on the Constitution Reform Bill HL Paper 125-I 2003-4 and see also Memorandum from Professor John Griffiths

4 See the Lords Select Committee on the Constitutional Reform Bill HL Paper 125 Session 2003-4, paras 30 and 130-31 for a brief summary of the arguments and Research Paper 05/06*The Constitutional Reform Bill [HL] : A Supreme Court for the United Kingdom and Judicial Appointments* for arguments relating to the Supreme Court

- Requires the Lord Chancellor to be a senior lawyer and member of the House of Lords
- Removes the requirement of the Lord Chancellor to be Speaker of the House of Lords
- Removes the Law Lords from membership of the House of Lords and creates a new Supreme Court[5]
- Enshrines a concordat between the Government and the judiciary about judiciary-related functions of the office
- Creates an independent statutory Judicial Appointments Commission to recommend appointments to the Crown
- Enshrines a statutory guarantee to uphold judicial independence and the rule of law

As a result of amendments to the Bill in the Lords, the Lord Chancellor must be a member of the Lords and must have held judicial office or been a practising lawyer. These amendments are expected to be reversed by the Government during the Commons stages of the Bill.[6]

The Bill, if enacted, will make some fundamental changes to the constitution of the United Kingdom. As Professor Vernon Bogdanor noted, the changes proposed came without manifesto commitments or popular discussion of the issues:

> We are in the process of doing something quite unique in the democratic world, in slowly converting an uncodified constitution into a codified one, by piecemeal means, there being neither the political will nor the public consensus to proceed more rapidly. It may be said, therefore, that the British people, through their elected representatives, are in effect giving themselves a constitution. The theory of the American Constitution is that the people, through their elected representatives in Congress, are able to maintain a democratic dialogue, on how that Constitution is interpreted. The question may arise in Britain of whether the people should through Parliament, be able to initiate such a democratic dialogue. That is a fundamental and difficult question.[7]

Lord Norton of Louth argued that the Government proposals did not deal logically with the issue of separation of powers, leaving alone the intermingling of legislature with executive:

> The claim that change is necessary in order to give effect to the principle of the separation of powers suggests a lack of rigour in thinking through what this means. Taken literally, a separation of powers already exists in practice, in the

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5 Law Lords is the colloquial term for the Lords of Appeal in Ordinary and is discussed more fully in Research Paper 05/06 *The Constitutional Reform Bill [HL] : A Supreme Court for the United Kingdom and Judicial Appointments*

6 See response of Lord Falconer of Throroton HL Deb 13 July 2004 c1235

7 Memorandum by Vernon Bogdanor, Professor of Government, Oxford University in Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4

> United Kingdom and has done so for some time. What the term normally refers to is a separation of institutions, with separate personnel. However, in the USA, there are some exceptions (such as the Vice President chairing the Senate and the Chief Justice presiding over impeachment trials in the Senate) and the concept applies as much to the separation of the executive from the legislature as it does the separation of the judiciary from the legislature. To call in aid the concept of the separation of powers thus raises far more fundamental questions about the relationship between the executive and legislature than have been addressed in the context of the Bill. If one is to embrace the separation of powers, then this Bill is inadequate to the purpose.[8]

Many speakers in the debates on the Bill have made reference to the doctrine of separation of powers. Those supporting the retention of the Law Lords in the House of Lords have referred to the value of their contribution to the House. As Lord McCluskey said on second reading:

> It is now suddenly suggested that to have serving judges participate in the work of the upper House is an offence against the doctrine of the separation of powers. A good deal of nonsense is spoken about the separation of powers. We have never had a separation of powers of the kind that Montesquieu persuaded the American founders of the constitution to adopt in Philadelphia at the end of the 18th century. For example, our executive is embedded in the legislature in a way that must make Montesquieu turn in his grave. I have reminded your Lordships that for a very long time, certainly for 135 years or so, serving judges have always played an important part in the deliberations of this House. They seldom vote. If voting is seen as anomalous, I am sure that they would be ready to adopt a convention that they would never vote except on matters of conscience, just as the non-judicial Members of this House observe a convention that they do not vote in the proceedings of the Appellate Committee. There is nothing to stop us adopting a convention that enables us to separate our judicial function from our function as Members of this House.[9]

But proponents of change have argued that further separation is necessary to modernise the operation of the constitution, as Baroness Jay of Paddington commented:

> After all, many of us regard constitutional change as a means to renew our institutions in the general interests of our democracy and specifically to renew the parliamentary process. From that perspective—and it is the perspective of many political working Peers in this House—the Bill's provisions are most welcome. They take forward the Government's programme of parliamentary reform and, as has been argued cogently, give an enhanced independence to the judiciary. The result is the clear separation of the three arms of state authority: the legislature, the executive and the judiciary. Each should be strengthened by the separation.

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8 Memorandum by Lord Norton of Louth to the Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4

9 HL Deb 7 March 2004 c 1030

> It will be a huge political achievement to make all our key institutions more fit for purpose in the 21st century through this one Bill. Those of us whose ambition is primarily overall to improve the governance of the country will do all we can to support it. [10]

Many of the arguments heard during the passage of the Bill have illustrated the traditional divergence of views between those concerned to uphold the unique nature of the British constitution as an organic creation, who believe that to alter one aspect may undermine the whole, and reformers anxious to modernise conventions which they believe are no longer sustainable in the modern world. The former Clerk of the Parliaments, Sir Michael Wheeler Booth, illustrated some of these concerns in his evidence to the Lords select committee on the Bill:

> 5 Our constitution can be likened to a bird's nest. It has slowly evolved over centuries. It is an elaborate construction of interconnected and interdependent sticks, fluff and straw all bound together. One element is dependent on another. Remove one twig and you affect others, remove a number and the nest is in trouble. For 'sticks and fluff' read 'statute law' 'practice' 'parliamentary procedure', 'convention' 'the law and practice of parliament' and the 'rule of law'. This unwritten tradition, witnessed in Glanvill (c1187-9) and Bracton (c1250) is very old and as early as thereafter has had the advantage of being flexible and evolutionary.
> 6. Since 1997, bit by bit this old constitution so dependent on convention is being replaced by written texts, of which the Human Rights Act is perhaps the most important. The difficulty is that these changes are being made piecemeal and without indication of their interconnectedness with the other changes having been considered. [11]

1. The concordat

The creation of a concordat between Government and the Lord Chief Justice, representing the judiciary, published on 26 January 2004[12] may perhaps illustrate how major parts of the British constitution continue to evolve through non-statutory agreement by the interested parties, rather than resulting from democratic pressure. The concordat is discussed further in Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments* but in essence was an agreement on the details of the transfer of the Lord Chancellor's judicially-related functions, to be partially reflected in a series of changes to the drafting of the Bill. It formed part of the complex negotiations so far necessary to secure enactment of this Bill. The concordat is covered in detail in Part II of Research Paper 05/06.

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10 HL Deb 7 March 2004 c1038

11 Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4

12 Printed as Appendix 6 to the Lords Select Committee on the Constitution Reform Bill HL Paper 125-I 2003-4 and available from the DCA website

Finally Part V of this paper considers the impact on the House of Lords as a legislature of the departure of the Law Lords. Research Paper 05/06 considers the creation of the Supreme Court. The removal of the Law Lords did not feature significantly in the debate on House of Lords reform until 2003.

II The office of Lord Chancellor

A. Background

The constitutional position of the Lord Chancellor as simultaneously a member of the legislature, the executive and the head of the judiciary[13] has been the subject of much discussion and proposed reform in recent years. But in the early days of the Labour Government of 1997 Lord Irvine staunchly defended the office:

> The Lord Chancellor is at a critical cusp in the separation of powers between Parliament, government and the judiciary. He is the natural conduit for communications between the judiciary and the executive, so that each fully understands the legitimate objectives of the other. Under the previous government the public were disturbed that the separation of powers was not alive and well because the judiciary and the executive appeared to be at war. It is for the Lord Chancellor to ensure that the public can have continuous confidence that our system, based on the separation of powers, is working. I am referring of course in particular to the well-publicised unhappy relations between the former Home Secretary and the judiciary. That kind of thing will not happen under this Government. I believe that the higher judiciary would be the first to agree that since 2nd May strong co-operative arrangements have been in place which are working well in practice.
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> It is also a major duty of any Lord Chancellor to uphold the independence of the judiciary upon which the rule of law depends. It is the fact that Ministers' or governments' strongly held views, and their judgment of the interests of their departments, or of the interests of government, or of the public interest, can easily conflict with the judgments of the courts within the courts' independent sphere. That is why any Lord Chancellor, supported by a Permanent Secretary who must be fully conscious of these crucial values, is the guardian within government of judicial independence. [14]

As late as 2002, the Government were still defending the importance of the traditional role of the Lord Chancellor, for example in evidence to the Council of Europe.[15] Its evidence stated:

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13 For a cogent summary of the office see Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament: Functions, Practice and Procedures*, Sweet and Maxwell 2003

14 HL Deb 25 November 1997 c943

15 See Note by Lord Chancellor's Department November 2002 in Appendix to the Council of Europe Committee on Legal Affairs and Human Rights *Office of the Lord Chancellor in the Constitutional System of the United Kingdom* Doc 9798 28 April 2003

> 6. In addition to these safeguards the Lord Chancellor provides a counter-balance for the judicial branch against the centralised power of government and Parliament. At the same time he is removed to the House of Lords, away from the full force of party politics. The Lord Chancellor is always a senior lawyer or judge, and therefore comes to government imbued with a full understanding of legal culture and the rule of law. His tripartite role enables him to act as both a link and bulwark between the judiciary and the executive and the legislature. He can explain, defend and interpret each to the other.

On the other hand, Lord Alexander of Weedon, giving the Denning Society lecture in 2001, claimed that the conflict of roles had become more acute under Lord Irvine than under previous incumbents over the past 100 years:

> …the present Lord Chancellor, more than any other for a century, plays a central role in executive government and policy formation….Tensions between political pressures and what is good for the legal system are bound to exist – and perhaps more so the perception of a conflict of interest. What would strengthen government and open accountability would be to transfer the overtly political functions of the Lord Chancellor to other departments, leaving him the still-large role of court administration with responsibility for non-political law reform and appointing judges.

A report from the Council of Europe recommended in April 2003 that the Lord Chancellor should no longer sit as a judge, describing the position as a breach of the doctrine of separation of powers..[16] A description of the judicial function of the Lord Chancellor was given in a consultation paper issued in September 2003 (see below):

> The Lord Chancellor is a senior Judge and Head of the Judiciary in England and Wales and Northern Ireland. However, the current Secretary of State has made it clear that he will not sit in any judicial capacity in any part of the UK.
> Nevertheless, by law the Lord Chancellor is President of the Supreme Court of Judicature of England and Wales (which consists of the Court of Appeal, the High Court of Justice and the Crown Court, as defined by the Supreme Court Act 1981). He is also President of the Chancery Division and a Judge of the Court of Appeal. Of more practical importance, the Lord Chancellor is the presiding Chairman of the Appellate Committee of the House of Lords (that is the House of Lords sitting in its judicial capacity) and a member of the Judicial Committee of the Privy Council, where he usually presides. (For more details on the work of the Appellate Committee and the Judicial Committee of the Privy Council see the Consultation Paper, *A Supreme Court for the United Kingdom*[17], paragraphs 8-17).

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[16] See the Committee on Legal Affairs and Human Rights *Office of the Lord Chancellor in the Constitutional System of the United Kingdom* Doc 9798 28 April 2003 http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc03/EDOC9798.htm

[17] http://www.dca.gov.uk/consult/supremecourt/index.htm

> Although the Lord Chancellor's formal title is Lord High Chancellor of Great Britain, his functions in relation to Scotland are relatively limited. As a member of the Appellate Committee of the House of Lords he can sit to hear Scottish civil appeals, and he appoints members of some tribunals which have jurisdiction in Scotland as well as in England and Wales.
> The Lord Chancellor's responsibilities in respect to Northern Ireland are described at paragraph 27 He does not sit as a judge in that jurisdiction (except when hearing appeals from the Province as a member of the House of Lords Appellate Committee or the Judicial Committee of the Privy Council in the exercise of its devolution jurisdiction).

Further detail on the development of the office is contained in a history of the office by Nicholas Underhill and in *The Office of Lord Chancellor* by Professor Diana Woodhouse in 2001.[18] She argued that the LCD had already become a significant government department and the balance in the Lord Chancellor's functions had 'moved away from the judicial, towards the executive and political, a shift which means that increasingly executive responsibilities are being carried out by an unelected minister whose territorial boundaries are imprecise and subject to adjustment at his and the Prime Minister's dictate..[19]

The case for an enlarged, reformed LCD, under the title 'Ministry of Justice and Equality' had been promulgated by the Institute for Public Policy Research in March 2001.[20] Judicial appointments should be transferred from the Lord Chancellor to an independent commission; the Lord Chancellor should cease to be Speaker of the House of Lords; and the LCD should assume additional powers over freedom of information, human rights and race and immigration issues while a much reformed Home Office concentrated on crime reduction, prisons and national order and security. The paper emphasised the overtly cross-cutting nature of the reforms proposed and the need for a 'department that is capable of developing and promoting a coherent strategy on principles to which the government is committed'.

Some commentators had seen the complete abolition of the post of Lord Chancellor as the logical conclusion to the increased executive responsibilities of the Lord Chancellor as a member of the Cabinet, and the effect on his role as head of the judiciary of such factors as the *Human Rights Act 1998*. Many witnesses to the Lords Constitution Committee noted that the office of Lord Chancellor had developed profoundly since the mid 20th century. Professor Bogdanor argued that the pre 2003 position worked on a pragmatic basis only:

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18 See also *The Lord Chancellor* by Terence Underhill 1978 and RVT Heuston *Lives of the Lord Chancellors 1885-1940* 1964. A list of holders of the office is at www.dca.gov.uk/lcfr.htm

19 Professor Diana Woodhouse, 'The role of the Lord Chancellor', *Public Law* Winter 1998

20 Sarah Spencer, 'Future of the Home Office and the Lord Chancellor's Department', IPPR March 2001

> The system "worked" since, although in theory, the Lord Chancellor could regularly sit as a judge, he has rarely done so in recent years; and although he could, in theory, act as a partisan Cabinet minister by making political appointments to the judiciary, this too did not happen in modern times. Similarly, the law lords, by convention, played no part in political controversy in the upper house.[21]

By the time of the June 2003 reshuffle, a de facto Department of Constitutional Affairs could be said to be in existence. On its abolition in June 2003, the LCD comprised the Lord Chancellor's Department itself (including the Court Service and the Public Guardianship Office), the Northern Ireland Court Service, the Public Record Office and HM Land Registry. Its main responsibilities were established in June 2001 with some further changes resulting from the reorganisation of the Office of Deputy Prime Minister and of the Department of Transport, Local Government, and the Regions in May 2002. The Department's remit covered the courts, freedom of information/data protection, human rights, Lords and other constitutional reform, judicial appointments, party funding, electoral law and policy, civil and criminal law, legal aid, royal, church and hereditary issues. In March 2003 the Lord Chancellor announced that a new tribunals system would be a distinct part of the justice system, accountable to him.[22] Planned public spending by the LCD departments in 2003-04 was put at £3.2 billion.[23]

B. Initial Government proposals

On 11 June 2003 the Prime Minister announced a ministerial reshuffle and machinery of government changes. The post of Lord Chancellor was to be abolished in its entirety and a new Department for Constitutional Affairs (DCA) under Lord Falconer of Thoroton, incorporating the Wales and Scotland Offices, replaced the Lord Chancellor's Department. Immediate media attention was on the decision of Lord Irvine to retire amid suggestions of disagreements with the Prime Minister over the scale of reform to the post.[24] There was also dismay at the scale of the announced changes which had taken place without formal consultation.

A consultation paper issued by the new DCA in September 2003 gave more detail of the necessary legislative changes needed to abolish the office.[25]It noted:

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21 Memorandum by Vernon Bogdanor, Professor of Government, Oxford University in Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4

22 Following consultation of the proposals in *Tribunals for Users: One system, One Service*, chairman Sir Andrew Leggatt, March 2001; HL Deb 11 March 2003 c168W

23 http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr02/report/prebud_pbr02_repannexb2.cfm A description of the changing role of the LCD was given by its former Permanent Secretary, Sir Tom Legg in Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4

24 Phil Webster, 'Emergency surgery on the Cabinet', *The Times* 13 June 2003

25 *Constitutional Reform: reforming the office of the Lord Chancellor* CP 13/03 at http://www.dca.gov.uk/consult/lcoffice/index.htm

> 6…Once the Judicial Appointments Commission and new Supreme Court are in place, the post of Lord Chancellor will be abolished, at least in its present form, putting the relationship between the Executive, Legislature and the judiciary on a modern footing….
> 7.The Government's objective is to clarify the ministerial responsibilities which will be transferred to the Secretary of State for Constitutional Affairs, and to remove those duties and functions which are inappropriate to a Government Minister in the 21st century. The majority of the Lord Chancellor's responsibilities as a Departmental Minister will be progressively transferred to the Secretary of State for Constitutional Affairs. The exceptions are those responsibilities that are more appropriate to the Judicial Appointments Commission and some which relate to children and families.

The paper noted arguments for retaining the title of Lord Chancellor, perhaps in relation to another public office, but it argued that until the office as it currently existed was abolished, it could not be used in relation to any other position.[26]

The executive summary emphasised that the paper dealt with residual issues, not related to the Lord Chancellor's functions as a Departmental Minister or his capacity as Head of the Judiciary. The paper noted that the responsibilities of the Lord Chancellor in respect of children and families, including responsibility for the Children and Family Court Advisory and Support Service was being transferred to the Secretary of State for Education and Skills. It also noted that the responsibility for the Great Seal would be retained by the Secretary of State for Constitutional Affairs.[27] Responsibilities for the National Archives and Land Registry would remain with the Secretary of State. A summary of responses to the consultation paper is available at http://www.dca.gov.uk/consult/lcoffice/lcresp.htm

The select committee on the Lord Chancellor's Department, which had been established in January 2003 to oversee the work of the Department, was renamed the select committee for the Department of Constitutional Affairs on 11 September 2003. The Committee took evidence from Lord Falconer on 30 June 2003, as part of its enquiry into the role of the Lord Chancellor.[28] The Lords Constitution Committee also took evidence on 15 October 2003.[29] The Commons Constitutional Affairs Select Committee produced a report on aspects of the reforms in February 2004.[30]

Many of the responses to the consultation paper expressed dismay that the abolition of the office might upset the constitutional conventions upholding the independence of the

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[26] CP 13/03, Para 2.8

[27] Documents passed under the Great Seal include royal proclamations, writs, and letters patent. The procedure is set out in the *Great Seal Act 1884*

[28] HC 903-I uncorrected evidence

[29] HL Paper 180 2002-3

[30] Constitutional Affairs Committee *Judicial Appointments Committee and a Supreme Court (Court of Final Appeal)* HC 48 10 February 2004 Session 2003-4

judiciary. The Lords Select Committee on the Constitutional Reform Bill heard evidence from the Government and others that earlier Lord Chancellors had not in fact been able to act as defenders of the judiciary. In his evidence, Lord Falconer stated:

> 35. In recent times, no Lord Chancellor has resigned in protest at the actions of his government, irrespective of any perceived threat to the rule of law. The ability of the Lord Chancellor to resist what the lawyer would regard as attacks on the rule of law, or on the independence of the judiciary, depends to a large extent on his political standing. His position is no more secure than that of any other Minister: the Lord Chancellor's tenure in office is dependent on the Prime Minister and, as RVF Heuston notes, Lords Simonds and Kilmuir, for example, were "dismissed with peremptory abruptness for reasons which seemed good to the Prime Minister of the day".[Simonds was summarily dismissed as Lord Chancellor by Winston Churchill from his post-war Cabinet (Churchill asking Salisbury to tell Simonds that he was no longer needed) and Kilmuir was dismissed by Harold Macmillan as part of the `Night of the Long Knives' in 1962.
> 36. The Government is of course subject to the law, and Government action or inaction (whatever the source of its claimed legal power) is liable to be overturned by judicial review. There are, in addition, other specific mechanisms for upholding the rule of law: for instance, all legislation has to be accompanied by a statement of ECHR compatibility. All Ministers are bound by the rule of law, and to ensure compliance with the European Convention on Human Rights. The Attorney-General's role in advising on the lawfulness of Government proposals will continue. The courts are there to ensure that the law prevails and to ensure that aggrieved parties can seek redress. Nothing in the Bill undermines this. Separating the politician from the senior judge can only strengthen current arrangements and will, in fact, better secure the rule of law by distancing the judiciary from political influence. [31]

C. The role of the Secretary of State for constitutional affairs

The Government intended that the new office of Secretary of State for Constitutional Affairs would mean that the functions previously carried out by the Lord Chancellor need no longer be exercised by a lawyer. His role as head of the judiciary dates from the 18th century and is not a statutory requirement but has developed as a constitutional convention.[32] The *Supreme Court (Offices) Act 1997* had already removed earlier requirements for the Permanent Secretary to the department to have legal qualifications and experience. In evidence to the Lords Constitution Committee, Lord Falconer envisaged that the Secretary of State would have a special statutory responsibility to safeguard the independence of the judiciary.[33] One of the major issues was that the new

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[31] Memorandum by Secretary of State for Constitutional Affairs Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4. Other examples were given in the Lords Constitution Committee report of the meeting with the Lord Chancellor 16th report HL 193 2003-4 at Question 14

[32] Memorandum by Secretary of State for Constitutional Affairs Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4, para 14

[33] HL Paper 180 2003-3, Q8

minister would not occupy the same distinctive role of the Lord Chancellor within the Cabinet, as a more 'non-political' office holder.[34]

The Lords Committee on the Constitutional Reform Bill concluded the Lord Chancellor could no longer sit as a judge:

> 30. The first area of broad agreement is that it has long been impracticable for the Lord Chancellor to sit as a judge. Lord Bingham of Cornhill told the Committee that "the days when the highest court of the land should be presided over by somebody who, whatever his other qualities, has almost certainly not been selected for his qualities as a judge have gone and gone for ever" (Q 415). The Committee heard differing views on whether the practice of the Lord Chancellor sitting in the Appellate Committee of the House of Lords ran the risk of a successful challenge being made under Article 6 of the European Convention on Human Rights, which requires a court hearing a case to be "independent and impartial". Whatever the merits of the rival analyses, the practical constraints on the Lord Chancellor have long been clear. Lord Bingham of Cornhill said: "In the three years until Lord Irvine retired when I was here he sat on two cases. It was agreed between us that he could not do anything to do with crime because that affected his colleague, the Home Secretary, he could not deal with human rights because he piloted the bill through the House, he could not deal with judicial review because it was of governmental interest and he could not deal with commercial cases because they always went on for much longer than he could possibly sit .." (Q 415).

However, the Committee did not reach agreement as to whether the Secretary of State for Constitutional Affairs (or Lord Chancellor) should be a senior lawyer or a member of the House of Lords, both distinctive aspects of the office. These points have continued to cause controversy at all stages of the passage of the Bill. The principal arguments in favour of the status quo may be summarised as follows:

- It is important for the post holder to be a lawyer to understand the complexities and tensions faced by the judiciary and court service and to be responsible for upholding an impartial judiciary within the Cabinet
- The Lord Chancellor has traditionally been a very senior member of the Lords in the order of precedence within the Cabinet; the new post of the Secretary of State for Constitutional Affairs has a junior position in the list to be found in Hansard and will have no special qualification to uphold the rule of law
- It is important for the post holder to be a member of the Lords because:
  1. The person is likely to be drawing towards the end of their political career and so will not be unduly subject to political pressures

[34] See for example the exchanges between Lord Jauncey of Tullichettle and Lord Falconer in the Lords Constitution Committee, HL Paper 180 2002-3, Qs40-42

2. The Lords has a particular role to play in safeguarding the rule of law, judiciary and the constitution (this argument is often linked with the retention of the Law Lords within the House).
3. Retaining the Lord Chancellor as a minister who sits in the Lords would help preserve the link with the values and status of the historic office of Lord Chancellor

The Government have countered these arguments by stating that:

- It is not necessary to be a senior lawyer or judge to understand and uphold the rule of law and the independence of the judiciary, especially since there is broad agreement that the Lord Chancellor should no longer sit as a judge
- It would unduly restrict the pool of available talent to require the Lord Chancellor to be a lawyer
- The Department of Constitutional Affairs is a major department whose head should be accountable to the House of Commons

The arguments were rehearsed during the select committee hearings and throughout the Lords stages of the Bill and are referred to below in Part IV.

1. Responsibilities in respect of Northern Ireland

One of the most complex areas to be dealt with was the responsibilities of the Lord Chancellor in respect of Northern Ireland. The September 2003 consultation paper gave a list of provisions relating to the role of Lord Chancellor in Northern Ireland at Annex F. Following direct rule in 1972, he became responsible for making or advising on all judicial appointments in Northern Ireland, but had no role in relation to the administration of the courts. He discharges his functions under the *Judicature (Northern Ireland) Act 1978* through the Northern Ireland Court Service. Plans to transfer responsibilities over judicial appointments, the courts and the Northern Ireland Court Service have been made already in the *Justice (Northern Ireland) Act 2002* and subsequently modified in the *Justice (Northern Ireland) Act 200*4, which is discussed in Part II of *Research Paper 05/06 The Constitutional Reform Bill[HL]: A Supreme Court for the United Kingdom and Judicial Appointments.* The present uncertain state of the devolution settlement in Northern Ireland inhibits the delegation of his functions.

2. Miscellaneous duties

Butterworth's legislation database has over 400 extant Acts and Church of England measures in which the Lord Chancellor is cited. These powers and duties extend to a wide range of subjects and statutes, from tribunals, bankruptcy, patents, agricultural holdings, independent schools tribunals, ecclesiastical appointments and the 'Royal peculiars' (Westminster Abbey and St George's Chapel, Windsor). The Lord Chancellor also has a

number of church appointments to confer.[35] A list of statutory references to the Lord Chancellor is given at Annex E to the September 2003 consultation paper. This paper asked for responses to consider the future home for these types of function which did not seem to fit well with a new Department for Constitutional Affairs. These included:

- Ecclesiastical patronage.
- Other Ecclesiatical functions
- Visitation.
- Royal Peculiars.
- Charities and Schools

The consultation paper offered a considerable amount of detail in these subject areas.[36]. The subsequent amendment to retain the office of Lord Chancellor has meant that the changes proposed in the paper will require considerable modification if the office is to remain. The *Explanatory Notes* to the version of the Bill introduced into the Commons note:

> Clause 16 of the Bill also makes provision for the transfer, modification and abolition of other functions of the Lord Chancellor, for example functions in local and private acts, not yet identified, or functions created by primary legislation passed in the 2003-04 or 2004-05 Sessions or by secondary legislation made under such primary legislation. The clause also provides a power to amend charters and other prerogative instruments to take account of the transfer, modification or abolition of a function.[37]

3. The Great Seal

The September 2003 consultation paper made proposals in relation to the Great Seal of the Realm, since the Lord Chancellor has by convention been custodian of the Great Seal. By convention, and at least since the reign of George III, the office of the Lord Keeper of the Seal is combined with that of the Lord Chancellor. The documents to which the Great Seal is affixed are proclamations, writs, letters patent, and the documents which give power to sign and ratify treaties. Authority for the affixing of the Great Seal is given by a royal warrant under the Queen's Sign Manual and countersigned by the minister responsible for its safe custody. According to *An Encyclopaedia of Parliament*, whenever, a new Great Seal is adopted at the beginning of a new reign, the old seal becomes the property of the Lord Chancellor.[38]

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35 HC Deb 6 Feb 2002 WA

36 Further information is given in Library Standard Note 3137

37 *Explanatory Notesto Bill 18 of 2004-5* at http://www.publications.parliament.uk/pa/cm200405/cmbills/018/en/05018x--.htm

38 Wilding and Laundy (4th ed 1971) p332

The *Great Seal Act 1688* applies in circumstances where the Great Seal is held by a Commission and provides that such Commissioners have the powers and entitlements of the Lord Chancellor or Lord Keeper. Her Majesty under the Royal prerogative may appoint Commissioners who can act in place of the Lord Chancellor when he is for some reason unavailable. Further details are given in the consultation paper.[39] The consultation paper proposed that functions relating to the Seal be transferred to the Secretary of State for Constitutional Affairs. Due to amendments made in the Lords stages of the Bill, there is no longer a clause to abolish the Lord Keeper of the Seal or the 1688 legislation.

4. Speakership

Under House of Lords Standing Orders, the Lord Chancellor is the Speaker of the House of Lords. Standing Order No 18 – "Speaker of the House", which dates from 1660, states:

> It is the duty of the Lord Chancellor ordinarily to attend the Lords House of Parliament as Speaker of the House …

The Government's proposals to abolish the post of Lord Chancellor would also have had implications for the position of Speaker of the House of Lords. On 25 June 2003, the Leader of the House of Lords announced that, after consultations, a Select Committee on the Speakership would be set up to consider the future arrangements for the Speakership of the House, to report by the end of 2002-03 session.[40] The Committee undertook its work on the assumption that "the office of Lord Chancellor will indeed be abolished".[41]

The Committee reported on 18 November 2003. The Committee noted that the title 'Lord Speaker' already existed,[42] and recommended that the Speaker of the House of Lords should be known as such:

> So we come back to "Lord Speaker". It is not only the existing title, but it is also in our view the natural title. The only argument against it is that it might lead to confusion with the Speaker of the House of Commons. We do not regard this as a serious risk. Both Houses of the Canadian Parliament have a Speaker. Baroness Boothroyd, who approved the title "Lord Speaker", did not foresee any confusion (Q 76). We were impressed by her evidence. Accordingly we recommend that the existing title be retained, and that the new Speaker should be known as the Lord Speaker.[43]

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39 *Constitutional Reform: reforming the office of the Lord Chancellor* September 2003

40 HL Deb 25 June 2003 c295

41 Select Committee on the Speakership of the House, *The Speakership of the House of Lords*, 18 November 2003, HL 199 2002-03, para 5

42 *Ibid*, Para 55

43 *Ibid*, Para 59

However, there was opposition to the title Lord Speaker from the House of Commons. On 19 January 2004, Sir Michael Spicer tabled an Early Day Motion asking the House of Lords to reconsider the proposed title. The EDM had attracted 187 signatures by the end of the Session. It read:

> That this House notes the report prepared by the House of Lords' Select Committee on the Speakership of the House of Lords and its recommendation that the senior Lord presiding on the Woolsack should be known as the Lord Speaker; further notes that the Committee recognized the argument that this might lead to confusion with the Speaker of the House of Commons, but dismissed it; respectfully consider that there would be considerable scope for such confusion to occur, particularly in respect of Mr Speaker's role in representing this House at home and overseas; and calls upon the Government to facilitate consultations between both Houses about this important and sensitive issue.[44]

According to press reports, the Speaker of the House of Commons was also unhappy about the plans.[45]

Traditionally the House of Lords has relied on self-regulation to maintain order during debates. The Select Committee wanted to maintain this tradition and saw the Lord Speaker "not as an alternative to self-regulation but as an essential part of it".[46] Nevertheless, the Committee identified a number of responsibilities, mostly currently exercised by the Lord Chancellor that could be taken on by the Lords Speaker, both within and outside the Chamber. First within the Chamber:

- allowing Private Notice Questions;
- during oral questions, choosing between parties when two questioners rise at the same time;
- providing 'a tactful reminder' to the House when a Member speaks for too long or to the wrong amendment;
- authorising the recall of the House during a recess; and
- Chairing Committees of the Whole House, as well as sitting on the Woolsack.[47]

The Committee recommended that the two existing salaried Deputy Speakers, the chairman of Committees and the Principal Deputy Chairman, should retain their roles. It considered that the existing panel of 28 unsalaried deputies was too large and should be

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44 Early Day Motion 444, 2003-04

45 Eben Black, "Speaker tries to shout down a rival in the Lords", *Sunday Times*, 8 February 2004

46 Select Committee on the Speakership of the House, *The Speakership of the House of Lords*, 18 November 2003, HL 1999 2002-03, para 16

47 Select Committee on the Speakership of the House of Lords, The Speakership of the House of Lords, November 2003, HL 199 2002-03, paras 19-31

reduced to 16. This panel would support the Speaker in the Chamber and also take the chair in all Grand Committees.[48]

The Committee also considered the Speaker's role outside the Chamber. It began by noting that "The New Speaker will have much more time to involve himself in the affairs of the House than the Lord Chancellor".[49] It recommended that he should be an *ex officio* member of both the House Committee, which he should chair, and the Procedure Committee.

The Committee highlighted four further functions to which it attached "great importance":

- the ceremonial role –
  - the procession at the beginning and end of each day's business should continue,
  - the Speaker should be a Privy Counsellor and participate in royal Commissions at the beginning of each Parliament and the end of each session,
  - the Speaker should present the Address to Her Majesty the Queen on ceremonial occasions, and
  - His dress should be "dignified" and include a gown.

- representing the House abroad;

- receiving and entertaining overseas dignitaries;

- providing guidance to new members and to longer-serving members "on occasion".

The Committee considered the issue of accommodation for the Lord Speaker. It argued that "Certain of the rooms of the Lord Chancellor's residence will be needed for entertaining by the new Speaker …". It also recommended that a number of the Lord Chancellor's statutory functions should be transferred to the Speaker.[50]

III The Constitutional Reform Bill 2003-4 - parliamentary proceedings

The proceedings of the Bill have been of interest, firstly because of the unusual select committee procedure and secondly because of the use of carry over. There have been

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48 *Ibid*, paras 33-35
49 *Ibid*, Para 36
50 *Ibid*, paras 37-44

significant amendments in the Lords, which are unlikely to be fully acceptable to the Government. But because the Bill was introduced in the Lords, it is not possible to use the Parliament Acts to overrule the Lords. Some commentators have also argued that because the Bill did not feature in the Government manifestos of 1997 and 2001, the Salisbury convention should not apply.[51] This convention means that the Lords should not vote against 'manifesto' bills at second or third reading. There was considerable pressure for pre-legislative scrutiny from the Commons Constitutional Affairs Committee[52] and also from party spokesmen in the Lords.

The Bill was introduced into the Lords on 24 February 2004, and had its second reading on 8 March 2004. It was then committed to a special select committee of the House with a requirement to report to the House by 24 June 2004.[53] The decision to set up the committee formed part of usual channel negotiations following second reading as evidenced by this comment from Lord Brabazon of Tara:

> **The Chairman of Committees:** My Lords, the setting up of this committee—its composition and the carry-over Motion which the Leader of the House will be moving immediately after this Motion—were all agreed by the usual channels. The House agreed to set this committee up following the Second Reading debate on 8 March. The membership was agreed by the Committee of Selection and was published in its second report on Thursday 18 March. The timing of the first meeting and the time when the report will be made are also subject to the Motion today. All this was agreed by the usual channels.[54]

The final report was published on 2 July 2004.The Bill was re-presented in the Lords on 24 November 2004 as Bill 1 of 2004-5, following the carry over motion. It was introduced into the Commons as Bill 18 of 2004-5 after its Lords Third Reading on 20 December. The Committee was also subject to scrutiny from the Joint Committee on Human Rights[55] and the Lords Constitution Committee.[56]

1. Carry over motion

The major parties in the Lords agreed that the Bill should be subject to a carry over motion allowing the Bill to continue to be considered in Parliament in the 2004-5 session.

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51 See for example Sir Michael Wheeler Booth' memorandum in Lords Select Committee on the Constitution Reform Bill HL Paper 125-II 2003-4. The Salisbury Convention is discussed in Part IV of Research Paper 98/103 *Lords Reform: the Legislative Role of the House of Lords*

52 *Judicial Appointments and a Supreme Court (Court of Final Appeal)* HC 48 2003-4

53 The report and evidence to the committee can be found at its page on the parliamentary website at http://www.parliament.uk/parliamentary_committees/reformbill.cfm Lords Select Committee on the Constitution Reform Bill HL Paper 125, 2003-4

54 HL Deb 22 March 2004 c469

55 *Twenty Third Report* HL Paper 210/HC1282 2003-4

56 *Eleventh Report* HL Paper 142 2003-4

The motion was passed on 22 March 2004, when the Bill was committed to the select committee, and formed part of the inter - party negotiations that began once the Government faced defeat on the motion to commit the bill to a select committee.[57] The Commons Standing Orders state that a Commons Bill cannot be subject to more than one carry over motion. Because the Bill originated in the Lords and had its carry over there, it is not subject to the usual Commons standing orders, although there remains the possibility of the use of an ad hoc motion agreed in both Houses. The *Explanatory Memorandum from the Leader of the House* for the debate on 26 October 2004, which made carry over a permanent part of Commons Standing Orders, noted:

> If the House wished to carry over a Lords bill, that would require an ad hoc motion to which this standing order would not apply, and an equivalent order in the House of Lords. [58]

The Lords *Companion to the Standing Orders* states that the carry-over procedure does not apply over a dissolution of Parliament, but there is no specific prohibition in the Commons standing orders.[59] In the context of media speculation of a general election in spring 2005, doubts have been expressed as to whether the Bill will complete all its stages by the time of dissolution. It must be considered unlikely that another carry over motion would be agreed in the Lords.

2. Lords Select Committee on the Constitutional Reform Bill

This committal was a rare practice in respect of Government bills and precedents are discussed in the first chapter of the report from the Lords committee. The committee was required to report by 24 June 2004. Lord Falconer, as Secretary of State, was one of the members, as were the Opposition spokesmen, Lord Kingsland and Lord Goodhart. During this stage, over 400 mainly Government amendments were made by agreement, but the committee was divided on the two central issues: the abolition of the office of Lord Chancellor and the establishment of a Supreme Court. The working of the committee was described briefly by its chairman, Lord Richard, when the Bill proceeded to a Committee of the whole House.

> Our work was divided into three main phases. First, we met in public to take oral evidence from more than 32 witnesses. We received over 80 written submissions. We considered the views of 14 serving judges, seven retired judges, 14 academics, the lawyers' professional bodies in England and Wales, Scotland and Northern Ireland, as well as campaign groups, individual lawyers and law firms, and members of the public. The evidence is published in Volume 2 of the report.

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57 See Library Standard Note 3235 *Modernisation:Carry Over of Public Bills* for details of the procedure

58 *Explanatory Memorandum on the motion relating to the carry over of bills standing on the order paper in the name of the Leader of the House* 26 October 2004

59 Lords Companion para 6.08

This collation of the evidence and analysis of the facts and opinions about the reforms proposed in the Bill will, I hope, be of assistance to the House as it now resumes its scrutiny. I hope, too, that it provides a firm evidential basis for future argument, which no doubt will take place.

During our deliberation stage we met in private to consider the central issues that had emerged from the evidence. In total, we identified and examined 44 separate issues. On many of those questions we were able to reach conclusions on the basis of consensus. On some, our report shows that the committee supports the policy of the Bill. On other issues, we agreed to amend the Bill on the basis of amendments tabled by the noble and learned Lord the Lord Chancellor. Alternatively, we have indicated our support for amendments that the Government have undertaken to bring forward at a later stage.

It will be no surprise to noble Lords to learn that there were issues on which we did not reach agreement and consensus. Those included the two major questions of whether the office of Lord Chancellor should be abolished and whether a Supreme Court should be established. The committee was more or less evenly divided on those issues and we have explained the reasons for our disagreement in the report. Not only were we more or less evenly divided, but under the procedures of the committee the chairman had no casting vote. However, I have to say that, even if he had had such a casting vote, he would not have exercised it because it would have defeated the whole object of the committee if we had voted along those lines. These are major constitutional changes and it is right that they are determined by Parliament as a whole.

In the final, formal stages of our work, we amended the Bill and agreed our report. The amendments included those to which I have already alluded—the ones brought forward by the noble and learned Lord the Lord Chancellor in response to our discussions. Here I should say in parenthesis how valuable it was to have the noble and learned Lord there as a member of the committee. He could hear the argument, he had the authority and, in circumstances in which he thought it proper, his flexibility and natural charm allowed him to agree. Not only that, we accepted amendments which we felt would give better effect to the concordat between the Lord Chancellor and the Lord Chief Justice. Finally, we made a large number of minor drafting and technical amendments at the request of the Lord Chancellor. All the amendments were made by agreement.

What of the points of disagreement? As we explain more fully in paragraphs 7 and 8 of the report, we took the view early on that little would be served by seeking to vote. Instead it was better to register the areas of our disagreement in the report itself. I think that some of my colleagues on the committee would also wish me to emphasise that, in those areas of disagreement, the fact that we have stood the clauses and schedules as part of the Bill does not imply that we all acquiesce to them, nor will it inhibit some of our number at least from registering such disagreements at later stages of the Bill.[60]

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[60] HL Deb 13 July 2004 c1138-9

3. Sunrise clause

A Government amendment was made at report on 14 December 2004 to insert a 'sunrise clause' to ensure that the aspects of the bill creating a Supreme Court would not come into effect until the Lord Chancellor was satisfied that premises for the court were ready, having consulted the Law Lords.[61] A commencement order will be necessary to bring Part 2 of the bill into force and there is no specific time limit by which Part 2 has to come into effect. The content of the clause is dealt with in Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments*.

4. Sewel motion

Bills which affect areas devolved to the Scottish Parliament are subject to a Sewel motion made by the Scottish Executive and approved by the Scottish Parliament.[62] Due to the unusual nature of the parliamentary proceedings on the Bill, the Scottish Executive delayed lodging a motion until December 2004, rather than around second reading.[63] The Scottish Parliament referred the motion to Justice 2 committee which approved the motion.

IV Lords amendments to retain the office of Lord Chancellor

When the Bill was considered in Committee of the Whole House on 13 July an amendment was passed to retain the office of Lord Chancellor. The vote was preceded by a lengthy debate on the issues. The amendment was proposed by the Conservative spokesman, Lord Kingsland, and passed by 240 votes to 208.[64] A Government amendment was also passed to clarify the territorial extent of the office.[65] As a result of this defeat the Government made several amendments during the remaining Lords stages. References to specific clauses in this section are to the Bill as first printed in the Commons. The *Explanatory Notes* provide a description of each clause and this Part concentrates on the major issues.

In the rest of the Committee stage Opposition interest was evident in both retaining the office and ensuring that it was held by a senior lawyer. Amendments were made at report stage and at third reading. These may be summarised as follows:

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61 HL Deb 14 December 2004 c1318

62 For background see Library Standard Note no 2084 *The Sewel Convention*

63 For background see 1st report 2005 11 January 2005 from the Justice 2 Committee of the Scottish Parliament at http://www.scottish.parliament.uk/business/committees/justice2/reports-05/j2r05-01-01.htm

64 HL Deb 13 July 2004 c1194

65 HL Deb 13 July 2004 c1235

A. Office of Lord Chancellor

The Bill was amended to retain the title of Lord Chancellor on 13 July 2004. The Government considered the implication of this amendment over the summer recess. When the committee stage continued in the Lords, Lord Falconer promised to bring forward Government amendments on report to give effect to that decision.[66] But he did note:

> In line with that, we will ensure that the Bill is amended as follows: the Lord Chancellor will perform those functions that the Bill in its present form currently allocates to the Secretary of State for Constitutional Affairs; the Great Seal will remain with the Lord Chancellor; the Lord Chancellor will retain the current pension and salary arrangements of his office. In bringing forward such amendments our purpose is to ensure that the Bill gives effect to the will of this place. But, of course, that does not preclude the Government from seeking to restore the position of the Secretary of State for Constitutional Affairs in another place.
>
> In any event, the decision made on 13 July does not extend to whether the Bill should prescribe that the Lord Chancellor should be a Peer or a lawyer, nor does it extend to the kind of oath that the Lord Chancellor should take. These issues are still open for debate and we shall shortly turn to them. I shall at that time make clear why the Government will be resisting those amendments.[67]

Clause 114 of the Bill now provides, as part of general interpretation, that the term of Minister used throughout the Bill means Lord Chancellor.

B. Lord Chancellor and the rule of law

On the first day of report on 7 December 2004 Lord Falconer successfully moved an amendment to ensure that reform of the office did not weaken the protection of the rule of law:

> I believe that my Amendment No. 1 would meet the objective of preserving the existing position in relation to the rule of law while avoiding broader constitutional effects, particularly in relation to parliamentary sovereignty. My amendment seeks to maintain the balance in our constitutional arrangements and to preserve the sovereignty of Parliament, while providing the clarity and reassurance that the House has rightly sought with respect to the rule of law.
>
> The obvious way of providing that reassurance, while properly addressing the issues I have outlined, is to keep in mind the specific issue that we are trying to address, namely, the perceived threat to the rule of law from the changes the Bill will bring about, particularly the reform of the office of Lord Chancellor.
>
> We should start with a proposition about what the Bill is not to be taken as doing. The proposition is that it should not be taken as detracting from the rule of law, as

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66 HL Deb 11 October 2004 c13
67 HL Deb 11 October 2004 c 13

> it is currently understood as a principle of the United Kingdom constitution. The amendment acknowledges the rule of law as a principle of the constitution of the United Kingdom. This is, to my knowledge, unique in statutory language in this country and represents a powerful statement of the Government's commitment to the rule of law. It does not, however, create any legal paradox or create ambiguity with respect to other constitutional principles. Most importantly, it does not detract in any way from the principle of parliamentary sovereignty. The reference in the amendment is to the existing principle of the rule of law, which is, and will remain, subject to the sovereignty of Parliament.
>
> The second effect of the amendment is also to state what the Bill is not to be taken as doing, but this time with specific reference to the office of Lord Chancellor. Subsection (2) recognises that the Lord Chancellor has had, and will continue to have, a duty to respect the rule of law in the exercise of his functions, and states that the Bill cannot be interpreted as affecting that duty adversely either.
>
> Members of the Select Committee, many of whom I am glad to see in the Chamber today, and other followers of this debate will note that I have listened to concerns that my previous amendment was too narrowly drawn, in that it related only to those statutory functions conferred on the Lord Chancellor in the Bill. I accept that it is right that the duty should relate to all of the Lord Chancellor's functions, which would include his duty to speak up, if necessary, in Cabinet, and we have so provided in this amendment.
>
> I hope that it will also have been noted that this amendment also refers to the Lord Chancellor's duty to "respect" the rule of law. I have considered carefully our last debate on this issue and I accept that the term "respect" is preferable in this context, as the noble Lord, Lord Goodhart, said.
>
> Throughout the debates we have had on the rule of law, the contention has been that the Lord Chancellor has always had a role with regard to the rule of law and that it is important that we do not inadvertently lose or diminish that role. There has also been general, if perhaps not universal, agreement that such a duty was a political one, that it was not a duty to be enforced in the courts. My amendment seeks to give effect to both these lines of argument: it acknowledges that the Lord Chancellor has a duty with regard to the rule of law and it acknowledges that that duty is not one that is cognisable as a matter of law. It will ensure that the rule of law features in the deliberations of the reformed Lord Chancellor in the same way as it does now with the existing Lord Chancellor. But it does this in a way that does not have wider, unintended effects.[68]

The amendment was in response to concerns that a statutory requirement to uphold the independence of the judiciary was insufficient to replace the role of the Lord Chancellor. The question of the meaning of the ‘rule of law’ was extensively discussed at Lords committee stage on 13 July.[69] At Third Reading on 20 December 2004 Lord Falconer brought forward the final text of the amendment, after further discussions, with Conservative and Liberal Democrat spokesmen, who declared themselves satisfied with

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[68] HL Deb 7 December 2004 c740-41

[69] HL Deb 13 July c1216-1234

the new draft.[70] The text now reads as follows, since the Commons version of the Bill has been rearranged to create a new Part 1:

> **1. The rule of law**
> This Act 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.

A number of witnesses to the Lords Select Committee on the Bill had questioned whether such a declaratory clause could ever be enforceable in the courts, and it appears from Lord Falconer's statement above that the duty is not intended to be judicially enforceable.[71] The former Chancellor, Lord Mackay of Clashfern, argued in his evidence to the select committee for a statutory protection of the jurisdiction of the courts:

> The recent Government proposal to exclude any form of supervision by the ordinary courts of the proceedings and decisions of the Immigration Tribunal underlines a vital omission from clause 1. There is nothing in clause 1 protecting the jurisdiction of the High Court and above and indeed nothing protecting the jurisdiction of the courts at all. It is significant that the existence of the Office of Lord Chancellor up until June 2003 on the evidence available would have prevented the Government from putting forward this proposal since both Lord Irvine of Lairg and myself have opposed it strongly and on principle. Indeed so strong was Lord Irvine of Lairg's opposition that he succeeded in changing the Government's view without actually having to speak. I consider that the existence of the Office of Lord Chancellor and the presence of the Appellate Committee of the House of Lords in the House were powerful factors in the earlier arrangements protective of the jurisdiction of the courts.

There were several references in the evidence to the select committee report to the *Asylum and Immigration Act (Treatment of Claimants etc) 2004* where the initial Government proposals for the Asylum and Immigration Tribunals would have excluded the jurisdiction of the courts. On second reading of the Bill in the Lords the Government announced that the 'ouster clause' had been removed, in favour of modified restrictions.[72]

The Judges Council pressed in their evidence for a subclause which 'provides that all legislation should, so far as possible, be read, and given effect in a way which is consistent with the provisions of this clause'.[73] There is some precedent in the *Human*

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70 HL Deb 20 December 2004 c 1538-40

71 See Q111 Lord Woolf Lords Select Committee on the Constitutional Reform Bill HL Paper 125-II 2003-4,

72 For full details see *Blackstone's Guide to the Asylum and Immigration Act 2004* OUP 2004 paras 7.10-7.14

73 Memorandum by the Judges' Council Working Party on the Bill, para 1 Lords Select Committee on the Constitutional Reform Bill HL Paper 125 2003-4

Rights Act 1998 which requires statute law to be drafted so as not to breach the provisions of that Act. The new Part One does not appear to meet this point in its drafting.

C. Duty to uphold judicial independence

The opponents of the proposed changes to the office have relied on the antiquity and range of functions of the Lord Chancellor to justify its continuance. There has been a lively debate on the need to set out in statutory form guarantees of judicial independence consequent upon modification of the office.[74] Clause 4 sets out a guarantee of judicial independence, to be made by the Lord Chancellor, other Ministers and all with responsibility for judicial matters. In particular such persons must not seek to influence judicial decisions through access to the judiciary, and must have regard to the 'public interest' – again undefined. Clause 4(1-6) reads as follows:

> **4 Guarantee of continued judicial independence**
> (1) The Lord Chancellor, 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 judiciary.
> (2) Subsection (1) does not impose any duty which it would be within the legislative competence of the Scottish Parliament to impose.
> (3) A person is not subject to the duty imposed by subsection (1) if he is subject to the duty imposed by section 1(1) of the Justice (Northern Ireland) Act 2002 (c. 26).
> (4) The following particular duties are imposed for the purpose of upholding that independence.
> (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
> (6) The Lord Chancellor ("the Minister") 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 matters.

The *Explanatory Notes* state that 'special access' refers to any access over and above that which might be exercised by a member of the general public.' There was some earlier criticism that the phrase 'have regard to' judicial independence was insufficiently robust to describe the proposed new duty. The Joint Committee on Human Rights summed up the issue in its report on the Bill in November 2004:

> 1.41 However, we consider that the particular duties imposed on the Minister in relation to judicial independence in clause 1(4) are too weakly stated and that this potentially represents a retrograde step in terms of the degree of legal protection

[74] See Lord Brennan HL Deb 13 July 2004 c1156 for a broad outline of the issues

> given to judicial independence. A duty expressed in terms of a duty to "have regard to" various "needs" is a weak form of duty.[39] It is a procedural rather than a substantive duty: instead of requiring the Minister to secure the actual achievement of the matters listed in clause 1(4), it merely requires him or her to treat them as a relevant consideration in the decision-making process.[75]

The Lord Chancellor informed the Committee that the purpose of the Minister's obligation to "have regard to" was to create additional and special duties on the Minister, in line with the Concordat. In order to do this consistently with existing constitutional conventions, he considered it necessary to employ the distinctive language in the bill. The drafting had been considered very carefully in consultation with the senior judiciary. The Lord Chancellor also argued that there was a risk that a change to the drafting could cut across the doctrine of Cabinet collective responsibility

On report on 7 December, Viscount Bledisloe moved amendments to remove subsections 4-6 altogether so that the wording of Clause 4(1) stood alone.[76] Lord Falconer said in response that these subclauses 'draw out particularly important duties that must necessarily be met'.[77]The amendment was defeated by 178 votes to 128.

The devolution settlement in Scotland is preserved by acknowledging the potential role of the Scottish Parliament in subclause 2. Clause 5 sets out a similar guarantee in Northern Ireland, by amending the *Justice (Northern Ireland) Act 2002* to require the First and Deputy First Ministers and other Northern Ireland Ministers in particular to uphold judicial independence. This will have effect throughout the UK. The 2002 Act is not yet in force, due to the continuance of direct rule from Westminster.

D. Requirement to be Member of House of Lords

Lord Lloyd of Berwick, a retired Law Lord, moved an amendment at Lords report stage to require the Lord Chancellor to be a member of the House of Lords. Lord Falconer opposed the amendment:

> The proposition on which the whole argument depends is that one will always be better off with a Member of this House than with someone in the Commons to protect the rule of law. The basis for that proposition is faulty. In many cases one will be much better off having someone in this House, but surely the right course is not to restrict the holder of the office to this House but to make clear what we expect from that office holder. We expect the office holder to be a competent Minister, to perform the ministerial end of the concordat responsibly, and to be a guardian of the rule of law and the independence of the judiciary.[78]

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75 *Twenty Third Report* HL Paper 210/HC1282 2003-4
76 HL Deb 7 December 2004 c788-9
77 HL Deb 7 December 2004 c790

The amendment was carried by 229 to 206 votes.[79] It now appears as Clause 2.

E. Requirement for Lord Chancellor to be a lawyer

Lord Kingsland, the Shadow Lord Chancellor moved an amendment at Lords report stage to require the Lord Chancellor to either:

- Have held high judicial office for at least two years
- Have practiced as a qualifying practitioner (as defined in clause 22) for at least 12 years
- Be a person serving as a law officer of the Crown

The essential concerns were summarised by the Commons Constitutional Affairs select committee as follows:

> 13. Whoever carries out the functions of the office of Lord Chancellor will be in charge of the Court Service and will play a central role in the administration of justice. Part of that role is the protection of the judiciary from political pressure in Cabinet and, when necessary, in public. There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with possible advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion.[80]

In his speech, Lord Kingsland said that he understood that the Lord Chief Justice was in agreement with this amendment.[81] Earlier in the debate, Lord Woolf, Lord Chief Justice and Chairman of the Judges' Council, summarized the position of the Council as follows:

> At a meeting on 24 November last, the Judges' Council unanimously approved the Bill, subject to the concerns on which I must now address your Lordships. The first concern is that there should be a clear statement on the face of the Bill that the holder of my office will be the head of the judiciary. Without this amendment to the Bill, the Judges' Council is concerned that the retention of the title of Lord Chancellor could send a confusing message as to the role of the holder of my office in the future. The noble and learned Lord the Lord Chancellor recognises the validity of that point and is proposing Amendment No. 11 to Clause 3, which of course I support.
>
> Subject to that clarification, the Judges' Council would welcome the retention of an office called "the Lord Chancellor". It would like to see a requirement that the holder should be a lawyer, ideally with similar qualifications to those required before a person can be appointed a High Court judge. The Lord Chancellor will not be a judge, however, and so he should not take the judicial oath. But, again,

78 HL Deb 7 December 2004 c775
79 HL Deb 7 December 2004 c776
80 HC 48 2003-4
81 HL Deb 7 December c779

> there is a proposal for a different form of oath in one of the groups of amendments.
> The Judges' Council recognised that there were difficulties in fettering the Prime Minister's discretion as to his choice of Lord Chancellor. Therefore, the council considered it preferable, but not vital, that the Lord Chancellor should be a Member of this House.[82]

Lord Falconer opposed the amendment as unnecessarily restricting the pool of available talent:

> **Lord Falconer of Thoroton:** My Lords, this may be ground that we have gone over before. The effect of the provision is yet again to restrict further the pool from which this important office holder can be taken. In the light of the decision made earlier this afternoon he must now be a Lord. If noble Lords vote in favour of his being also a lawyer of 12 or 15 years' practice, inevitably the pool diminishes.
> As ever, the noble and learned Lord, Lord Howe, accurately put his finger on how the issue arises by quoting the excellent speech of the noble Lord, Lord Macdonald of Tradeston. If the relevant person is no longer to be a judge and constitute the head of the judiciary the issue arises whether the compulsion for this man or woman to be a lawyer is in the interests of the public and of the nation. Very often it will be in the interests of the nation to have someone undertaking this job who is a lawyer, but I ask noble Lords to consider what the job consists of. First of all, he is a Minister with responsibility for a £3 billion budget. His role in that respect, as everyone would agree, is to deliver a good service to the public regarding the courts and legal aid. Are lawyer Lords always the best people to be in charge of driving either the running of those functions or their reform? Sometimes they will be and sometimes they will not. One should not be driven by populism but what would the public say to the proposition that the people who are in charge of that £3 billion must always be in the Lords and must always be lawyers? I think that their answer might be to ask: why do you not choose the right person for the job who might well be a lawyer Lord but would not have to be?
> The concordat was negotiated on the basis that it could be undertaken by someone who was not a lawyer. For example, input into the role of appointing judges would be provided by the Judicial Appointments Commission. The Minister's role would be to be accountable in that respect. Similarly, as regards the disciplining and financing of the judiciary, the Minister's role would not be that of a lawyer, but that of a Minister performing a ministerial function.
> Finally, I turn to the independence of the judiciary and the rule of law. It is very difficult to rebut the proposition of the noble Lord, Lord Maclennan, that sometimes someone who is not a lawyer will be braver, stronger and more focused on those issues than a lawyer. During the course of the past century no Lord Chancellor ever resigned even though at one stage the then government procured that the Lord Chief Justice sign a letter of resignation in blank which the

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[82] HL Deb 7 December 2004 c757-8

> government could operate at any date they wished. The Lord Chancellor at that time was a senior lawyer.
> I do not think that the right course is to restrict the pool yet further. I do not think that would carry confidence. The right course is to allow the Prime Minister of the day, whoever he or she may be, to choose the right person for the job who can best protect the values of justice, the rule of law and the independence of the judiciary that we all hold so dear.
> **Lord Howe of Aberavon:** My Lords, I hope that the noble and learned Lord will answer one question. Is not the answer to his argument about restricting the pool immediately apparent when one contemplates what has happened already under this Government? The Prime Minister had no difficulty in enlarging the pool when he appointed Lord Williams of Mostyn as Attorney-General, later a distinguished Leader of this House, and when he appointed the noble and learned Lord, Lord Goldsmith, as Attorney-General. The merit of having the appointment in this House is that the pool may be enlarged in that way, and the argument about the pool effectively disappears.
> **Lord Falconer of Thoroton:** My Lords, with respect that demonstrates the gulf between us. Lord Williams of Mostyn, who is much missed in this House, was an excellent lawyer. The noble and learned Lord, Lord Goldsmith, who is much respected in this House, is an excellent lawyer. In practice they were both selected straight from the Bar to hold high office. Do noble Lords think that the person who is to be responsible for a ministerial budget of £3 billion should be selected—or has to be selected—only from among people whose previous experience comprises simply that of being excellent barristers?[83]

The amendment was passed by 215 to 175.[84] It now appears as Clause 3.

F. Lord Chief Justice to be head of judiciary in England and Wales

As part of the concordat, it was agreed that it would be no longer appropriate for the Lord Chancellor to hold judicial office or to have any formal role as head of the judiciary. Lord Falconer moved an amendment on 7 December to state explicitly that the Lord Chief Justice should assume the additional title of President of the Courts of England and Wales. The amendment was agreed to.[85] He also declared an intention to table an amendment to make the Lord Chief Justice of Northern Ireland the head of the judiciary in that jurisdiction.[86]

Clause 5 gives effect to the concordat by recognising the Lord Chief Justice as head of the judiciary in England and Wales by creating a new statutory office of President of the Courts of England and Wales. Clauses 6 and 7 create new statutory positions of Head and

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83 HL Deb 7 December 2004 c783-4
84 HL Deb 7 December 2004 c785
85 HL Deb 7 December 2004 c796
86 HL Deb 7 December 2004 c795

Deputy Head of Criminal Justice and Head of Family Justice. The *Explanatory Notes* give the background:

Clauses 10 and 11, together with Schedules 1 to 2 deal with rule-making powers previously held by the Lord Chancellor and transferred to the Lord Chief Justice.

G. Appointment functions transferred to the Crown

Lord Falconer also moved amendments on 7 December to transfer the power to make judicial appointments to the Crown. Recommendations will be made by the new statutory Judicial Appointments Commission, described in Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments*.[87] The *Explanatory Notes* state:

> 31. Clause 12 introduces Schedule 3, which provides that appointments to the offices listed in it will in future be made by Her Majesty The Queen on the recommendation of the Lord Chancellor, rather than by the Lord Chancellor himself, as currently. These appointments are those of civil District Judges, High Court Registrars and Masters, and the Senior District Judge (Chief Magistrate). The relevant appointing provisions are amended and the power to assign District Judges to districts and to district registries is transferred from the Lord Chancellor to the Lord Chief Justice. The power to determine the salaries of civil District Judges and High Court Masters and Registrars is made subject to the proviso that their salaries cannot be reduced, which brings them into line with District Judges (Magistrates' Courts) and more senior members of the judiciary. These appointments are also listed with others in Schedule 12, meaning that these appointments are in future to be made on the basis of selection by the Judicial Appointments Commission.

H. Lord Chancellor's oath

A new Lord Chancellor's oath is inserted into the *Promissory Oaths Act 1868* by Clause 14 to acknowledge the duty of the Lord Chancellor to respect the rule of law, to defend the judiciary and ensure efficient and effective support of the courts.[88] The wording is rather unusual in the wide-ranging duty to ensure effectiveness:

> **6A LORD CHANCELLOR'S OATH**
> (1) The oath set out in subsection (2) shall be tendered to and taken by the Lord Chancellor, after and in the same manner as the official oath, as soon as may be after his acceptance of office.
> (2) The oath is— "I, , do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the

[87] HL Deb 7 December 2004 c801
[88] HL Deb 7 December 2004 c805

> judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God."." (2) The section inserted by subsection (1) does not apply in the case of acceptance of office before the coming into force of this section."

The new oath does not resemble the judicial oath, which the Lord Chancellor will no longer be required to take, since he will no longer be a judge. It will taken along with oaths of ministerial office.[89]

I. Miscellaneous statutory amendments

At report stage on 7 December Lord Falconer introduced a new Schedule 4 listing a series of amendments to statutes, which took up 29 pages of Lords Hansard.[90] He promised further amendments to implement fully the concordat discussed in Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments*. Among other points, Schedule 4 and Clause 13 remove the statutory basis for the Lord Chancellor to sit as a judge.[91] They also deal with remaining judicial functions of the Lord Chancellor by amending legislation to substitute the Lord Chief Justice, in accordance with the provisions of the concordat. The *Explanatory Notes* summarise the effect as follows:

> The following statutory functions will remain with the Lord Chancellor: (i) those concerning the framework for the organisation of the courts system, including setting the geographical and jurisdictional boundaries within England and Wales; (ii) the provision and allocation of financial, material and human resources for the administration of justice; (iii) those relating to the pay, pensions and terms and conditions of the judiciary and the provision of staff and resources for training of the judiciary; and (iv) the determination of the overall number of judges and the distribution of business between different levels of courts in England and Wales. Those functions that do not require the Lord Chief Justice to be consulted or his concurrence have therefore been removed from this version of the Bill, following the decision of the House of Lords to retain the office of Lord Chancellor.

J. The Great Seal

Provisions in the original version of the Bill which would have abolished the *Great Seal Act 1688* have been withdrawn.[92] Abolition was no longer necessary, given the continued existence of the office of Lord Chancellor in the Bill as currently drafted.

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89 For the form of the judicial oath and the oath taken by Privy Counsellors see Appendix 3 of Research Paper 01/116 *The Parliamentary Oath*

90 HL Deb 7 December c822-881

91 HL Deb 14 December 2004 c1222 comments by Baroness Ashton of Upholland, junior Government minister

92 HL Deb 11 October 2004 c23

K. Speakership

During the debate, at report stage, discussion on the Speakership ranged from not allowing the head of a Government department responsible for £3 billion of public spending to chair the House of Lords,[93] to the tradition of the Lord Chancellor holding the "historic role as Speaker of the House". On third reading, Lord Falconer confirmed that the choice of Speaker of the House of Lords was a matter for that House alone. He argued that the provisions in the Bill (now clause 15 and Schedule 5) would allow the House of Lords to choose whomsoever they wished to fill that role, rather than vest it in the Lord Chancellor. The provisions were technical and would allow the powers of the Speaker, which are currently ascribed to the Lord Chancellor in legislation, to be vested in the Speaker of the House of Lords so that the Lord Chancellor would not have to continue as Speaker. However, if the House of Lords decided that it wanted an individual Lord Chancellor to serve as Speaker as well this would not be precluded.[94]

L. Protection of judicially related functions

At Lords third reading the Government moved a new schedule to protect judiciary-related and other functions of the Lord Chancellor so that they cannot be transferred to another minister by delegated legislation through a transfer of functions order under the *Ministers of the Crown Act 1975*.[95] This was to meet concerns that the functions of the Secretary of State for Constitutional Affairs might be treated as simply another set of ministerial functions, to be transferred without full scrutiny. Where a public act is amended, the order will be subject to affirmative resolution procedure.The Delegated Powers Committee had some concern about the scope of the amendments in its fifth report, and the junior minister, Baroness Ashton, promised further amendments to be tabled in the Commons.[96]

Schedule 6 creates a series of protected functions which may not be transferred by delegated legislation under the *Ministers of the Crown Act 1975*. There are provisions to amend the list of protected functions which include:

- Functions relating to the Great Seal
- Functions under the Constitutional Reform Bill
- Functions under a series of acts relating principally to judicial functions or the organisation of the courts

The *Explanatory Notes* set out the proposed function of the schedule:

> The listed functions cannot be transferred by an order under clause 16 or by an order under section 1 of the Ministers of the Crown Act 1975 (as amended by

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93 HL Deb 7 December 2004 c885

94 HL Deb 20 December 2004 c1543

95 When departments are amalgamated or modified, functions of individual ministers are commonly transferred by statutory instrument under this Act. HL Deb 20 December 2004 c1615

96 HL Deb 20 December 2004 c1546

> clause 17 of the Bill). Schedule 6 may be amended by an order under clause 16, certain Transfer of Functions Orders under section 1 of the Ministers of the Crown Act 1975, or by an order under clause 18.

M. Remaining functions of the Lord Chancellor

Clause 16 enables functions of the Lord Chancellor to be amended. The *Explanatory Notes* give detail of the purpose behind the clause as follows:

> One of the purposes of this power is to ensure that effect may be given to the Concordat agreed with the Lord Chief Justice, in particular with a regard to functions set out in subordinate legislation or Acts of Parliament passed since the introduction of the Bill. (The power is limited to amending legislation made in, or under, Acts passed up to and including in the session in which this Bill is enacted). These provisions are also intended to be used in relation to, for example, functions of the Lord Chancellor conferred by private, personal or local Acts which may have been missed and thus have not been addressed in the substantive provisions of the Bill. This power is also intended for use in relation to the functions of the Lord Chancellor under charters or other governing instruments of private institutions, such as colleges or universities. Where they wish to alter or remove the role of the Lord Chancellor, this power would avoid the need for each of the institutions concerned to make their own separate arrangements

N. Relations between parliament and the judiciary

At Lords report there were unsuccessful amendments to introduce mechanisms ensuring communication between the judiciary and parliament, given the departure of the Law Lords from the House.[97] Lord Falconer promised to consider the matter at Third Reading and subsequently accepted an amendment tabled by the Lord Chief Justice, Lord Woolf, which will allow the three judges, the Lord Chief Justice of England and Wales, the Lord President in Scotland and the Lord Chief Justice in Northern Ireland to lay written representations before Parliament which are in the opinion of the judge laying the paper, matters of importance relating to the judiciary or the administration of justice. But matters under consideration by the Scottish Parliament would be outwith the scope of the clause.[98]It now appears as clause 6.

V The House of Lords without its judicial Members

This Part considers more generally the effects on the Lords as a legislature of the departure of the Law Lords. Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments* assesses the

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97 HL Deb 7 December 2004 c807-812
98 HL Deb 20 December 2004 c1541

implication of a new Supreme Court. Since the removal of most hereditary peers in the *House of Lords Act 1999*, there have been a series of reports considering the second stage of Lords reform. Until 2003, Government proposals did not appear to include the removal of the Law Lords.

The removal of the Law Lords will have some impact on the facilities of the Lords, discussed in the select committee report on the Constitutional Reform Bill, in particular the removal will make more space available within the Palace and affect the operation of the Library.[99]

A. The Government's proposals

In its July 2003 consultation on the establishment of a Supreme Court, the Department for Constitutional Affairs confirmed that the primary objective was "to establish the Court as a separate body from Parliament". Although the DCA acknowledged that there were benefits to the Law Lords in hearing the deliberations of Parliament at first hand and that the House of Lords benefited from their presence, the Government thought the best course of action was to disqualify the members of the Supreme Court from sitting in the House of Lords. Existing members of the House of Lords would retain their titles and could return to the Lords once their judicial appointment ended and the retired Law Lords would continue to sit in the chamber, but eventually there could be no retired Law Lords in the House of Lords.[100] The responses to the consultation reflected a range of opinion. Whilst over two thirds of 88 respondents thought that retired Law Lords should become members of the House of Lords, although not automatically, it was suggested that only those that indicated they would be "full working members" should be ennobled. The remainder thought that there should be complete severance.

More than three quarters of 85 respondents thought that the bar on sitting and voting in the Lords should be extended to all holders of high judicial office. Some respondents felt that should be a complete bar, whilst others, including several law lords thought that "the bar should not extend to the Lord Chief Justice of England and Wales, the President of the Supreme Court, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland". However, one former law lord, Lord Nolan, cautioned that there was a danger of Supreme Court members becoming "inward-looking, and out of touch with the wider world" if they no longer sat in the House. Finally, almost two thirds of the 81 respondents agreed that there should be an end to the presumption that holders of high judicial office should receive peerages.[101]

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99 See HL Paper 125-I at para 109

100 Department for Constitutional Affairs, *Constitutional reform: a Supreme Court for the United Kingdom*, CP 11/03, July 2003

101 Departmental for Constitutional Affairs, *Constitutional reform: a Supreme Court for the United Kingdom – Summary of Responses to the Consultation Paper*, January 2004, http://www.dca.gov.uk/consult/supremecourt/scresp.htm#part3

The Bill as originally introduced to the Lords would have disqualified both judges of the Supreme Court and members of the supplementary panel[102] from sitting and voting in the House of Lords. However, clause 109 of the Bill that has been brought to the Commons would disqualify Supreme Court judges only from taking part in the business of the House of Lords.

B. The role of the Law Lords in the Lords

The Constitutional Reform Bill Committee of the House of Lords could not reach agreement on whether the Law Lords should retain their membership of the House of Lords. As with other issues on which the Committee could not agree, it outlined both the arguments for and against the Law Lords retaining their places, in chapter 5 of its report.[103]

In evidence to the Select Committee on the Constitutional Reform Bill, Lord Hope of Craighead, one of the current Law Lords, argued that Law Lords should be able to participate in the public business of the House of Lords, although without the right to vote. He concluded his arguments by outlining the extent of the role they played and considered that allowing the participation of fully retired Law Lords would not be adequate:

> The value of participation of the Law Lords in the work of Committees of the House needs to be assessed too. These include the Committee for Privileges and the various scrutiny committees. It has never to my knowledge been suggested that the participation by Law Lords in the work of the Select Committee on the European Union has compromised their judicial work. My own experience has been that it adds greatly to knowledge and understanding of this area of the law in a way that is not readily obtainable anywhere else and is wholly beneficial. Allowing former judges of the Supreme Court to begin to participate in this work only after their complete retirement from judicial work (probably when aged 75) is an unsatisfactory substitute for the present system.[104]

In oral evidence to the Committee, Lord Hope was asked about his experience as chairman of Sub-Committee E of the House of Lords European Union Select Committee. He estimated that he spent eight or nine hours a week on Committee work. He reiterated his concerns about a retired Law Lord taking up the chairmanship and suggested that an active lawyer would be required to chair the Sub-Committee.[105]

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[102] The supplementary panel is made up of recently retired holders of high judicial office –See Research Paper 05/06 *The Constitutional Reform Bill [HL]: A Supreme Court for the United Kingdom and Judicial Appointments*

[103] Constitutional Reform Bill Committee, *Constitutional Reform Bill [HL]*, 2 July 2004, HL 125-I 2003-04, paras 390-407

[104] Constitutional Reform Bill Committee, *Constitutional Reform Bill [HL]*, 2 July 2004, HL 125-II 2003-04, Memorandum by Lord Hope of Craighead, para 14, p191

[105] *Ibid*, Q649

In its report on *Judicial appointments and a Supreme Court (court of final appeal)*, the Commons Constitutional Affairs Committee considered the question of the relationship between the Supreme Court and Parliament. It described it as a complex issue and noted that the unresolved issue of House of Lords reform was one of the complicating factors. The Committee reported evidence it had received, which highlighted the work that the Law Lords performed in connection with public business in the House of Lords, and reviewed the Government's consultation on the appointment of Law Lords to the House of Lords.[106]

It drew the following conclusion:

> From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers.[107]

After the publication of that report, the Constitutional Affairs Committee began an inquiry into the Bill itself, and on 8 June 2004 it took evidence from Lord Chancellor. In an opening statement to the Committee, Lord Falconer confirmed that "The Law Lords are judges and not legislators: the separation between those two roles should be made explicit".[108] Research Paper 05/06 gives details of the costs of the Appellate Committee in 2002-03.

The following table, derived from the published information on Members' expenses illustrates the times that Law Lords (the Lords of Appeal in Ordinary) have participated in public business:

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[106] Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, 10 February 2004, HC 48-I, paras 70-79

[107] *Ibid* para 80

[108] Constitutional Affairs Committee, *Constitutional Reform Bill: the government's proposals*, Uncorrected Minutes of Evidence, 8 June 2004, HC 628-iii 2003-04, q146

Lord	No. of days attended at public business 2001-02	2002-03	2003-04
Lord Bingham of Cornhill	9	3	7
Lord Brown of Eaton-under-Heywood (int 13 Jan 2004)			5
Lord Carswell (int 13 Jan 2004)			11
Lord Clyde (retd 1 Oct 2001)	8		
Baroness Hale of Richmond (int 12 Jan 2004)			3
Lord Hobhouse of Woodborough (decd 15 Mar 2004)	7	6	8
Lord Hoffmann	7	5	10
Lord Hope of Craighead	32	47	37
Lord Hutton (retd 11 Jan 2004)	5	8	3
Lord Millett (retd 11 Jan 2004)	5	5	3
Lord Nicholls of Birkenhead	2	4	4
Lord Rodger of Earlsferry	11	12	7
Lord Saville of Newdigate			
Lord Scott of Foscote	37	48	52
Lord Slynn of Hadley (retd 30 Sept 2002)	16	6	
Lord Steyn	9	9	25
Lord Walker of Gestingthorpe (int 8 Oct 2002)		9	3

Source: House of Lords: Members' Expenses
Notes: int - introduced; decd - deceased; retd - retired

C. Debate in the House of Lords on the Bill

During the Committee stage in the Lords, Lord Lloyd of Berwick posited eight arguments in favour of retaining the Law Lords in the House of Lords, which are discussed in Research Paper 05/06. On report stage, Lord Falconer conceded that the retired Law Lords who sit on the supplementary panel should not be disqualified from sitting and voting in the House of Lords, as envisaged in the original Bill:

> I have closely considered the views expressed on this issue by your Lordships, and I have concluded that membership of the panel is in reality a part-time judicial office, and it would not work against our principle of functional separation to allow members of the panel to participate in the business of the House as fully as may other holders of part-time judicial office. The proportion of time that they would spend sitting judicially would be limited, and the ability to ensure that they are not called on to sit in cases with which they have had any connection through business of this House is far greater than is possible with full-time, permanent judges. Amendment No. 168AA therefore deletes the reference to members of the Supreme Court's supplementary panel from Clause 98(1), with the effect that they will not come under the disqualification in subsection (2).[109]

D. Earlier analysis of the position of the Law Lords

Standard Note 2973 *House of Lords Reform: Recent Developments* gives background on the decision not to bring forward a bill to reform the House of Lords in the 2003-4 session. Lords reform remains unfinished, and the proposals in this Bill to remove the

[109] HL Deb 14 December 2004 c1313

Law Lords will mark another change in the evolving composition of the Lords. Similarly if a different form of Speakership develops for the Lords, this would indicate continuing evolution, rather than a thorough review of purposes and functions of the upper chamber.

The 1968 white paper on House of Lords reform briefly summarised the history of the Law Lords' presence in the House:

> The position of the House of Lords as the supreme court of the realm also comes from the House's origins as the King's Council. Until 1876, the judicial functions of the Lords had to be provided by those who happened to be members of it, or hereditary peerages had to be conferred to bring suitably qualified men into the House. At that point, concern about the lack of available expertise led to the innovation of conferring life peerages specifically for judicial work in the Lords, so that those who did not feel they had the resources to maintain the estate and dignity of a peerage through future generations could still be appointed. There are 12 active Law Lords at any one time, but retired Law Lords are still able to act judicially up to the age of 75, and all Law Lords are members of the House for life.[110]

No reform followed this white paper, which did not recommend removal of the Law Lords.[111] Historical studies of the work of the Law Lords may be found in a chapter in *The House of Lords at work.*[112] The *House of Lords Act 1999* removed most hereditary peers from the House, but longer term issues on composition were given to a royal commission to determine.

1. The Royal Commission on the Reform of the House of Lords

The Royal Commission on the Reform of the House of Lords (Wakeham Commission), considered the future of the House of Lords rather than the establishment of a Supreme Court. However, the Royal Commission considered the position of the Law Lords in the reformed second chamber. It noted its objectives meant that only some aspects of the role and position of the Law Lords in the second chamber came within its ambit.[113]

The Royal Commission concluded that "There is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords".[114]

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[110] *House of Lords reform*, Cmnd 3799, Nov 1968, para 60.

[111] For background see Research Paper 99/6 *The House of Lords Bill: Options for Stage Two*

[112] Eds D Shell and D Beamish, N Baldwin 'The membership of the House". See also M Rush and N Baldwin "Lawyers in Parliament" in D Oliver and G Drewry *The Law and Parliament* 1998 pp 163-173

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

[114] *Ibid*, para 9.5

The Royal Commission then considered the contribution made by the Law Lords. It reported that they "make a positive contribution to the work of the House of Lords" and outlined how the Law Lords contributed:

> They chair or serve on Committees. By convention, Law Lords chair the Joint Committee on Consolidation Bills, the Ecclesiastical Committee and Sub-Committee E (Law and Institutions) of the European Union Committee. They also give decisive opinions on the Privileges Committee. The Law Lords contribute to general debates and to the consideration of proposed legislation, giving the benefit of their extensive judicial experience. Even when they cannot offer personal views they can usefully clarify legal points or help to identify issues which require decision. They can often bring to bear their understanding of how law works in practice. Finally, the Law Lords can draw on their commitment to the rule of law and due process to identify proposed legislation or other developments which could threaten either of those concepts.[115]

The Royal Commission recommended that the Law Lords should "continue to be *ex officio* members of the reformed second chamber and carry out its judicial functions". But it recommended changes to the *Appellate Jurisdiction Act 1876* to reflect its proposed changes to the length of service of other members of the reformed second chamber.[116]

The Royal Commission was aware of the need for Law Lords to be impartial and to be seen to be impartial. It recommended that the Law Lords should publish "a statement of principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases".[117]

On 22 June 2000, Lord Bingham reported to the House of Lords a statement, agreed by all the Law Lords, in response to the Wakeham Commission's recommendation, agreeing self denying ordinances in respect of participation in debates and voting. This is discussed in Research Paper The Constitutional Reform Bill [HL] - the office of Lord Chancellor.

In response to the Wakeham Commission, the Government published a white paper, *The House of Lords – Completing the Reform*, in which it envisaged the membership of the reformed second chamber including:

> … at least 12 Law Lords, and, very probably, some other Law Lords between the ages of 70 and 75.[118]

The white paper, which was not particularly well-received, was debated in both Houses in January 2002.[119] And, in May 2002, Robin Cook, the then Leader of the House of

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[115] *Ibid*, para 9.6
[116] *Ibid*, paras 9.6- 9.8
[117] *Ibid*, paras 9.9- 9.10
[118] Prime Minister, *The House of Lords – Completing the Reform*, November 2001, Cm 5291, para 64

Commons, announced the establishment of a Joint Committee on House of Lords reform "in the hope that we can forge the broadest possible parliamentary consensus on the way forward".[120]

2. Joint Committee on House of Lords Reform

The Joint Committee on House of Lords Reform considered that "the judicial function of the House of Lords to be a matter worthy of independent inquiry and expert attention".[121]

During the course of the first debate on the Joint Committee's report, the Law Lords were hardly mentioned. Jack Cunningham, the Committee's chairman, simply noted that, if Parliament decided that the reformed second chamber was to be wholly elected, "the bishops and Law Lords would be removed, as would many independents, as they would not stand for election".[122] They were also cited in discussions on hybridity as exemplifying the current mixed membership of the House of Lords.[123] Only Simon Thomas argued that the Law Lords should not sit in the second chamber:

> Of course, the final part of the reform is the establishment of a supreme court. We cannot allow Law Lords to remain within that second Chamber.[124]

They were mentioned once, in passing, during the second debate on 4 February 2003, when the House voted on the options on the proportion of members that should be elected to the reformed second chamber, proposed by the Joint Committee.[125]

It was not until the Government announced its proposals for a supreme court in July 2003 that the question of the removal of the Law Lords came to the fore.[126] Their removal would lead to a small overall change in the composition of the Lords. More widespread Lords reform may be the subject of Government proposals in a new Parliament.

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119 HC Deb 10 January 2002 cc702-778; and HL Deb 9 January 2002 cc561-682, HL Deb 10 January 2002 cc692-824

120 HC Deb 13 May 2002

121 Joint Committee on House of Lords Reform, *First Report*, 11 December 2002, HC 171 2002-03, para 25 and see also para 56

122 HC Deb 21 January 2003 c190

123 *Ibid* c204 and c224

124 *Ibid* c254

125 HC Deb 4 February 2003 c217

126 See Research Paper 05/06 The Constitutional Reform Bill [HL] : A Supreme Court for the United Kingdom and Judicial Appointments for further details