

EXPLANATORY MEMORANDUM TO
THE LORD CHANCELLOR (TRANSFER OF FUNCTIONS AND
SUPPLEMENTARY PROVISIONS) (No.2) ORDER 2006

2006 No. 1016

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order amends primary legislation, and secondary legislation which can only be amended by affirmative instrument, in order to abolish, transfer or modify functions of the Lord Chancellor in accordance with the changes made to that office by the Constitutional Reform Act 2005 and with the Concordat agreed between the Lord Chancellor and the Lord Chief Justice. In particular, it ends the role of the Lord Chancellor as a Lord of Appeal under the Appellate Jurisdictions Acts. It also makes supplementary provision to correct an amendment made to the Copyright, Designs and Patents Act 1988 by the Constitutional Reform Act.

2.2 The Order is subject to the affirmative resolution procedure.

3. Matters of special interest to joint committee on statutory instruments/select committee on statutory instruments

3.1 None.

4. Legislative Background

4.1 The Order will be made under section 19 of the Constitutional Reform Act 2005. Since the Order amends public general Acts of Parliament it is subject to the affirmative resolution procedure under the provisions of section 144(4) and (5) of the Act. It is one of a group of orders planned to implement provisions of the Act (the others deal with judicial appointments and judicial complaints and discipline). The instrument will be the second Lord Chancellor (Transfer of Functions) Order to be made under the Act, but the first order will be subject to the negative resolution procedure and has not yet been made and laid before Parliament.

5. Extent

5.1 This Order extends to the United Kingdom.

6. European Convention on Human Rights

6.1 In the Lord Chancellor's view this Order is compatible with the European Convention on Human Rights.

7. Policy background

The Act

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

7.2 Part 3 of the Act creates a new Supreme Court, and the Act repeals the Appellate Jurisdiction Acts, which govern the judicial role of the House of Lords. In doing so the Act ends the judicial role of the Lord Chancellor as a Lord of Appeal. However, these provisions and repeals will not be commenced until 2008, when the new Supreme Court is brought into being; it is therefore necessary in the meantime to make provision to end the Lord Chancellor's formal role as a Law Lord (although the current Lord Chancellor has never sat as such).

The Order

7.3 The Order contains 3 schedules. Schedule 1 amends primary legislation, this includes the Appellate Jurisdiction Acts 1876 and 1887 which are amended to delete references to the Lord Chancellor as a Lord of Appeal. In accordance with the Concordat agreed by the Lord Chancellor and Lord Chief Justice, schedule 1 also modifies other functions conferred on the Lord Chancellor in primary legislation enacted in the 2004-2005 session of Parliament, usually by transferring functions to the Lord Chief Justice or by requiring the Lord Chancellor to consult or obtain the concurrence of the Lord Chief Justice before exercising his function. Certain functions which extend across the United Kingdom are amended to require the concurrence of all three of the Chief Justices (the Lord Chief Justice of England and Wales, Lord President of the Court of Session, and Lord Chief Justice of Northern Ireland). Certain functions relating to Northern Ireland are amended to require the concurrence of, or consultation with, the Lord Chief Justice of Northern Ireland.

7.4 Schedule 2 amends in the same way a small number of pieces of secondary legislation which can only be amended by an affirmative order. Schedule 3 corrects a slip in the drafting of paragraph 199 of schedule 4 to the Constitutional Reform Act, which amended section 146 of the Copyright, Design and Patents Act 1988 but omitted a necessary reference to members of the copyright tribunal being appointed as well as removed.

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

8. Impact

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

8.2 There is no financial impact on the public sector.

9. Contact

9.1 Jonathan Creer at the Department for Constitutional Affairs, Tel: 020 7210 8981 or e-mail: jonathan.creer@dca.gsi.gov.uk can answer any queries regarding the instrument.