



Ministry of
JUSTICE

Memorandum to the Justice Select Committee

Post-Legislative Assessment of the
Constitutional Reform Act 2005

March 2010



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Post-Legislative Assessment of the
Constitutional Reform Act 2005

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

March 2010

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Foreword by the Lord Chancellor and Secretary of State for Justice

This Government has been responsible for substantial reform and renewal of the UK's constitutional arrangements. Since 1997 we have devolved powers to Scotland, Wales and Northern Ireland, as well as establishing an elected Mayor and Assembly for Greater London. We have brought rights home with the Human Rights Act 1998, which incorporated the European Convention of Human Rights into UK law. We have revolutionised the public's access to official information under the Freedom of Information Act 2000, and put national statistics on an independent footing. Within Parliament, we have reformed many of the procedures and structures of the House of Commons, including strengthened select committees, new topical parliamentary questions, biannual appearances of the Prime Minister before the Liaison Committee, and the replacement of the old Standing Committees by new Public Bill Committees. The House of Lords, meanwhile, has been transformed into a much more independent and active chamber following the removal of the vast majority of hereditary peers, and we are now ready to progress with final reform of the second chamber.

All of these reforms have an immediate impact, but as with any constitutional changes their full implications can only be judged over the long term. As such, it may feel somewhat premature to be undertaking post-legislative scrutiny of another pivotal reform of the last thirteen years, the Constitutional Reform Act 2005. With key elements of this legislation only recently coming to fruition – notably the new Supreme Court – it is, as Zhou Enlai might say, “too early to say” what impact the Act has had or will go on to have.

Nonetheless I am pleased to have the opportunity to provide some initial reflections in this memorandum on what the legislation has achieved to date.

The Act is based on our objective to strengthen the rule of law. That is the foundation stone of any healthy democracy, and is a principle best defended by an impartial judiciary properly separated from the executive. The quality and integrity of our judiciary is celebrated in the UK, and acknowledged around the world.

The Act guaranteed the rule of law and, for its protection, drew a better division between the role of the Lord Chancellor and the Lord Chief Justice, and between the Lord Chancellor and the House of Lords (which now has its own Lord Speaker). The Lord Chief Justice has rightly assumed the leadership functions of the Head of the Judiciary in England and Wales, and the Lord Chancellor is bound by oath to protect judicial independence. There are matters requiring co-operation between the Lord Chancellor and Lord Chief Justice; the relationship between the executive and the judiciary is strong.

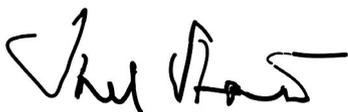
The Act also created the UK's Supreme Court. Its opening in October 2009 marks the culmination of the same long process of separation, and further emphasises the independence of the judiciary. We now have at the apex of our judicial system an institution that is more accessible to the public it serves.

The process by which the judicial appointments are made is also now significantly more independent and distanced from Government. Indeed, there is now no meaningful part for the executive in any but the most senior appointments. In those, we have rightly retained a role for the Lord Chancellor, respecting the constitutional separation of powers and the respective accountabilities of the Lord Chancellor and Lord Chief Justice. The new Judicial Appointments Commission has in its first phase of existence been charged with making this new system operational. There is of course further to go before the full benefits of these reforms to judicial appointments are realised by way of a smoothly and efficiently bedded-down system, and we are keeping progress on that under review.

I firmly believe that we have much more to do to improve the diversity of the judiciary, and welcome the impressive report on that subject drawn up by Baroness Neuberger and her panel. Their far-reaching recommendations call on resources and efforts beyond those of the Government, and we will work urgently, with all who have a part to play, to make them a practical reality.

The provisions in the Act deal with issues at the heart of our constitutional settlement. They will take time to bed down, and their impact will not be fully felt for many years. To a great extent, the Act has informed the principles given expression in the *Governance of Britain* programme, which set out the next phase in Labour's programme of constitutional change. That agenda is currently being advanced through the Constitutional Reform and Governance Bill, which has recently passed through its Commons stages, and is set for scrutiny in the Lords. That legislation will likewise take some time to make its full presence felt.

However, after five years on the statute book we are able to provide this first snapshot of the operation of the Constitutional Reform Act.



Jack Straw
Lord Chancellor and Secretary of State for Justice

Introduction

1. This memorandum provides a preliminary assessment of the Constitutional Reform Act 2005 (2005 Ch. 4) and has been prepared by the Ministry of Justice for submission to the Justice Committee. It is published as part of the process set out in the document *Post Legislative Scrutiny – The Government’s Approach* (Cm 7320). The paragraphs below follow the order of the provisions in the Act.

Objectives of the Constitutional Reform Act 2005 (“the Act”)

2. The Act received Royal Assent on 24 March 2005. The objectives of the Act were to:

Office of the Lord Chancellor

3. Make provision for modifying the office of Lord Chancellor so he or she is no longer a judge nor exercises any judicial functions; it set out qualifications for appointment to this office. It shared functions relating to the judiciary and courts between the Lord Chancellor and the Lord Chief Justice in Northern Ireland and England & Wales (and/or other senior members of the judiciary). It provided a guarantee of continued judicial independence. It provided for the role of Speakership of the House of Lords. There were also provisions for the modification, abolition or transfer of other existing functions of the Lord Chancellor and provision that certain functions cannot be transferred from the office holder to other Ministers by a Transfer of Functions Order under the Ministers of the Crown Act 1975.

“Constitutional Reform. The Lord Chancellor’s judiciary-related functions: Proposals”

4. 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').¹

United Kingdom Supreme Court

5. Make provision for the creation and operation of a UK Supreme Court, to replace the system of Law Lords operating as a committee of the House of Lords.

Judicial Appointments and Discipline

6. Make provision for a Judicial Appointments Commission (JAC) to be responsible for recruiting and selecting judges for the Courts of England and Wales and members of certain tribunals, and arrangements for the appointment of the Lord Chief Justice and other Heads of Division and of the Lords Justices of Appeal. Provide for the Commission to report to the Lord Chancellor on who has been selected, and for the Lord Chancellor to make the appointment or the recommendation for appointment to The Queen. It also made provision for a Judicial Appointments and Conduct Ombudsman, and for judicial discipline.

Northern Ireland Judicial Appointments

7. Make provision for the supply of information to the existing Northern Ireland Judicial Appointments Commission, create a Northern Ireland Judicial Appointments Ombudsman, and provide a mechanism for the removal of judicial office holders in Northern Ireland.

Parliamentary Disqualification

8. Make provision regarding Parliamentary disqualification of certain judges, and make amendments about the Judicial Committee of the Privy Council.²

The Rule of Law

9. Provide the Act did not adversely impact the Rule of Law, nor the Lord Chancellor's role in relation to that principle.

¹ 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.

² As set out by the amended Schedule 1, Part 1 of the House of Commons Disqualification Act 1975 (c.24).

Implementation of the Act and Secondary Legislation

Part 1: The Rule of Law

10. Part 1, which provides that the Act does not adversely affect the rule of law or the Lord Chancellor's role in relation to the Rule of Law, was commenced fully on 3 April 2006.³

Part 2: Arrangements to Modify the Office of Lord Chancellor

11. Part 2, which provides for arrangements to modify the Office of Lord Chancellor, has been largely commenced.
12. Sections 2 to 13 (covering qualifications for office of Lord Chancellor, continued judicial independence, representations by senior judges to Parliament and the Northern Ireland Assembly; judiciary and courts in England and Wales; judiciary and courts in Northern Ireland; and other provisions about the judiciary and courts) and Schedules 1 (Powers to make rules) and 2 (Powers to give directions) were fully commenced by 2 October 2008.⁴
13. Sections 14 (transfer of appointment functions to Her Majesty) and 15 (other functions of the Lord Chancellor and organisation of the courts) and Schedules 3 (transfer of appointment functions to her Majesty), 4 (other functions of the Lord Chancellor and organisation of the courts) and 5 (functions under legislation relating to Northern Ireland) have been partially commenced.⁵
14. A number of amendments contained in Schedule 5 are contingent on the devolution of justice functions to the Northern Ireland Assembly and were not intended to be commenced until the Assembly made a resolution in favour of the transfer of powers. A change in policy regarding the future exercise of judicial appointment and removal functions rendered some of those prospective amendments redundant and provision has been made in the Northern Ireland Act 2009 for their repeal. The remaining provisions (paragraphs 120, 121, 127 and 128(3)) will be commenced when the Assembly has resolved that justice functions should be transferred. The repeals contained in the 2009 Act will also be commenced to coincide with devolution.

³ The Constitutional Reform Act 2005 (Commencement No.5) Order 2006 SI 2006/1014.

⁴ SI 2006/1014, the Constitutional Reform Act 2005 (Commencement No.8) Order 2007 SI 2007/1121, the Constitutional Reform Act 2005 (Commencement No.9) Order 2007 SI 2007/1252 and the Constitutional Reform Act 2005 (Commencement No.10) Order 2008 SI 2008/2597.

⁵ The Constitutional Reform Act 2005 (Commencement No.2) Order 2005 SI 2005/2284, the Constitutional Reform Act 2005 (Commencement No.3) Order 2005 SI 2005/2505, SI 2006/1014 and the Constitutional Reform Act 2005 (Commencement No.6) Order 2006 SI 2006/1537.

15. Sections 16 (Functions of the Lord Chief Justice during vacancy or incapacity) and 17 (Lord Chancellor's oath) were fully commenced on 3 April 2006.⁶
16. Sections 18 to 22 (covering the Speakership of the House of Lords and Lord Chancellor functions subject to transfer, modification or abolition) and Schedules 6 (Speakership of the House of Lords) and 7 (protected functions of the Lord Chancellor) were commenced fully on Royal Assent.⁷
17. The power in section 21(1) to amend Schedule 7 by order has not been exercised. The provisions concerning ecclesiastical patronage have not been commenced. This is because it was decided that there would be no administrative savings in transferring the powers from the Lord Chancellor to the Crown, since the same officials handle both the Lord Chancellor's and the Crown's appointments. This was announced by Written Ministerial Statement on 30 March 2006.⁸
18. The following delegated legislation has been made under Part 2:
 - **the Lord Chancellor (Transfer of Functions and Supplementary Provisions) Order 2006**⁹
Date of entry into force: 3 April 2006.
Purpose: to transfer, modify and abolish certain functions of the Lord Chancellor contained in secondary legislation.¹⁰
 - **the Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006**¹¹
Date of entry into force: 3 April 2006.
Purpose: to transfer, modify and abolish certain functions of the Lord Chancellor contained in primary legislation and in secondary legislation subject to the affirmative resolution procedure.

⁶ SI 2006/1014.

⁷ Section 148(2) (b) and (g).

⁸ In relation to the functions on ecclesiastical appointments, included in Schedule 4, paragraphs 7–12, 14, 42 and 159 which would have amended the Pluralities Act 1838, the Ecclesiastical Leasing Act 1842, the Inclosure Act 1859, the City of London (Guild Churches) Act 1952 and the Pastoral Measure 1983; Schedule 17, Part 1, paragraphs 7–8 relating to the Patronage (Benefices) Measure 1986 and Priests (Ordination of Women) Measure 1993; (and the corresponding provisions in Schedule 18). House of Lords: 30 Mar 2006: Column WS117.

⁹ SI 2006/680 (enabling power: section 19).

¹⁰ Article 2 of, and Schedule 1 to, this Order transfer, modify or abolish certain functions of the Lord Chancellor contained in secondary legislation. In doing so, this Order implemented the "Concordat" agreed between the Lord Chancellor and the Lord Chief Justice in January 2004.

¹¹ SI 2006/1016 (enabling power: section 19).

- **the Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.3) Order 2006**¹²
Date of entry into force: 22 June 2006 (for some purposes) and the day after the day on which the Lord Chancellor ceased to hold the office of Speaker (for other purposes).
Purpose: to transfer certain functions of the Lord Chancellor to the Speaker of the House of Lords and to make supplementary provision in relation to pay, pensions and allowances for the office of Speaker of the House of Lords.
- **the Lord Chancellor (Transfer of Functions and Supplementary Provisions) Order 2007**¹³
Date of entry into force: 1 April 2007.
Purpose: to abolish or transfer certain functions of the Lord Chancellor relating to colleges and charitable institutions, including those functions exercised by the Lord Chancellor as visitor to those institutions.
- **the Lord Chancellor (Modification of Functions) Order 2007**¹⁴
Date of entry into force: 1 April 2007.
Purpose: to modify certain functions of the Lord Chancellor relating to road traffic regulations.

Part 3: The Supreme Court

19. Part 3 and Schedules 8 to 11, which provide for a Supreme Court to replace the Law Lords sitting as a Committee of the House of Lords, were commenced fully on 1 October 2009.¹⁵
20. The power in section 23(3) for Her Majesty to increase the number of judges of the Supreme Court by Order in Council has not yet needed to be exercised.
21. The following delegated legislation has been made under Part 3:
 - **the Supreme Court Rules 2009**¹⁶
Date of entry into force: 1 October 2009.
Purpose: to make rules governing the practice and procedure of the Supreme Court of the United Kingdom.
 - **the Supreme Court Fees Order 2009**¹⁷
Date of entry into force: 1 October 2009.
Purpose: to specify the fees payable in the Supreme Court of the United Kingdom.

¹² SI 2006/1640 (enabling power: section 19).

¹³ SI 2007/661 (enabling power: section 19).

¹⁴ SI 2007/1756 (enabling power: section 19).

¹⁵ The Constitutional Reform Act 2005 (Commencement No.4) Order 2006 SI 2006/228 and the Constitutional Reform Act 2005 (Commencement No.11) Order 2009 SI 2009/1604.

¹⁶ SI 2009/1603 (enabling power: sections 45 and 46).

¹⁷ SI 2009/2131 (enabling power: section 52).

Part 4: Judicial Appointments and Discipline

22. Part 4 and Schedules 12 to 14, which establish the Judicial Appointments Commission (JAC), provide for judicial discipline and establish a Judicial Appointments and Conduct Ombudsman, have been almost fully commenced; most of the provisions came into force on 3 April 2006¹⁸
23. Schedule 14 lists those judicial offices in respect of which the function of selecting candidates for recommendation or appointment to judicial office is exercised by the JAC. The only entries in Schedule 14 that remain uncommenced are those entries relating to justices of the peace. It is intended to repeal those entries as the Lord Chancellor, Lord Chief Justice, the JAC and the Magistrates' Association have agreed that the JAC will not take on the function of selecting magistrates for appointment. This function will remain with the local Advisory Committees on Justices of the Peace.
24. The Lord Chancellor's power in section 65 to issue guidance about procedures for the performance of the JAC's selection functions has not been exercised. The Lord Chancellor has not chosen to issue guidance to date.
25. The following delegated legislation has been made under Part 4:
- **the Judicial Discipline (Prescribed Procedures) Regulations 2006**¹⁹
Date of entry into force: 3 April 2006.
Purpose: to prescribe the procedures to be followed in the investigation and determination of allegations of misconduct by judicial office holders under Part 4.
 - **the Discipline of Coroners (Designation) Order 2006**²⁰
Date of entry into force: 3 April 2006.
Purpose: to designate coroners to bring them within the discipline regime under Part 4.
 - **the Judicial Appointments and Discipline (Modification of Offices) Order 2006**²¹
Date of entry into force: 3 April 2006.
Purpose: to add a number of judicial offices to the list in Part 3 of Schedule 14.²²

¹⁸ The Constitutional Reform Act 2005 (Commencement No.3) Order 2005 SI 2005/2505, SI 2006/1014 and the Constitutional Reform Act 2005 (Commencement No.7) Order 2007 SI 2007/967.

¹⁹ SI 2006/676 (enabling powers: sections 115, 120 and 121).

²⁰ SI 2006/677 (enabling power: section 118).

²¹ SI 2006/678 (enabling power: section 85).

²² Offices to which paragraph 2 (2) (D) of Schedule 12 (provides 1 other JAC Commissioner must be the holder of an office listed in Part 3 of Schedule 14) applies.

- **the Complaints (Magistrates) Rules 2006²³**
Date of entry into force: 3 April 2006.
Purpose: to make rules governing the procedure for handling allegations of misconduct against magistrates.
- **the Judicial Complaints (Tribunals) Rules 2006²⁴**
Date of entry into force: 7 April 2006.
Purpose: to make rules governing the procedure for handling allegations of misconduct against tribunal judges.
- **the Permitted Persons (Designation) Order 2006²⁵**
Date of entry into force: 3 April 2006.
Purpose: to designate persons permitted to disclose information to the JAC for the purposes of selection under Part 4.
- **the Judicial Appointments and Discipline (Modification of Offices) (No.2) Order 2006²⁶**
Date of entry into force: 10 July 2006.
Purpose: to add judicial offices to the list in Part 3 of Schedule 14.
- **the Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008²⁷**
Date of entry into force: 28 August 2008.
Purpose: to amend the Judicial Discipline (Prescribed Procedures) Regulations 2006.
- **the Discipline of Judges (Designation) Order 2008²⁸**
Date of entry into force: 3 November 2008.
Purpose: to designate certain offices to bring them within the discipline regime under Part 4.
- **the Complaints (Magistrates) Rules 2008²⁹**
Date of entry into force: 28 August 2008.
Purpose: to make rules governing the procedure for handling allegations of misconduct against magistrates, revoking the Complaints (Magistrates) Rules 2006.
- **the Judicial Complaints (Tribunals) Rules 2008³⁰**
Date of entry into force: 28 August 2008.
Purpose: to make rules governing the procedure for handling allegations of misconduct against tribunal judges, revoking the Judicial Complaints (Tribunal) Rules 2006.

²³ Enabling powers: sections 115 and 117.

²⁴ Enabling power: section 117.

²⁵ SI 2006/679 (enabling power: section 107).

²⁶ SI 2006/1551 (enabling power: section 85).

²⁷ SI 2008/2098 (enabling powers: sections 115, 120 and 121).

²⁸ SI 2008/2700 (enabling power: section 118).

²⁹ Enabling powers: sections 115 and 117.

³⁰ Enabling powers: sections 115, 117, 120 and 121.

- **the Judicial Complaints (Tribunals) (No.2) Rules 2008**³¹
Date of entry into force: 3 November 2008.
Purpose: to make rules governing the procedure for handling allegations of misconduct against tribunal judges, revoking the Judicial Complaints (Tribunal) Rules 2008.
- **the Discipline of Judges (Designation) Order 2009**³²
Date of entry into force: 6 April 2009.
Purpose: to designate certain offices to bring them within the discipline regime under Part 4, replacing the Discipline of Judges (Designation) Order 2008.

Part 5: Judicial Appointment and Removals: Northern Ireland

26. Part 5 and Schedule 15, which provide for disclosure of information to the Northern Ireland Judicial Appointments Commission (NI JAC), establish a Northern Ireland Judicial Appointments Ombudsman and provide for the removal of judicial office holders in Northern Ireland, have been largely commenced.
27. Section 123 (disclosure of information to the Northern Ireland Judicial Appointments Commission) was commenced on 15 June 2006, except in so far as it inserts section 5A(6), an order-making power for the Lord Chancellor to designate persons who may disclose information to the NI JAC, into the Justice (Northern Ireland) Act 2002.³³ Section 123 provided for information held by or on behalf of permitted persons to be disclosed to the Northern Ireland Judicial Appointments Commission for the purposes of selecting individuals for judicial appointment. This was a minor technical amendment to existing provision for appointments in the Justice (Northern Ireland) Act 2002.
28. It has not been necessary to exercise the power and therefore it has been possible to avoid making an order solely for the purposes of commencing section 5A(6), but it is intended to use the next available vehicle so that the power is available for exercise should that prove necessary.
29. Section 124, sections 126 to 131 and Schedule 15, which make provision relating to the Ombudsman, were fully commenced on 25 September 2006. Section 125 (complaints: interpretation) was partially commenced by the same order.³⁴
30. Section 125 was not commenced insofar as it relates to the insertion of section 9B(3)(b) into the Justice (Northern Ireland) Act 2002. Section 9B(3)(b) provides for appointments to the office of General Commissioner

³¹ Enabling powers: sections 115, 117, 120 and 121.

³² SI 2009/590 (enabling power: section 118).

³³ The Constitutional Reform Act 2005 (Commencement No.1) Order 2005 SI 2005/1431.

³⁴ SI 2006/1537.

for Income Tax for Northern Ireland to be subject to investigation by the Northern Ireland Judicial Appointments Ombudsman.

31. The provision was not commenced to coincide with the rest of section 9B because the office of General Commissioner in Northern Ireland was not subject to selection by the NIJAC (in relation to which the Ombudsman exercises jurisdiction) at the time the Ombudsman's office was established. The office of General Commissioner of Income Tax was repealed by Schedule 8, paragraph 1(2) to the Tribunals, Courts and Enforcement Act 2007 with effect from 1 April 2009 (SI 2009/2696) and paragraph 9B(3)(b) will not now be commenced.
32. Sections 132 to 136, which provide for confidentiality in relation to judicial appointments and discipline, and removals, were fully commenced by 3 April 2006.³⁵

Part 6: Other Provisions relating to the Judiciary

33. Part 6 and Schedule 16, which provide for parliamentary disqualification and amendments about the Judicial Committee of the Privy Council, were commenced fully on 26 June 2009.³⁶

Part 7: General

34. Part 7 and Schedules 17 (minor and consequential amendments) and 18 (repeals and revocations), which make general provision under the Act, have been largely commenced.
35. Section 139 (confidentiality) was commenced fully on 3 April 2006.³⁷
36. Sections 140 to 144 and sections 147 to 149 were commenced fully on Royal Assent.³⁸
37. Sections 145 and 146 and Schedules 17 and 18 have been partially commenced.³⁹ Minor and technical amendments and repeals rest on the commencement of the substantive provisions in the Act; where they remain uncommenced, it is because the underlying substantive provision to which they relate remains uncommenced.
38. The following delegated legislation (other than commencement orders) has been made under Part 7:

³⁵ SI 2005/1431 and SI 2006/1014.

³⁶ SI 2009/1604.

³⁷ SI 2006/1014.

³⁸ Section 148 (2)(c) to (f).

³⁹ SI 2006/1014 and SI 2009/1604.

- **the Constitutional Reform Act 2005 (Transitional and Consequential Provisions) Order 2005**⁴⁰
Date of entry into force: 1 October 2005.
Purpose: to make transitional and consequential provision arising from the commencement of certain paragraphs of Schedule 4 to the Act.⁴¹
- **the Constitutional Reform Act 2005 (Temporary Modifications) Order 2006**⁴²
Date of entry into force: 27 February 2006.
Purpose: to make provision for the President of the Supreme Court to make the Supreme Court Rules.
- **the Lord Chancellor (Consequential Provisions) Order (Northern Ireland) 2006**⁴³
Date of entry into force: 3 April 2006.
Purpose: to amend certain functions of the Lord Chancellor contained in secondary legislation.⁴⁴
- **the Constitutional Reform Act 2005 (Supplementary Provisions) Order 2006**⁴⁵
Date of entry into force: 28 June 2006.
Purpose: to make supplementary, transitory and transitional provision arising out of amendments to the Land Charges Act 1975 made by Schedule 4 to the Act
- **the Constitutional Reform Act 2005 (Consequential Amendments) Order 2009**⁴⁶
Date of entry into force: 1 October 2009.
Purpose: to make amendments to secondary legislation concerning the provision of legal aid consequential to the creation of the Supreme Court.

⁴⁰ SI 2005/2506 (enabling power: section 143).

⁴¹ The purpose of the transitional provisions made by article 2 of this Order is to ensure that references to the Vice-Chancellor in other legislation, which will be amended by provisions of the Act to be brought into force at a later date, do not conflict with the new references to the Chancellor of the High Court brought into force by the 3rd Commencement Order (SI 2005/2505). The consequential provisions in article 3 are to ensure that references to the Vice-Chancellor in certain secondary legislation are amended to refer to the Chancellor of the High Court.

⁴² SI 2006/227 (enabling power: section 143).

⁴³ SR (NI) 2006 No.115 (enabling power: section 143).

⁴⁴ These amendments are consequential to amendments effected by Schedule 5 to the Act, which transfers certain of the Lord Chancellor's functions to the Lord Chief Justice of Northern Ireland, and requires certain functions to be exercised by the Lord Chancellor only after consulting or obtaining the concurrence of the Lord Chief Justice of Northern Ireland.

⁴⁵ SI 2006/1693 (enabling power: section 143).

⁴⁶ SI 2009/2468 (enabling power: section 143).

Legal Issues

39. There have been three challenges raising legal issues around the provisions of the Act:
40. An unsuccessful applicant for judicial appointment brought a judicial review against the JAC, arguing that the JAC's decision to use a qualifying test to shortlist candidates for interview was contrary to the JAC's statutory duty in section 63(2) of the CRA to select "solely on merit". The Administrative Court refused permission for the application to proceed on the basis that it disclosed no arguable claim.⁴⁷ The court observed that section 88 provides for the JAC to determine the selection process to be applied, and that use of the qualifying test as a filter did not mean that the process was not based on merit.
41. A judicial office holder who had been suspended under disciplinary powers for an alleged breach of section 139 of the CRA brought a judicial review against the Lord Chancellor and the Lord Chief Justice. The claimant argued that section 139, which prevents the disclosure of confidential information without lawful authority, should be read down to provide that disclosure is lawful if withholding the information would breach the right to freedom of expression under Article 10 of the European Convention on Human Rights. The Administrative Court refused permission for the application to proceed.⁴⁸ It observed that the lawful authority requirement was intended to maintain judicial independence, was entirely reasonable and was clearly justified by Article 10(2).
42. An offender challenging the Ministry of Justice's management of indeterminate sentences for public protection brought a simultaneous judicial review arguing that insufficient financial safeguards had been put in place when the Ministry of Justice was created to protect the independence of the judiciary. The claimant argued that was contrary to the guarantee of continued judicial independence in section 3 of the Act. The claimant cited the Ministry of Justice's funding responsibilities to the judiciary, Her Majesty's Courts Service and the National Offender Management Service. The claimant expressed concern that the judiciary might lack the independence to determine his substantive challenge given the financial implications for the Ministry of Justice should he succeed. The Administrative Court refused permission for the application to proceed on the basis that it was clearly unarguable.⁴⁹ The court made the following observations:

⁴⁷ Page v. Judicial Appointments Commission, 30 March 2009.

⁴⁸ Clipson v. Lord Chief Justice & Lord Chancellor, 30 October 2009.

⁴⁹ Walker v Secretary of State for Justice, 24 August 2007.

- although there were concerns that the new arrangements could impact on the judicial independence such that a fair-minded and informed observer would conclude that there was a real possibility of impermissible pressure on the judiciary, there was no such reasonable concern in relation to the judiciary in post;
- the claimant's substantive claim had succeeded which underlined the independence of the judges who had heard it;
- when the Lord Chancellor took his oath of office, he specifically accepted the obligation to provide sufficient resources for the courts and he confirmed his recognition of the importance of maintaining the independence of the judiciary;
- the claim was premature because discussions as to possible structural measures were still ongoing;
- in any event, it was for Parliament rather than a judge hearing a judicial review to determine any particular funding arrangements to be put in place.

Other reviews

43. The following is a summary of other known post-legislative reviews or assessments of the Act conducted in Government, by Parliament, or elsewhere. It is not the intention of this section to provide an exhaustive list:
44. The Joint Committee on the Draft Constitutional Renewal Bill, Session 2007–08, published the *Draft Constitutional Renewal Bill, Volume I: Report*.⁵⁰ On Courts and tribunals, the Report concluded that “it is far too soon to propose significant reforms only two years after the Constitutional Reform Act 2005.” The Government response to the Report was published 2007–08.⁵¹
45. The Government published the Green Paper *The Governance of Britain: Judicial Appointments* in October 2007.⁵² It provided an opportunity to consider judicial appointments arrangements in a wider constitutional context. A response paper – *Governance of Britain: Judicial Appointments: Response to Consultation Paper* – was published in April 2008 on behalf

⁵⁰ HL 166-I; HC 551-I.

⁵¹ CM 7688.

⁵² CM 7210.

of the Judicial Executive Board and the Judges' Council. The Judicial Appointments Commission also published a response paper, in January 2008 – *Judicial Appointments for the 21st Century: Independence, Responsibility and Accountability* and gave written and oral evidence to the Joint Committee which carried out pre-legislative scrutiny of the Draft Bill in June 2008.

46. The House of Lords Select Committee on the Constitution published *Relations between the executive, judiciary and Parliament* in July 2007, 6th Report of Session 2006–07.⁵³ The Committee's Eleventh Report of session (2006–07) contained the Government Response and the Judicial Response to the report.
47. The House of Lords Constitution Committee produced a *Follow-up Report* (11th Session 2007–08) to its first Report on *Relations between the executive, judiciary and Parliament*.⁵⁴
48. The House of Lords Committee on the Speakership of the Lords, Session 2005–06, published its report on 19 December 2005.⁵⁵ Appendix 3 to this Report lists certain statutory roles of the Lord Chancellor which have already been transferred to "the Speaker of the House of Lords" by Schedule 6 to the Act.
49. The House of Lords Select Committee on the Constitution, 6th Report of Session 2008–09, Northern Ireland Bill Report. The Report explored processes relating to the removal or appointment of the senior judiciary in Northern Ireland'.
50. The House of Commons Justice Committee, *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, 4th Report of Session 2007–08.⁵⁶ The question was raised about who within Government would ensure that the Rule of Law was followed if not the Attorney General. The Committee recommended a statutory duty being placed on all ministers to observe the Rule of Law.
51. *Review of the Administration of Justice in the Courts*, published by the Lord Chief Justice.⁵⁷ The report included a review of issues arising from the changes made by the Act, covering: the Lord Chief Justice's role and the constitutional position of the Judiciary; increased leadership responsibilities of judges; the Directorate of the Judicial Offices of England and Wales, which supports the Lord Chief Justice in the exercise of his statutory functions; relations with government and Parliament; the creation of the Ministry of Justice; appointments. The second *Review of the*

⁵³ HL 151.

⁵⁴ HL 177.

⁵⁵ HL 92.

⁵⁶ HC 698.

⁵⁷ HC 448. This report was pursuant to s5(1) of the Act, 31 March 2008.

Administration of Justice in the Courts was published 3 February 2009. The Review focused on the work of the major courts and on the wide range of statutory responsibilities which fell to the Lord Chief Justice when the Constitutional Reform Act 2005 came into force on 3 April 2006.⁵⁸

52. *Judicial Diversity Conference Report: A Judiciary for the 21st Century* (11 March 2009). Collates suggestions emanating from the conference on how to build on the establishment of the JAC under the Act, in order to increase diversity in the judiciary and achieve further judicial reforms for the 21st century.
53. *Final Appellate jurisdiction in the Scottish legal system*, by Professor Neil Walker.⁵⁹ This independent review was commissioned by the Scottish Government.
54. There has also been a vast amount of academic and wider interest in the Act, especially on the Supreme Court, both in the United Kingdom and internationally.

⁵⁸ <http://www.judiciary.gov.uk/docs/lcj-review-2009.pdf>.

⁵⁹ Professor Walker is Regius Professor of Public Law and the Law of Nature and Nations School of Law, Edinburgh University, 22 January 2010.

Preliminary Assessment of the Act

55. The Constitutional Reform Act 2005 introduced wide-ranging constitutional reform to the relationship between the legislature, the judiciary and the executive. This reform has been implemented in line with the stated objectives of the Act.
56. The office of Lord Chancellor itself has been successfully modified and remains operational. For example, ensuring courts are resourced, judicial appointments and regulating the legal profession. Certain responsibilities the Act provides to be transferred have been and are now undertaken by the Lord Speaker and the Lord Chief Justice, with the latter supported by senior judges as so provided.
57. The Lord Chief Justice and senior judiciary are supported in their discharge of their statutory and constitutional responsibilities by the Directorate of Judicial Offices of England and Wales. The Lord Chief Justice's 2009–10 annual report states the Directorate of Judicial Office of England and Wales were engaged in a "period of consolidation in which we build on the foundations laid by the Constitutional Reform Act 2005."
58. The document "*Constitutional Reform. The Lord Chancellor's judiciary-related functions: Proposals*" has now been substantially superseded by the Act, and remains an important document when read alongside it. Formal 'Concordat' discussions take place annually between the Lord Chief Justice and the Lord Chancellor on the budget of Her Majesty's Courts Service (HMCS) and a Framework Document⁶⁰ published in April 2008 sets out the terms of an agreement reached by the Lord Chancellor and the Lord Chief Justice on a partnership between them in relation to the effective governance, financing and operation of HMCS with a view to preserving the due and independent administration of justice
59. In July 2009 the Law Lords sat as the Appellate Committee of the House of Lords for the last time. On 1st October 2009 the Supreme Court of the United Kingdom opened at the refurbished Middlesex Guildhall on Parliament Square, with her Majesty the Queen officially opening the court on 16th October 2009. The increased visibility of the Court is reflected in 900 visitors a week and 26,000 website hits a month. The Ministry of Justice sponsored Supreme Court Implementation Programme delivered the court on time and under budget. The Law Lords were heavily consulted throughout the Programme on both the renovation and the setting up of the business in the new building.

⁶⁰ Her Majesty's Courts Service Framework Document CM 7350 April 2008.

60. In England and Wales the Judicial Appointments Commission have been in operation since April 2006. In accordance with the Act, the JAC has fifteen Commissioners, including the Chairman. All are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges' Council. Membership of the Commission is drawn from the judiciary, the legal profession, tribunals, the magistracy and the public. In 2008-09 the JAC completed 24 separate exercises considering over 3,500 applications. The Judicial Appointments and Conduct Ombudsman has also been in operation since April 2006. In 2008-09 the Ombudsman determined 103 cases, 44 of which it upheld in relation to complaints about judges and 1 of which was partially upheld concerning the process operated by the JAC.
61. Provisions for Parliamentary disqualification of certain judges, and amendments about the Judicial Committee of the Privy Council, were enacted in June 2009.
62. The Office of the Lord Chancellor has continued to uphold the principle of the Rule of Law.
63. This document carries out an initial post-legislative scrutiny of the Act. The full impact on our constitutional settlement of these major reforms is only likely to be felt years from now, as the institutions and relationships it created continue to mature.



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