



## Role of the Lord Chancellor

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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 under Lord Falconer, of Thoroton, incorporating the Wales and Scotland Offices, replaced the Lord Chancellor's Department. Although the Lord Chancellor's Department Select Committee had been examining the role of the Lord Chancellor, which was widely thought to be due for reform, the radical nature of the announcement was almost completely unexpected.

A consultation paper issued in September 2003 gave more detail of the necessary legislative changes needed to abolish the office.<sup>1</sup> A House of Lords committee is examining the role of the Speaker, subsequent to the abolition of the post of Lord Chancellor. This note summarises the history behind the changes, the status of the Lord Chancellor's Department just prior to June 2003 and the concerns raised by the announcement. It also gives a summary of the consultation paper proposals.

### Contents

A.	Introduction	2
B.	The new Department for Constitutional Affairs	5
C.	Consultation paper on reforming the office of the Lord Chancellor	7
D.	The history and development of the post of Lord Chancellor	8
E.	Juridical role	10
	1. Judicial appointments	11
	2. <i>The Human Rights Act 1998</i>	13
	3. A new supreme court?	15
F.	The role of Speaker of the House of Lords	16
G.	Responsibilities in respect of Northern Ireland	18
H.	Ecclesiastical and other duties	18
I.	Legislation	20

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<sup>1</sup> *Constitutional Reform: reforming the office of the Lord Chancellor* CP 13/03

## A. Introduction

In early June 2003 the Prime Minister was widely expected to reshuffle his Government, and an announcement was duly made on 11 June. The Prime Minister took the opportunity to make fundamental machinery of government changes. These included the complete ‘abolition’ of the post of Lord Chancellor; a new role for the Law Lords under a future independent Supreme Court; an end to the separate posts of Secretary of State for Wales and Secretary of State for Scotland; and in place of the Lord Chancellor’s Department (LCD) a new Department for Constitutional Affairs.

The constitutional position of the Lord Chancellor as simultaneously a member of the legislature, the executive and the head of the judiciary<sup>2</sup> 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.

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.<sup>3</sup>

The retirement of the Lord Chancellor amid suggestions of disagreements with the Prime Minister over the scale of reform to the post, and the unexpected resignation of the Secretary of State for Health, Alan Milburn, dominated the initial reporting of the reshuffle. The breadth of the changes seemed to take many commentators by surprise. *The Times* was characteristic of the tone adopted by media reports:

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<sup>2</sup> 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

<sup>3</sup> HL Deb 25 November 1997 c943

The Prime Minister struggled to maintain his Cabinet grip last night after Alan Milburn's resignation left plans for an orderly mid-term reshuffle in tatters and cost him one of his most important supporters.

Tony Blair responded by promoting two of his closest allies: moving John Reid to replace Mr Milburn as Health Secretary and bringing his old friend Lord Falconer of Thoroton into the Cabinet as Secretary of State for Constitutional Affairs.

That post is created as part of one of the biggest constitutional upheavals for decades, designed to separate politics from the law. The post of Lord Chancellor is abolished after nearly 1,400 years, with the retirement of Lord Irvine of Lairg, and his department is disbanded. A US-style supreme court will replace the law lords, judges will be appointed by an independent commission, and there will be a new Speaker of the Lords.

Lord Irvine had been a staunch defender of the Lord Chancellor's triple role, but the changes that follow his departure mean a Cabinet minister will no longer be in charge of the judiciary, nor sit as a judge in the highest court of the land.

Lord Falconer's new department - which will incorporate the Scotland and Wales offices - will take over most of the roles of the Lord Chancellor's Department.

But the Home Office will retain its responsibilities for prisons and probation.

That represents a victory for David Blunkett, who had fought to prevent the dismemberment of his department and the creation of a Ministry of Justice.<sup>4</sup>

In fact, 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.<sup>5</sup> 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'.

The announcement of a Department for Constitutional Affairs closely resembles this template from the IPPR, although its first Secretary of State (Lord Falconer) is in the Lords, rather than the Commons and, as the press reported in the days after the announcement of the reshuffle, the Home Office had retained its core responsibilities.

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* of 1998. Professor Diana Woodhouse, for example, concluded in March 2002 that:

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<sup>4</sup> Phil Webster, 'Emergency surgery on the Cabinet', *The Times* 13 June 2003

<sup>5</sup> Sarah Spencer, 'Future of the Home Office and the Lord Chancellor's Department', IPPR March 2001

...the nature of the office of Lord Chancellor is such that once the judicial role is relinquished, justifications for these other roles also disappear. The office should therefore be consigned to history, with other institutions assuming its responsibilities.<sup>6</sup>

By the time of the June 2003 reshuffle, a de facto Department of Constitutional Affairs could be said to be in existence. The press and media comment on the reshuffle was therefore directed largely at speculation about the disputed Home Office responsibilities - criminal justice, prisons, police and probation; at the rumoured abolition of the Wales and Scotland Offices; and at the removal of the Lord Chancellor's ancient role in presiding over the Lords from the Woolsack.<sup>7</sup> There was also some discussion about how the many duties of the Lord Chancellor in legislation, would be transferred, and to whom. These range from the *Patronage (Benefices) Measures 1986*, to the *Freedom of Information Act 2000*,<sup>8</sup>

Lord Williams, then Lord President of the Council, was asked on 7 July 2003 by Lord Morris of Aberavon about preparations to deal with the legislative changes that would be needed.<sup>9</sup>

**Lord Williams of Mostyn:** My Lords, I was not privy to any particular advice about legislation or a legislative timetable, but there is no doubt that it was well appreciated that some degree of legislative change would be required—not least because, as my noble and learned friend points out by necessary implication, some of the Lord Chancellor's functions are statutory and could therefore only be changed either by Order in Council or by statute.

The press notice issued by the Prime Minister's office on 12 June confirmed that for the period of transition, Lord Falconer 'will exercise all the functions of Lord Chancellor as necessary', but that he would not sit as a judge in the House of Lords before the new Supreme Court was established.<sup>10</sup> The *Secretary of State for Constitutional Affairs Order 2003* transfers to the Secretary of State for Constitutional Affairs the function of the Lord Chancellor in a list of enactments set out in Schedule 1.<sup>11</sup>

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<sup>6</sup> Professor Diana Woodhouse, 'The office of Lord Chancellor: time to abandon the judicial role – the rest will follow' *Legal Studies* March 2002

<sup>7</sup> For example *Financial Times* 12 June 2003

<sup>8</sup> eg Joshua Rozenberg, 'Brief Encounters', *Daily Telegraph* 3 July 2003; 'We need reform but not this shambles', *Daily Telegraph* 19 June 2003

<sup>9</sup> HL Deb 7 July 2003 c6

<sup>10</sup> PN 212 July 2003 'Modernising Government - Lord Falconer appointed Secretary of State for Constitutional Affairs'

<sup>11</sup> This is an Order in Council under the *Ministers of the Crown Act 1975*, SI 2003 no 1887

## **B. The new Department for Constitutional Affairs**

The Department for Constitutional Affairs which replaced the LCD retained all of these responsibilities, and it was announced that the Scotland and Wales Offices would be subsumed under the new Department.

On the 12 June a press notice issued by the Prime Minister's Office described the new arrangements:

The devolved administrations have bedded down successfully, and there is no longer a requirement for full-time Cabinet ministers and free-standing departments to conduct the remaining Scottish and Welsh business within Parliament and the UK government. The Scotland and Wales Offices will henceforth be located within the new Department for Constitutional Affairs, together with the Parliamentary Under-Secretaries of State for Scotland and Wales. At Cabinet level, responsibility for the conduct of Scottish and Welsh business, and lead responsibility for the representation of Wales and Scotland within the Government and Parliament, will lie with Alistair Darling (Scotland) and Peter Hain (Wales) respectively, supported by the staff located within the new Department. They will combine these important duties with their other Cabinet responsibilities.<sup>12</sup>

Tony Blair confirmed this in his statement to the House on 18 June, which he had been invited to make by the Speaker amid perceived confusion about the changes:

The civil servants in the Scotland Office and the Wales Office will be part of the Department for Constitutional Affairs, so as to ensure that they do not move should the Cabinet Ministers change. The new Department has responsibility for the devolution settlement and the new Secretary of State, like the Lord Chancellor before him, will remain chairing the main Cabinet Constitutional Reform Committee. Oral and written questions will continue, as now, to be answered by the Secretaries of State for Scotland and Wales.

The Leader of the Opposition however reflected the confusion of the intervening days over the reshuffle and responsibilities of the new Department:<sup>13</sup>

Will the Prime Minister explain why the Scotland Office said last Friday morning that it had been abolished and was now part of the DCA, while the Wales Office stated

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<sup>12</sup> Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs' 10 Downing Street PN, 12 June 2003

<sup>13</sup> HC Deb 18 Jun 2003 : c361

that it had not been abolished and remained independent? I quote from the Wales Office statement:

"Across the road at the Scotland Office, they are rudderless and there is confusion on their part. They are taking down their old signs but we are not."

Later that day, the Scotland Office suddenly decided that it existed after all, and changed its statement. It stated:

"Alistair Darling has confirmed the Scotland Office still exists but has been merged into a bigger department. I don't have any more details, we are still trying to get to grips with all of this."

I tried to get to the bottom of the—*[Interruption.]* Labour Members can shout as much as they like, but they will not escape the fact that this reorganisation is botched, bungled and totally wrong. ... In fact, today the Prime Minister has contradicted what his right hon. Friend the part-time Secretary of State for Wales said yesterday. What the Prime Minister has said is completely different:

"The civil servants in the Scotland Office and the Wales Office will be part of the Department for Constitutional Affairs, so as to ensure they do not move should the Cabinet Members change."

On Tuesday, the part-time Leader of the House said:

"I have already answered that question. The Scotland Office exists. It exists as it did before Thursday, as it does now, and as it will in the future, as does the Wales Office."—*[Official Report, 17 June 2003; Vol. 110, c. 237.]*

That is yet another change in 24 hours—more chaos, and more confusion.

Will the Prime Minister tell the House whom the civil servants will report to? Will the two part-time Secretaries of State report to Lord Falconer? What are the statutory functions of the Secretary of State for Constitutional Affairs? Where is his budget coming from, and under what authority? *[Interruption.]*

Alex Salmond took the opportunity of an adjournment debate on 3 July to question the detail of these arrangements, in an exchange with Anne McGuire, the Parliamentary Under-Secretary of State for the Scotland Office.<sup>14</sup>

A *Transfer of Functions Order* made under s5 of the *Ministers of the Crown Act 1975* would appear to be necessary to abolish the role of Secretary of State for Wales. This would be an Order in Council which would have to be passed by both Houses. In the case of the Secretary of State for Scotland, it is possible that certain of the functions specified in the Act could be carried out by a Secretary of State for Constitutional Affairs without a Transfer of Functions Order. At present, however, both Secretaries of State continue in existence.

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<sup>14</sup> HCDeb 3 July 2003 c628-30

The new office of Secretary of State for Constitutional Affairs means that the functions carried out by the Lord Chancellor need no longer be exercised by a lawyer. The *Supreme Court (Offices) Act 1997* has 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.<sup>15</sup> Some concern has been expressed that the new minister will not occupy the same distinctive role of the Lord Chancellor within the Cabinet, as a more ‘non-political’ office holder.<sup>16</sup> The concerns were epitomised in this exchange during the Constitutional Affairs select committee oral evidence in September 2003:

**Q15 Peter Bottomley:** We now have a Secretary of State for Constitutional Affairs who does not need to be in the Lords, who could be in the House of Commons and therefore rather more uncertain as to his or her parliamentary future, if I can put it that way, and could be a Minister who ranks low not only in the Cabinet list but also in terms of power and weight among colleagues. Who other than a Cabinet Minister could fulfil the kind of role of being the protector of the judiciary or by whose presence other Secretaries of State would feel somewhat inhibited as to the freedom with which they could lash out?

**Lord Mackay of Clashfern:** I think that is a difficulty. During my time I obviously had a lot of conversations with people in other jurisdictions with regard to that and they thought it was valuable that we had someone in this sort of a situation. The only person I can think of is the Attorney General, who of course at the moment is not a member of the Cabinet and has not been for quite a long time, for reasons which seem good, that he, having ultimate responsibility for prosecutions, should not be seen as having membership of the Cabinet which might inhibit him in fearless pursuit of that. So far as I know the Lord Chancellor is the only Cabinet Minister who takes the judicial oath and that judicial oath, as I say, covers all his activities as Lord Chancellor. Although it is a judicial oath it is the oath of office as Lord Chancellor and that ought to permeate, and I am sure it does permeate, all his work. I do not know anyone who has the same sort of scope or responsibility that could be devised to replace him.<sup>17</sup>

### **C. Consultation paper on reforming the office of the Lord Chancellor**

The Department of Constitutional Affairs issued a paper on September, with responses sought by 7 November. The executive summary emphasised that it dealt with residual issues, not related to his functions as a Departmental Minister or his capacity as Head of the

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<sup>15</sup> HL Paper 180 2003-3, Q8

<sup>16</sup> 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

<sup>17</sup> Constitutional Affairs Select Committee, Oral Evidence, HC 1105 2002-3

Judiciary. The paper on the office of the Lord Chancellor 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.<sup>18</sup> Responsibilities for the National Archives and Land Registry would remain with the Secretary of State.

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.<sup>19</sup> The Lords Constitution Committee also took evidence on 15 October 2003.<sup>20</sup>

## **D. The history and development of the post of Lord Chancellor**

The post dates back to medieval times when the holder acted as secretary to the King. The September consultation paper summarised the history as follows:

The origin of the office of the Lord Chancellor was as secretary to the medieval Kings of England. In this role the Chancellor was responsible for the supervision, preparation and dispatch of the King's letters, which entailed the use of the Sovereign's seal. In due course the Chancellor took on further administrative functions on behalf of the Sovereign. Although the Lord Chancellor has fulfilled a variety of different roles throughout history, it has consistently been his duty to hold the Great Seal of the Realm, which has come to symbolise his office.

In view of his importance in the King's Council the Lord Chancellor came to preside over Parliament when the Monarch was not personally available. The Lord Chancellor also came to exercise a judicial role as the source of equity in the Court of Chancery (for redress when common law or precedent did not apply or produced an unfair outcome) on the King's behalf. Therefore, the Lord Chancellor was described as 'Keeper of the Royal Conscience'. When the Court of Chancery was combined with the common law courts to become part of the single court system, this separate identifiable role ceased to exist.

In addition, as Speaker of the House of Lords, the Lord Chancellor also came to exercise the jurisdiction of that House. For more information on this see the Consultation Paper, *A Supreme Court for the United Kingdom*<sup>21</sup>, paragraph 10.

By the end of the 19th century, the office of Lord Chancellor also began to acquire a permanent administrative staff, which in time has developed into a government department. The office of the Lord Chancellor acquired a significant range of new responsibilities for the higher courts in England and Wales when the Courts Act 1971

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<sup>18</sup> Documents passed under the Great Seal include royal proclamations, writs, letters patent. The procedure is set out in the *Great Seal Act 1884*

<sup>19</sup> HC 903-I uncorrected evidence

<sup>20</sup> HL Paper 180 2002-3

<sup>21</sup> <http://www.dca.gov.uk/consult/supremecourt/index.htm>

came into force in 1972. Other responsibilities have been added progressively over the decades, including those for criminal legal aid and the administration of a number of tribunals.

Further detail on the development of the office is contained in *The Office of Lord Chancellor* by Professor Diana Woodhouse in 2001.<sup>22</sup> 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<sup>23</sup> would be a distinct part of the justice system, accountable to him. Planned public spending by the LCD departments in 2003-04 was put at £3.2 million.<sup>24</sup>

In his 2001-02 Departmental Report, Lord Irvine had signalled a 'new era' for the LCD, describing 'the business of the departments, our public targets, our present performance and our future challenges... As our report illustrates, we put customers at the heart of our thinking and planning...' It set out the strategic objectives, and specific PSA (Public Service Agreement) targets. The LCD thus in its language and presentation reflected firmly the Public Service Reform ethos of the Cabinet Office, led by Sir Andrew Turnbull. It was described as 'a resource-hungry department at the centre of government, which operates under the same management and value-for-money regime as other ministries'.<sup>25</sup>

Professor Woodhouse went on to argue that the LCD had thus 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.' She thus built on her arguments in 1998, before the last expansion in responsibilities that it was:

time to abandon the pretence that the position of the Lord Chancellor, as currently understood, is fundamental to our constitutional arrangements, particularly as those arrangements are themselves undergoing change through, among other things, the incorporation of the

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<sup>22</sup> See also *The Lord Chancellor* by Terence Underhill 1978

<sup>23</sup> 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

<sup>24</sup> [http://www.hm-treasury.gov.uk/pre\\_budget\\_report/prebud\\_pbr02/report/prebud\\_pbr02\\_repannexb2.cfm](http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr02/report/prebud_pbr02_repannexb2.cfm)

<sup>25</sup> Professor Diana Woodhouse, 'The office of Lord Chancellor: time to abandon the judicial role – the rest will follow' *Legal Studies* March 2002

Convention of Human Rights and the reform of the House of Lords, both of which will make the position of the Lord Chancellor even more questionable.<sup>26</sup>

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.

Lord Alexander argued that this ‘non-political’ Lord Chancellor would still be charged with constitutional responsibilities such as freedom of information and human rights, and preside over the Lords but without a vote, ‘a very considerable and healthier role’.

In the event, the constitutional changes of June 2003 went much further than Lord Alexander and other parliamentarians and observers expected. The main roles of the Lord Chancellor are summarised in the following sections.

## **E. Juridical role**

The September consultation paper noted the role of Lord Chancellor as judge:

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*<sup>27</sup>, paragraphs 8-17).

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,

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<sup>26</sup> Professor Diana Woodhouse, ‘The role of the Lord Chancellor’, *Public Law* Winter 1998

<sup>27</sup> <http://www.dca.gov.uk/consult/supremecourt/index.htm>

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<sup>28</sup>. 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).

The removal of the Law Lords from the House of Lords, their replacement with an independent supreme court, and the reform of the judicial appointments system have all been mooted in recent years by lawyers, law lords, think-tanks and academics.. Recently, Lords Bingham and Steyn both called for a new Supreme Court for the United Kingdom.<sup>29</sup>

On the question of appointments, Lord Irvine himself conceded, in April 2003, that:

I am prepared to conduct a wide consultation. It will be part of a single, integrated programme of work. It will extend to the possibility of a judicial appointments commission; it will extend to the manner of the appointment of Queen's counsel; it will extend to whether the status of Queen's counsel should continue to exist or not; and it will extend to whether the existing court dress should remain or be changed... I want to emphasise one thing: I have no concluded view. I am well aware of the argument, but I have no concluded view on any of those three very important issues.<sup>30</sup>

Lord Irvine's announcement (to the LCD Select Committee) followed a report from Sir Iain Glidewell, commissioned by the Bar Council, which concluded of the Lord Chancellor's judicial role, 'We do not consider that the current processes can be seen to be wholly satisfactory for the 21<sup>st</sup> century. In particular the system of appointment by invitation is hardly transparent.'<sup>31</sup>

## 1. Judicial appointments

This is the subject of a separate consultation paper issued in July 2003.<sup>32</sup> Since 2001 there has been a non-statutory Judicial Appointments Commission in existence to monitor the procedures for the appointment of judges and Queen's counsel. But judicial appointments are a matter for the executive. The Lord Chancellor advises the Prime Minister who in turn advises the Crown on the appointment of Law Lords, Heads of Divisions and Lord Justices of Appeal; he appoints (by advice to the Crown) High Court Judges, Circuit judges and District judges. He also has direct responsibility for the appointment of judicial officers, a large

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<sup>28</sup> <http://www.dca.gov.uk/consult/lcoffice/para27#para27>

<sup>29</sup> Lord Steyn, 'Human Rights: The Legacy of Mrs Roosevelt', *Public Law* Autumn 2002; Lord Bingham, 'A New Supreme Court for the UK, Constitution Unit Spring Lecture 2002.

<sup>30</sup> Lord Chancellor's Department Select Committee, Uncorrected oral evidence, 2 April 2003 HC611-I, 2002-03

<sup>31</sup> Bar Council Working Party on Judicial Appointments and Silk, chaired by Sir Iain Glidewell, Mar 2003

<sup>32</sup> *Constitutional Reform: a new way of appointing judges* July 2003 CP 10/03

number of tribunal chairmen and members, and all lay magistrates (except within the Duchy of Lancaster). The Lord Chancellor also appoints Queen's counsel. The Judicial Appointments Commission was criticised for the limitations of its role: 'It is confined to scrutiny and its remit won't run to monitoring the appointments of the Lord Chief Justice and the law lords.'<sup>33</sup>

In the autumn of 2001 the QC David Pannick had argued for removing the role of the Lord Chancellor's department in appointing Queen's Counsel.<sup>34</sup> Conceding that the system had improved since the days when it was described by Lord Williams as 'the Franz Kafka school of business management', Mr Pannick wrote that 'there is a compelling case for removing the role of the Lord Chancellor's Department. The Bar rightly values its independence. It is, then, impossible to justify a system by which promotion to a senior status is dependent on the advice of civil servants and the judgement of a politician, however conscientious. If a higher rank is to be obtained, the Bar itself should decide the relevant criteria and procedures, organising an appointments panel consisting of eminent lawyers and distinguished non-lawyers.'

The Bar Council's Glidewell Report<sup>35</sup>, subsequently produced its report into judicial appointments and made a number of recommendations, including removing the power of the Lord Chancellor over High Court appointments.

We have concluded that it has become politically unacceptable for High Court Judges to be appointed in effect by a Member of the Government of the day and that in future appointment to the High Court Bench should be the responsibility of a new, high calibre, independent High Court Appointments Board, the composition and nature of which we consider in the Report.

We consider that the current practice of appointing Deputy High Court Judges, effectively by the Lord Chancellor without any formal procedure, should be brought as closely as possible into line with the procedures for appointment to other part-time judicial posts as dealt with earlier in our Report. The procedure would start with an advertisement seeking applications, and details of the procedure should be published as soon as possible.

**We have concluded that it is undesirable that appointment to the highest rank of advocate should be made by the holder of a political office, however impartial he may be. The Working Party therefore proposes that, whilst the recommendations for appointment should continue formally to emanate from the Lord Chancellor, his officials concerned with the Silk appointment process should in future report to an independent panel with a broad, diverse representation, chaired by a retired Law Lord or Lord Justice of Appeal. It would be the role of the panel to recommend a list of proposed appointees to the Lord Chancellor for him to adopt as his formal recommendations to the Crown.**

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<sup>33</sup> David Beetham et al, *Democracy under Blair: Democratic Audit of the United Kingdom*, Politicos 2002

<sup>34</sup> David Pannick QC, 'Why the silk purse won't survive' *Public Law* Autumn 2001

<sup>35</sup> Above

Agreement to launch a consultation on the future appointment system for QCs had formed part of Lord Irvine's evidence to the LCD Select Committee in April 2003. A consultation issued in July 2003 looks at this issue.<sup>36</sup>

On June 18 2003 in the House of Commons, the Prime Minister confirmed that:

It is increasingly anomalous for a Minister—and an unelected one at that—to choose judges... Following the Human Rights Act 1998, such a system is particularly outdated. The selection of judges should be by a transparent process, independently conducted. We propose to establish an independent judicial appointments commission to recommend candidates for appointment as judges on an open basis—something long advocated by many inside and outside the legal profession. There is already such an independent commission in place for selecting judges in Scotland and one forms part of the agreed settlement in Northern Ireland. The Lord Chancellor will also cease to sit as a judge, and the Appellate Committee of the House of Lords will become a fully independent supreme court.<sup>37</sup>

The consultation paper issued in July 2003 sought responses by 7 November 2003.

## **2. *The Human Rights Act 1998***

The argument that there was an incompatibility between the Lord Chancellor's role and the *Human Rights Act 1998* - to which Mr Blair referred - has been articulated more strongly in recent years. Lord Steyn, a Lord of Appeal in Ordinary, wrote that:

The 1998 [Human Rights] Act has, of course, invigorated the process of constitutionalisation of public law. It has put on the agenda structural changes in our system. The Lord Chancellor is a Cabinet minister. Nevertheless from time to time he sits in the Appellate Committee, admittedly rarely and only in the most unimportant private law cases. His right to do so is now controversial. Appellate Committees which include the Lord Chancellor may not fulfil the requirement of independence required by Article 6 of the European Convention on Human Rights. Following Pinochet (No. 2) the House may have to rule on this issue at any time. Even ten years ago Law Lords participated in debate in the House of Lords freely and in large numbers. Now there is a change. The Law Lords rarely exercise this right. The sooner it withers away altogether the better. ...Furthermore, it is no longer acceptable that alone among constitutional democracies our country does not have a supreme court. Public confidence in the administration of justice would be enhanced and the public interest would be advanced if the highest court in the land ceased to be a committee of the legislature. What is required is a proper supreme court as an

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<sup>36</sup> *Constitutional Reform: the future of Queen's Counsel*. CP 08/03. Responses were invited by 7 November 2003

<sup>37</sup> HL Deb 18 June 2003 c357

independent branch of government in our parliamentary democracy in which the final word rests with Parliament.<sup>38</sup>

The European Court of Human Rights had made a potentially significant ruling with relevance to this issue in February 2000.<sup>39</sup> The case concerned a Guernsey flower grower refused planning consent, whose appeal had been heard by a judge who also presided over the island's legislature. However as recently as March 2003, the Government did not accept the human rights argument in relation to the Lord Chancellor's functions, as Lord MacDonald of Tradeston made clear in his response to Lord Goodhart's *Ministerial and Other Salaries Bill*.<sup>40</sup>

It has been suggested that by implication, the Human Rights Act might make it inappropriate for my noble and learned friend to continue to exercise any judicial functions. The Government do not accept that reasoning. In the United Kingdom, we have never accepted pure adherence to a doctrine of the separation of powers....

...the office of Lord Chancellor, straddling as it does the three parts of the constitution, makes its holder uniquely placed to protect the interests of each part against the demands of the others. In particular, it both upholds judicial independence and mediates between the executive and the judiciary when occasion for controversy arises.

The Lord Chancellor is able to perform that function both because of his seniority in Cabinet and because he is head of the judiciary and sits as such from time to time. Through his office, the judiciary has a representative in the Cabinet. The Lord Chancellor is in a position to promote mutual understanding in order to avoid collisions at the major intersections in the separation of the powers.

...It is of course important that when the Lord Chancellor sits as a judge, it should not be in a case in which it would be inappropriate. My noble and learned friend has made it amply clear that he would take great care not to compromise his position in such a way....It can be argued, of course, that whatever may have been appropriate in the past, the Human Rights Act now makes it unacceptable that the Lord Chancellor should continue to fulfil his multiple functions. The Government do not accept that. I would point out, first that the only jurisprudence on this subject from the European Court in Strasbourg, the McGonnell case.... emphasised that:

"The question is always whether, in a given case, the requirements of the convention are met".

The court accepted the UK's contention that neither Article 6 nor any other provision of the convention required,

"states to comply with any theoretical constitutional concepts as such".

It follows that the Government do not accept that the Human Rights Act 1998 causes us to review the role of the Lord Chancellor. If there is a human rights point here—we do not think that there is—it stems from our international obligations, not from domestic legislation.

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<sup>38</sup> 'Human Rights: The Legacy of Mrs Roosevelt', *Public Law* Autumn 2002

<sup>39</sup> *McGonnell v United Kingdom* (2000) 30 EHRR 289

<sup>40</sup> HL Deb 7 Mar 2003 : c 1086 (The purpose of the Bill was to link the Lord Chancellor's salary to that of other ministers rather than that of the Lord Chief Justice.)

Lord Irvine as Lord Chancellor himself had defended his office from abolition in the wake of the human rights legislation.

Down the centuries, the judges have decided cases according to the law in ways that have been highly controversial: take the landmark civil liberties cases; the great trade union cases about liability for industrial action; the development of judicial review, with the courts striking down unlawful government action; the cases deciding whether a life support machine should be shut off; and every controversial decision in the criminal law. All that the Human Rights Act will make is a difference of degree not kind.<sup>41</sup>

### 3. A new supreme court?

The human rights issue was part of the wider advocacy of a court independent of the House of Lords and the removal of the Law Lords from Parliament.

The modern form of appeal to the House was established by the *Appellate Jurisdiction Act 1876* in which provision was made for the creation of Law Lords (Lords of Appeal in Ordinary) who are appointed by the Crown. There is a maximum of 12 and they are entitled to sit and vote on all Lords business during their lifetime.

Radical reform of the Lords' appellate jurisdiction has tended to be subsumed over the years under more general proposals for reform of the Lords' political powers.<sup>42</sup> But in recent years support for a new top level 'supreme court' had been growing, voiced by Lords Donaldson, Bingham, Steyn and Phillips; organisations such as IPPR and Justice, and a number of law professors. Further detail is given in another standard note.<sup>43</sup> Lord Bingham and Lord Steyn argued consistently for the severance of the House of Lords Appeal functions from the upper chamber of Parliament. On 1 March 2002 Lord Steyn, giving the Neill lecture at All Souls College Oxford, predicted that if the Lord Chancellor continued to sit judicially, 'it could only be a matter of time before the law lords were accused of breaching the Human Rights Act, which guarantees a fair trial before an independent and impartial tribunal'.

The Constitution Unit at University College, London expressed surprise, in its publication *The Future of the United Kingdom's Highest Courts*, at the lack of a reform programme for the Lords judicial role.<sup>44</sup>

Consideration of the future of the Appellate and Judicial Committees could have formed part of the Labour Government's constitutional reform programme in which many major public institutions were created anew or had working methods altered or

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<sup>41</sup> Lord Irvine, *Daily Telegraph* 28 July 1999

<sup>42</sup> The presentation *Commonwealth of Britain* Bill 1992, Part VII set up an independent High Court of Law Lords and members of the Judicial Committee, confirmed by Select Committee.

<sup>43</sup> SN/HA/2701 *Proposals for a Supreme Court for the United Kingdom*

<sup>44</sup> Andrew Le Sueur and Richard Cornes, *The Future of the UK's Highest Courts*, Constitution Unit 2001

their constitutional status changed. The Royal Commission on Reform of the House of Lords did deal with the judicial function of the upper chamber of Parliament in its 2000 report, albeit fairly briefly. The Commission recommended no significant structural changes in relation to the Law Lords. It was however widely acknowledged that detailed consideration of reform of the judicial function fell outside the scope of the commission's enquiry — as did the position of the Judicial Committee. It is something of a paradox that while being given important roles in the schemes to incorporate the ECHR into domestic law and in the devolution settlement, the Appellate Committee and the Judicial Committee have, as institutions, been so little affected by the forces of modernisation.

The role that the Law Lords would or would not play in a reformed chamber has been discussed over the years, for example in the 1968 White Paper *House of Lords Reform*, the Home Report (1978), the Mackay Commission (1998).<sup>45</sup>

The then Lord Chancellor, Lord Irvine, defended the presence of Law Lords in the House of Lords against the accusation that this violated the doctrine of separation of powers.<sup>46</sup>

They are there for good pragmatic reasons. They make a distinctive contribution to debates on the administration of justice and to many specialist select committees. The House of Lords should not lose the considerable benefits they confer, provided their primary role as our final appellate judges is not prejudiced. So long as a law lord has abstained from expressing a concluded view in the chamber on an issue coming before him judicially, there is no reason why he should not sit. Provided the Lord Chancellor does the same, and does not sit in any case where the interests of the executive are directly engaged, there is no reason why he should not sit and preside judicially.

By June 2003, the Government had become persuaded of the need for far-reaching reform of the appellate system and proposals for the form a new Court would take, and the fate of the Law Lords, were to form the subject of consultation until November 2003.<sup>47</sup> A consultation paper was issued in September 2003, entitled *Constitutional Reform: a Supreme Court for the United Kingdom*.<sup>48</sup>

## **F. The role of Speaker of the House of Lords**

The third ramification of the Government's proposals to reform the office of Lord Chancellor is the loss to the House of Lords of its 'presiding officer'. House of Lords Standing Orders 18 and 19, dating from 1621 and 1660, describe the arrangements for the

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<sup>45</sup> See Library Research Paper 99/6 *The House of Lords Bill: Options for Stage Two*, pp44-46

<sup>46</sup> *Daily Telegraph*, 28 July 1997

<sup>47</sup> Lord Williams, HLDeb 25 June 2003 c297

<sup>48</sup> See SN/HA /2701 for further details

Lord Chancellor to preside over the Lords' chamber. The peculiar constitutional position makes his role unlike that of the Commons' Speaker and, curiously, in the view of one commentator, the Lord Chancellor can in theory be a commoner.<sup>49</sup>

[His position ] is older than democracy, older than Parliament, older than Magna Carta, older than the Norman Conquest...the antiquity of the office also explains why the Lord Chancellor is the Speaker of the Lords, and why he can discharge his functions as Speaker without being a peer, and therefore not a member of the House...

Opposition to this aspect of the reform of the Chancellorship developed rapidly after the Prime Minister's statement to the House of Commons on 18 June, and a week later, 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.<sup>50</sup>

That remit will allow the committee to consider not only the role of the Presiding Officer, and the method of appointment, but also the following issues which your Lordships have identified as important: the Presiding Officer's title, pay, term of office and accommodation—the latter was a topic of keen interest, particularly among those of your Lordships who assured me they had no interest in occupying the particular post; Deputy Speakers; the relationship with the Chairman of Committees, the Clerk of the Parliaments and the Clerks, and the House authorities generally and, of course, State Opening and other ceremonial functions.

During the course of the debate on the Speakership, Baroness Williams proposed that 'serious consideration should be given to retaining the title [of Lord Chancellor]. The person who will preside over this House will also in many instances represent this House, particularly abroad. We should think very carefully before abandoning a title that has great historic reverberations associated with it, and that enables those persons who preside over this House to establish themselves as very major personalities when they visit other parliaments and other senates in other parts of the world.'<sup>51</sup> This was a point made again in the debate on House of Lords reform in that chamber on 7 November 2003. The former Commons Speaker, Lord Weatherill also argued for the 'old traditions of self-regulation' to be upheld.<sup>52</sup> In response, Lord Falconer noted strong feeling in the House in favour of self-regulation.<sup>53</sup> The Lords select committee has not yet published its conclusions.

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<sup>49</sup> RFV Heuston, *Lives of the Lord Chancellors 1940-70* (1974)

<sup>50</sup> HL Deb 25 June 2003 c295

<sup>51</sup> HL Deb 25 June 2003 c297 (this suggestion was also made by Joshua Rozenberg in *The Search for Justice: an anatomy of the Law*, 1994)

<sup>52</sup> HL Deb 7 November 2003 c1062

<sup>53</sup> HL Deb 7 November c1080

## **G. Responsibilities in respect of Northern Ireland**

One of the most complex areas to be dealt with are the responsibilities of the Lord Chancellor in respect of Northern Ireland. Following direct rule in 1972, he became responsible for making or advising on all judicial appointments in Northern Ireland, but 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, established as a distinct service in the 1978 legislation. He acquired responsibility for legal aid and the registration of maintenance orders in 1982, and for advising on the appointments of QCs in 1999, both from the Secretary of State for Northern Ireland. The September consultation paper gives a list of provisions relating to the role of Lord Chancellor in Northern Ireland at Annex F to the paper. The present uncertain state of the settlement in Northern Ireland inhibits the delegation of his functions. The paper noted:

32. The Government has stated on a number of occasions its commitment to devolving policing and justice to Northern Ireland on a robust and workable basis. The report of the Criminal Justice Review established by Government under the Belfast Agreement was published in March 2000. A number of the Review's recommendations are given legislative effect in the Justice (Northern Ireland) Act 2002. That Act contains a number of important provisions in relation to judicial appointments (including the establishment of a Judicial Appointment Commission in Northern Ireland) and removals, the courts and the NICtS, all of which are responsibilities of the Lord Chancellor in Northern Ireland. Many of the Act's provisions are, however, not yet commenced as they are linked to a transfer of responsibility for judicial appointments and the administration of the courts from the Lord Chancellor to the devolved administration. The Government is committed to bringing forward a Judicial Appointments Commission in Northern Ireland in advance of devolution of those functions to the Northern Ireland Assembly. The immediate issue is to adapt the existing role and responsibilities of the Lord Chancellor in Northern Ireland to permit that to happen. This will be the subject of separate legislation for Northern Ireland.

## **H. Ecclesiastical and other duties**

A search of Butterworth's legislation database reveals 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.<sup>54</sup>

The September consultation 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 include:

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<sup>54</sup> HC Deb 6 Feb 2002 WA

- **Ecclesiastical patronage.** This has existed since the fourteenth century, and currently the Lord Chancellor is sole or shared patron for about 5.5 per cent of the total number of benefices. Under the *Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974*, if the Lord Chancellor is Roman Catholic, provisions may be made by Order in Council for his functions in relation to church patronage to be exercised by another Minister of the Crown. This provision has yet to be used. The choice of appointee both by the Sovereign, on the advice of the Prime Minister, and the Lord Chancellor is administered through a single office headed by the Prime Minister's Appointment Secretary, who is also the Lord Chancellor's Ecclesiastical Secretary.
- **Other Ecclesiastical functions.** These range from being an *ex officio* member of the Church Commissioners, consultation on certain ecclesiastical judicial appointments, and power as Speaker to nominate 15 members of the House of Lords to sit on the Ecclesiastical Committee, which approves Measures of the Church of England.
- **Visitation.** This is a form of supervision over the domestic affairs of an institution. By convention, where the Crown is a Visitor, jurisdiction will be exercised by the Lord Chancellor on behalf of the Crown. The most important aspect of these duties are in respect of universities where the Visitor has to determine disputes arising between the academic institution and its members, including appeals by students. The Department for Education and Skills has already announced reform plans for the role of Visitor in respect of student complaints.<sup>55</sup>
- **Royal Peculiars.** These are places of worship outside the normal structure of ecclesiastical jurisdiction: Westminster Abbey, St George's Chapel, Windsor and the Chapels Royal. The Lord Chancellor has a role both as an *ex officio* visitor and an advisor to the Queen in relation to their administration. They were the subject of a Review Group on management and accountability, which reported to the Lord Chancellor in 2001.
- **Charities and Schools.** The Lord Chancellor has a variety of duties in relation to appointments to certain charities and the election of members of governing bodies of certain public schools, such as Charterhouse, Rugby and Harrow. These mainly derive from statute, or royal charter. In addition, other functions are derived from private and local acts. The consultation paper noted that the proposed legislation would include a power for the Secretary of State for Constitutional Affairs to address these residual functions.

The key questions to be answered in the consultation process are as follows:

**Annex A: Questions and topics which need a view**

**Ecclesiastical Patronage**

How should this patronage best be exercised once there is no longer a Minister of the Crown with the office of Lord Chancellor?

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<sup>55</sup> Details are given in CP 13/03, para 5.59

Do you prefer:

The Secretary of State for Constitutional Affairs, or another Minister of the Crown, to retain responsibility for Ecclesiastical Patronage

The responsibility for Ecclesiastical Patronage to be dealt with in the same manner as other Crown livings (i.e. with the Prime Minister advising The Queen);

Transferring the Lord Chancellor's patronage powers, at least in respect of parochial appointments, to the Church? If so, who in the church would be the best recipient in your view?

In each case please give your reasons.

(Views on this subject are invited from all interested parties, but it would be helpful in your response if you could state whether you have any position in relation to the Church, for example as a member of a PCC.)

### **Visitorship**

How should the Visitorial roles of the Lord Chancellor best be exercised in the future? And by whom? What are your reasons?

### **Royal Peculiars**

There is a distinction to be drawn between providing advice to Her Majesty in relation to Royal Peculiars and carrying out visitorial functions in respect of them. How should the two roles best be carried out in the future? What are your reasons?

### **Charities and Schools**

Where the Lord Chancellor has a function in relation to specific schools, charities or other bodies not connected to his Departmental or Visitorial responsibilities, do you see any value in continuing such involvement? What are your reasons?

## **I. Legislation**

Legislation is expected before the next election to implement the whole package of constitutional reform consequent on abolition. The September consultation paper noted:

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. (The new arrangements for judicial appointments and the Supreme Court are discussed in the Consultation Papers, *A New Way of Appointing Judges*<sup>56</sup> and *A Supreme Court for the United Kingdom*<sup>57</sup>.)

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. As the first step in this process a Transfer of Functions Order has already been made.

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<sup>56</sup> <http://www.dca.gov.uk/consult/jacommission/index.htm>

<sup>57</sup> <http://www.dca.gov.uk/consult/supremecourt/index.htm>

A further Transfer of Functions Order will be made later in the year, with relevant legislation to deal with those functions requiring legislative change being introduced into Parliament as early as Parliamentary time allows.

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.<sup>58</sup>

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<sup>58</sup> CP 13/03, para 2.8