



The Constitutional Reform Act 2005-the role of the Lord Chancellor

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Author: Oonagh Gay

Parliament and Constitution Centre

This Note is designed to provide a short supplement to Standard Notes no 2105 and Research Papers 05/05 which described the provisions of, and background to, the *Constitutional Reform Bill* in relation to the Lord Chancellor until its second reading in the Commons. The Bill had a protracted initial passage through the Lords where a special committee had taken evidence on the Bill before eventual report stage and third reading. The scrutiny of the Bill in the Commons was truncated by the general election of 2005.

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A. The passage of the Bill through the Commons

Full details of the passage of the Bill in the 2004-5 session are available in the Bill Index Page at http://hcl4.hclibrary.parliament.uk/weblink/bill_index/200405/report.html The Bill's second reading was on 17 January, and there were three days in committee on the floor of the House on 31 January, 1 February and 1 March, where the bill had its report stage and third reading before being returned to the Lords. The Constitutional Affairs Select Committee issued a report on the Bill on 25 January¹ and there was a Government response on 3 March 2005.²

After debate on 15 March, the Lords sent the Bill back to the Commons where it was again debated on 16 March 2005. The main areas of disagreement were:

- a legal qualification for the office of Lord Chancellor
- a requirement that the Lord Chancellor sit in the Lords

The Lords considered the Bill again on 21 March where they withdrew their objections to these points. The final text of the Act in relation to the qualification of the Lord Chancellor was composed from the Commons amendment designed to secure agreement from the Lords. Section 2 reads as follows:

2 Lord Chancellor to be qualified by experience

(1) A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience.

(2) The Prime Minister may take into account any of these-

- (a) experience as a Minister of the Crown;
- (b) experience as a member of either House of Parliament;
- (c) experience as a qualifying practitioner;
- (d) experience as a teacher of law in a university;
- (e) other experience that the Prime Minister considers relevant.

(3) In this section "qualifying practitioner" means any of these-

- (a) a person who has a Senior Courts qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41);
- (b) an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary;
- (c) a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

¹ HC 275 2004-5

² Cm 6488

B. The concordat

The *Explanatory Notes* to the *Constitutional Reform Act* set out the status of the concordat agreed between the Lord Chief Justice and the Lord Chancellor:

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

The concordat was therefore intended to establish the terms of the new relationship between the Lord Chancellor, the justice system and Parliament.

C. The new role of the Lord Chancellor

The office of Lord Chancellor continues in existence, following a Government defeat on this matter in the Lords. However, the office is no longer the official head of the judiciary and the creation of the Judicial Appointments Commission removes his responsibility for judicial appointments. Nor need the office-holder be a peer or a judge or lawyer.

Under section 3 the Lord Chancellor has a duty to uphold continued judicial independence, but this duty also extends to other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice. There are specific duties under s3 (6) as follows:

- (6) The Lord Chancellor must have regard to-
 - (a) the need to defend that independence;
 - (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
 - (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters

The *Explanatory Notes* state that the section should be read in conjunction with Part 1 of the Courts Act 2003, which sets out the duty of the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of the courts of England and Wales.

Different arrangements apply in relation to justice in Northern Ireland, set out in s4. Section 1 offers a declaratory statement to the effect that the Lord Chancellor's existing constitutional role in relation upholding the rule of law continues.

Section 5 (1) allows for representations to Parliament:

The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom

The responsibility of the Lord Chancellor for certain judicial appointments is transferred to Her Majesty under section 14 and Schedule 3. Schedules 4 modifies a series of functions undertaken by the Lord Chancellor, and remove the statutory basis for the Lord Chancellor to sit as a judge.

Section 14 amends the text of the Lord Chancellor's oath as follows:

"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 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."³

The modification was necessary, as the Lord Chancellor will no longer be a judge and so subject to the judicial oath. The text of the new oath is wide-ranging.

Section 18 and Schedule 6 make changes to the effect that the Lord Chancellor is no longer required to act as Speaker of the House of Lords, although he continues in that position pending the recommendations of a Lords committee, established to consider the role of the Speaker. There are provisions for an individual Lord Chancellor to act if Speaker, if this is the will of the House.⁴ The Committee's website notes:

On Tuesday 12 July 2005 the House agreed to a motion to resolve "That this House should elect its own presiding officer". The motion also provided "That a Select Committee on the Speakership of the House be appointed to consider further how to implement this resolution with full regard to the House's tradition of self-regulation."⁵

The Committee is due to report by the end of December 2005. It was originally convened in 2003 and produced a report in November 2003.⁶ This report was discussed in Standard Note 2973 *House of Lords Reform: Recent Developments*.

Part 4 of the Act amends the traditional role of the Lord Chancellor in the appointment of judges in England and Wales. The new statutory Judicial Appointments Commission has a duty to report to the Lord Chancellor on the selection of judges. It is for the Lord Chancellor to make the appointment or the recommendation for appointment to The Queen. However, in effect, he has only strictly limited powers to challenge the recommendations of the JAC for appointment. Removal of judges will be by the Lord Chancellor, but with the agreement of

³ The amendment is to the *Promissory Oaths Act 1868*

⁴ HL Deb 20 December 2004 c1543

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http://www.parliament.uk/parliamentary_committees/lords_committee_on_the_speakership_of_the_house.cfm

⁶ HL 299 Session 2002-3

the Lord Chief Justice. The higher judiciary may only be removed on address by both Houses of Parliament.

The continuing role of the Lord Chancellor in respect of the justice system in England and Wales is summarised by the *Explanatory Notes* as follows:

All of this means that 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;

The *Explanatory Notes* also summarise a series of protected functions:

Schedule 7 lists various protected functions of the Lord Chancellor which may not be transferred to other Ministers by a Transfer of Functions Order under the Ministers of the Crown Act. These include functions relating to the custody or use of the Great Seal; functions conferred on the Lord Chancellor by the Constitutional Reform Act or modified by that Act; other listed functions; and listed functions in relation to Northern Ireland.

Finally, there are some transitional arrangements for the modification, abolition or transfer of functions from the Lord Chancellor's office in sections 18-21. For example there are functions of the Lord Chancellor conferred by private, personal or local legislation, and functions under charters or private governing bodies. These may need to be altered at some future date. Schedule 4 includes provisions preliminary to the making of arrangements for ending the Lord Chancellor's ecclesiastical patronage and, as announced by the Government on 2 March 2004, for its future exercise by the Prime Minister. These changes will be completed by non-legislative means.